

# **ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL**

## **EUROPEAN CONVENTION ON HUMAN RIGHTS**

### **MEMORANDUM BY THE HOME OFFICE / DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT / DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS / MINISTRY OF JUSTICE**

#### **Introduction**

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Anti-social Behaviour, Crime and Policing Bill. The memorandum has been prepared by the Home Office, the Department for Communities and Local Government, the Department for Environment, Food and Rural Affairs and the Ministry of Justice. The Home Secretary has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights.

#### **Summary**

2. The Bill is in 13 Parts:
  - Part 1 makes provision for a civil injunction to prevent nuisance and annoyance;
  - Part 2 makes provision for an order on conviction to prevent behaviour which causes harassment, alarm or distress;
  - Part 3 contains a power for the police to disperse people causing harassment, alarm or distress;
  - Part 4 makes provision for a community protection notice and a public spaces protection order, both of which have the aim of preventing behaviour which is detrimental to the local community. It also makes provision for premises closure notices and orders to be issued and made in respect of premises which cause nuisance to the public;
  - Part 5 makes provision for the recovery of possession of houses on anti-social behaviour grounds;
  - Part 6 contains provisions on establishing a community remedy document and dealing with responses to complaints of anti-social behaviour;
  - Part 7 amends the provisions of the Dangerous Dogs Act 1991;
  - Part 8 introduces a new offence of possession of illegal firearms for sale or supply and increases the maximum penalties for the importation or exportation of illegal firearms;
  - Part 9 introduces a new offence of forced marriage and criminalises the breach of a forced marriage protection order;
  - Part 10 contains various measures in respect of policing, including conferring functions on the College of Policing, establishing a Police Remuneration Review Body, conferring additional powers on the Independent Police Complaints Commission and amending the counter-terrorism border security powers in Schedules 7 and 8 to the Terrorism Act 2000;
  - Part 11 makes various amendments to the Extradition Act 2003;

- Part 12 contains a number of criminal justice measures, including revision of the test for determining eligibility for compensation following a miscarriage of justice. This Part also contains a placeholder clause for prospective measures in respect of the setting of court and tribunal fees; and
  - Part 13 contains minor and consequential amendments to other enactments and general provisions.
3. The Government considers that clauses of and Schedules to the Bill which are not mentioned in this memorandum do not engage rights protected under the ECHR.

### **Part 1: Injunctions to prevent nuisance and annoyance**

4. Part 1 makes provision for a civil injunction to prevent anti-social behaviour (defined as causing nuisance or annoyance). These provisions may engage Articles 5, 6, 8, 9, 10 and 11.
5. The injunction to prevent nuisance and annoyance is a purely civil injunction available in the county court for adults and in the youth court for those under the age of 18. The injunction will replace a range of current powers including anti-social behaviour orders (ASBOs) under section 1 of the Crime and Disorder Act 1998, the drinking banning order on application, intervention orders and individual support orders.
6. Clause 1 sets out a two-part test for granting an injunction. An injunction may be made against a person aged 10 or over if the court is satisfied, on the balance of probabilities, that the person has engaged in, or is threatening to engage in, anti-social behaviour and that it is just and convenient to grant the injunction. This test replicates that for the current anti-social behaviour injunctions under section 153A of the Housing Act 1996, which is used effectively by many private registered providers of social housing and local authorities (in relation to their housing management functions) to stop anti-social behaviour quickly.
7. The injunction could include prohibitions or requirements that assist in the prevention of future nuisance or annoyance (clause 1(4)). Such prohibitions may include, for example, not being in possession of a can of spray paint in a public place, not entering a particular area, or not being drunk in a public place. The requirements in an injunction may include, for example, attendance at a course to educate offenders on alcohol and its effects and to reduce re-offending. The requirements would be designed to deal with the causes of their behaviour, thus aiming to reduce breach rates in the long term.

#### *Article 5*

8. The power of arrest may be attached to any prohibition or requirement in an injunction and breach of the order will be a contempt of court. Any detention pursuant to the power of arrest will require the respondent to be brought before the court within 24 hours (excluding Sundays and certain bank holidays), which satisfies Article 5(3). The provisions will expressly provide for the power of arrest and detention and the resulting detention would be as a result of non-compliance with a lawful order of the court in accordance with Article 5(1)(b). Similarly, any sentence of imprisonment or detention imposed as a result of a contempt of court will fall within Article 5(1)(a). The respondent

will still be able to appeal against the finding that he or she is in contempt and the resulting sentence in the usual way.

9. The Government is therefore satisfied that the provisions fully respect Article 5.
10. There is express provision in relation to those aged between 14 and 17 who breach their injunction in which situation a short (three month) detention order is available only as a measure of last resort in compliance with the UN Convention on the Rights of the Child (“UNCRC”). A detention order cannot be made in respect of 10 to 13 year olds. The provisions make it clear that a youth detention order can only be imposed when the court takes the view that due to the severity or extent of the breach, no other option is appropriate and if the court does come to that view, it must give reasons in open court for that view. Moreover, in respect of persons under the age of 18, the maximum period for which an injunction can be imposed is 12 months.

#### *Article 6*

11. An injunction is issued by the county court in the case of those respondents aged 18 and over and by the youth court in the case of those respondents aged under 18. Appeals against decisions of a district judge in the county court will lie to a circuit judge and appeals from the decision of a circuit judge in the county court will lie to the Court of Appeal. Appeals against decisions from the youth court will lie to the Crown Court. Legal representation and interpreters may be obtained at all stages of proceedings, and legal aid is available.
12. An application for an injunction may be made without notice being given to the respondent. Without notice applications would, in practice, only be made in exceptional or urgent circumstances and the applicant would need to produce evidence to the court as to why a without notice hearing was necessary. There is provision for an interim injunction to be made if the court adjourns the proceedings for whatever reason but only if the court considers it just to do so. There is provision for the respondent to apply to the court to have the injunction varied or discharged. No positive requirement may be included in the injunction unless the court has heard evidence as to its suitability and enforceability. No injunction may be applied for in relation to a person under 18 years without consulting the local youth offending team.
13. Breach of the injunction does not amount to a criminal offence; instead breach will be dealt with as a contempt of court. For those aged 18 and over, this means that a senior court (of which the county court is one) may impose an unlimited fine and/or imprisonment (detention in the case of those aged 18 to 20) of up to 2 years (community sentences are not available).
14. Committal proceedings for contempt of court (which would be commenced by the original injunction applicant when there was evidence of breach of the injunction, or by the court dealing with a respondent who has been arrested for an alleged breach of the injunction and produced before the court) have been held to be criminal proceedings for the purposes of Article 6 irrespective of whether the contempt itself was civil or criminal, including the right to be legally represented at such proceedings (see *Hammerton v Hammerton* [2007] EWCA Civ 248).

15. The Government is therefore satisfied that the provisions fully respect Article 6.

#### *Article 8*

16. Injunctions may contain any prohibition or requirement that the court considers appropriate in order to prevent the person from engaging in anti-social behaviour. Article 8 may be engaged by these prohibitions. Article 8 is a qualified right meaning that a restriction can be justified in accordance with Article 8(2).

17. Under section 6 of the Human Rights Act 1998, the courts, as public bodies, must exercise their discretion to impose prohibitions or requirements in a way that is compatible with Article 8. Such prohibitions or requirements must be justified in the interests of preventing disorder (which will in practice include the interest of protecting the rights and freedoms of others) and will also only be imposed if a court considers it just and convenient to do so. For these reasons, any interference with those rights by prohibitions or requirements will be justified under Article 8(2).

18. In relation to proportionality, the court has a discretion whether to grant an injunction at all, as well as in relation to what requirements or prohibitions are imposed by any injunction. The court will have in mind prohibitions and requirements which are proportionate to the legitimate aim of preventing disorder. The court will consider each respondent separately in relation to their own individual circumstances before deciding whether any particular prohibition or restriction is appropriate in order to prevent anti-social behaviour in any particular case. There are no mandatory restrictions or prohibitions and positive requirements may only be imposed if the court has received evidence about their suitability and enforceability. The court cannot grant an injunction with mutually incompatible requirements. The procedural safeguards set out in relation to Article 6 are also relevant to the consideration of the proportionality of any restriction on Article 8 rights.

19. The court must also take into account any potential conflict with any school or educational establishment or place of work the person attends regularly (for example, there could be an exception to a “non-association” provision to allow contact in the work or college environment), and any other court order or other legal obligation to which the person is subject (for example, bail conditions or a community sentence).

20. There is a power for the court to include a provision excluding a person from their own home but this is only possible where the applicant for the injunction is the person’s landlord and the court is of the view that there has been violence or threatened violence against someone who lives in the premises or someone who lives in that premises is at significant risk of harm from the respondent. This is tightly drawn and proportionate to the harm or threat of harm posed by such a respondent to another person.

21. The Government is therefore satisfied that these provisions are compatible with Article 8.

#### *Article 9*

22. There is express provision to ensure that any requirements or prohibitions included in an injunction are compatible with Article 9. The court must try to avoid, as far as practicable, any potential conflict with the person’s religious beliefs (for example, excluding them

from the area including their regular place of worship – this could still be done but could include an exception for particular times on particular days).

23. The Government therefore is satisfied that these provisions are compatible with Article 9.

#### *Articles 10 and 11*

24. Restrictions or requirements imposed by an injunction may interfere with the respondent's rights in relation to freedom of assembly (especially if there is a non-association clause). To a lesser extent, depending on the particular terms of the injunction, there could be an interference with the respondent's right to freedom of expression (for example if the respondent was prohibited from going to a protest rally). Both of these rights are qualified rights and those rights may be limited in accordance with Articles 10(2) and 11(2).

25. The legitimate aim that is being pursued by these provisions is the prevention of disorder which could result should the person be allowed to continue to cause nuisance and annoyance to members of the public, and the protection of the rights of others to go about their lawful business without being subject to such nuisance and annoyance.

26. An injunction would only include provisions which interfered with the respondent's Article 10 or 11 rights if the court considered that this was appropriate for the purpose of preventing the respondent from engaging in anti-social behaviour. The same points made in paragraph 18 above apply.

27. The Government therefore is satisfied that these provisions are compatible with Articles 10 and 11.

28. The Government also notes that applicants for an injunction are public bodies and are therefore obliged to act compatibly with the ECHR, as are the courts who grant any injunction, in accordance with section 6 of the Human Rights Act 1998.

#### **Part 2: Criminal behaviour orders**

29. A court may make an order on conviction when the court considers that the defendant has engaged in behaviour which causes or is likely to cause harassment, alarm or distress and that making an order will assist in preventing the defendant from engaging in such behaviour. In relation to persons aged under 18 years of age, an order may last between one and three years. In relation to a person aged over 18, an order must last at least two years.

30. These provisions may engage rights under Articles 5, 6, 8, 9, 10 and 11 of the ECHR.

#### *Article 5*

31. This Part provides that breach of a criminal behaviour order is a criminal offence punishable on conviction on indictment by a term of imprisonment of up to five years; as such the penalty is prescribed under national law. In accordance with established case

law including *Poole –v- United Kingdom*<sup>1</sup>, *Johnson –v- United Kingdom*<sup>2</sup> and *Denson –v- United Kingdom*<sup>3</sup>, this amounts to the lawful detention of a person after conviction by a competent court and therefore the Government is satisfied that this fulfils Article 5(1)(a) and complies with Article 5.

