The Sentencing Bill – European Convention on Human Rights

Memorandum prepared by the Ministry of Justice

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Sentencing Bill ("the Bill"). On introduction, Lord Keen, on behalf the Government, made a statement, pursuant to section 19(1)(a) of the Human Rights Act 1998, that the provisions of the Bill were compatible with Convention rights.

2. Only the sections containing substantive ECHR issues are discussed in the context of this Bill. The Government considers that no substantive ECHR issues arise within the sections of the Bill not covered by this memorandum.

Background

3. The Law Commission was tasked by the Ministry of Justice in 2014 to consider, clarify and consolidate the current legislative framework for the sentencing of offenders. Current legislative provisions on sentencing run to approximately 1300 pages, containing complex transitional and savings provisions to which the courts have reference when sentencing. The Bill is the second part of a two-stage process of consolidation. Prior to the introduction of the Bill, the Sentencing (Pre-consolidation Amendments) Bill ('the PCA Bill') makes pre-consolidation amendments to legislation relating to sentencing, with those amendments coming into force immediately prior to the commencement of the Bill, to enable the single [consolidated] Sentencing Code to become law. The PCA Bill is then immediately repealed.

4. The interaction between the PCA Bill and the Bill requires further exposition within an ECHR context. Section 1 of the PCA Bill sets out the "clean sweep" which operates retroactively on the historical layers of transitional and savings provisions in sentencing legislation to nullify their effect (by extension or repeal) so the final Sentencing Code, from its commencement, will extend all current sentencing disposals to all offenders convicted of a criminal offence.

5. The "clean sweep" can only come into effect once the Bill has been passed by Parliament, and so acts relating to sentencing will remain unaffected by the PCA Bill until this happens. "clean sweep" does not apply indiscriminately, and exemptions have been made from its application to ensures that certain sentencing legislation, such as minimum terms or recidivist premiums, protect offenders from receiving a heavier penalty which would otherwise engage and potentially infringe Article 7. These exceptions are restated in the final Sentencing Code with their transition dates preserved.

6. Penalty maxima for individual criminal offences remain unaffected by the Bill and the consolidation.

Summary of the Bill

7. The Bill is in 5 Groups of 14 Parts, and contains 29 Schedules.

   The First Group of Parts make provision at Part 1 for introductory provisions and the application of the Sentencing Code.

The Second Group of Parts make provisions which apply generally to sentencing courts. Part 2 outlines powers exercisable before passing sentence; powers of deferment of sentence, powers to commit to the Crown Court for sentence, and remission to the youth or magistrates court for sentence. Part 3 makes provision for sentencing procedure, specifically court powers to obtain information or require reports for the purposes of sentencing, derogatory assertion orders, duty to impose the victims surcharge, duty to impose the criminal courts charge, and the duty to give reasons or explain sentence. Part 4 provides for the exercise of the court's discretion, specifying the purposes of sentencing, the application of sentencing guidelines of the Sentencing Council and the duties of the court, and the nature of seriousness in assessing a sentence and determining a sentence - both generally and regarding aggravating and mitigating factors.

The Third Group of Parts makes provision for the disposals available to the court. Part 5 provides for absolute and conditional discharge. Part 6 provides for orders relating to an offender's conduct, specifically referral orders for offenders under 18 and reparation orders for offenders under 18. Part 7 provides for financial orders and orders relating to property being fines, compensation orders, restitution orders, deprivation orders and forfeiture. Part 8 provides for disqualification provisions, specifically disqualification from driving, disqualification from the ownership of animals further to specific offences, and disqualification from the directorship of a company. Part 9 provides for community sentencing; youth rehabilitation orders, community orders, requirements that may be imposed, obligations of offenders and responsible officers, and breach, revocation or amendment of such orders. Part 10 concerns custodial sentencing, making general provisions relating to custody, thereafter provision for offenders under 18 and their detention generally - specified, extended or for life; provision for adults aged under 21 and their detention in a young offender institutions; application of special custodial sentences for offenders of particular concern; extended sentences and custody for life; provisions for adults over the age of 21 and their imprisonment, making provision for special custodial sentences for certain offenders of particular concern - extended sentences and life sentences; provisions for suspending a custodial sentence and requirements, and obligations of an offender and responsible officers, and breach, revocation and amendment of suspended sentences; provision for dangerous offenders and the assessment to be made by the court; provision is made for minimum custodial sentences for single and repeated offending; further provision is made for minimum terms for life sentences - both mandatory and discretionary; and provision is made for sentence administration - for the calculation of bail under certain conditions to

count as time served and court powers to recommend licence conditions for those sentenced to 12 months custody or more.

The Fourth Group of Parts provides for further powers relating to sentencing. Part 11 provides for behaviour orders, specifying criminal behaviour orders, sexual harm prevention orders, protection from harassment, parenting orders and binding over.

The Fifth Group of Parts makes miscellaneous and supplementary provision. Part 12 provides for costs, fines and other financial orders made against those under the age of 18, commencement and alteration of sentence, deportation of offenders, assistance to the prosecution by an offender, recognizance power for magistrates, rules for community orders and suspended sentences, and execution of warrants within Great Britain. Part 13 provides for interpretation of the Bill Part 14 makes supplementary provision for the purposes of maintaining the Bill, powers of amendment, transitional provisions and savings, repeals and revocation, and the extent of the Bill, commencement and the short title.

Consideration of the Bill

8. The Bill's purpose is solely to consolidate legislation relating to sentencing. It does not therefore make substantive changes to the law of sentencing in compliance with the Law Commissions Act 1965. However, the underlying subject of this consolidation is the procedural law pertaining to sentencing, and the Bill therefore contains provisions containing the procedure, length and administration of sentences for crimes generally, and additionally, for certain crimes and certain offenders.

Group 1

9. Part 1, Section 2, details the commencement and application of the Bill. It provides that the Code will not apply to a person convicted of an offence before the date on which the Bill subsequently comes into force.

10. The Government confirms its previous position, as advanced in respect of the PCA Bill, namely, that the operation of the clean sweep and the commencement provisions for the Sentencing Code are in compliance with Article 7, and do not permit the prospect of a heavier penalty being imposed than was available at time the offence was committed.

11. In relation to the prospect of a heavier penalty being imposed:
    - Article 7 unconditionally prohibits the retrospective application of the criminal law where it is to an accused's disadvantage; *Del Río Prada v. Spain* [1]
    - The principle of non-retroactivity of criminal law applies both to the provisions defining the offence and to those setting the penalties incurred; *Jamil v. France, M. v. Germany,* and *Gurguchiani v. Spain.*[2]

Group 2

Procedure - Derogatory assertion orders

[1] (42750/09).
[2] (15917/89), (19359/04), (16012/06)

12. Sections 38 to 40 concern the powers of the court to make a derogatory assertion order, which postpone reports of derogatory assertions about named or identified persons that have been made in mitigation for the purposes of setting a sentence. The court must have substantial grounds for believing that the assertion is derogatory and false or that the facts asserted are irrelevant to the sentence.

13. Section 39 outlines the power that may be exercised when a court is determining sentence, when a magistrates' court is determining whether an accused should be committed to a Crown Court for sentence, and when a court is considering whether to give permission to appeal against a sentence or hearing an appeal against, or reviewing, a sentence. An interim order can be made as soon as the assertion has been made if there is a real possibility that a final order will be made. A final order, maximum duration 12 months, must be made by the court as soon as reasonably practicable after the sentence is passed.

14. Section 40 provides that it is a criminal offence if an assertion is published or included in a relevant programme, and outlines a person who will be guilty of the offence is subject to an unlimited fine in England and Wales.

Article 10

15. Derogatory assertion orders challenge the principle of open justice[3] derived from English common law, and engage the right to freedom of expression, guaranteed by Article 10. The right to freedom of expression is guaranteed by Article 10 and is engaged by these provisions. Freedom of expression and information is not absolute. The state may interfere with that freedom in certain circumstances, but to be permissible any restriction on freedom of expression must be prescribed by law and be necessary in a democratic society to pursue a legitimate aim set out in Article 10(2). In the view of the Government, the provisions for a derogatory assertion order is a proportionate means of achieving the legitimate aims of prevention of disorder or crime and protection of the reputation or rights of others.

16. Legitimacy of aim is not the sole requirement to derogate from Article 10, there must be a procedure properly made in law.

[3] Statutory exemptions are provided to the open justice principle – the criminal courts are not subject to open justice principles in respect of those under 18 years. See prohibitions on the reporting of youth court proceedings at section 49 Children and Young Persons Act 1933

Section 39 permits the court to make its own proportionate assessment of necessity of such orders. The court may only make a derogatory assertion order where there are substantial grounds for believing an assertion is derogatory to a person's character, and that the assertion is false or facts so asserted are irrelevant to the sentence. The effect is then that it is only those assertions are subject to the order. *Re Trinity Mirror*[4], the Court of Appeal noted the need to make restrictions would be exceptional, that they depended on express provision in statute, and court discretion to use such powers would rest on the absolute necessity for doing so in an individual case.

