

## DOMESTIC ABUSE BILL

### EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

#### A. Summary of the draft Bill

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Domestic Abuse Bill. It has been prepared by the Home Office, Ministry of Justice, and Ministry of Housing, Communities and Local Government. On introduction of the Bill in the House of Commons, the Home Secretary (the Rt Hon Priti Patel MP) made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights.
2. The Bill will:
  - a) Provide for a statutory definition of domestic abuse;
  - b) Establish the office of Domestic Abuse Commissioner and set out the Commissioner’s functions and powers;
  - c) Provide for a new Domestic Abuse Protection Notice and Domestic Abuse Protection Order;
  - d) Place duties on tier one local authorities in England in respect of the provision of support to victims of domestic abuse and their children in safe accommodation;
  - e) Provide that complainants of an offence involving behaviour which amounts to domestic abuse are eligible for special measures in the criminal courts in England and Wales;
  - f) Prohibit perpetrators or alleged perpetrators of abuse from cross-examining their victims in person in the family courts (and vice versa) in England and Wales, and provide, in certain circumstances, for the appointment of a publicly-funded legal representative to conduct the cross-examination;
  - g) Extend the extraterritorial jurisdiction of the criminal courts in England and Wales, Scotland and Northern Ireland to further violent and sexual offences;
  - h) Enable domestic abuse offenders to be subject to polygraph testing as a condition of their licence following their release from custody;
  - i) Place the guidance supporting the Domestic Violence Disclosure Scheme on a statutory footing;
  - j) Ensure that where a local authority, for reasons connected with domestic abuse, grants a new secure tenancy to a social tenant who had or has a secure lifetime or assured tenancy (other than an assured shorthold tenancy) this must be a secure lifetime tenancy; and
  - k) Confer power on the Secretary of State to issue guidance about domestic abuse.
3. The Government considers that clauses of or Schedules to the Bill which are not mentioned in this memorandum do not give rise to any human rights issues.

## **Domestic Abuse Commissioner (Part 2)**

4. Part 2 of the Bill provides for the appointment of a Domestic Abuse Commissioner and sets out the Commissioner's functions, including functions in relation to encouraging good practice in the identification of people who carry out domestic abuse, victims of domestic abuse and children affected by domestic abuse.
5. Clause 16 provides for disclosure of information (including personal data) to and by the Commissioner. Clause 16(1) enables the Commissioner to disclose to a person any information they receive in connection with and for a purpose connected with a function of the Commissioner. Clause 16(2) enables a person to disclose any information to the Commissioner if the disclosure is made for the purposes of enabling or assisting the Commissioner to exercise any function. The Bill therefore provides an information-sharing gateway to enable disclosures of information (including personal data) by and to the Commissioner but only if, in the case of disclosures by the Commissioner, the information was received by the Commissioner for a purpose connected with the Commissioner's functions and the disclosure is made for a purpose connected with a function of the Commissioner or, in the case of disclosures to the Commissioner, the disclosures are made for the purpose of enabling or assisting the Commissioner to exercise their functions. However, the information-sharing gateway is subject to important statutory restrictions on disclosure of information; the Bill does not authorise or require disclosure of patient information, or the disclosure of personal data would contravene the data protection legislation (as defined by section 3 of the Data Protection Act 2018), or a disclosure which is prohibited by the Investigatory Powers Act 2016 (Parts 1 to 7 or Chapter 1 of Part 9 thereof).
6. The disclosure provisions in the Bill are therefore compliant with the requirements of Article 8 for the following reasons. The disclosure of information will be lawful because it is only authorised in connection with the functions of the Commissioner as set out in the Bill. Where that information includes personal data, it must only be made if the disclosure is in accordance with the relevant provisions set out in the data protection legislation, although exemptions may be available, as appropriate, such as the crime exemption set out in Schedule 2 to the Data Protection Act 2018. In addition to the safeguards set out in the data protection legislation, the Human Rights Act 1998 will continue to apply to the conduct of the Commissioner, although not expressly referred to in the Bill. The Government also considers that the balancing of interests between the exercise of a person's right to a private and family life on the one hand and the need to prevent domestic abuse, on the other, should be satisfied by compliance with data protection and other legislation when the Commissioner or other persons make disclosures of personal information.

## **Domestic abuse protection notices and orders (Part 3)**

7. Part 3 of the Bill provides for the creation of new civil preventative measures – the Domestic Abuse Protection Notice ("DAPN") and the Domestic Abuse Protection Order ("DAPO"). These are closely modelled on the Domestic Violence Protection Notice and Domestic Violence Protection Order introduced under the Crime and Security Act 2010 (clause 51 of the Bill repeals the relevant provisions of that Act).