#### *Article 6*

32. The court may only make a criminal behaviour order on the application of the prosecutor for the criminal proceedings and such an order is only available on conviction. Before applying for an order against a person aged under 18, the prosecutor must consult with the local youth offending team. Moreover, in relation to a person under the age of 18, the imposition of an order must be reviewed annually, taking into account matters including those relevant to the question whether an application should be made for the order to be varied or discharged.
33. The court will be able to grant an interim order if it considers it just do so. This might happen when sentencing for the criminal offence is adjourned. As this is an ancillary order to a criminal sentence the usual appeal routes apply, namely from the magistrates' or youth court to the Crown Court and from the Crown Court to the Court of Appeal.
34. The Government is therefore satisfied that the process fully respects Article 6 rights.

#### *Article 8*

35. An order may contain positive requirements as well as well as prohibitions. Any interference with a person's rights to a private and family life as a result of the imposition of a prohibition or requirement will need to be justified under Article 8(2). The prohibition or requirement will be imposed for the purpose of the prevention of disorder (likely to be caused by harassment, alarm or distress the order seeks to prevent) which will, in practice, include protecting the rights of others to go about their lawful business without being subjected to harassment, alarm or distress, and will only be imposed if the court considers it would help prevent such behaviour.
36. In relation to proportionality, the court has a discretion whether to make an order and can only do so if the offender has previously engaged in behaviour which caused harassment, alarm or distress and the court considers that this order will help in preventing a recurrence of this behaviour. The court will have in mind prohibitions and requirements which are proportionate to the legitimate aim of preventing disorder. The court will consider the individual circumstances of the offender before deciding whether any particular prohibition or restriction is appropriate in order to prevent the behaviour in any particular case. There are no mandatory restrictions or prohibitions and positive requirements may only be imposed if the court has received evidence about their suitability and enforceability, including evidence from the person who would supervise and monitor them. The court cannot grant an order with mutually incompatible requirements. The procedural safeguards set out in relation to Article 6 are also relevant to the consideration of the proportionality of any restriction on Article 8 rights. The duty of the courts to review the operation of the Criminal Behaviour Order in relation to

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<sup>1</sup> (1998) App. No. 28190/95.

<sup>2</sup> (1998) App. No. 28455/95.

<sup>3</sup> (1998) App. No. 25286/94.

persons aged under 18 will provide an opportunity to assess the continued need and proportionality of the order. In relation to those over 18, the ability of the offender or prosecution to apply to have the order varied or discharged fulfils this function.

37. The court must ensure that any requirements, so far as practicable, do not conflict with any school or educational establishment or place of work the person attends regularly (for example, there could be an exception to a “non-association” provision to allow contact in the work or college environment), the offender’s religious beliefs (see below) and any other court order or other legal obligation to which the person is subject (for example, bail conditions or a community sentence). These provisions will help ensure that any order is proportionate.

38. The Government therefore is satisfied that these provisions are compatible with Article 8.

#### *Article 9*

39. The analysis at paragraphs 22 and 23 above applies equally in this context.

#### *Articles 10 and 11*

40. A similar analysis applies as in the case of injunctions to prevent nuisance and annoyance (see paragraphs 24 to 28).

### **Part 3: Dispersal powers**

41. These provisions establish a power to direct people away from an area where they are engaged in, or are likely to be engaged in, anti-social behaviour. This is a power for constables and Police Community Support Officers to issue a dispersal direction to any person aged 10 and over to leave a specific area and not return for up to 48 hours. The use of this power must be authorised by a police officer of at least the rank of inspector. Knowingly breaching the direction is a criminal offence. There is also a power to require property which has been used (or is likely to be used) in the anti-social behaviour to be surrendered.

42. The test that needs to be met is that the constable has reasonable grounds for suspecting that the person’s behaviour in the area is contributing to anti-social behaviour (which is behaviour which causes harassment, alarm or distress) or crime or disorder in the area or is likely to contribute to anti-social behaviour or crime or disorder in the area; and that the direction is necessary for the purposes of reducing the likelihood of the occurrence of anti-social behaviour or crime or disorder in the area.

43. The direction must be issued in writing unless in all the circumstances it is not practicable to do so. The direction must clearly state the area from which the individual is being dispersed and make it clear what consequences can flow should the direction be breached. The exclusion period is for a maximum of 48 hours.

44. These provisions may engage Articles 8, 9, 10 and 11 and Article 1 of Protocol 1 (“A1P1”).

### *Article 8*

45. Any interference with a person's rights to a private and family life will need to be justified under Article 8(2). The direction will be issued for the purpose of the prevention of disorder (likely to be caused by harassment, alarm or distress, the criminality or disorder the direction seeks to prevent) which will include, in practice, protecting the rights of others to go about their lawful business without being subjected to harassment, alarm or distress, and will only be imposed if the court considers it just and convenient to do so.
46. The provisions are strictly limited in their application as far as the time period for which a direction can be given and the area in relation to which it can be given. There are express limitations which ensure that the person cannot be excluded from their home or their place of work or education. Insofar as a direction under these provisions may engage in Article 8, the police, as a public body, must exercise the powers compatibly with Article 8, by virtue of section 6 of the Human Rights Act 1998.
47. The Government therefore is satisfied that these provisions are compatible with Article 8.

### *Article 9*

48. A direction may have the effect of excluding a person from their regular place of worship for a maximum of 48 hours, but a direction could not exclude the person from all places of worship, just those in the locality. Any exclusion would be strictly limited in terms of time and geographical location (clause 33(1)(a) allows a direction to be made in relation to a locality or part of a locality).
49. The Government therefore is satisfied that these provisions are compatible with Article 9.

### *Articles 10 and 11*

50. The provisions are also explicit to the effect that the direction must not be used in such a way as to prevent the person from having access to the place where he or she resides; any school or other educational establishment he or she attends regularly; any place of work he or she attends regularly; any hospital he or she is required to attend for the purpose of receiving medical treatment during the period of the direction; or any place he or she is obliged to attend by virtue of any enactment or order from any court of tribunal. The direction must not be issued to someone who is taking part in lawful picketing or a public procession of a kind mentioned in section 11(1) of the Public Order Act 1986. In light of the legitimate aims pursued by the direction (prevention of crime and disorder and protection of the rights of others) and the limitations in terms of time, locality and effect which are set out in the provisions, any interference with Articles 10 and 11 can and should be proportionate to the legitimate aim pursued.
51. The Government is therefore satisfied that the provisions are compatible with Articles 10 and 11.



### *Article 1 Protocol 1*

52. A1P1 may be engaged by the power for the police to require the surrender of items which the police reasonably believe have been used in the anti-social behaviour in relation to which the direction was issued. A1P1 allows the State to control property where this is in accordance with the general interest.
53. The power to require items and retain them is strictly time limited (unless the item is to be retained pending criminal proceedings) as the item(s) will be returned once the period of the direction is finished; therefore this is not a deprivation of property, rather it is a control of property. Items will only be required to be surrendered if there is reason to believe they have been used in anti-social behaviour or are likely to be used in such behaviour and therefore this pursues the general interest of preventing such behaviour.
54. The Government therefore considers that these provisions, in conferring a time-limited power to take control of possessions in the general interest of preventing anti-social behaviour, are compatible with A1P1.

### *UN Convention on the Rights of the Child*

55. In the law of England and Wales criminal responsibility arises from the age of 10 as it is considered children aged 10 and over are able to understand when they are doing something wrong. Acting in a way which causes members of the public harassment, alarm or distress or engaging in criminality or disorder is behaviour which is wrong.
56. The UNCRC, in particular Article 3, requires the best interests of the child to be a primary consideration in all actions concerning children. To that end there is provision for the police to take home a child who is reasonably believed to be under the age of 16 or to take them to a place of safety. This is done in the child's best interests since there is no benefit for children to be in an environment where there is disorder, criminality or anti-social behaviour, irrespective of whether the child is participating in that behaviour.
57. The Government also notes the police who have the power to issue a direction are obliged to act compatibly with the ECHR, in accordance with section 6 of the Human Rights Act 1998.

### **Part 4, Chapter 1: Community Protection Notices**

58. The Community Protection Notice ("CPN") may be issued by the police, local authority or person designated by the local authority in respect of a person whose persistent or continuing conduct or behaviour (or inaction) is unreasonable and is having a detrimental effect on the local community's quality of life. Guidance will be issued as to what constitutes unreasonable conduct. The CPN must clearly state what is required in order to rectify the issue and might include an obligation to take reasonable steps to prevent the behaviour from re-occurring. Breach of the CPN without reasonable excuse is a criminal offence. The court on conviction, in addition to a fine, would be able to impose any reasonable requirement in order to rectify the issue (breach of which would constitute a contempt of court) and would also be able to order forfeiture and destruction of any item used in the commission of the offence.

59. In order to ensure this power is not used as a first resort, there will be an obligation to warn the person in writing that their behaviour is considered to be unreasonable and having a detrimental effect on the local community's quality of life such that if they do not rectify their behaviour, they may be issued with a CPN.
60. A person issued with a CPN may appeal against the notice to the magistrates' court. A person who fails to comply with a CPN may be issued with a remedial notice by the local authority in respect of work which the local authority proposes to carry out in order to rectify the problem (for example, cleaning graffiti from a wall). The remedial notice will specify the cost involved but the work can only be carried out with the consent of the defaulter and, except where he cannot be reasonably contacted, the property owner. An appeal against the cost lies to the magistrates' court and the decision of the local authority to carry out the remedial work will be susceptible to judicial review.
61. These provisions are likely to engage Articles 6, 8, 9 and 10 and A1P1.
62. In considering whether Article 11 might be engaged it is noted that the CPN would not itself prevent any assembly from taking place, rather it might limit what the effects of such an assembly could be (such as littering or excessive noise) in the public interest and that Article 11 does not protect an individual's rights to make as much noise as he or she would like to make or to litter. Therefore the Government does not consider that this will interfere with rights protected by Article 11.

#### *Article 6*

63. It is possible that the issuing of a CPN may determine a person's civil rights under Article 6. Although there is a large discretion as to whether to issue a CPN, which is relevant as to whether Article 6 is engaged,<sup>4</sup> Article 6 will generally be taken to apply to a dispute concerning action taken by an administrative authority which has a direct and appreciable effect on the enjoyment or exercise of property rights or interests, including the enjoyment of a person's land.<sup>5</sup> That being the case, it is possible that Article 6 is engaged.
64. The Bill makes provision for a CPN to be appealed to a magistrates' court on a wide range of issues and contains provision for the magistrates' court to vary or quash the CPN. In essence, the grounds of appeal are that the statutory test has not been met or that the conduct is not conduct that the person can reasonably be expected to control or affect. This fulfils the requirement in Article 6 for a person to be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.
65. The Government therefore considers that the provisions fully respect Article 6.

#### *Article 8*

66. These provisions may interfere with Article 8 rights but the legislative test to be met helps to ensure that CPNs are only issued in pursuance of the legitimate aim of public safety and/or protecting the rights of others which involve a balance of what should be allowed

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<sup>4</sup> In accordance with *Jacobsson –v- Sweden* (1989) 12 E.H.R.R. 56.

<sup>5</sup> In accordance with *Zander –v- Sweden* (1993) 18 E.H.R.R. 175 at paragraph 27.

in a public space (or a private space which affects the public, for example, a large mound of rubbish in a front garden) with a person's right to enjoy their private life.