Article 6

17. Whilst the Government does not consider derogatory assertion orders directly engage Article 6, it may be argued that reporting restrictions could potentially undermine the principle of a public hearing and potentially contravene of Article 6. However, Article 6 permits an exception to the principle of a fair public hearing, with the media or the public excluded for all or part of the trial for the protection of the private life of the parties, or to the extent that strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. In so far as Article 6 is engaged, in the Government's view, derogatory assertion orders fall within these exceptions. The provisions at section 39 direct the court that it may only make a derogatory assertion order where there are substantial grounds for believing an assertion is derogatory to a person's character, and that the assertion is false or facts so asserted are irrelevant to the sentence. *Re Trinity Mirror*[5], noted the need to make restrictions would be exceptional, that they depended on express provision, and that court discretion to use such powers would rest on the absolute necessity for doing so.

18. The Government is satisfied that the provisions for derogatory assertion orders are compatible with Convention rights.

Procedure – Surcharge

19. Section 42 sets out the court's duty to impose the surcharge after 1 April 2007. The application of the surcharge applies only to offences committed after this date.

[4] [2008] EWCA Crim 50
[5] Ibid

20. The aim of the surcharge is to ensure offenders hold some responsibility for meeting the cost of supporting victims and witnesses of crime. Income from the surcharge is therefore ring-fenced and used to fund support services for victims and witnesses. The amount to be paid is set by the Secretary of State for Justice by regulations. Currently the surcharge levels are mostly flat rate sums to be paid depending on the sentence and the age of the offender. The exception is where a court sets a fine, in which case the surcharge is 10 per cent of the fine amount (subject to minimum and maximum amounts).

Article 6

21. The surcharge engages Article 6 - the right to a fair trial. Specifically, whether the charge involves the determination of a civil right or obligation or criminal charge; the nature of the tribunal and prescribed rate; whether the charge is an impermissible interference in the right of access to the courts; and the compatibility of enforcement powers.

22. Whether a charge is criminal requires the application of the criteria from *Engel v Netherlands*[6], being firstly the domestic classification, thereafter the nature of the offence, and finally, the severity of the penalty. Applying that criteria, the Government considers that the surcharge is not a determination of a criminal charge, but is a partial contribution by an offender towards the cost of victims' support services.

23. The victim surcharge must be imposed during criminal proceedings, it does not follow that the domestic classification is criminal. The charge is a non-criminal aspect of criminal proceedings, and the sum required does not directly relate to the severity of offending.

Article 1, Protocol 1

24. The surcharge engages Article 1 of Protocol 1, which protects the peaceful enjoyment of possessions. The surcharge deprives offenders of their property, and therefore must be justified in the public interest and subject to the conditions provided for by law. As stated in Article 1(2) of Protocol 1, however, States retain the right to enforce such laws as they consider necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[6] (5370/72)

25. Surcharge levels are set out clearly in statutory instruments made by the Secretary of State. The Government is satisfied that the interference with Article 1 of Protocol 1 is justified in the public interest, as offenders should be required to contribute towards the cost of supporting victims and witnesses of crime. Further, as the Secretary of State is obliged by section 6 of the Human Rights Act 1998 to act compatibly with Convention rights (including Article 1 of Protocol 1) when setting the surcharge levels.

Procedure - Criminal courts charge

26. Sections 44 to 51 concerns the recovery from offenders of a proportion of the costs involved in operating the criminal courts in England and Wales. The provisions require a court to order a person convicted of a criminal offence to pay an amount prescribed by the Lord Chancellor for relevant court costs. The court is obliged to make an order when dealing with an offender, for unsuccessful appeals and concerning certain post-conviction hearings. The amounts prescribed by the Lord Chancellor are amounts fixed according to the type of case concerned. The provision requires that in setting the charge, the amounts are not to exceed the relevant court costs reasonably attributable to that type of case. Enforcement of the charge is as a sum adjudged to be paid on conviction by a magistrates' court, enforced in a similar way to other such sums (which include compensation orders, the victim surcharge, prosecution costs and fines). The courts have a power to remit the whole or part of a criminal courts charge in certain circumstances.

Article 6

27. The Government's view is that the criminal courts charge is not a determination of a criminal charge, but it engages Article 6 as it is applied upon conviction of a person for a criminal offence. Article 6 applies from the moment a person is charged with a criminal offence through to when the charge is determined, which is when sentence has been fixed and any appeal has been decided. It is applicable to the procedure for the determination of the offence and conviction upon which the criminal courts charge is applied.

28. Whilst the charge is applied upon conviction, it is not itself a criminal penalty. The criminal relates solely to the costs of criminal proceedings and is not designed to penalise the offender. The severity of the offence will not be directly relevant to the amount of the charge. The charge is only determined by reference to the costs involved in dealing with the offender. The costs are therefore proportionate to the costs of the case. It could be argued that as the charge

is not a criminal penalty, being a non-criminal aspect of the criminal proceedings and akin to a civil obligation on the basis its imposition would result in offenders being liable to make payments.

29. Howsoever Article 6 is engaged, the Government considers that these provisions are compatible with it. This is because the charge would be imposed following trial and conviction which is itself Article 6 compliant, the court being an independent and impartial tribunal.

30. Courts recognise that Article 6 contains an implicit right of access to the courts. It might be argued that the charge operates as a barrier to defendants in terms of access to both trial and appeal courts. However, the provisions in no way impedes a defendant's ability to access court. In relation both to the trial stage and appeal stage of proceedings, the charge is imposed at the end of the stage and so payment is not a condition of being able to access the courts or to continue with the case. In addition, in relation to the trial stage, the initiation of criminal proceedings lies with the prosecution and so the imposition of the charge on the offender will not affect whether that person appears or is brought before the courts.

31. The Government has considered whether there are "access to court" issues arising from the way defendants might behave in criminal proceedings by having knowledge that a charge may be imposed. It could be argued that there is a financial incentive on the offender to plead guilty or to consent to summary trial over Crown Court trial. It may also be argued that there is a financial incentive not to appeal. One issue is that the charge is imposed regardless of an offender's means to pay. There is case law in the civil context to the effect that fees must be assessed in the light of the circumstances of a case, including the applicant's ability to pay them, *Kreuz v Poland*[7] . See also the pre-HRA case, *R v Lord Chancellor, ex parte Witham*[8] (fees order in the absence of specific statutory provision to authorise denial of access to the poor, fell foul of the "constitutional right" of access at common law).

32. The Government's view is that these issues are not properly "access to court" issues as these incentives do not hinder access to the courts. There is nothing in the Strasbourg case law which prohibits incentives of these kinds. Even were the Strasbourg court to extend the "access to court" principles to determine the acceptable scope of any potential incentives, the likely test to be applied, drawing on the access to court case law in the civil context, is that

[7] (28249/95)
[8] [1998] QB 575

incentives are permissible where proportionate (see *Golder v United Kingdom*[9]). The scheme of charges would be proportionate with a sliding scale of charges, and also because each class of case would not exceed the relevant court costs reasonably attributable to that class. While there is no means test on imposition of the charge, an offender's means can be taken into account for the purposes of enforcement.

33. The criminal courts charge is to be collected and enforced as a sum adjudged to be paid on conviction. These enforcement powers include powers of courts and fines officers to collect sums through payments by instalment and to issue warrants of distress. The courts may in tightly controlled circumstances, commit an offender to custody in default. There is case law indicating that these existing powers are compatible with Article 6. See *R (Minshall) v Marylebone Magistrates' Court*[10] (enforcement proceedings are regarded as criminal proceedings for the purposes of Article 6). Providing that these powers are exercisable to enforce the criminal courts charge they are compatible with Article 6.

Article 1, Protocol 1

34. These provisions also engage Article 1 Protocol 1. The requirement to pay money is an interference with the peaceful enjoyment of possessions. The Government considers that the public interest justifies such interference: individuals who give rise to the need for criminal proceedings in the first place ought to contribute to the costs of those proceedings. In any event, the section sets out a power to prescribe the level of the court charge and not set out the amount of the charge. This power is therefore capable of being exercised compatibly.

Article 14

35. Article 14 may also be engaged, in combination with Article 6 and Article 1 Protocol 1. There is one element which may involve direct discrimination, namely, age. The charge is only to apply to adult offenders. The Government considers that imposing the charge on adult offenders only is justifiable. The policy is about providing that individuals are responsible for the financial consequences of their behaviour. It is appropriate to impose more in this respect from adults than children and young people.

[9] (4451/70), 1975) 1 EHRR 524, ECtHR, at para 38 (Civil)
[10] [2008] EWHC 2800 (Admin)

Exercise of court's discretion - Sentencing guidelines-

36. Section 59 sets out the general duty of the court to follow guidelines when sentencing an offender which are relevant to an offender's case, unless the court considers that it would contrary to the interests of justice to do so. Section 60 provides for the considerations for the determination of sentence where guidelines apply, and such guideline is available, an offence specific guideline, and to impose a sentence within the offence range as set out in the guideline. Section 61 concerns the determination of the appropriate custodial terms for extended sentences and non-mandatory life sentences with reference to sentencing guidelines.

37. The duty to consider guidelines will now apply to cases brought for sentence after the commencement of the Sentencing Code, irrespective of the date the offence was committed. Section 59 permits a court to disregard the application of the duty if it considers that to do so would be contrary to the interests of justice. Sentence is imposed at the date of sentencing hearing, on the basis of the legislative provisions applicable at the date the offence was committed, and then by measured reference to any definitive guidelines relevant to the situation revealed by the established facts[11].

