

**ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL**  
**EUROPEAN CONVENTION ON HUMAN RIGHTS**  
**SUPPLEMENTARY MEMORANDUM BY THE HOME OFFICE**

The Home Office published an ECHR memorandum on introduction of the Anti-social Behaviour, Crime and Policing Bill in the House of Commons on 9 May 2013. This further supplementary memorandum addresses the issues arising from Government amendments tabled on 23 January 2014 for Lords Third Reading.

**Forced marriage**

1. The amendments to clause 119 modify the criminal offence in subsection (1) so that, in the specific case of a victim who lacks the capacity to consent to marriage, the offence can be committed by any conduct carried out for the purpose of causing the victim to enter into marriage, even if that conduct does not amount to violence, threats or any other form of coercion. Equivalent amendments are made to the Scottish offence in clause 120.

2. The Government accepts that these amendments may have the potential to engage Articles 12 and 8, given that the effect may be to criminalise the conduct of a person such as a partner or family member of a victim who believes that they are acting in the victim's best interests. This impact is considered below.

Article 12

3. Article 12 sets out the right for men and women of marriageable age to marry, according to the national laws governing the exercise of this right. In R (on the application of Baiai and others) v SSHD (2008) All ER (D) 411, the House of Lords confirmed that although the right to marry is a strong and fundamental right, contracting states may impose proportionate restrictions on the right to marry in pursuit of legitimate aims.

4. The case of Hamer v UK (1979) is authority for the proposition that generally it will be a matter for national law to decide on such matters as capacity to marry, and the relevant formalities for marriage. States may lay down rules of substance based on generally recognised considerations of public interest, including rules concerning capacity to marry, provided that national laws do not deprive a person of full legal capacity of the right to marry.

5. Pursuant to section 12 of the Matrimonial Causes Act 1973, a marriage is already voidable on the grounds that a party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind, or otherwise. The procedure is via an application to a court for a decree of nullity. This operates to annul the marriage from the point that the decree has been made absolute.

6. The amendments takes the approach a stage further by criminalising conduct carried out for the purpose of causing a person to marry where they lack the capacity to do so. This is based on the view that, where a person lacks the capacity to consent to marriage, it is never acceptable for another person (even if a parent or a partner) to cause them to enter into a marriage. This proposition is already reflected in section 27 of the Mental Capacity Act 2005 (which applies to England and Wales),

which states that nothing in that Act permits a decision on consenting to marriage or civil partnership, or consenting to sexual relations, to be made on behalf of another person.

7. Here, the legitimate aim being pursued by the Government is the aim of combating forced marriage, and in particular to protect a specific sub-class of victim; namely those who lack the capacity to consent to marriage, on the basis that they are a particularly vulnerable group who require additional protections.

8. In the context of Article 8, it has already been established in R (on the application of Quila) v SSHD (2010) 1 FCR 51 that the problem of forced marriage is a real one, which has a self-evident negative impact on victims. Burnett J found that the problem of forced marriage is a substantial one, and one which is under-reported. Given that forced marriage involves a serious violation of individual rights, it calls for a vigorous policy response.

9. The Government's view is that it is entitled to restrict the right to marry of persons who lack the capacity to consent to marriage in pursuit of the legitimate aim of preventing forced marriage, and that this is consistent with the case law cited above, in particular Hamer v UK. (1979).

10. The Government recognises that these amendments may interfere with the Article 12 right of a partner (A) who does have the capacity to consent to marriage, but who risks being prosecuted for marrying a person (B) who lacks the capacity to consent to marriage. The Government's view is that any such interference is in the pursuit of a legitimate aim; namely protecting those who lack the capacity to consent to marriage from being caused to enter into a marriage where they are unable to make this decision for themselves. In this regard, the amendments can be viewed as a rights-enhancing measure, as it strengthens the protection conferred by this clause on those who cannot give consent.

11. Any such interference is necessary because the evidence considered by the Government indicates that the current system in section 12 of the Matrimonial Causes Act 1973 is insufficient, in that it affords a measure of protection to victims in the aftermath of a marriage, but does not have the effect of preventing such marriages from taking place in the first place. It is anticipated that a criminal offence will have a deterrent effect, which will modify the conduct of those surrounding the victims.

12. Any such interference is proportionate, because of the way in which the mental element of the offence is framed. The alleged offender (A) must believe or ought reasonably to believe, that the conduct may cause the other person (B) to enter into marriage without free and full consent. Therefore, if A did not appreciate and could not have reasonably appreciated that B lacks the capacity to consent to marriage, the offence will not be made out. Furthermore, In accordance with the code for crown prosecutors, a prosecution will only take place where it is judged to be in the public interest.

#### Article 8

13. Very similar considerations arise when the issue is considered by reference to Article 8. In particular, it might be argued that the right to respect for family life of the

victim's parent includes the right to make arrangements for their dependent child to be cared for in marriage by another person, where the parent is motivated by a desire to protect the best interests of their child. Similarly, it could be argued that the right to respect for family life of the victim's partner includes the right to marry, live with, and support the "victim".

14. The Government's response here is materially the same as the arguments arising under Article 12. Any interference is in pursuit of a legitimate aim within Article 8(2), namely the protection of the rights and freedoms of those who lack the capacity to consent to marriage. The Government's position on necessity and proportionality is as set out in the text on Article 12 above.

**Home Office**  
**23 January 2014**