67. In particular the failure by State authorities to take measures to protect individuals from environmental harm, including the right to respect for his or her home, may constitute a violation of Article 8.<sup>6</sup> Therefore there must be a balancing exercise between the needs of the community and the protection of the individual.<sup>7</sup> The small minority do not have a right to spoil community life for the majority and therefore the CPN is an appropriate way to address that balance.

68. The CPN can only be issued if the person is firstly made aware that their behaviour is detrimental to the local community and it cannot be issued in respect of very minor behaviour as there is a requirement that the problem be of a persistent or continuing nature. This ensures that the interference is in accordance with national law which is sufficiently precise and accessible for an individual to foresee the consequence of their actions. This is a proportionate way to tackle nuisance behaviour for the benefit of the local community.

69. The Government therefore considers that these provisions are compatible with Article 8.

#### *Article 9*

70. It is possible, although not very likely, that Article 9 might be engaged by these provisions insofar as it might require for example householders to paint over large signs and pictures connected with their religious beliefs which are considered to be detrimental to the local community's quality of life.

71. Insofar as this would engage Article 9 by limiting the ability of the person subject to the notice to manifest their beliefs, when considering whether to uphold a notice, the court must be satisfied that the person's right to manifest his or her religious beliefs is outweighed by the rights of others or one of the other legitimate aims in Article 8(2). There is sufficient discretion afforded to the court to consider this due to the use of the word "may" issue a CPN, rather than "must".

72. The Government therefore is satisfied these provisions are compatible with Article 9.

#### *Article 10*

73. It may be that a CPN affects a person's freedom of expression, in a similar manner perhaps to the example given in relation to Article 9 above. The discretion afforded to the court as mentioned above (through the use of the word "may") allows a court to exercise the power to uphold a CPN in such a way that any limitations on a person's freedom of expression is justified under Article 10(2) (in particular, relying upon the interests of public safety and protecting the rights and freedoms of others).

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<sup>6</sup> In accordance with *Moreno Gomez -v- Spain* App. No. 4142/02.

<sup>7</sup> *Hatton -v- UK* (2003) 37 E.H.R.R. 28.

74. In addition the conduct must be unreasonable, so anyone exercising their Article 10 rights would have a ground to say that their conduct is reasonable and a CPN should therefore not be issued, or if a CPN has been issued, it could form a ground of appeal.
75. The Government therefore is satisfied that these provisions are compatible with Article 10.

#### *Article 1 of Protocol 1*

76. An item used in the commission of the offence of breach of a CPN may be seized upon application to a court or as a result of a conviction for the offence, both of which fall under the public interest for which possessions may be seized under A1P1<sup>8</sup>. An independent and impartial tribunal determines whether a warrant for seizure should be issued, or a forfeiture order made upon conviction and therefore these procedural safeguards ensure that any deprivation of property would be subject to the conditions provided for by law. The courts are also provided with a power to order a person to carry out work to their property or for the forfeiture of items used in the commission of an offence. These powers are justified on the basis that they help undo the negative effects of anti-social behaviour and prevent its reoccurrence. Once again, an independent and impartial tribunal decides on whether these powers as provided for by law should be exercised.
77. The Government therefore is satisfied that these provisions are compatible with A1P1.
78. The Government also notes that persons who may issue a CPN are public bodies and are therefore obliged to act compatibly with the ECHR, in accordance with section 6 of the Human Rights Act 1998.

#### **Part 4, Chapter 2: Public Spaces Protection Orders**

79. A Public Spaces Protection Order (“PSPO”) can be issued by the local authority if it is satisfied that activities carried on in a public place within the authority’s area have had a detrimental effect on the quality of life of those in the local area, or that it is likely that activities will be carried on in a public place within that area and that they will have such an effect and that the effect of the activities is of a persistent or continuing nature and is such as to make the activities unreasonable and means that the restrictions in the notice are justified.
80. The PSPO can be made for a maximum of 3 years and must be published to ensure that everyone is aware of any restrictions imposed by the order (for example, to keep dogs on a lead in particular parks). Breach of the PSPO without reasonable excuse is a criminal offence attracting a maximum punishment of a fine not exceeding level 3 on the standard scale. A fixed penalty notice can alternatively be imposed. An interested party can challenge the imposition of a PSPO in the High Court.
81. These provisions may engage Articles 8, 9, 10 and 11 and A1P1.

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<sup>8</sup> See *Vendittelli –v- Italy* (1994) 19 E.H.R.R. 464 at paragraph 38 and *X –v- Netherlands* App. No. 7721/76.

### *Article 8*

82. The conditions imposed by a PSPO will affect what individuals can do in the particular area in relation to which the PSPO applies and that this is likely to engage Article 8.
83. The rationale for imposing a PSPO is clearly set out in the provisions which also expressly provide that the restrictions must be reasonable to impose.
84. The legitimate aim which these provisions pursue is that of preventing disorder, public safety and protecting the rights of others which involve a balance of what should be allowed in public with a person's right to enjoy their private life. The PSPO will impose conditions about the use of a public space for all persons who choose to use that public space but only if those conditions are justified to deal with the particular problem. A PSPO which restricts public rights of way over a highway is limited in relation to occupiers of premises adjoining the highway and access to dwellings. It will be for the local authority, as a public body which must act in accordance with the ECHR, to act compatibly with Article 8. Guidance will be issued to help ensure that local authorities make decisions compatibly with Article 8.
85. The provisions include a mechanism to challenge the PSPO which is considered a proportionate way to tackle unreasonable nuisance behaviour for the benefit of the local community.
86. The Government therefore is satisfied that these provisions are compatible with Article 8.

### *Article 9*

87. Although it is not considered likely that Article 9 will be engaged nevertheless a particular restriction in a PSPO may, for example, restrict the ability for members of a particular religious group to have faith meetings in public spaces which would engage Article 9.
88. As in relation to Article 8, the rationale for imposing a PSPO is clearly set out in the provisions and the provisions also expressly provide that the restrictions must be proportionate to the effect of the activities.
89. Again the legitimate aim which these provisions pursue is that of public safety and protecting the rights of others which involve a balance of what should be allowed in public with a person's right to enjoy their private life. For those reasons any interference with Article 9(1) rights are capable of being justified within the meaning of Article 9(2).
90. The Government therefore is satisfied that these provisions are compatible with Article 9.

### *Article 10 and 11*

91. It is possible that Articles 10 and 11 could be engaged by the restrictions set out in a PSPO. For example, a person may be prohibited from holding events on certain public spaces. The legitimate aim which these provisions pursue is that of public safety and protecting the rights of others which involve a balance of what should be allowed in

public with a person's right enjoy their private life.<sup>9</sup> The PSPO will impose conditions about the use of a public space for all persons who choose to use that public space but only if those conditions are justified to deal with the particular problem.

92. The PSPO is limited in terms of its geographical area as the provisions ensure that a PSPO can only be issued in respect of an area where there has either been a problem with unreasonable activities or where it is likely that there will be a problem with unreasonable activities.
93. The Government therefore is satisfied that these provisions are compatible with Articles 10 and 11.

#### *Article 1 Protocol 1*

94. There is provision which enables an authorised person to require any person consuming alcohol in a particular place where a PSPO has been issued prohibiting the consumption of alcohol in that place to surrender the alcohol. Failure to do so is a criminal offence, making the offender liable to a fine not exceeding level 2 on the standard scale.
95. Since this requirement would only exist when an offence was being committed (since breach of the PSPO which prohibits the consumption of alcohol is a criminal offence) this is a situation in which possessions may be seized in the public interest of preventing criminal behaviour in conditions provided for by law.<sup>10</sup>
96. Therefore the Government is satisfied that these provisions are compatible with A1P1.
97. The Government also notes that local authorities, who can make a PSPO, and local authorities and police, who may enforce the PSPO, are public bodies and are therefore obliged to act compatibly with the ECHR, in accordance with section 6 of the Human Rights Act 1998.

#### **Part 4, Chapter 3: Closure of premises associated with nuisance or disorder etc**

98. These provisions have the effect of streamlining existing powers (under Parts 1 and 1A and sections 40 and 41 of the Anti-social Behaviour Act 2003 and sections 161 to 169 of the Licensing Act 2003).
99. A notice can be issued by a police officer of the rank of at least inspector or the local authority if there is reason to believe that that the use of particular premises has resulted in nuisance to members of the public, or that there is likely soon to be disorder on or near those premises associated with the use of those premises, and that the order is necessary to prevent the nuisance or disorder from continuing or occurring. A decision to issue a notice may be the subject of a challenge by way of judicial review. This is considered a sufficient level of review in respect of the notice since there is an obligation to make an application to a court when a notice is issued; this has the effect that a fair and impartial tribunal will consider whether an order can be made (and at the same time, whether the notice should have been issued). The only time where an application does not need to be

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<sup>9</sup> *City of London Corporation –v- Samede* and others [2012] EWHC 34 (QB).

<sup>10</sup> See *Vendittelli –v- Italy* (1994) 19 E.H.R.R. 464 at paragraph 38 and *X –v- Netherlands* App. No. 7721/76.

made to the court is when the police or local authority has cancelled the notice before the time limit (maximum of 48 hours) expires. If there is no need for a notice to continue in the form of an order, the Government considered it better for the individual that the notice can be cancelled immediately. The safeguard against any improper use of notices which are then cancelled is the ability for the individual affected to seek a judicial review of the police or local authority decision to issue the notice.

100. The closure notice cannot prohibit access to the property in relation to any person who lives there or the owner of the property and can be issued for a maximum of 24 hours unless there is sign off at superintendent level (if it is a police issued notice) or chief executive level (if it is a local authority-issued notice) in which case it may be issued for a maximum of 48 hours (or extended to a maximum of 48 hours).

101. Breach of the notice without reasonable excuse is an offence. If the police issued the notice, they must apply to the magistrates' court for a closure order (the local authority must apply if the authority issued the notice) unless the notice has been cancelled. The court can make a closure order if a person has engaged in disorderly, anti-social, nuisance or criminal behaviour on the premises; and the making of the order is necessary to prevent the occurrence or reoccurrence of such behaviour for the period specified in the order. The order can last no more than three months although this can be extended to a total of six months upon application to the court. The order may prohibit the person who resides in the premises and/or owns the premises from entering the premises. Breach of the closure order is a criminal offence. An order may be appealed to the Crown Court.

102. These provisions may engage Article 8 and A1P1.

#### *Article 8*

103. In terms of any interference with Article 8, the legitimate aim pursued is that of protecting the rights and freedoms of others not to be subjected to disorderly, anti-social, nuisance or criminal behaviour, which means that there is a balance to be struck between the rights of the individual and the rights of the general public. The closure notice does not prevent a person who habitually resides in the premises from continuing to do so; and a closure order will do so only after the court has given an opportunity to hear representations from those with an interest in making them (that is, the person with control or responsibility for the premises and any other person with an interest in the premises).

104. The test for the notice to be issued and the order granted is that the notice or order must be necessary to prevent the nuisance or disorder from continuing which the Government considers that this will ensure that only notices or orders which are proportionate to the nuisance or disorder are issued or granted.

105. The Government therefore is satisfied that these provisions are compatible with Article 8.

#### *Article 1 Protocol 1*

106. Since the maximum time for which an order can be made (taking into account extensions) is 6 months therefore the issue of deprivation of property under A1P1 does not arise; rather this is a control of property or possession under A1P1.