Article 7

38. The Government considers that Article 7 is not engaged by the extension of the duty to historic cases. Sentencing guidelines are not law, but *sui generis*, assisting the court to weigh culpability and harm from the offending and thereafter directing the court to other factors which may be of relevance, considering aggravating or mitigating conduct or factors or other statutory considerations such as the weighting that should be given to a guilty plea. Their purpose is to assist a court in setting sentences commensurate with the seriousness of the offence, within the statutory maxima for that offence.

39. The maxima for any criminal offence remains unaffected by the extension of the duty to consider sentencing guidelines; what must be considered by the court is the maxima as set down in statute at the time of the offending, and the ECtHR has confined its concerns on

[11] *R v H* (2012) 2 Cr App R (S) 21*,* see also *R v Clifford* [2014] EWCA Crim 2245

retroactive criminalisation to whether a greater maximum penalty can be applied to a historic offence[12]. The Government is satisfied that the duty applied to historic offending does not mean a greater penalty is imposed for the purposes of Article 7 and that the provisions are compatible with the Convention.

Exercise of court's discretion – Seriousness and determining sentence - Aggravating factors

40. Sections 64 to 72 provide for statutory aggravating factors to be applied by the courts in setting a sentence where the relevant circumstances for applying an aggravating factor are met. Statutory aggravating factors will now be available to all cases, permitting aggravating factors to be applied to relevant historic cases of offending charged after the Sentencing Code's commencement.

Article 7

41. The operation of the aggravating factors to historic cases does not, in the opinion of the Government, operate to impose a greater penalty on an offender retrospectively which would represent a breach of Article 7. Aggravating factors in statute operate within the maxima set down in criminal law statute that applied at the time the offence was committed, reflecting the English practice of sentencing according to current law and practice, which is still subject to the statutory maximum at the time of the offence[13]. They are not penalties but statutory directions to the judiciary to consider increasing a sentence where certain factual circumstances apply to an offender, with those circumstances having to be proved to be beyond a reasonable doubt to apply to that offender. The ECtHR, for the purposes of Article 7, confines its assessment of a more severe penalty being imposed with reference to the maxima applicable.

42. The Government is content therefore that the aggravating factors and their extent at sections 67 to 72 are compliant with Article 7 and are compliant with Convention rights.

Financial Orders and Orders relating to property – Fines

[12] *Coeme and Others v Belgium* (2000) and cited *in R v Uttley* [2004] UKHL 38
[13] *R v Docherty (Appellant)* [2016] UKSC 62

43. Sections 118 to 132 concern the imposition of fines on an offender. A fine is a penalty and as such engages with Article 6 and its protections. A fine may only be imposed on conviction for a criminal offence relative to the seriousness of the offence, and its severity and proportionality as a sentence is governed by the consideration of the court in line with the criteria set down in the legislative enactments dealing with that offence and sections 118 to 132. The offender's means can be taken into account by section 124 which places a duty on the court to inquire into an individual offender's circumstances. Also, pursuant to section 125(2) a court must take into account the circumstances of the offending and in particular the financial circumstances of the offender as far as they are known. Where financial circumstances pertaining to the offender are unknown, the court has the power to make a determination as it sees fit under section 126, and section 127 provides the court with a power to remit a fine, in whole or part, as a fine constituting a penalty.

Article 6

44. These protections ensure that that power of the court to impose a fine are compliant with the requirements of Article 6 ensuring the right to a fair trial in criminal proceedings, which guarantees an offender's rights not only as regards the process of a criminal trial but the entirety of the proceedings, including the setting of a sentence, which may include a fine. Proceedings taken against an offender for failure to pay a fine are criminal in character under domestic law and constitute a 'criminal charge' for the purposes of Article 6, see *R (Minshall) v Marylebone* Magistrates' Court. Fines may be appealed as part of a sentence, being provided for by section 108 of the Magistrates' Courts Act 1980 and section 9 of the Criminal Appeal Act 1968. The Government is satisfied that sufficient safeguards further to non-payment meet the criminal limb of Article 6. The Government is therefore satisfied that the processes for enforcement fully respect Article 6 rights.

Article 1, Protocol 1

45. The availability of a fine on conviction may in principle deprive an offender of monies, and as such it engages Article 1, Protocol 1, in that no person may be deprived of his or her possessions unless by the proper operation of domestic law. The Government is satisfied that the provisions for the making of a fine operate compatibly with Article 6, reflecting a fair trial and that, for the purposes of Article 1, Protocol 1, there is a proper operation of domestic law for the setting of fines, sufficient to secure a penalty. The Government is satisfied that the fine provisions within the Bill comply with Article 1, Protocol 1.

Article 7

46. Maximum amounts that may be set by a court have been varied by legislative enactments being consolidated. The powers given in sections 118 for a magistrates' court, or at section 120 for the Crown Court, should be read in conjunction with other relevant offence provisions as defined in the Bill, and also section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012[14], which amended the maximum fine amount from 12 March 2015[15], providing that a fine previously expressed at a maximum of £5,000 could then be considered to be unlimited.

47. The setting of fine amounts within the standard scale set out in section 122 have varied over time, spanned by the underlying legislation being consolidated by the Bill, will remain the same in their application, in a consolidated form. Section 122 sets out the current standard scale for the imposition of fines from levels 1 to 5 for offences committed on or after 11 April 1983 and before 1 October 1992, and restates the new amounts for offences committed after 1 October 1992.

48. No offender will after commencement of the Bill, face a greater fine than that which applied at the time the offence was committed.

49. Accordingly, the Government is satisfied that the provisions for fines within the Bill are compatible with Article 7 and Convention rights.

Financial orders and orders relating to property - Compensation orders

50. Sections 133 to 146 concern the power of the court to make a compensation order. The court may choose to make such an order on conviction for an offender to pay compensation to a victim for any personal injury, loss or damage evidenced and resulting from the offence or any other offence taken into consideration for the purposes of determining the sentence for the instant offence. Section 134 outlines that a compensation order, may be made whether the court deals with the offender for the offence in any other way. Section 135 provides that an

[14] This act removed the limit for certain fines on conviction, specifically the fine or maximum fine of £5,000 or more (however expressed), the offence would be punishable on summary conviction on or after by a fine of any amount as opposed to the prior statutory limit.

[15] The date when section 85 of that Act came into force, being passed via Parliament on 5 September 2014.

amount made by way of compensation must be that which the court considers appropriate, having regard to an offender's means so far as known, and provides that where a court considers that it would be appropriate to impose both a fine and compensation order but an offender appears to have insufficient means to pay both, the compensation order must take preference over a fine.

Article 6

51. Compensation orders are subject to enforcement in the same way as fines, with committal to custody for non-payment as a prospective sanction. Proceedings taken against an offender for failure to pay a fine are criminal in character under domestic law and constitute a 'criminal charge' for the purposes of Article 6, see *R (Minshall) v Marylebone Magistrates' Court*[16]. Compensation orders may be appealed as part of a sentence, being provided for by section 108 of the Magistrates' Courts Act 1980 and section 9 of the Criminal Appeal Act 1968. The Government is satisfied that sufficient safeguards further to non-payment meet the criminal limb of Article 6. The Government is therefore satisfied that the processes for enforcement fully respect Article 6 rights. Further, additional safeguards are provided at section 143 which sets the powers of the court to review compensation orders subject to there being no further right of appeal.

Article 1, Protocol 1

52. The availability of a compensation order on conviction may in principle deprive an offender of monies, and as such engages with Article 1, Protocol 1. Article 1, Protocol 1 does not, however, impair the right of the Government to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties. The court is obliged to consider the offender's means in making such an order and consider whether there is evidence of personal injury, loss or damage resulting from the offence to make the order. The Government considers that the provisions relating to compensation orders are compliant with Article 1, Protocol 1.

Article 7

[16] [2008] EWHC 2800 (Admin)

53. Section 142 sets a limit on the application of compensation orders for offences committed before 11 December 2013. This exception is to ensure the offender's where it might otherwise suggest that a heavier penalty may be imposed on the offender than that which was available at the time the offence was committed. Section 142 therefore sets out the differential limits on sums that may be awarded by a court by way of a compensation order, with reference to the dates in the underlying legislation being consolidated. The Government is satisfied then that the provisions are compliant with Article 7 and compatible with Convention rights.

Financial orders and orders relating to property – Restitution and restoration –

54. Sections 147 to 151 concern the power of the court to make a restitution order. Restitution orders are made to restore either goods that have been stolen or otherwise unlawfully removed from the owner. Alternatively, the court may make an order for a sum of monies representing the proceeds of the goods out of monies in the offender's possession when apprehended for the crime. The power to make such orders is only available when the offender has been convicted of the offence falling under section 148, specifically an offence related to the theft of goods.

55. Section 149 sets out the considerations for the court before making a restitution order. The purpose is to make restitution of either physical property or a sum at value in lieu. Section 148 clarifies that they are not intended on any account to be a method of recovery for sums in excess of the value of the original goods. Courts may not make restitution orders in excess of the value of the goods. Further, orders can only be made on the relevant facts sufficiently appearing from material made available at trial or as part of committal proceedings.

Article 6, Article 1, Protocol 1

56. These provisions may engage both Article 1 of Protocol 1 and Article 6. The Government considers it justifiable in the public interest to restore an equivalent sum to the victim where there is an established loss of goods. In relation to Article 6, that restitution orders may only be made on criminal conviction in respect of the theft of goods, and where sufficient facts emerge at trial and leaves the ultimate decision to the Court (who must act compatibly with Convention rights). An offender may appeal a restitution order as part of a sentence. The Government is satisfied that the provisions are Convention compliant.

Financial orders and orders relating to property – forfeiture, deprivation of property –

Article 6, Article 1 Protocol 1

57. Sections 152 to 159 concern deprivation orders. These provisions may engage both Article 1 of Protocol 1 and Article 6. So far as Article 1 Protocol 1 is concerned, the Government considers that any interference is justifiable in the public interest in preserving evidence, preventing the commission of further crimes, and in the case of forfeiture, punishment. In relation to Article 6, the Bill provides for a process by which the owner may make representations before the court and leaves the ultimate decision on forfeiture or deprivation to the court (who must act compatibly with Convention rights). The Government is satisfied that these provisions are compliant with Convention Rights.

Disqualification – Driving disqualification –

58. Sections 162 to 169 make provision for a court to make a driving disqualification order against an offender further to conviction. The ability to disqualify arises in two scenarios. First, at section 163, which sets out the ability to do so for any offence committed on or after 1 January 1998 and the Secretary of State has notified that the power is exercisable. Secondly, at section 164, where such power is available when an offender is convicted of an offence; that offence being punishable on indictment with imprisonment for a term of two years or more, and the Crown Court is satisfied that a motor vehicle was used for the purpose of committing or facilitating the commissioning of the offence. Section 164 also allows a driving disqualification order to be made where an offence is common assault or any other offence involving an assault and such an offence was committed after 1 July 1992. Section 167 provides for the relevant extension periods for driving disqualification if a custodial sentence is imposed at the same time in instances of detention and training orders; extended sentences for those under 18; special custodial sentence for certain offenders of particular concern for adults between the ages of 18 to 20; extended sentences in a young offender institution; and special custodial sentences for certain offenders of particular concern for adults 21 years or over - an extended sentence, a life sentence with a minimum term order, and any other standard determinate sentence that was imposed.

Article 6

59. Driving disqualification under these sections are penalties. Article 6 requires that they are imposed as part of a fair trial. The determination of a sentence is part of a fair trial, as is

prospect of an appeal for that sentence. Driving disqualification orders may be appealed as part of a sentence set by the court. The usual processes and appeal routes apply for criminal proceedings, and the Government is satisfied that existing safeguards for criminal court hearings meet the criminal limb of Article 6. The Government is therefore satisfied that the provisions respect Article 6 rights.

60. The Government is satisfied that no issue arises under Article 7. These sections giving the courts powers to make driving disqualification orders have been set out within the Bill with clear dates from the underlying legislation as to when a court may consider they are available, ensuring that they cannot be imposed for offending before these dates.

Community sentences - Youth rehabilitation order –

61. Sections 173 to 199 and Schedules 6 to 8 set out the provisions on youth rehabilitation orders; a form of community sentence available for under 18-year olds. The availability of a generic community sentence which sets out different options enables the court to make bespoke orders specific to the circumstances of the individual and their offence. The same ECHR considerations apply in respect of the individual requirements as apply to the equivalent requirements available as part of an adult community or suspended sentence order. An analysis of those considerations is made at paragraphs 67 to 98 of this memorandum; the Government considers that the requirements that are available are compatible with the Convention.

62. Additionally, for children and young people, when making sentencing decisions the court must also take account of the principal aim of the youth justice system to prevent offending by children and young people (contained in section 37 of the Crime and Disorder Act 1998) and the requirement to have regard to the welfare of the child (see section 44 of the Children and Young Persons Act 1933). The order as a whole must be suitable for the child or young person and any restrictions on liberty (e.g. curfew requirements) must be commensurate with the seriousness of that offence. Further, the availability of the menu of options enables the court to make sure that the requirements imposed on children and young people are proportionate and do not constitute an infringement of any Convention rights (pursuant to their duty under section 6 of the Human Rights Act 1998).

63. Further to the generic youth rehabilitation order, section 175 provides for a youth rehabilitation order with intensive supervision and surveillance which must include the

following requirements: supervision, curfew, electronic monitoring and an extended activity requirement. The offence must be imprisonable and the court must be of the opinion that the offence is so serious that a custodial sentence would be appropriate. Where a child or young person is under the age of 15 at the time of conviction the court must also be satisfied that they are a persistent offender. Again, when deciding to impose a youth rehabilitation order with intensive supervision and surveillance the court must be satisfied that, where Convention rights are engaged, any interference with those rights are necessary and proportionate to the legitimate aim of the rehabilitation of offenders.

Article 8

64. Section 176 provides for a youth rehabilitation order with fostering which means for a period specified in the order the child or young person must reside with a local authority foster parent. It must also include a supervision requirement. The offence must be imprisonable and the court must be of the opinion that the offence is so serious that a custodial sentence would be appropriate. Where a child or young person is under the age of 15 at the time of conviction the court must be satisfied that they are a persistent offender. The court must be satisfied that the behaviour was due to a significant extent to the circumstances in which the child or young person was living and the imposition of a fostering requirement would assist in their rehabilitation. When considering whether to impose a fostering requirement Article 8 will be engaged and any interference with such rights must be proportionate. Sentencing Council guidelines (Sentencing Children and Young People: Overarching principles) require the Court to consult the child or young person's parent or guardian (unless impracticable) and the local authority before including this requirement. Additionally, it can only be included if the child or young person was legally represented in court when consideration was being given to imposing such a requirement.

65. For both youth rehabilitation orders with intensive supervision and surveillance or fostering, the relevant legislation is clear that they must only be used as a direct alternative to custody. Before passing a detention and training order the court must consider whether a youth rehabilitation order with intensive supervision or surveillance or with fostering would be justified instead.

66. The Government is satisfied that the safeguards embedded in the sentencing process and the constraints of the youth rehabilitation order strike the right balance and meet the requirements of the Convention.

Community Orders - Community sentences –

67. Sections 200 to 220 provides for the community sentence and its requirements. Section 201 outlines the requirements that may be made as part of a community order. The operating provisions for the fifteen requirements that can form part of an individual community order are found at Schedule 9 of the Bill. Community orders and their requirements apply only to offenders at the age of 18 over and where a criminal offence is imprisonable.

Article 6

68. The community sentence engages with Article 6 regarding the right to a fair trial. Article 6 covers the entirety of proceedings in issue, including appeal and the determination of a sentence[17] . That principle does not however obligate a court to administer all the aspects of a sentence set for an offender.

69. The sentencing function of the court and the arrangements for the administration of the sentence are distinct. The domestic courts and the ECtHR have consistently drawn a distinction between a measure that constitutes a 'penalty' and a measure that concerns the "'execution' or 'enforcement' of a penalty. This distinction was recognised in *R v Secretary of State for the Home Department ex parte Uttley*[18].

70. The court may further to its powers then specify differing elements of community requirements to differing extents, the demands of Article 6 are in the Government's view satisfied where the core elements of the sentence are determined by the court. The provisions outline that the court retains control over the community order. In specifying the requirements and the balance to be struck between requirements, the court will also decide on the appropriateness overall of the requirements in an individual case. The court must consider and ensure the requirements imposed under the order are those which are most suitable for that offender and that any restriction on liberty imposed by an order are, in the view of the court, commensurate with the seriousness of the offence(s). The Government is content that the provisions are compliant with Convention rights.

[17] *Vinter and Others v United Kingdom* (66069/09)
[18] [2004] UKHL 38

Community orders -duty of offender to obtain permission before changing residence –

71. Section 216 places a duty on the offender to obtain permission either of the responsible officer or the court before changing residence if they are subject to a community order but are not also subject to a residence requirement as part of that order. The court or responsible officer may refuse permission if it is considered that the change in residence is likely to prevent the offender from complying with a requirement imposed by the community order or it would hinder the offender's rehabilitation.

Article 8

72. Section 216 may, dependent on the impact of any refusal of permission, amount to an interference with an offender's Article 8 rights. The Government considers that any interference is justified as it is in pursuit of a legitimate aim and is necessary in a democratic society, and that such interference has a sufficient legal basis.

73. The legitimate aim is the prevention of crime and public safety. By requiring an offender to seek permission to change residence, unnecessary moves which could undermine the effectiveness of a community order are sought to be minimised; greater rehabilitative support can be provided; and consistent engagement with and maintenance of relationships with responsible officers can be encouraged, thereby supporting effective rehabilitation to prevent further offending. Section 216 pursues the legitimate aim of the prevention of crime.

74. The interference is, in the Government's view, proportionate to the legitimate aim. The decision whether to grant permission to change residence will be taken by the court or the responsible officer. That decision is not solely at the discretion of the decision maker. Grounds for refusal must therefore be that changing residence is likely to prevent the offender from complying with a requirement or that it would hinder the offender's rehabilitation. Permission can only be refused in those circumstances, with an effective presumption that an offender may change their residence unless the court or responsible officer can show that changing residence will likely prevent the offender from complying with a requirement or that the change will hinder rehabilitation. Accordingly, the section is expressly limited to those situations where there would be demonstrable impact on the effectiveness of the community sentence, drawing a clear link between any Article 8 interference and the legitimate aim pursued by the Government.