107. This is a justified control of possessions for a limited period of time in accordance with the general interest of preventing disorderly, anti-social, nuisance or criminal behaviour.<sup>11</sup>

108. Therefore the Government is satisfied that these provisions comply with A1P1.

109. The Government also notes that persons who may issue a notice are public bodies which must act compatibly with the ECHR under section 6 of the Human Rights Act 1998 and that only people of a sufficient senior status in those public bodies may issue a notice. Moreover, the courts, as public bodies, must also act compatibly with the ECHR when considering whether to make a closure order.

### **Part 5: Recovery of possession of dwelling-houses: anti-social behaviour grounds**

110. The Bill introduces an absolute ground for possession in certain circumstances related to anti-social behaviour for secure tenancies under the Housing Act 1985 (“the 1985 Act”) and assured tenancies under the Housing Act 1988 (“the 1988 Act”); amends provisions relating to secure and assured tenants rights when possession is sought on the absolute ground; introduces into those Acts a discretionary ground for possession for riot-related anti-social behaviour; and amends the existing discretionary ground for possession for anti-social behaviour so that landlords will be able to seek possession where that behaviour occurs outside the locality of the dwelling-house but adversely affects the landlord’s housing management functions.

111. In all but a few cases, secure tenants are local authority tenants. An assured tenancy may be granted by a private registered provider of social housing (“PRP”) (registered in England), a registered social landlord (“RSL”) (registered in Wales) or a private landlord.

112. These provisions will only apply where the offence or anti-social behaviour concerned was committed after commencement of the provisions.

113. The Government has considered Articles 6, 7 and 8 and A1P1 and takes the view that the provisions are likely to engage Articles 6 and 8 and A1P1.

#### *Article 6*

114. Insofar as Article 6 may be engaged in the granting of an order of possession, with the absolute ground of possession, the amended discretionary ground for possession, and the new discretionary ground for possession, the landlord may only obtain possession of the property by obtaining a court order for possession and executing that order.<sup>12</sup> Therefore the usual procedural safeguards will apply through the court process.

115. The Government therefore is satisfied that these provisions fully respect Article 6.

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<sup>11</sup> *Air Canada –v- United Kingdom* (1995) 20 E.H.R.R. 150 at paragraph 42 in relation to seizing aircraft in the general interest of combating international drug trafficking.

<sup>12</sup> Section 82 Housing Act 1985 and section 5 Housing Act 1988.



## *Article 7*

116. The Government is satisfied that the provisions are compliant with Article 7.
117. Although a criminal conviction may give rise to it, in the Government's view, the absolute ground for possession is not a penalty for the purposes of Article 7. The offence that gives rise to the absolute ground must be connected to the dwelling house, the locality of the dwelling house or to the landlord. The intention is not to punish the offender but to sever the connection between the offender and the dwelling house and thus to prevent harm being caused in the future to the neighbours, the landlord and anyone employed in connection with the landlord's housing management functions.
118. The riot-related ground for possession may be committed anywhere in the UK so it would seem that there need be no connection between the offence and the dwelling house. Without such a connection, the riot-related ground for possession would appear to be a penalty rather than a means of preventing harm being caused to others in the community. However, the court may only grant possession on riot-related ground where it is reasonable to do so and, in the Government's view, this will ensure that there is a connection between the dwelling house and the offence and that this ground for possession will not be used simply as a punishment.
119. Only offences committed after the Bill is commenced will give rise to the absolute and riot-related grounds for possession. In the event that these offences were considered to be penalties for the purposes of Article 7, the penalty is not retroactive and Article 7 is not therefore engaged.

## *Article 8*

120. It is likely Article 8 will be engaged by the two new grounds for possession and by the amended discretionary grounds for possession, as an individual's right to respect for his or her family life and his or her home will be affected by an eviction.
121. Any interference with Article 8 rights will be in accordance with the law because there will be clear provision in primary legislation about the additional circumstances in which landlords will be able to seek possession and any evictions must be carried out in accordance with the legislation. With secure and assured tenancies, the landlord may only gain possession of the property by obtaining an order for possession and executing that order.<sup>13</sup>
122. The provisions pursue the legitimate aims of the protection of the rights and freedoms of others, the prevention of disorder and crime and public safety.

### Absolute ground for possession

123. The absolute ground for possession may be used where the tenant, a person living in the tenant's property or a visitor to that property has been found by another court to have committed anti-social behaviour. Its purpose is to protect other people from the consequences of that behaviour (which may include violence, harassment or nuisance), to

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<sup>13</sup> Section 82 Housing Act 1985 and section 5 Housing Act 1988.

discourage such behaviour and to improve public safety. It is intended to provide an additional, faster route for ending serious distress being caused to people living in the vicinity of those who commit serious anti-social behaviour and to enable landlords to evict tenants for such behaviour that affects their housing management functions.

124. Local authorities are public authorities for the purposes of the Human Rights Act 1998. A PRP in receipt of public money and exercising similar functions to a local authority has been found to be a hybrid public authority exercising public functions when terminating a tenancy (*R (Weaver) v London and Quadrant Housing Association*).<sup>14</sup>

125. In *Manchester City Council v Pinnock*<sup>15</sup> the Supreme Court held that any person who risked losing his home in possession proceedings involving a public authority had a right to raise Article 8 and have the matter determined by an independent tribunal, even if his right to occupation under domestic law had come to an end. In such cases the court must be able to determine relevant disputes of fact. Where there is more than one stage to the proceedings, the proceedings as a whole must be considered in order to see if Article 8 has been complied with. In summary, where the landlord is a public authority or is exercising public functions, any interference with a tenant's Article 8 rights would need to be proportionate.

126. In terms of the Housing Act 1985, new section 84A(1) (which is to be introduced by the Bill) makes clear that the absolute ground for possession is subject to 'any available defence based on the tenant's Convention rights...'. The Bill also amends section 7 of the Housing Act 1988 to make clear that the grounds for possession in Part 1 of Schedule 2 to that Act (grounds on which the court must order possession) (which is to include the absolute ground for possession) are also subject to 'any available defence based on the tenant's Convention rights...'. New section 84A(1) of the Housing Act 1985 and the amendment to section 7 of the Housing Act 1988 do no more than state the law as it is. At present, tenants of public authorities or of landlords exercising public functions are able to raise Article 8 as a defence to possession proceedings. Other tenants may not and the Bill does not change this.

127. However, the Bill is drafted in such a way as to take into account the evolution of the law. The courts are public authorities obliged by section 6 of the Human Rights Act 1998 to act in accordance with Convention rights. Although the current case law is conflicting, it is arguable that for the courts to comply with these obligations, they should consider, when asked to do so, whether granting possession is proportionate, even when the landlord is not a public authority. If the law were to evolve in this way, the drafting of new section 84A of the Housing Act 1985 and the amendment to section 7 of the Housing Act 1988 would still hold true because the defence would then become available to those tenants.

#### Discretionary grounds for possession

128. Ground 2 of Schedule 2 to the Housing Act 1985 and Ground 14 of Schedule 2 to the Housing Act 1988 provide the existing discretionary grounds for possession for anti-social behaviour and criminality for secure tenancies and assured tenancies respectively.

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<sup>14</sup> *R (on the application of Weaver) v London and Quadrant Housing Association* [2009] EWCA Civ 589.

<sup>15</sup> *Manchester City Council v Pinnock* [2010] UKSC 45 [2011] 1 All ER 285.

Possession can however only be sought under these grounds where the anti-social behaviour or criminality has taken place in, or in the locality of, the dwelling house. The court may order possession only if it is satisfied that it is reasonable to do so.

129. The Bill amends the existing grounds for possession for anti-social behaviour to enable landlords to seek possession when the anti-social behaviour has occurred outside the locality of the dwelling-house but has affected the landlord or a person employed (whether or not by the landlord) in connection with the landlord's housing management functions.

130. The Bill also introduces a new discretionary ground of possession for riot-related anti-social behaviour to enable landlords of dwelling-houses in England to apply for possession where a tenant or person living in the property has been convicted of a riot-related offence committed anywhere in the UK. The amendment is to enable the court to order possession where a riot-related offence has been committed beyond the immediate neighbourhood of the property but causes significant harm to the wider community. It is also intended to deter and prevent such behaviour.

131. The court may only order possession on the discretionary ground where it considers it reasonable to do so. Reasonableness has been held to require the judge to take into account *all relevant circumstances at they exist at the date of the hearing in a broad commonsense way*<sup>16</sup>. A court required to consider reasonableness is unlikely to reach a substantially different decision from that which it would reach if considering the proportionality of the decision<sup>17</sup> as a disproportionate decision is unlikely to be a reasonable one, although the court could consider the two matters separately.

132. The Government is therefore satisfied that these provisions are compatible with Article 8.

#### *Article 1 Protocol 1*

133. It is likely that A1P1 will be engaged by the provisions of the Bill which provide for: an absolute ground for possession in certain circumstances related to anti-social behaviour; the amendment to tenants' rights when possession is sought on that ground; the amendment to the existing discretionary ground for possession for anti-social behaviour; and the new discretionary ground for possession for riot-related anti-social behaviour.

134. The concept of "possessions" has been given a broad interpretation in case law. A contractual right, such as a tenancy agreement, is property for the purposes of A1P1.<sup>18</sup> It is therefore arguable that the statutory rights that secure and assured tenants possess may be considered by a court to be an aspect of their property rights.

135. Any interference with the A1P1 rights will be in accordance with the law because there will be clear provision in primary legislation about the circumstances in which landlords will be able to seek possession on the absolute and the new discretionary ground. The absolute ground for possession and the discretionary riot-related ground for possession were the subject of a wide public consultation which ended in November 2011.

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<sup>16</sup> *Cumming v Danson* 2 [1942] All ER 653.

<sup>17</sup> *Lambeth LBC v Howard* [2001] EWCA Civ 468 (2001) 33 HLR 58.

<sup>18</sup> *Mellacher v Austria* (1989) 12 EHRR 391.

The amendment to the existing discretionary ground for possession for anti-social behaviour is in response to the consultation, and to representations made by social landlords and their representative organisations both to the Government following the publication of the draft Bill and in submissions to the Home Affairs Select Committee as part of the pre-legislative scrutiny process. Those landlords wished to ensure that the discretionary ground for possession for anti-social behaviour applied where that behaviour occurred outside the locality of the dwelling-house but was directed at people employed in connection with the landlord's housing management functions and the behaviour was related to those functions. This is the same test as exists for the absolute ground for possession and would enable landlords to seek possession where the high threshold for the absolute ground for possession is not met.

136. In relation to housing, states have a wide margin of appreciation and their actions will be justifiable unless the action is manifestly unreasonable.<sup>19</sup>

#### Absolute ground for possession

137. For the reasons given above in relation to Article 8, any interference with the A1P1 rights is considered to be in pursuit of a legitimate aim.

138. A1P1 exists to protect the individual's possessions from arbitrary interference or deprivation by public authorities; however the proposed provisions address circumstances in which the actions of the tenant, a member of the tenant's household or a visitor to the property and the effect of those actions on others are the reasons for the loss of their tenancy. Deprivation could only occur once a tenant, a member of the tenant's household or a visitor to the property had been adjudged, through a proper court process, guilty of the kind of behaviour in question, to the extent necessary for a court to impose a sanction against the tenant.

139. It is also relevant to note that the landlord's property interests are engaged and are in need of protection, as are the rights of other tenants to the peaceful enjoyment of their properties free from intimidation, violence, nuisance or annoyance.