75. Further, it is implicit within section 216 that the court or the responsible officer must consider the extent to which it is possible for offenders to access similar rehabilitative support in another area. Where that is available the Government considers that an officer will not be able to refuse permission under section 216.

76. Both the court and the responsible officer are public authorities further to section 6 of the Human Rights Act 1998, and must therefore act compatibly with an offender's Convention rights.

77. The Government considers that a decision as to where an offender may reside is likely to amount a determination of the offender's civil rights and any dispute or contesting of that issue is likely to need to be dealt with in accordance with Article 6[19].

78. The responsible officer is not an independent and impartial tribunal for the purposes of Article 6. Section 216 however provides that permission may be given by either a responsible officer or the court, and that where a responsible officer refuses permission to reside elsewhere, the offender may apply to the court for it to consider the whether to grant permission. This is a fresh consideration of responsible officer's decision by an Article 6 compliant tribunal, and the Government considers that Article 6 is complied with.

79. Certain requirements which may be part of community sentence will engage with the ECHR and a discussion of the more significant engagement is considered with respect to those particular requirements below.

Curfew requirement – Article 5

80. A curfew requirement is a requirement that an offender must remain, for a particular period, at a particular place. In making such an order the court must specify the curfew period and the place where the offender must remain.

[19] *Re MB* [2006] EWHC 1000 (Admin); in the context of control orders which imposed compulsory residence requirements, para 36

81. The Government accepts that curfews are a restriction on the liberty of an offender at particular times, however, the use of a curfew requirement does not amount to a deprivation of liberty for the purpose of Article 5. The specified time periods available and the maximum number of 16 hours are set so that in principle, the offender may be able to serve their sentence in the community should there be other requirements made within the community order. The court is also required, in setting the community sentence, to assess the overall compatibility of requirements when set against each other as provided for at section 208. The balance of the requirements is a matter for the court.

82. Limits are set for the period of curfew; at a minimum the period must be not less than two hours a day, and it must not be for more than 16 hours a day. In assessing what constitutes a deprivation of liberty, what must be focused on is the extent to which the individual is "actually confined" – that is the length of the period for which the individual is confined to their residence.

83. The Government is content that the availability of the curfew requirement, with respect to the number of hours available, is not in principle a deprivation of liberty, either by itself or in combination with other community requirements. It does not stringently confine an offender to that extent; in *Secretary of State for the Home Department v E*[20] Lord Bingham stated if that the core element of confinement was "insufficiently stringent" then other conditions imposed will not convert a case into one where a person has been deprived of liberty for the purpose of Article 5, a position reiterated in *Secretary of State for the Home Department v JJ and Others*[21].

Rehabilitation activity requirement – Article 6

84. An offender subject to this requirement as part of a community sentence (which may also be considered as part of a suspended sentence) is obliged to comply with the instructions of a responsible officer to participate in activities or attend appointments, or both. The requirement states that any instructions given by the responsible officer must be made with a view to promoting the offender's rehabilitation, but instructions may also be given for additional purposes.

[20][2008] 1 AC 499
[21][2007] UKHL 45

85. This requirement may be said to engage Article 6, on the basis that Article 6 covers the whole of the proceedings in issue, including the appeal proceedings and the determination of sentence[22]. The Government considers that the community sentence must be imposed by independent and impartial tribunal, but it does not consider that this principle must extend to every detail of a sentence and its administration.

86. The court does not therefore determine the specific activity which the offender is required to participate in. That is determined by the responsible officer, who will have a detailed knowledge of the offender's specific needs and availability of relevant programmes and activities in the relevant area.

87. As discussed above at paragraphs 69 to 70, the Government considers that there is a distinction between the sentencing function of a court and arrangements for the implementation of a sentence[23]. The sentence is the community sentence itself which will be imposed by the court in line with its statutory obligations in the Bill, and a rehabilitation activity requirement is a prospective element of that sentence. The Government considers that Article 6 is satisfied where the core aspects of a sentence are determined by a court, distinct from the arrangements for delivering a sentence.

Mental health treatment requirement, drug treatment requirement, alcohol treatment requirement – Article 3, Article 8

88. Requirements may be imposed by a court to provide an offender with medical treatment, reduce or eliminate dependency on alcohol, likewise drug dependency. Article 3, the right against degrading treatment, and Article 8 the right to a private life, may be said to be, in principle, engaged by such requirements. It is a requirement in Schedule 9, paragraphs 167(4), 20(5) and 23(4) (mental health, drug rehabilitation and alcohol treatment respectively) for the imposition of such requirements that the offender consents to any medical treatment made via a requirement and expresses a willingness to comply with that requirement, stated as the "consent condition". For mental health requirements, these may not be made for mentally disordered offenders sufficient to be detained under the Mental Health Act 1983.

[22] *V v United Kingdom*, (24888/94)
[23] *R v Secretary of State for the Home Department ex parte Uttley* [2004] UKHL 38

89. The consent condition is maintained as a consideration through the duration of the requirement. To be given a community order (or a suspended sentence order) with any of the treatment requirements the offender must express a willingness to comply. Further, sufficient for one of these requirements to be amended, whether at a review hearing for the purposes of a drug rehabilitation requirement or during breach proceedings, again the offender must express a willingness to comply by means of the consent condition. If the offender does not express a willingness to comply, the order can be revoked.

90. Should a doctor or another relevant person in charge of the offender considers that the treatment is no longer necessary for any reason, or different treatment is required, they must report this to the court and the court must vary or cancel the requirement.

91. Refusal to undergo any 'surgical, electrical or other treatment' cannot be treated as the offender failing without reasonable excuse to comply with a requirement if the court thinks that refusal was reasonable in all the circumstances. An application to amend the community order (or suspended sentence order) can be made while an appeal against the order is pending.

92. These provisions in the Bill reflect the special nature of treatment requirements and respect for the Convention rights of the offenders. The Government considers the treatment requirements for the community order are compatible with the Convention.

Electronic monitoring – Article 5, Article 8

93. Certain community requirements and compliance with those requirements may be enhanced by means of electronic monitoring. Electronic monitoring of offenders as a standalone requirement is also available, but otherwise electronic compliance monitoring requirements and limitations on availability as part of a community order are set out section 207(4).

94. Electronic monitoring does not amount to a confinement. It does not physically restrict a person's movement and is not, in or of itself, imposed for the purposes of punishment. The Government does not consider that Article 5 is engaged regarding electronic monitoring with respect to the imposition of a community order. In *Secretary of State for the Home Department v E*[24]Lord Bingham stated if that the core element of confinement was

[24] [2008] 1 AC 499

"insufficiently stringent" then other conditions imposed will not convert a case into one where a person has been deprived of liberty for the purpose of Article 5, a position reiterated in *Secretary of State for the Home Department v JJ and Others*[25].

95. Electronic monitoring, in principle, engages Article 8 which protects private life. The concept of "private life" is broad and has not been exhaustively defined by the ECtHR. The imposition of electronic monitoring, with the collection and storage of an offender's location data, may constitute an interference with an individual's rights under Article 8 further to *Leander v Sweden*[26]and *Uzun v Germany*[27].

96. The Government considers that a community requirement supported by electronic monitoring is done in support of a legitimate aim – ensuring compliance with that a requirement and preventing reoffending during the course of the community order being served in the community, in addition to the general prevention of crime.

97. The Government considers that electronic monitoring, which may include tracking of a person's whereabouts in the course of serving a community order as part of a particular requirement, can be necessary in a democratic society. Electronic monitoring is for monitoring compliance with a community requirement (deemed suitable for that offender after the consideration by the court) and/or the tracking of whereabouts. The Government considers that the electronic monitoring of an offender is justified, and it is appropriate, that offenders who are subject to a community requirement are monitored appropriately and comply with their requirements under the community order that the court has chosen to make.

98. The Government is satisfied that the community order and the use of electronic monitoring are compliant with Article 8 and is compatible with Convention rights.

Group 3

Custodial sentences - Offenders under 18 – detention and training orders –

Sections 233 to 248 contain provisions relating to the principal custodial sentence available for those aged under 18 at the date of conviction. They enable the court to make detention

[25] [2007] UKHL 45

[26] (1987) 9 EHRR 433
[27] (2011) 53 EHRR 24

and training orders under which half of the sentence is served in youth detention accommodation and the other half is served in the community under supervision. Section 236 sets out that the term of a detention and training order must be 4, 6, 8, 10, 12, 18 or 24 months. The Secretary of State may release an individual from the detention and training period earlier than the half way point but may only release an individual late where a youth court so orders. Schedule 12 deals with enforcement of the supervision period.

Article 5

99. The period of time spent in detention and training order is determined by a court and compatible with Article 5 and Article 6. The term of the order cannot be extended without recourse back to a court who must act compatibly with section 6 of the Human Rights Act 1998.

Custodial sentences – Offenders under 18 -Detention for a specified period -

100. Sections 249 to 253 contain the provisions to enable a court to impose sentences of detention for a determinate period or for life, on conviction for certain offences listed in the provision and in relation to persons under 18 at conviction. This consolidates what is known as the "grave crimes" provision.

101. The same issues as to compatibility to the Convention arising in relation to determinate sentences for adults apply in respect of these provisions. The Government considers that the provisions are compatible with the Convention.

Custodial sentences – Offenders under 18 -Extended sentences –

102. Sections 254 to 257 deal with extended sentences of detention where the offender is aged under 18 when convicted. The issues concerning the compatibility with the Convention of the extended sentence for adults are generally are applicable and discussed at paragraphs 118 to 120 below.

Custodial sentences – Offenders under 18 -Detention for life –

103. Section 258 provides for the duty to impose a life sentence on dangerous offenders where the requisite conditions are met.

104. Section 259 provides for the duty to impose a sentence of detention at Her Majesty's Pleasure in case of individuals aged under 18 years at the time of the offence who are convicted of murder.

105. The same considerations arise concerning the compatibility of the provisions referred to below as "*Custodial Sentences - Effect of Life Sentences – mandatory life sentences; further provision*" at paragraph 122 of this memorandum. It should be noted there is an exception; a whole life order cannot be a starting point for the sentencing of those under the age of 18 as they cannot be subject to such an order. In addition, for under 18-year olds, when setting the minimum term order, the court is required to consider the overarching aim of the youth justice system, to prevent offending by children and young people. The court is also required, when sentencing, to take into account the welfare of the child[28]. For those who were under-18 when the offence was committed the appropriate starting point for a minimum term order is 12 years.

Article 3 and 5

106. In *Venables v United Kingdom*[29] the Strasbourg court considered the mandatory sentence of detention during Her Majesty's pleasure upon under 18-year olds and found no violation of the Convention. The Court of Appeal also considered the compatibility of the sentence of detention at Her Majesty's pleasure in *R v McGill, Hewitt, Hewitt*[30] and found that there was no basis for a finding that the sentences imposed had breached Articles 3 and 5, as alleged. In coming to this conclusion, the court considered that the sentencing regime allowed for individualised assessments as the minimum term is fixed on the basis for a detailed consideration of the circumstances of the offence and the offender and that when the minimum term is reviewed and the licence conditions are fixed, the individual circumstances are again considered and a decision is made on that basis. Further, the Parole Board would not detain an individual beyond the minimum term if they posed no risk, and there would be

[28] Section 44(1) of the Children and Young Persons Act 1933
[29] 24888/94
[30] [2017] EWCA 1228

a remedy by way of judicial review. Accordingly, the Government is satisfied that the requirements of the Convention are met.

Custodial sentences – Adults aged under 21 – special custodial sentence for certain offenders of particular concern

107. Section 265 provides for the special custodial sentence for detention of certain offenders of particular concern for adults between 18 and 20. The same issues arising concerning the Convention compatibility of the special custodial sentence for offenders of particular concern are then discussed at paragraph 114.

Custodial sentences – Adults aged under 21 years – extended sentence in a young offender institution for certain violent, sexual and terrorism offences

108. Sections 266 to 269 concern the imposition of an extended sentence on a young offender[31] for specified offences in Schedule 14 of the Bill. The issues concerning the Convention compatibility of the extended sentence for adults are dealt with at paragraphs 118 to 120 below.

Custodial sentences - Suspended sentences

109. Section 277 provides that a court may suspend a term of imprisonment between 14 days and 2 years. Suspended sentences remain custodial sentences, but in making the suspension, the court may order the offender to comply during the supervision period with a number of requirements, as specified in Schedule 9. The suspension of the sentence is between 6 months and 2 years, and the supervision period where the requirements set by the court must take place cannot be any longer than the period of the suspension.

110. Should an offender breach a requirement, then the court has a number of options. The offender may be warned after which he may be brought to court and dealt with via the provisions of Schedule 9 of the Bill. Following persistent breach, the court must order the custodial term set as part of the original order to take effect, either in whole or in part; unless

[31] Applies at the age of 18 at the time of committing the offence and aged under 21 years at the date of conviction

in the alternative the court considers that it would be unjust to do so, in which case, the court has powers to impose other punitive measures such as a fine.

111. Requirements may be imposed as an immediate alternative to custody. The requirements available in principle for a suspended sentence are the same as those available for the community order dealt with at paragraphs 67 to 98 of this memorandum, with the same considerations for Convention compatibility. The court makes a consideration of the suitable requirements for that offender. The administration of requirements and the consideration of whether an offender has complied are not part of the sentence for the purposes of the Convention, and do not amount to a penalty in of themselves.

112. The sentencing function of the court and the arrangements for the administration of the sentence are distinct. This distinction was recognised *in R v Secretary of State for the Home Department ex parte Uttley*[32]. A requirement of any kind within the suspended sentence is therefore an element of the sentence, but that element may be delivered and or administered by bodies other than the court itself.

Article 6

113. The demands of Article 6 which require that a sentence is set in the context of a fair trial are in the Government's view satisfied where the core elements of the sentence are determined by the court. It is satisfied that this occurs for the suspended sentence. The court retains control over the suspended sentence in the following ways: First, by specifying the requirements and the balance to be struck between requirements. Secondly, the court will decide on the appropriateness overall of the requirement in an individual case, and against other requirements which are to be imposed on an individual offender. Thirdly, the court must consider and ensure the requirements imposed under the order are those which are most suitable for that offender, and that, any restriction on liberty is, in the view of the court, commensurate with the seriousness of the offence. Finally, the court retains a right of review of the suspended sentence and compliance with all or any requirements made – but in so doing, it does not have the right to resentence for a breach of the original offence. It may decide to activate the custodial element of the sentence if the court considers that it would not be unjust to do so, and if it does activate that custodial element, it must take account of

[32] [2004] UKHL 38

the offender's compliance and performance of any requirement under the suspended sentence order and adjust that custodial element as it sees fit. The Government is satisfied that the provisions for a suspended sentence are compatible with Convention rights.

Custodial sentences- Adults aged 21 and over -special custodial sentence for certain offenders of particular concern

114. Section 278 outlines the special custodial sentence for certain offenders of particular concern, to be imposed on adult offenders aged 21 or over convicted of certain terrorist or child sex offences, where the court considers that a custodial sentence (other than a life sentence or an extended sentence pursuant to Section 279) is appropriate. The Secretary of State may by order add, vary or remove offences to which this sentence applies.

115. The sentence comprises two parts; a custodial term; and a period of one year for which the offender is to be subject to licence. The offender will be eligible for release at the Parole Board's discretion between halfway and the end of the custodial term (as opposed to the standard determinate sentence which involves automatic release at the halfway point of the sentence). In considering release, the Parole Board would consider whether the offender presents a risk of serious harm to the public. If an offender is released before the end of the custodial term they will serve the remainder of that term on licence, and subsequently serve an additional year on licence. If an offender reaches the end of the custodial term without having been released by the Parole Board, they would be automatically released to serve the year licence period.

Article 5

116. Section 278 provides the court with discretion, when imposing the sentence, to ensure that the resulting deprivation of liberty is not arbitrary for the purposes of Article 5. The sentence imposed is one which the court considers is proportionate in all the circumstances, as required at Section 231. The discretion is retained because the court decides whether to impose a custodial sentence and if so, the length of it. The court does not have a discretion over the licence period, but retains the discretion as to the length of the custodial term. The Government is satisfied that these provisions are compatible with Convention rights.

Custodial sentences -Adults aged 21 and over- Extended sentences –

117. Section 279 provides for an extended sentence of imprisonment for certain violent, sexual or terrorism offences committed by persons aged 21 or over. If an offender is convicted of an offence specified in Schedule 14, and the court considers that there is a significant risk to members of the public of serious harm from further such offences, a court may impose an extended sentence if that offender has a previous conviction for a Schedule 14 offence; or if the court would give a custodial term of at least 4 years for instant offence.

118. The extended sentence comprises two parts. The first is the appropriate custodial term which is the appropriate sentence commensurate with the seriousness of the offence and is proportionate, after the court has considered the requirement found at Section 231. An extended licence period of up to 5 years in the case of a specified violent offence, and 8 years in the case of a specified sexual or terrorism offence, can then be imposed. In either instance, the total of the custodial term and the licence period must be within the statutory maxima for the offence, and together, this then compromises the extended sentence.

119. Regarding the eligibility for an extended sentence, it is available to all sentences passed after the date of the commencement of the Sentencing Code; applying to historic offending. Offenders receiving an extended sentence will therefore be subject to an extended licence period, but the imposition of an extended licence period does not constitute the imposition of a penalty (see *R v R* [33]).

Article 6 and 7

120. The imposition of an extended licence period does not then constitute the imposition of a penalty for the purposes of Articles 6 and 7. Section 281(3) requires the court to set the extended licence period at such length as it considers for public protection. Section 281(5) further expressly prohibits the that the extended sentence in toto must not exceed the statutory maxima for the offence, ensuring that no greater penalty will be imposed on an offender than that which was applicable at the time of the offence: see *R (Uttley) v Secretary of State for the Home Department*[34] and also, *M v Germany*[35]. The Government is satisfied that these provisions are compatible with Convention rights.

[33] [2003] (4 All ER 882).
[34] [2004] UKHL 38
[35] (19359/04).