140. The Human Rights Act 1998 requires landlords that are public authorities or exercising public functions to act in accordance with Convention rights. The tenant will also have the right to raise proportionality as a defence to possession proceedings. In these circumstances the landlord and the court would need to determine whether a fair balance had been struck between the general interest of the community (including other tenants) and the need to protect the individual's fundamental rights, by applying a proportionality test. This may be particularly relevant where the anti-social behaviour has been committed by a person other than the tenant.

#### Absolute ground of possession: effect on the right to buy

141. If possession proceedings on the absolute ground are pending before any court, the landlord will be under no duty to convey the freehold or grant a lease to a secure tenant who has applied to exercise the right to buy the property under Part 5 of the 1985 Act. The landlord is already under no duty to convey the freehold or grant a lease where possession

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<sup>19</sup> *James v United Kingdom* (1986) 12 EHRR 391.

proceedings are pending before any court on the discretionary ground for anti-social behaviour or for proceedings for a demotion order. (A demotion order temporarily removes security of tenure and certain rights from secure tenants in cases of housing-related anti-social conduct.) In all cases, the right to buy will be reinstated if the possession proceedings fail or are withdrawn.

142. The amendment to the right to buy provisions may amount to a temporary interference with the tenant's A1P1 rights. However, for the reasons given above, this is in pursuit of a legitimate aim. As above, any interference with the tenant's rights would not arise from arbitrary interference by a public authority but from the actions of the tenant, a member of the tenant's household or a visitor to the dwelling-house. The landlord's property rights are also relevant and, of particular importance, are the rights of other residents to peaceful enjoyment of their properties, which may be overridden if the tenant were able to avoid eviction simply by exercising the right to buy.

#### Absolute ground of possession: effect on mutual exchange and transfer

143. Secure tenants have the right to assign the tenancy by way of exchange ("mutual exchange") with another secure tenant or an assured tenant of a social landlord<sup>20</sup>. Whilst the landlord's permission is required, the landlord may only refuse on one of the grounds in Schedule 3 to the 1985 Act. The Bill amends Schedule 3 so that landlords may refuse where possession proceedings are pending before any court on the absolute ground, in the same way that permission may currently be refused based upon the discretionary ground for anti-social behaviour or for proceedings for a demotion order. In all cases, if the court does not grant possession, the tenant's original rights will be reinstated.
144. The Localism Act 2011 gives some secure tenants and assured tenants the right to exchange properties but keep their original security of tenure. Whilst the landlord's permission is required, the landlord may only refuse on one of the grounds in Schedule 14 to that Act. The Bill amends Schedule 14 so that it applies in relation the absolute ground for possession in the same way as it applies to the discretionary ground for possession and demotion orders.
145. As with the right to buy, the amendment to the mutual exchange and transfer provisions may amount to a temporary interference with the tenant's A1P1 rights. However, for the reasons given above, this is in pursuit of a legitimate aim. As above, any interference with the tenant's rights would not arise from arbitrary interference by a public authority but from the actions of the tenant, a member of the tenant's household or a visitor to the dwelling house. Of particular importance here are the landlord's property rights, as landlords should be able to decide whether to accept into their housing stock a tenant against whom another landlord is seeking possession based on the absolute ground for possession. This will enable landlords to consider the potential prospect of interference with their existing tenants' rights, in particular, those tenants' right to peaceful enjoyment of their property.

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<sup>20</sup> Section 92 of the 1985 Act.

### Discretionary grounds for possession

146. For the reasons given in relation to Article 8 and the amendment to the discretionary ground for possession, any interference with the tenant's A1P1 rights is considered to be in pursuance of a legitimate aim.
147. As with the absolute ground for possession, if the tenant were to be evicted from the property, this would be a result not of arbitrary interference by the state but as a result either of the actions of the tenant or the action of a person living in or visiting the tenant's property. With the amendment to the discretionary ground, the tenant or a person living with or visiting the tenant, must have committed anti-social conduct that has affected the landlord or a person employed in connection with the landlord's housing management functions. With the new riot-related ground for possession, the tenant or a person living with the tenant have committed a criminal offence during a riot. In both cases, the court must also consider it reasonable to grant possession based upon these actions. A court required to consider reasonableness is unlikely to reach a substantially different decision from that which it would reach if considering the proportionality of the decision<sup>21</sup> as a disproportionate decision is unlikely to be a reasonable one, although the court could consider the two matters separately.
148. The Government therefore is satisfied that these provisions are compatible with A1P1.

### **Part 6: Local involvement and accountability**

#### Community remedies

149. These provisions oblige a Police and Crime Commissioner (or the London equivalent) to consult members of the public about the sorts of sanctions which are offered to offenders who are dealt with outside of the formal criminal justice process (that is, those against whom criminal proceedings are not brought). This is done either by way of informal sanctions or as part of a conditional caution. Although members of the public may suggest any sort of sanctions, only those agreed with the chief constable will be put forward on the agreed list. The chief constable will only agree to sanctions that are achievable and realistic (for example, community work options or certain types of courses). These informal sanctions are already available and used; the new part of the proposal is the public consultation on the options.
150. When dealing with an offender informally the police constable will be obliged to consult any person who it appears is a victim of the offenders' behaviour (or has been otherwise affected by the offender's behaviour) as to what sort of sanction on the agreed list should be offered to the offenders. Despite this input from the victim, the final decision as to what sanction should be offered remains that of the police officer, who will know best what sort of sanction is proportionate to the offender's behaviour, what is realistic and achievable in the particular area and circumstances and also will be aware that any sanction proposed must comply with the offender's ECHR rights in light of section 6 the Human Rights Act 1998.

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<sup>21</sup> *Lambeth LBC v Howard* [2001] EWCA Civ 468 (2001) 33 HLR 58.

151. This consultation with the victim already takes place in practice in many cases; the new part of the proposal is to require such consultation (unless the victim cannot be identified or does not wish to be consulted). This does not give rise to any ECHR concerns since the police are not obliged to follow the victim's wishes if they are not appropriate in the particular case.
152. The offender is not obliged to carry out whatever sanction is proposed. They are free not to comply, at which stage the police and Crown Prosecution Service may consider whether to bring criminal proceedings.
153. The Government therefore is satisfied that these provisions are compatible with ECHR rights.

#### Responses to complaints about anti-social behaviour

154. These provisions impose a duty on a group of authorities to create a structure by which complaints, which have not previously been properly addressed, should be dealt with. This would include repeated complaints made by an individual. The provisions are not overly prescriptive to ensure that local issues are properly addressed.
155. This does not raise any significant ECHR issues. The group of authorities will not have the power to impose any sanctions, they are only empowered to issue recommendations to persons carrying out public functions.
156. The Government therefore is satisfied that these provisions are compatible with ECHR rights.

### **Part 7: Dangerous dogs**

#### Keeping proper control of dogs in any place

157. Clause 98 extends the application of section 3 of the Dangerous Dogs Act 1991 ("DDA") from public places to all places, notably therefore inside a private dwelling.
158. The Government consider that this provision will engage Article 8, but that any interference with those rights can be justified, in accordance with Article 8(2), in the interests of public safety<sup>22</sup>. The Government is pursuing a legitimate aim in protecting people from dog attacks by way of deterrent, namely the extension of the offence. This is necessary in a democratic society given the statistics on dog attacks in private dwellings - there have been a number of high profile serious attacks inside the home with attacks on members of the family or visiting friends and family. In many of these cases the victims have been children who have either suffered serious injury or, in some cases, have died.
159. The Government further considers that the measures are proportionate. Various options were considered in the consultation 'Promoting more responsible dog ownership: proposals to tackle irresponsible dog ownership', notably whether the offence should extend only to public places and private places where the dog has no right to be, whether it should extend to the outside of private properties only or whether it should include the

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<sup>22</sup> As in *Silver v United Kingdom* (1983) 5 E.H.R.R. 347. Given the significant number of fatal dog attacks there is also arguably a legitimate aim to protect the Article 2 rights of others.

inside of private dwellings. Given the significant number of attacks inside the home where the dog has a right to be, the least onerous effective measure is the extension to the dwelling home.

160. The extension of section 3 offences to assistance dogs in addition to people imposes an additional obligation on dog owners or keepers to maintain control of their dogs when they are near assistance dogs. The Government considers that potential offences are likely to occur in public places and Article 8 is therefore unlikely to engage. Should an offence occur in a private place, Article 8 will engage and the considerations discussed in paragraphs 158 and 159 above will apply.
161. In relation to offences both in public and private places, Article 6 is likely to be engaged in respect of the court and evidential process, particularly in relation to what constitutes “reasonable apprehension” that an assistance dog will be attacked, but the Government considers that the established court mechanism will be able to accommodate this change whilst satisfying the requirements of Article 6.

#### Whether a dog is a danger to public safety

162. The DDA currently operates to potentially deprive a person of any dog to which section 1 applies<sup>23</sup>. The default position under section 4 is that, where a person is convicted of an offence under (*inter alia*) section 1, the court shall order the destruction of any dog in respect of which an offence has been committed. However, section 4(1A) provides that the court is not required to make an order for destruction where the court is satisfied that the dog would not constitute a danger to public safety. A similar mechanism applies for civil proceedings brought under section 4B.
163. Clause 99 creates a requirement for the court, when considering whether a dog constitutes a danger to public safety, to consider a number of relevant circumstances, notably including whether the owner or person in charge is a fit and proper person to look after the dog. These factors mirror the Sentencing Council Guideline issued in August 2012, and seek to rectify what the Government considers to be the *per incuriam* decision of the High Court in *Sandhu*<sup>24</sup>, where Collins J held that whether the owner was a fit and proper person was an irrelevant consideration<sup>25</sup>.
164. Clause 99 creates a power to establish a scheme requiring a court to consider whether a person is a fit and proper person to be in charge of a dog. This is an extension of an existing order-making power to enable keepers of dogs to be referred to the court for an assessment of suitability for long term “keepership”.
165. Given that the outcome of these changes is that the court may now order that a dog should be destroyed in circumstances where it would not currently be destroyed, the Government considers that these changes will engage A1P1. The Government has also considered whether Article 8 would be engaged but concluded that it will not, given that

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<sup>23</sup> Section 1 dogs are dogs which have traditionally been bred for fighting and currently include any dog of the type known as the pit bull terrier, the Japanese tosa, the Dogo Argentino and the Fila Brasileiro.

<sup>24</sup> *The Queen on the Application of Sandhu v Isleworth Crown Court and Defra* [2012] EWHC 1658 (Admin)

<sup>25</sup> *Sandhu* is *per incuriam* because the Court of Appeal in *R v Flack* [2008] 2 Crim 204 held that being a man of good character was a relevant consideration. The Court of Appeal confirmed that *R v Flack* applies to section 1 dogs in *R v Baballa (Moses)* [2010] EWCA Crim 1950.



the keeping of a dog has been held not to fall within the sphere of the owner's private life for the purposes of Article 8<sup>26</sup>.