Custodial sentences – life sentences – life sentence for second listed offence –

Article 5

121. Sections 283 concerns the imposition of a life sentence for a second listed offence. For life imprisonment to be available two conditions must be met. First, the sentence condition, but for section 283, the court would otherwise be imposing a standard determinate sentence of 10 years or more; and secondly, the previous offence condition, which is that the offender had, at the time of the index offence, previously been convicted of an offence to be found at Schedule 15 and that a life sentence or sentence of imprisonment or detention had been imposed. This provides that a court, where it is dealing with an offender who has committed an index offence under Schedule 15, and where the offender was 21 years or over when convicted of the index offence, then the court must impose a sentence of imprisonment for life unless it is of the opinion it would be unjust to do so in all the circumstances, ensuring that the principled effect is not arbitrary for the purposes of Article 5, noting the Court's obligations to operate minimum sentence provisions compatibly with the Convention.

Article 7

122. The application of section 283 is limited by reference to the date of the index offence being committed and whether the previous offence condition applied to any prior offending. Section 283 makes clear that Schedule 15 must be read as if Part 1 did not include any offence added after the date of the index offence being sentenced was committed. Section 283 details what a relevant sentence will be for the purposes of imposing a life sentence for a second listed offence. Schedule 15 specifies the date when offences can be considered relevant by a court, which is an exception to the normal extent of the Bill where disposals are available for historic offending. Section 283 applicability is then limited with reference to a date. The provisions are Article 7 compatible, there is not in prospect a heavier penalty, specifically the imposition of the life sentence for a second offence, imposed than was available at the point the offence was committed. The Government is content that the provisions are compatible with Convention rights.

Custodial sentences – minimum sentences for particular offences –

123. Sections 311 to 318 provide for minimum sentences for particular criminal offences. Minimum sentence provisions operate within statutory maxima; they operate legally to direct a court to consider setting an appropriate custodial term to a minimum level. The requirement is that the court must consider the minimum specified in statute, but that consideration which must be made does not prevent the court from setting a sentence that is either higher than any suggested minimum, or setting a sentence which is less than a minimum in statute if there are factors derived from the particular circumstances of the offending, or the offender, which it considers should be taken into account, and to impose the minimum would be unjust in all the circumstances, or exceptional circumstances exist, Article 5 ensures that no one should be deprived of his or her liberty in an arbitrary fashion, with detention only authorised under that Article where it follows conviction for a criminal offence.

Article 5

124. The Government considers that mandatory minimum sentences are compatible with Article 5. Sections 311, 312, 313, 314, 315 and 318 provide a mandatory consideration in the provision sufficient for a court to depart from the minimum suggested if either exceptional circumstances are found in the cases of section 311, and in the case of sections 312, 313, 314, 315 and 318, that to impose the minimum would be unjust in all circumstances. *R v Offen*[36] underlined that minimum sentence provisions must be read compatibly with the Convention and the Government is satisfied that the provisions for minimum sentences are compatible with Convention rights.

Custodial sentences - Effect of life sentences – minimum term order or whole life order

125. Section 321 provides the criteria for a life sentence to be set, requiring a court to consider whether a minimum term order or whole life order should be made.

126. Where then an offender was aged 21 years of over at the time the offence was committed, and the court is of the opinion, that the circumstances of the offending are sufficiently serious, it should not make a minimum term order but instead make a whole life order.

[36] [2001] 1 WLR 253

127. A minimum term order is a life sentence with a minimum period that must be served before the offender becomes eligible for release, which is provided for at sections 28(5) to (8) of the Crime (Sentences) Act 1997. A whole life order is an order to which the release provisions do not apply, meaning that there is no point when an offender can apply to the Parole Board for their release but that the prospect of, or hope of release, will be governed by section 30 of the Crime (Sentences) Act 1997, which provides the Secretary of State may at any time release a life prisoner on licence if they are satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds. These provisions regarding release do not form part of the Bill, release being excluded from the consolidation process.

Article 3

128. In *Vinter and Others v United Kingdom*[37] considered that whole life orders were incompatible with the guarantees of Article 3 in the absence of an adequate mechanism for review, due to the lack of clarity in domestic law. The imposition of a whole life order was, however, compatible with Article 3. The Court of Appeal (having considered *Vinter*) then held in *R v McLoughlin*[38] that the domestic law of England and Wales did provide for the "possible exceptional release of whole life prisoners" and all other life prisoners. The Secretary of State for Justice was bound to exercise his power of compassionate release under section 30 of the Crime (Sentences) Act 1997 in a manner compatible with principles of domestic administrative law and Article 3.

129. The Court of Appeal held that it was "entirely consistent with the rule of law that such requests are considered on an individual basis against the criteria that circumstances have exceptionally changed so as to render the original punishment which was justifiable no longer justifiable."

130. Section 30 of the Crime (Sentences) Act 1997 provides for that possibility, giving to the offender subject to a whole life order the possibility of release in exceptional circumstances. In *Hutchinson v UK*[39], the ECtHR accepted that that Secretary of State's power to release such offenders on compassionate grounds was compatible with Article 3 for the following reasons;

[37] (66069/05)
[38] [2014] EWCA Crim 188, also AG Reference (No 69 of 2013)
[39] [2016] ECHR 021

a) The power of review under section 30 arises if there are exceptional circumstances. The offender subject to the whole life order is therefore required to demonstrate to the Secretary of State that although the whole life order was just punishment at the time the order was made, exceptional circumstances have since arisen.

b) The Secretary of State must then consider whether such exceptional circumstances justify the release on compassionate grounds. The policy set out in the Lifer Manual is restrictive but it does not restrict the duty in section 30, such that the Secretary of State should consider all circumstances relevant to release on compassionate grounds.

c) The term "compassionate grounds" must be read[40], in a manner compatible with Article 3.

d) The decision of the Secretary of State must be reasoned by reference to the circumstances of each case and is subject to scrutiny by way of judicial review.

e) Accordingly, an offender subject to a whole life order does have "hope" or the "possibility" of release in exceptional circumstances which render the just punishment originally imposed no longer justifiable.

131. The above was accepted and outlined in *Hutchinson v United Kingdom*[41] , where the Court noted that a contracting State's margin of appreciation did not mean that the Court's task to prescribe the form (executive or judicial) that a review should take and, significantly, that the Court of Appeal's direct and reasoned response to the Grand Chamber's concerns in *Vinter* was sufficient; the Court of Appeal had set out an "unequivocal statement of the legal position" and the ECtHR had to accept that interpretation of domestic law. There was no violation of Article 3. The Government is satisfied that the provisions for an offender to receive a "whole life order" are compatible with Article 3 and Convention rights.

Custodial Sentences - Effect of Life Sentences – mandatory life sentences; further provision

[40] *R v Bieber* [2008] EWCA Crim 1601
[41] Insert ref

132. The only sentence available for murder is life the sentence provided that is fixed by law. The sentence is only imposed on those who have been proved to have taken a life or lives, as adults, with the intention of doing so or of causing serious physical injury, and the responsibility for which is not diminished. The sentence is imposed by a competent court, and is imposed with a procedure prescribed by law for the purposes of Article 6.

133. Section 322 requires the court to have regard to the principles set out in Schedule 21, and it also provides that a court have regard to any relevant guidelines which are relevant to the instant case and not incompatible with the provisions of Schedule 21, which sets out starting points for the sentencing of murder.

134. Section 322 as provides court also has a duty, in either making a minimum term order or a whole life order as the life sentence for murder, to provide reasons for deciding on the order made in compliance with Section 52 (which provides that a Court must give reasons for its sentence), and specifically requires the starting point in Schedule 21 it has chosen and its reasons, and state its reasons if it has departed from that starting point.

135. Starting points within Schedule 21 outline criteria by which the court should set the minimum term, with a requirement that these are normally factors to be taken into account. Schedule 21 however, does not mandate any minimum term to be made, permitting a court to instead set a sentence that it considers appropriate. Schedule 21 then enables a court to conduct a proportionality exercise to set any minimum term, permitting the court to take account of the relevant factors, while having regard to relevant guidelines for to set the minimum term. Finally, court will also consider the facts and circumstances of each case, ensuring that the period of the term is not set in an arbitrary manner sufficient to engage with Article 5. The Government considers that Schedule 21 is Article 5 compliant and meets the requirements of Convention rights.

Sentence administration - Recommendations

136. Section 328 gives the court the power to recommend licence conditions for adults aged 21 or over if they have been sentenced to 12 months or more. Subsection (3) provides that any such recommendation made by a court under section 328 shall not be treated for any purpose as part of the sentence passed on the offender.

Article 7

137. Licence provisions are part of the regime for release and do not form part of any penalty for the purpose of Article 7. In *Uttley v UK*[42] it was held that even though licence conditions on the applicant were capable of being "onerous" in the sense that they limited the freedom of action, they did not form part of the penalty given but were part of the regime by which prisoners could be released.

138. Where the nature and purpose of a measure relate to release it will not form part of a penalty within the meaning of Article 7, see *Hogben v UK*[43] and *Del Rio Prada v Spain*[44] .The Government considers that section 328 is compatible with Convention rights.

Group 4

Further powers relating to sentencing - Behaviour orders –

139. These orders within this Group do not form part of any penalty under Article 7. Their purpose is, as stated within the underlying legislation being consolidated, preventive or otherwise aimed at reducing the possibility of harm to the public. As such they do not form part of a sentence, but may be used on conviction, following an application, if either the Court considers that it is appropriate to prevent the commission of harm or their use is mandated in statute if certain conditions are met. *Welch v UK*[45] established the factors which the Court will consider when making an assessment as to whether a measure is punitive. These are whether a measure follows conviction for an offence, the nature and purpose of the measure, its characterisation under national law, procedures involved in making the measure, implementation, and severity.