166. Having closely examined the situation that would result should the court consider that the owner or keeper is not a fit and proper person to keep the dog, that is destruction of the animal, the Government's view is that this is a clear case of deprivation. The case of Henry Bates v UK (Application No. 26280/95) (unreported, 16 January 1996) related to the destruction of a section 1 DDA dog and the Government is influenced by the Commission's conclusions in this case, that the impounding of a dog which is the subject of a destruction order amounts to a deprivation of property which should be considered under the second sentence of the first paragraph of A1P1. This was likewise confirmed in a dog destruction case, Bullock v United Kingdom<sup>27</sup>.
167. Any deprivation would be in accordance with conditions provided for by law, as set out in the DDA. Likewise, the State is entitled to enact legislation to control dangerous dogs in the interests of public safety and this amendment to the legislation goes to the heart of protecting the public, by reducing irresponsible dog ownership. However, there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised, with a fair balance being struck without placing an excessive burden on an individual.
168. This provision in the Bill is not equivalent to the initial action proposed by the DDA, namely the removal of a whole breed or breeds of dog from the United Kingdom. However those measures were considered by the Commission to have been justified in Bullock v United Kingdom<sup>28</sup>, where the Commission was "cognisant of the fact that the pit bull terrier breed was developed as a fighting animal which, prior to the introduction of the 1991 Act, was known to have attacked persons in the United Kingdom causing much concern".
169. There has also been a history of no compensation being paid for the destruction of dogs under the DDA in these circumstances, the destruction forming part of the penalty of owning a banned breed after the stipulated deadline in the DDA<sup>29</sup>. The public were initially entitled to compensation for the destruction of their dog under the *Dangerous Dogs Compensation and Exemption Schemes Order 1991* where their dog was destroyed before the appointed day on 30 November 1991, but were put on notice that no compensation would be payable thereafter.
170. Each case will be considered by the court on a case by case basis to examine the danger to public safety, taking into consideration all relevant circumstances. The Defendant will be given an adequate opportunity to present their case and any expert evidence in their favour and will also be able to pursue any usual avenues of appeal<sup>30</sup>. Given the safeguards in place in the court system, the justification for the lack of compensation and bearing in mind the wide margin of appreciation afforded to the legislature in

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<sup>26</sup> No. 6825/74, X v Iceland, Dec. 18 May 1976, D.R. 5 p86

<sup>27</sup> App. No. 29102/95, (1996) 21 E.H.R.R. CD85, 16 January 1996

<sup>28</sup> App. No. 29102/95, (1996) 21 E.H.R.R. CD85, 16 January 1996

<sup>29</sup> Referred to at first instance in Booker Aquaculture Limited (trading as Marine Harvest McConnell) v The Scottish Ministers (Joined Cases C-20/00 C-64/00) [1999] 1 CMLR 35.

<sup>30</sup> For example under section 108 of the Magistrates' Courts Act 1980.

implementing social and economic policies<sup>31</sup>, the Government has concluded that these measures are proportionate within the meaning of A1P1. It follows that any cases falling to be considered under control of use, perhaps because the dog may subsequently be released, would also be justified under A1P1.

171. These changes will be brought into the current mechanism whereby the court will consider, under section 4 of the DDA, whether to make a destruction order or a contingent destruction order. Given that the usual opportunities for representation at court, presentation of evidence and appeal apply, the Government considers that this provision will comply with the requirements of Article 6. We note that for section 4B (which is a civil procedure) legal aid is unlikely to be available, however Article 6(3)(c) does not give an absolute right to free legal representation and we consider that on the balance of probabilities a defendant will not establish that the interests of justice require legal aid to be provided for civil cases.

### **Part 9: Forced marriage**

172. The Government does not consider that the new forced marriage offences engage the right to respect for private life and family life in Article 8. This is because the right to respect for family life does not extend to a right to use violence, threats or coercion to cause your family member (for example, a child) to marry, and should not be interpreted as such. The Government's view is that the new offences actually enhance the Article 8 rights of potential victims of forced marriage. This is because Article 8 guarantees respect for individuals to shape and define who they are through personal choices and self-determination. Article 8 includes respect for bodily or physical integrity, a right to self-determination, respect for sexual relations, and respect for personal identity. Thus, it is hoped that the criminalization of forced marriage will offer protection to victims and potential victims of forced marriage which will enhance their Article 8 rights.

173. Equally, the Government does not consider that the new offences engage the right to marry in Article 12. This is because the right to marry does not extend to a right to force a family member into a marriage to which they do not consent, and should not be interpreted as such. The Government's view is that the new offences actually enhance the Article 12 rights of potential victims of forced marriage. This is because there is case law indicating that Article 12 confers a right not to marry as well as a right to marry – see Pretty V DPP UHHL [2002] 1 AC 800, at paragraph 6, in which Lord Bingham stated that he would be inclined to infer that Article 12 confers a right not to marry. It follows that forcing a person to marry against their will and without their consent could constitute an interference with Article 12. Thus, the criminalization of forced marriage enhances the Article 12 rights of potential victims by protecting them from such an interference with their rights.

### **Part 10, clauses 116 to 120: Independent Police Complaints Commission**

174. The framework in Part 2 of the Police Reform Act 2002 (“the 2002 Act”) in accordance with which the Independent Police Complaints Commission (“the Commission”) has oversight in relation to policing bodies was intended to ensure that its

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<sup>31</sup> See for example *James v United Kingdom* (1986) 8 EHRR 123, where the ECHR held that it would respect the legislature's judgment as to what is in the public interest unless that judgment is “manifestly without reasonable foundation”.

exercise of any of its functions is compatible with the investigative duties under Articles 2 and 3, and the requirements under Article 13 of the Convention.

175. The investigative obligation has, in relation to Article 2, been described as an obligation *to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated* (in *R (Middleton) v HM Coroner For The Western District Of Somerset & Anor* [2004] 2 AC 182). This obligation has been extended to Article 3 (see, for example, *Assenov v. Bulgaria* (1998) 28 EHRR 652 at paragraph 102).
176. The 2002 Act establishes the Commission as an independent body from those bodies in relation to which it exercises oversight. Its oversight relates to complaints, conduct matters or cases in which a person has died or suffered serious injury. The 2002 Act makes provision to ensure that this oversight is effective and expeditious, and where appropriate involves those who are affected by the matters being investigated.
177. Clause 118 confers power on the Commission to obtain information from any person where the information is required for the purposes of an investigation carried out by it. The Commission may serve an information notice on the person which specifies the information the Commission requires, the form in which the information should be provided to it, the period within which the information should be provided and the rights of appeal available to the person to which the notice is given. Certain information is excluded from the requirement; this includes information which attracts legal professional privilege and information that would, by revealing evidence of the commission of an offence, expose the person providing the information to criminal proceedings for that offence. Failure to comply with the notice, or making a false statement in connection with it, will enable the Commission to refer the matter to the court for its determination; this reflects the approach set out in section 54 of the Freedom of Information Act 2000. A person may appeal to the First-tier Tribunal. The Tribunal must allow the appeal or substitute such other notice as may have been served by the Commission if it is satisfied that the notice is not in accordance with the law.
178. The Commission may only request information or serve a notice in accordance with this clause if it considers that the information is necessary for the purposes of discharging its functions, and that the processing of the data is necessary for statutory purposes and that it is reasonable, proportionate and justified. The Commission, as a public authority, will have a duty under section 6 of the Human Rights Act 1998 to ensure that the procedures established by it for investigating complaints and other matters (as well as its own actions) are compatible with the ECHR.
179. Provision governing the processing of personal information about a person engages Article 8(1). The provision made in this clause ensures that this is in accordance with the law, and is necessary in a democratic society in the interests of public safety, the prevention of crime and the protection of the rights and freedoms of others. The clause contains a number of safeguards, including provision for independent oversight by the courts, and at the same time ensures that the independence of the Commission, which it should enjoy to ensure compatibility with the Article 2 and 3 rights described above, is not compromised.

180. The interference with Article 8(1) which may be justified under Article 8(2) is accordingly is the processing of personal information under the power in this clause. Article 8(2) describes the basis on which such interference may be justified. The interferences will be in accordance with the law because there is clear provision in primary legislation governing what information is required to be provided to the Commission and the purpose of the provision of such information. The provisions in the clause are set out with sufficient precision to enable a person to know in what circumstances and to what extent the powers can be exercised.
181. The interferences with Convention rights caused by the acquisition of information by the Commission will be in pursuit of a legitimate aim, namely the prevention of disorder or crime, the protection of the rights and freedoms of others or ensuring the State's compliance with its duty to comply with Articles 2 and 3. These aims can be pursued by virtue of the Commission's exercise its statutory functions, including the functions contained in this clause.
182. The interferences with these rights will also be proportionate. The power may only be exercised in relation to information which the Commission *reasonably requires for the purposes of an investigation*. This qualification should import the consideration of whether the Commission's request for the information is proportionate and justified exercise of the power. The availability of an appeal right on the basis of which the Commission's decision to serve an information notice may be quashed if it is not in accordance with the law is a further safeguard in this respect. The Commission, in determining what information is to be specified or described in the notice, must have regard to its obligations under section 6 of the Human Rights Act 1998 and can therefore be expected to ensure that the nature and extent of the information it seeks is no more than is necessary to enable it to discharge its investigative functions. The provision for safeguards in the clause will ensure that the Commission observes these parameters.
183. The Government recognises that the power may result in the imposition of statutory duties on persons other than public authorities. As such, it may give rise to an interference with their rights under A1P1. This is because it may require such persons to allocate financial resources to discharging these duties which they would not otherwise carry out.
184. A1P1 is a qualified right. However, for the reasons set out above in relation to the justification for the interference with Article 8(1) rights, the Government considers that any interference with A1P1 rights will be capable of being justified.
185. The Government considers, therefore, that the provision in this clause is compatible with the ECHR.

**Part 10, clause 124 and Schedule 6: Port and border controls**

186. The provisions amending the border security powers in Schedules 7 and 8 to the Terrorism Act 2000:
- reduce the level of interference which the powers exercisable under Schedule 7 have on individual rights;

- extend the safeguards to the exercise of those powers provided in Schedule 8.

187. The Government considers that the powers of examination, detention and search available under Schedule 7 subject to the safeguards in Schedule 8 are, when considered with the statutory code of practice for examining officers<sup>32</sup>, currently fully compliant with the Convention. This view has been supported by recent case law.<sup>33</sup> The High Court has held that the powers enabling officers to stop and examine individuals travelling through ports are an essential tool to protect the inhabitants of the United Kingdom from terrorism and that it is unarguable that they are necessary in a democratic society.<sup>34</sup>

188. Nevertheless it is recognised that Schedule 7 powers are susceptible to challenge on the basis of compliance with Convention rights and one of the purposes of the proposed amendments is to strengthen their compliance. The exercise of stop and search powers under the Terrorism Act 2000 was recently considered by the European Court of Human Rights.<sup>35</sup> The Court considered general powers of stop and search which were considerably wider in their applicability than those contained in Schedule 7. It held that, because they were insufficiently prescribed by law and not subject to sufficient safeguards, they were in breach of Article 8. It is noteworthy that the Court distinguished the exercise of the more general powers to the requirement on travellers to submit to searches at airports, noting that in the latter case there is an expectation that a search may be conducted. Nevertheless it is proposed to reduce the level of interference possible under Schedule 7 powers; to more tightly prescribe their use; and to increase the level of safeguards relating to use of the powers.

#### *Article 5*

189. It is accepted that the exercise of powers under Schedule 7 may engage Article 5. It is considered that deprivation of a person's liberty by examination under paragraphs 2 and 3 of Schedule 7 is lawful under Article 5(1)(b) because the deprivation of liberty is to secure the fulfilment of an obligation prescribed by law. It is proposed to reduce the potential level of interference with a person's right to liberty by decreasing the maximum duration of any deprivation of liberty from nine to six hours. In addition, provision will be made so that after one hour of examination, the individual must be formally detained under paragraph 6(b) of Schedule 7.

190. Formal detention means that the safeguard mechanisms under Schedule 8 are engaged. It is proposed to extend some of the Schedule 8 protections that are currently afforded only to individuals detained under paragraph 6(b) at police stations to individuals detained at ports. A person detained under paragraph 6(b) at a port or at the border will be:

- entitled to have a person informed of his detention;
- entitled to consult a solicitor as soon as is reasonably practicable, privately and at any time.

The corresponding qualifications to those entitlements under paragraphs 8 and 9 of Schedule 8 will also be extended to detentions at ports or the border. These paragraphs

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<sup>32</sup> Examining Officers under the Terrorism Act 2000

<sup>33</sup> CC v Commissioner for the Metropolitan Police and Secretary of State 2011 EWHC 3316

<sup>34</sup> AK v Secretary of State for the Home Department [Judgement of 20/12/2012]

<sup>35</sup> Gillan and Quinton v UK ECHR 4158/05

prescribe in detail the circumstances in which these rights may be deferred or otherwise limited and it is considered that they are proportionate and sufficiently prescribed by law.

191. The Bill introduces a requirement to review detention as a further safeguard to the deprivation of liberty. The Terrorism Act 2000, as amended by the Bill, will require the Secretary of State to issue a code of practice about the periodic review by a review officer (an officer of higher rank than the examining officer) of a person's detention in which the review interval must be specified. The review officer may authorise continued detention if satisfied that it is necessary for the purposes of the power to examine in paragraphs 2 and 3; if the review officer is not satisfied then the person must be released.
192. The Government considers that these changes will mean that the exercise of powers resulting in the deprivation of liberty will be more stringently prescribed and more proportionate because they will be subject to an increased level of safeguard and the extent of the potential deprivation of liberty will be significantly reduced.

#### *Article 6*

193. The Government does not consider that examination or detention under Schedule 7 to the Terrorism Act 2000 engages Article 6 rights because the person is not subject to criminal investigation or proceedings and there is no determination of a civil right. Notwithstanding this, it is considered that the extension of the right to consult a solicitor in private to persons detained at ports will ensure that Schedule 7 is compatible with Article 6 in the event that it is found to be engaged.

#### *Article 8*

194. The Government accepts that the exercise of Schedule 7 powers may interfere with the right to a private life under Article 8(1). However, it is considered that any such interference is in accordance with law and is necessary in a democratic society in the interests of national security, public safety, the prevention of crime and for the protection of the rights and freedoms of others. Accordingly, any such interference is considered to be lawful. The powers are sufficiently prescribed by law and subject to a range of safeguards on their use. Further safeguards are proposed in relation to the taking of samples and searches of the person.
195. It is proposed to make it explicit that there is no power to carry out an intimate search of a person detained. It is proposed to further prescribe the circumstances in which a strip search may be conducted. The person must be detained under paragraph 6 of Schedule 7; the examining officer must have reasonable grounds to suspect that the person is concealing something which may be evidence that the person is a 'terrorist' within the meaning of section 40(1)(b) of the Terrorism Act 2000; and the search must be authorised by a more senior officer who has not been directly involved in questioning the person. The amendments to Schedule 7 to the Terrorism Act 2000 will define the terms 'intimate search' and 'strip search'.
196. The Bill repeals the power to take an intimate sample from a person detained at a police station under paragraph 6 currently contained in paragraph 10(5) of Schedule 8.

197. It should be noted that Schedule 8 already provides a safeguarding mechanism in relation to the taking of non-intimate samples and fingerprints. Where such material is taken without consent, paragraph 9(4) provides that the person must be formally detained at a police station and the taking of the sample must be authorised by a police officer of at least the rank of superintendent.

198. The Government considers that the above proposals, in addition to those considered under Article 5, will strengthen the argument that any interference with Article 8 caused by Schedule 7 powers is sufficiently prescribed by law and is necessary and proportionate to the aim of the protection of the public from acts of terrorism.

#### *Article 14 and generally*

199. The Bill amends Schedules 7 and 8 so that the Secretary of State must issue a code of practice about the training to be undertaken by persons who will exercise powers as examining officers or as reviewing officers. This is intended to ensure that the powers are exercised in a manner that is compatible with the ECHR in general and to minimise the risk of the powers being exercised in a discriminatory manner. All officers exercising Schedule 7 powers are required to act in a manner compatible with Convention rights under section 6 of the Human Rights Act 1998.

200. As noted above, various amendments will require that provisions are made under the code of practice issued under paragraph 6 of Schedule 14 to the Terrorism Act 2000. Accordingly it is proposed to amend the existing code of practice issued under paragraph 6 of Schedule 14 to take account of these requirements; to update it as regards the other amendments and to update it generally.

### **Part 11: Extradition**

#### Clause 127: Appeals

201. Clause 127 amends the Extradition Act 2003 (“the 2003 Act”) in two ways.

202. First, it amends sections 26, 103 and 108 to make clear that the rights of appeal set out in those sections lie only with the leave of the High Court<sup>36</sup>. Section 26 deals with the right of appeal to the High Court in Part 1 cases (surrender to EU Member States under a European Arrest Warrant). Section 103 deals with the right of appeal against the decision of the judge in Part 2 cases. Section 108 deals with the right of appeal against the decision of the Secretary of State to order extradition in Part 2 cases. At present these rights of appeal lie without the leave of the High Court.

203. Second, clause 127 sets out that if a person gives notice of application for leave to appeal after the expiry of the relevant period provided for by the 2003 Act, but he or she did everything reasonably possible to ensure that it was given as soon as it could be given, the High Court may hear the application. In Part 1 cases, the period is seven days starting on the day the extradition order is made. In Part 2 cases, the period is 14 days starting on the day the Secretary of State informs the person that she has made an extradition order. This change is further to the Supreme Court judgment in the case of

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<sup>36</sup> Section 216(9) of the 2003 Act sets out that, in relation to Scotland, references in the Act to “High Court” mean “High Court of Justiciary”.

*Halligen and others* [2012] UKSC 20. In that case, the Court held that, so far as British citizens are concerned, applying the strict time limits in the 2003 Act inflexibly could result in a breach of Article 6 of the Convention.

204. The Government considers that this clause is compatible with the Convention rights. Any person in respect of whom extradition is ordered will be able to apply to the High Court for leave to appeal. Those with an arguable case will be able to present that case to the Court at a full appeal hearing. Moreover, giving the High Court the ability to accept notice of application for leave to appeal outside the statutory period will ensure that the Court can hear an application in circumstances where to refuse to do so could result in a breach of Article 6 of the Convention.

#### Clause 128: Asylum etc

205. Clause 128 also amends the 2003 Act in two ways.

206. First, it makes clear that in all cases where the person whose extradition has been requested has claimed asylum, surrender cannot take place until after the asylum claim has been finally determined. Sections 39 and 121 of the 2003 Act currently deal with asylum claims made after the commencement of extradition proceedings, and set out that extradition cannot take place until after the final determination of such a claim. Clause 128 extends this protection to people who claimed asylum before the commencement of extradition proceedings.

207. Second, clause 128 allows the Secretary of State, when she comes to consider a case under Part 2 of the 2003 Act (extradition to non-EU Member States), to discharge a person who has been granted asylum or leave on the ground that it would be a breach of Article 2 or 3 of the Convention to remove him or her to the territory which has requested his or her extradition (“protection-based leave”). At present, section 70 of the 2003 Act allows the Secretary of State to refuse to certify a request if the person has been granted asylum or protection-based leave. However, there is no power for the Secretary of State to discharge a person later in the process on the basis that he or she has, since the issue of the section 70 certificate, been granted asylum or protection-based leave. Clause 128 gives the Secretary of State this power. This is preferable to the current position, whereby the Secretary of State simply refuses to make an order for extradition within the statutory period and the person must then apply to the court to be discharged from proceedings.

208. The Government considers that this clause is compatible with the Convention rights. In particular, it will ensure that the Secretary of State can discharge a person from extradition proceedings where he or she has been granted leave on the basis that to return him or her to the requesting State would result in a breach of Article 2 or 3 of the Convention.

#### Clause 130: Non-UK extradition: transit through the United Kingdom

209. Clause 130 inserts new sections 189A to 189E into the 2003 Act.

210. New section 189A makes provision for the issue of certificates to facilitate the transit through the United Kingdom of a person who is being extradited from one territory to



another territory. Where the destination territory is a Part 1 territory, it will be for the National Crime Agency to issue a certificate. In all other cases, it will be for the Secretary of State to issue a certificate. A certificate authorises a constable or other authorised officer to escort the person from one form of transportation to another, to take the person into custody to facilitate the transit and/or to search the person (and any item in his or her possession) for any item which the person may use to cause physical injury (or, in a case where he or she has been taken into custody, to escape from custody). Reasonable force may be used. There are ancillary powers to seize and retain items found in the exercise of the search powers.

211. New section 189B deals with cases where a person is being extradited from one territory to another and he or she makes an unscheduled arrival in the United Kingdom. It allows a constable or other authorised officer to take the person into custody, for a maximum period of 72 hours, to facilitate the transit of the person through the United Kingdom. There are equivalent powers of search, seizure and retention to those under new section 189A.

212. The Government considers that this clause is compatible with the Convention rights. Although the clause authorises a constable to detain a person, and as such Article 5 is relevant, the lawful detention of a person against whom action is being taken with a view to extradition is permitted by Article 5(1)(f). Following the issue of a transit certificate or an unscheduled arrival, a person may only be taken into custody to facilitate his or her transit through the United Kingdom for the purposes of the extradition. In addition, in the case of detention following an unscheduled arrival, detention is only possible for a maximum of 72 hours (without a transit certificate). Moreover, by section 189D, the Secretary of State must issue a code of practice in connection with the exercise of the powers in sections 189A and 189B.

213. As the clause provides powers of search, Article 8 is also relevant. However, the powers are limited to searching for any item in possession of the person which may be used to cause physical injury or escape from lawful custody. In addition, the powers do not authorise a constable to require a person to remove any clothing other than an outer coat, jacket, headgear or gloves. As such, the Government believes the powers go no further than necessary and that any interference with Article 8 is justified.

214. In addition, AIP1 is relevant. This provision is clear that a person may be deprived of his or her possessions where this is in the public interest and subject to the conditions provided for by law. In this regard, the Government notes that the power to seize items found is limited to cases where the constable has reasonable grounds for believing that the person may use the item to cause injury or escape from custody. In addition, any item seized may only be retained while the person is in transit through the United Kingdom.

#### Clause 131: Extradition to a territory that is party to an international Convention

215. Clause 131 substitutes section 193 of the 2003 Act. The new section 193 will allow the Secretary of State to designate an international convention to which the United Kingdom is a territory and specify conduct which applies to that convention. Thereafter, in cases where the Secretary of State believes that: (i) a request for a person's extradition is from a territory designated under the section; (ii) the territory is not designated for the purposes of Part 1 or Part 2 of the 2003 Act; and (iii) the conduct specified in the request

is conduct specified under the section for the relevant convention, she may certify that that is the case. The result of certification is that the 2003 Act applies (with modifications) in respect of the person's extradition as if the requesting territory were a Part 2 territory.