Further powers relating to sentencing - Criminal Behaviour Orders

140. Section 330 defines the purpose of a criminal behaviour order and Section 331 sets out the powers of the Court to make such an order. Section 332 outlines the requirements of the prosecution to make an application further to conviction. Section 333 provides the court with considerations when setting down requirements in such orders.

[42] (36946/03),
[43] (11653/85)
[44] (42750/09).
[45] (17740/90)

141. The criminal behaviour order is not a penalty. The legislative aim is the prevention of behaviour that is likely to cause harassment, alarm or distress. It does not operate to punish, and the restrictions of a criminal behaviour order are statutorily confined to those "necessary" for protective and preventative purposes, where the court must consider whether making the order will help in preventing the offender from engaging in behaviour that causes harassment, alarm, or distress. A criminal behaviour order may be made by means of application on conviction, but it does not follow a conviction for an offence.

Article 5

142. Section 339 engages Article 5 as breach of an order is a criminal offence, which can result in the arrest and detention of an individual. The applicable power of arrest lies in section 24 of the Police and Criminal Evidence Act 1984. Constables may only carry out an arrest if they have a reasonable suspicion of the commission of an offence. The penalty for breach of a criminal behaviour order is set out Section 339. The penalty and power of arrest is in accordance with a procedure prescribed by law, and falls within the permissible grounds in Article 5(1), namely, the lawful detention of a person after conviction (Article 5(1)(a)); the lawful arrest or detention of a person for non-compliance with the lawful order of a court (Article 5(1)(b)); and the lawful arrest or detention of a person effected for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence (Article 5(1)(c)). The protections provided for by Article 5 (3) in respect of arrest are met and any offender subject to the order is able to appeal against conviction and sentence.

143. Article 5 is concerned with the deprivation of liberty and not with mere restrictions on freedom of movement. The provisions give the court discretion to impose prohibitions and/or positive requirements on an individual. But, if doing so, the court may only impose prohibitions or requirements restricting an individual's movements (e.g. curfew, attendance at a particular location, geographical restrictions). The ECtHR has held, in *Guzzardi v Italy*[46], that the difference between restriction on movement and deprivation of liberty is one of degree or intensity, rather than nature or substance. The domestic courts have held, in individual cases, that no deprivation of liberty arose from control orders imposing a curfew

[46] 7367/76

alongside other restrictions on conduct (see *Secretary of State for the Home Department v E and Another* [47]). This analysis applies to criminal behaviour orders. The criminal behaviour order provisions allow courts to determine appropriate prohibitions and/or requirements which do not amount to the kind of arbitrary detention proscribed by Article 5. Accordingly, the Government is of the view that the provisions are compatible with Article 5.

Article 6

144. In relation to Article 6, the Government considers that the proceedings where a criminal behaviour order may be imposed satisfy fair trial requirements. The rules which govern the imposition of a criminal behaviour orders made further to an application by a prosecutor on conviction, ensure participation of the person concerned in the court process, and the existence of a prescribed right of appeal and ability to subsequently apply to the court to vary or discharge the order affords further safeguards. The Government is satisfied that the provisions do not therefore violate Article 6 and adequate safeguards exist to ensure procedural fairness.

145. Breach of a criminal behaviour order amounts to a criminal offence, punishable on summary conviction by a term of imprisonment of up to six months and on conviction on indictment by a term of imprisonment of up to five years. Proceedings taken for breach of a criminal behaviour order are criminal in character under domestic law and constitute a 'criminal charge' for the purposes of Article 6. The usual processes and appeal routes apply as for criminal proceedings, and the Government is satisfied that existing safeguards for criminal court hearings meet the criminal limb of Article 6. The Government is therefore satisfied that the processes fully respect Article 6 rights.

Further powers relating to sentencing- Sexual Harm prevention orders

146. Sections 343 to 358 make provision for the imposition of a sexual harm prevention Orders by a court in relation to a person who has been convicted, found not guilty by reason of insanity, or found to be under a disability and to have done the act charged, or cautioned for an offence listed in either Schedule 3 (specified sexual offences) or Schedule 5 (specified violent offences) to the Sexual Offences Act 2003 in the United Kingdom) An application for sexual harm prevention order may also be made on a free standing application made to a

[47] [2007] UKHL 47

magistrates' court by a chief officer of police or the Director General of the National Crime Agency. The application is made in respect of a defendant with a previous conviction for an offence listed in Schedule 3 or Schedule 5 to the Sexual Offences 2003 Act or again, a finding that the defendant is not guilty of such an offence by reason of insanity or that the defendant is under a disability but has done the act charged or a caution received in respect of the offence either in the United Kingdom or overseas. For an offence committed overseas the conduct must be an offence under the laws of that country and would have constituted an offence under Schedule 3 or Schedule 5 if it had been committed in the United Kingdom.

147. Section 344 defines the meaning of "sexual harm" which is to be prevented. A sexual harm prevention order may only contain prohibitions which are necessary for the purpose of—(a) protecting the public or any particular members of the public from sexual harm from the offender, or (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the offender in or outside the United Kingdom. The sexual harm prevention order does not therefore represent a penalty noting *Welch v United Kingdom*[48] . The only permitted purpose of an order is the prevention of further sexual harm and, while a power of the court to make a sexual harm prevention occurs on conviction, it may also be made further to a caution and on an application to court by way of civil proceedings, should either a chief constable or the National Crime Agency consider it justified. Further, in *Ibbotson v UK*[49], a sex offender registration requirement was not found to be a penalty, primarily on the grounds that the requirement's purpose was to protect the public, not to punish an offender.

Article 5

148. Article 5 is concerned with the deprivation of liberty and not with mere restrictions on freedom of movement. The provisions give the court discretion to impose prohibitions on an individual. The court may only impose proportionate requirements which restrict an individual's movements. The ECtHR has held, in *Guzzardi v Italy*[50], that the difference between restriction on movement and deprivation of liberty is one of degree or intensity, rather than nature or substance. The domestic courts have held, in individual cases, that no deprivation of liberty arose from control orders imposing a curfew alongside other restrictions on conduct. This analysis applies to sexual harm prevention orders and the provisions allow courts to

[48] (17740/90)
[49] (40146/98)
[50](7367/76)

determine appropriate prohibitions which do not amount to the kind of arbitrary detention proscribed by Article 5. Accordingly, the Government is of the view that the provisions are compatible with Article 5.

Article 6

149. Consequently, in relation to Article 6, the Government considers that these civil proceedings clearly satisfy any fair trial requirements arising under the civil limb of Article 6(1). The rules which govern the imposition of a sexual harm prevention order made by the court ensure participation of the person concerned in the court process, and the existence of a prescribed right of appeal and ability to subsequently apply to the court to vary or discharge the order affords further safeguards. The Government is satisfied that the use of the civil standard does not violate Article 6 and adequate safeguards are provided to ensure procedural fairness.

150. Breach of a sexual harm prevention order amounts to a criminal offence, punishable on summary conviction by a term of imprisonment of up to six months and on conviction on indictment by a term of imprisonment of up to five years. Proceedings taken for breach of a sexual harm prevention order are criminal in character under domestic law and constitute a 'criminal charge' for the purposes of Article 6. The usual processes and appeal routes apply for criminal proceedings, and the Government is satisfied that existing safeguards for criminal court hearings meet the criminal limb of Article 6. The Government is therefore satisfied that the processes fully respect Article 6 rights.

Parenting Orders

151. Chapter 4 of Part 11 concerns parenting orders which can be imposed following the conviction of a person under 18 years old.

Article 8

152. The compatibility of parenting orders with the Convention under an earlier iteration of section 8 of the Crime and Disorder Act 1998 was considered in *R (on the application of M) v Inner London Crown Court*[51]. The claim that parenting orders breached Article 6 was not

[51] [2003] EWHC 301 (Admin)

upheld as the role of the court was one of evaluation and assessment about whether a parenting order would help prevent the child behaving in a particular way rather than determining a particular fact (had the child actually behaved in a particular way) so a heightened civil standard of proof was not necessary. There was also no breach of Article 8 as the infringement of private and family life was proportionate to the aim of preventing youth offending and necessary in a democratic society. The order was deemed to balance the competing interests of the parent and the community. Article 8(2) was accordingly satisfied.

153. The Government considers these provisions to be compatible with Convention rights. The imposition of a parenting order does not involve any criminal charge. The legislation clearly sets out the court's task and confers a discretion on the court to determine whether it is desirable in the interests of preventing the commission of a further offence. Where the young person or child is under 16 years of age there is a presumption that a parenting order must be made but this is subject to the safeguard that the court can decide that it is not so satisfied. A person who is made subject to a parenting order has the same right of appeal as if they had committed the offence in respect of which the child or young person had been sentenced. Additionally, section 367 contains procedural requirements which on their face satisfy the court's duty under section 6 of the Human Rights Act 1998 not to breach the Convention. Specifically, any interference with family life which may result from the parent or guardian's attendance at a residential course is proportionate in all the circumstances.

154. Breach of a parenting order amounts to a criminal offence, punishable on summary conviction to a fine. The Government is satisfied that existing safeguards for criminal court hearings meet the criminal limb of Article 6.

Ministry of Justice

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