216. The Government considers that this clause, which will ensure that the United Kingdom is able to meet its obligations under relevant international conventions, is compatible with the Convention rights. In all cases where a request is received and a certificate issued under the new section 193, the protections and safeguards in Part 2 of the 2003 Act will apply with respect to the request. These include section 87, which requires the judge to decide whether the person's extradition would be compatible with the Convention rights and to discharge the person if the judge decides that extradition would not be so compatible.

### **Part 12, clause 132: Miscarriages of Justice - Amendment to section 133 of the Criminal Justice Act 1988**

217. Clause 132 of the Bill amends section 133 of the Criminal Justice Act 1988 ("the 1988 Act"). Section 133 provides for the payment of compensation by the Secretary of State to a person whose conviction has been reversed on the basis that a new or newly discovered fact demonstrates beyond reasonable doubt that there has been a miscarriage of justice. Section 133 implements across the UK Article 14(6) of the International Covenant on Civil and Political Rights ("ICCPR"). It does not define the term "miscarriage of justice" which has led to a significant body of case law seeking to define its meaning. The judiciary has not been able to agree on the right test. The Bill seeks to provide that a miscarriage of justice will have occurred only where the applicant was clearly innocent of the relevant offence. The Government has considered this amendment in light of Articles 6(1) and 6(2) and Article 14.

#### Article 6: rights of a person applying to compensation under section 133 of the Criminal Justice Act 1988

##### *Article 6(1)*

218. The Government does not consider there is any basis to contend that an application for compensation for a miscarriage of justice under section 133 would amount to the determination of a "criminal charge". In relation to the determination of a civil right in Article 6(1) the Divisional Court in its recent decision in *Ali*<sup>37</sup> appeared to accept the Secretary of State's submissions that Article 6(1) was not in play and doubted whether the Secretary of State's consideration of an application for compensation under section 133 engages Article 6. The Divisional Court went on to consider that even if Article 6 were engaged, the right involved would not be "at the core of civil rights"<sup>38</sup>.

219. The Government does not see that the proposed change to "clear innocence" from the slightly wider test in *Ali* alters the analysis of the Divisional Court, either on the application of Article 6(1) or with respect to the fact that judicial review will cure any criticism that the decision is not made by an impartial tribunal<sup>39</sup>.

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<sup>37</sup> *R (oao) Ali and others v the Secretary of State for Justice* [2013] EWHC 72 (Admin), at paragraph 69

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ali* at para. 72

*Article 6(2)*

220. The Government has also considered whether the “innocence test” would interfere with the right protected by Article 6(2) to be presumed innocent until proven guilty. The Government has concluded that it would not. Article 6(2) applies to criminal proceedings, or to proceedings closely linked to them. The Government considers it unlikely that a court would hold that the Secretary of State’s determination under section 133(1) would be sufficiently closely linked to the original criminal proceedings for Article 6(2) to apply. Indeed the Supreme Court has already so held (see below).
221. Further, Article 3 of Protocol 7 to the ECHR (the UK is not a signatory to that protocol) provides for the payment of compensation for a miscarriage of justice mirroring Article 14(6) of the ICCPR on which section 133 is based. There is no decision on Article 3 Protocol 7 which suggests that Article 6(2) is engaged by it and the point was used by Lord Judge (at paragraph 256) in *Adams* as one reason for dismissing the argument based on Article 6(2).
222. The Government notes the decision in *Y v Norway*<sup>40</sup> in which the Strasbourg Court held that civil proceedings for compensation payable to a complainant following a person’s acquittal (as opposed to compensation for a miscarriage of justice) may engage Article 6(2). However, in that case, there had been significant proximity between the criminal trial and the compensation proceedings – both had been conducted in the same forum, and the compensation decision followed the acquittal by one day. The Government considers that the determination under section 133 is sufficiently distinct from the criminal process that Article 6(2) would not be engaged.
223. Further, the Supreme Court in *Adams* held unanimously that whatever the precise meaning of a miscarriage of justice, the presumption of innocence is not infringed by the section 133 scheme<sup>41</sup>.
224. Accordingly, the Government is satisfied about the compatibility of the proposed scheme with Article 6(2).

Effect of differential territorial application on Article 14 in conjunction with Article 6(1)

225. The new provisions will apply only in England and Wales, and in certain Northern Irish cases determined in practice by the Secretary of State for Northern Ireland<sup>42</sup>.
226. Changing the test for a miscarriage of justice to one of innocence would effectively narrow eligibility for compensation in England and Wales and in some, but not all, cases in Northern Ireland. To that extent it would be open to a person subject to the new test at least to claim that he or she has been discriminated against by comparison to somebody whose claim falls to be determined under the pre-existing law.

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<sup>40</sup> (2003) 41 EHRR 87

<sup>41</sup> See in particular Lord Phillips at paragraph 58, Lord Hope at paragraph 111 and Lord Judge at paragraph 255

<sup>42</sup> Specifically cases to which section 133(6H) of the 1988 Act applies.

227. The Government has considered whether this differential application could arguably constitute unlawful discrimination for the purposes of Article 14 read with Article 6(1) and has concluded that it would not.

#### *Article 6(1)*

228. The Government relies on the Divisional Court's holding at paragraph 69 of *Ali* that it is doubtful whether an application under section 133 engaged Article 6 overall, and take the view that there would be an insufficiently "meaningful connection"<sup>43</sup> with the core protections of Article 6(1) for the Court to conclude that Article 14 could apply. However, for completeness the point is considered further below.

#### *Is there a distinction on the basis of a protected ground?*

229. Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or "status", by which persons or groups of persons are distinguishable from one another. Article 14 lists specific grounds which constitute "status" including sex, race and property, but the list set out in Article 14 is illustrative and not exhaustive. A person could be discriminated against on the ground of any other status. "Other status" is interpreted widely by domestic courts and in Strasbourg, although there is some inconsistency in the case law as to its limits.

230. To the extent that any person could claim to enjoy "other status" by virtue of the differential application of this provision in different parts of the United Kingdom, any different treatment of these persons is simply a consequence of our system of devolution. Accordingly, the Government does not consider that there is an arguable basis to claim this provision would give rise to a breach of Article 14 read with Article 6(1).

231. It is a legitimate aim to implement Article 14(6) of the ICCPR in accordance with what the Government considers to be its proper meaning and to clarify the law in the face of continued uncertainty in the courts. It could not be said to be disproportionate to seek to legislate in this way and nor does Article 14 prevent contracting states with a number of jurisdictions from applying different rules in different geographical locations<sup>44</sup>.

#### **Part 12, clause 133: Low-value shoplifting**

232. This provision relate to the mode of trial of theft, where that theft is from a shop and the value of the property stolen does not exceed £200. Theft is presently triable either summarily in a magistrates' court or on indictment in the Crown Court. These provisions would provide that shop theft under £200 is treated as triable summarily in a magistrates' court only. They would however preserve the ability of the defendant to choose Crown Court trial for such offences, thus preserving the ability of the defendant to elect trial by jury. The simpler procedure for summary cases would facilitate such thefts being prosecuted by the police as specified proceedings, for example, where the defendant elects to plead guilty by post. The procedure would also mean a magistrates' court could

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<sup>43</sup> *R(M) v the Secretary of State for Work and Pensions*, Lord Bingham at paragraph 4

<sup>44</sup> Admissibility decision in *P v the United Kingdom*, application number 13473/87

not allocate such thefts to the Crown Court, thus ensuring a proportionate approach is taken to them.

233. These proposals do not give rise to the risk of ECHR incompatibility. The effect of the policy would be to increase the circumstances in which shop theft is tried summarily rather than on indictment. Both trial in a magistrates' court and in the Crown Court are compatible with Article 6. The diversion of this type of theft does not alter the position that the offence will be tried by a compatible procedure.

234. The change in procedure would apply concerning shop theft offences committed before the coming into force of the provisions. Nevertheless, Article 7, which prohibits retrospective criminal offences and penalties, is not engaged. This is because the effect of these proposals would not be retrospectively to criminalise conduct or to impose a heavier penalty than the one which existed at the point the criminal offence is committed. It is only to change the procedure that is followed in relation to that offence.

235. There is no right to trial by jury under the Convention rights. But because the provisions retain the right to elect jury trial for such cases in any event, the issue does not arise.

#### **Part 12, clause 134: Protection arrangements for persons at risk**

236. The Bill amends Chapter 4 of Part 2 of the Serious Organised Crime and Police Act 2005 which provides for the protection of a person whose safety is at risk by virtue of their being a person specified in Schedule 5 to that Act (that is persons who are, or are likely to be, involved in civil or criminal proceedings, or those closely linked to them). The UK has a positive obligation under Article 2 of the Convention to take reasonable steps to avert a "real and immediate" risk to life<sup>45</sup>, and the provision in the Serious Organised Crime and Police Act 2005 is but one of the ways in which the State discharges this obligation. The amendments will extend the power to make these statutory arrangements to encompass any person whose safety is considered to be at risk, as a consequence of the actual or potential criminal conduct of another, not merely those specified in Schedule 5. The statute does not specify the arrangements that may be made under this power, but it has been exercised for purposes including provision of police protection and creation of new identities. In parallel with the statutory regime, "protection providers" (which term includes the police) currently provide non-statutory protection arrangements in discharge of their Article 2 obligations, but the safeguards provided by the statutory scheme are not available in those cases. The overall purpose of the amendment, therefore, is to ensure that a protection provider is not prevented from making statutory protection arrangements by virtue of a person not being specified in Schedule 5.

237. This protection regime includes two criminal offences relating to the disclosure of information relating to protection arrangements (at sections 86 and 88 of the Serious Organised Crime and Police Act 2005). The Government has considered whether there is any possible argument over Article 7 here but is satisfied that since the offences will only apply to conduct occurring post-commencement and do not otherwise have any retrospective effects there is no issue.

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<sup>45</sup> Osman v UK [1998] EHRR 101

**Part 12, clause 135: Provision related to a surcharge payable under section 161A of the Criminal Justice Act 2003**

238. The Bill makes limited provision in relation to a surcharge payable under section 161A of the Criminal Justice Act 2003 (“the surcharge”). Firstly, the Bill removes a magistrates’ court’s powers under section 82 of the Magistrates Court Act 1980 to imprison a person in default, when it orders a surcharge under section 161A of the Criminal Justice Act 2003 at the same time as sentencing a person to immediate imprisonment. It also provides the court with a power to vary the amount of a surcharge imposed under section 161A(1) of the 2003 Act where the fine amount in respect of which the amount of the surcharge is calculated is remitted under either section 85 of the Magistrates’ Court Act 1980, or section 165 of the Criminal Justice Act 2003. The provision made by the Bill does not give rise to any interference with the Convention rights. While a surcharge payable under section 161A of the Criminal Justice Act 2003 would engage A1P1 of the Convention the Government is satisfied that this is in the public interest and subject to conditions provided for by law. Preventing a magistrates’ court from ordering additional days in prison instead of requiring payment of the surcharge does not affect that analysis. It also mirrors the position in respect of the Crown Court (section 139(3) of the Powers of Criminal Courts (Sentencing) Act 2000). If anything this clause avoids the prospect of further deprivation of liberty and (with respect to the power to vary) enables the reduction of a surcharge in certain circumstances to the benefit of the offender.

**Home Office/Department for Communities and Local Government/Department for Environment, Food and Rural Affairs/Ministry of Justice**

**9 May 2013**