8. Clause 19 gives a senior police officer the power to issue a DAPN where there are reasonable grounds to believe that a person (“the perpetrator”) has been abusive towards a person (“the victim”) aged 16 or over to whom the perpetrator is personally connected, and that giving the notice is necessary to protect the victim from domestic abuse, or the risk of domestic abuse, carried out by the perpetrator. DAPNs may contain such provision as is necessary in the circumstances, including to prohibit the perpetrator from entering premises shared with the person for whose protection the notice is given. A notice may also prohibit the perpetrator from contacting that person. After giving the notice, the appropriate chief officer of police (as defined in clause 25(4)) must apply for a DAPO against the perpetrator, such application to be by complaint to a magistrates’ court and heard within 48 hours of giving the notice. The perpetrator will be given notice of the hearing (although the hearing may be held in the perpetrator’s absence where he or she failed to provide an address for service and the court is satisfied the chief officer of police made reasonable efforts to give them the notice of hearing – clause 26(6)) and the DAPN will remain in effect until the application for a DAPO is determined or withdrawn.
9. Clauses 25, 26 and 28 provide for the making of a DAPO either on application (by certain persons, or by the police following a DAPN or on a standalone basis) or of the court’s own volition during certain specified proceedings. Clause 31 confirms that an order may be made without notice against a person where it is just and convenient to do so. In exercising this power, the court must have regard to certain matters, including the risk of significant harm if the order is not made immediately. Where an order has been made without notice, the subject of the DAPO will be given the opportunity to make representations at a subsequent hearing. As with a DAPN, a DAPO may, for the purpose of preventing the perpetrator from being abusive towards a named person, prohibit the perpetrator from doing things described in the order. A DAPO may also impose positive requirements on the perpetrator for the same purpose, as provided by clauses 32 and 33, including that the perpetrator must submit to electronic monitoring for the purpose of monitoring their compliance with another requirement of the DAPO (clause 32(6)).
10. Electronic monitoring is not an end in itself; it is a tool to monitor compliance with another requirement imposed by an order with the aim to support the management of risk of harm (here in the context of domestic abuse). It is a way of remotely monitoring and recording information on an individual’s compliance with conditions/restrictions on their behaviour, for example a curfew or exclusion zone, using an electronic tag which is normally fitted to a subject’s ankle. The tag worn by the subject transmits their location data to a monitoring centre where it is processed and recorded. The monitoring centre, operated by the ‘responsible person’, reviews this information to see whether the subject is complying with the conditions being electronically monitored. Where a subject has failed to comply, the responsible person provides information of the failure to the police for the enforcement of the order.
11. Breach of a DAPO without reasonable excuse is a criminal offence (clause 36) albeit it may be punished, in the alternative, as a civil contempt of court. The maximum sentence on summary conviction is six months’ imprisonment or a fine (or both). Conviction on indictment is punishable by a maximum of five years’

imprisonment or a fine (or both). The penalty for a civil contempt of court will vary according to the level of judge and the court dealing with the matter, though could be up to two years' imprisonment or a fine (or both).

### *Article 5*

12. These provisions engage Article 5 because breach of an order will be a criminal offence which can result in the arrest and detention of an individual. Alternatively, a breach of an order may be treated as a civil contempt of court for which a person can also be detained. There is specific provision which allows a constable to arrest without warrant a person he or she reasonably believes to be in breach of a DAPN. A breach of a notice is not a criminal offence nor a contempt of court. Anyone arrested for the breach of a DAPN must be brought before a magistrates' court within 24 hours, excluding Sundays and certain public holidays.
13. Article 5(1)(b) provides that interference with the right to liberty is permitted for non-compliance with a lawful court order and Article (5)(1)(c) provides that interference with the right to liberty is permitted for the purpose of bringing an individual before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent the person committing an offence. 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. Any arrest for a criminal offence will usually result in a person being brought before a court within 36 hours, where they have not otherwise been released under investigation or on police bail, which satisfies the requirements of Article 5(3).
14. These provisions give the court discretion to impose prohibitions, restrictions and/or positive requirements on a person who has not been convicted. The court may only impose requirements which place a prohibition on a person's movements (for example, a curfew, attendance at a particular location for a particular period) which do not amount to a breach of Article 5. *Guzzardi v Italy* [1980] ECHR 5 found there was no clear line between deprivation of liberty which would amount to a breach of Article 5 and a mere restriction on liberty which would not amount to breach – the difference is a matter of degree not substance. Account must be taken of a wide range of factors including: type, duration, effect and manner of implementation. Clause 33(1) provides that the requirements in a DAPO must, as far as practicable, be such as to avoid conflict with a person's religious beliefs or interference with work or education.
15. These provisions allow courts to act in a way which is compatible with Article 5 when deciding what requirements the order should impose.

### *Article 6*

16. The protection of Article 6 ECHR extends to disputes that concern and determine a "civil right". The 'right' of access to one's child has been held to constitute a 'civil right' for the purposes of Article 6 (*R v United Kingdom*<sup>1</sup>), as has a person's right

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<sup>1</sup> (1987) 10 EHRR 74

to enjoy their property (*Marckx v Belgium*<sup>2</sup>). The making of a DAPN or DAPO may interfere with Article 6 to the extent that the person subject to a notice or order could be prohibited from entering their own property (to which they have legal title), or from contacting the person to be protected (which could, depending on the facts, prevent access to a child). Whether Article 6 is in fact engaged will always depend on the circumstances of an individual case.

17. A DAPN may be given summarily 'on the spot' to a person in the circumstances described above, which remain in effect until the subsequent application for a DAPO (which will be listed for hearing within 48 hours (excluding Sundays and certain public holidays) of the time the notice is given) is determined or withdrawn. Interim measures which effectively determine a civil right, such as a DAPN, fall within the scope of Article 6; however, the Article will not be breached to the extent that the safeguards therein could not be applied without unduly prejudicing the legitimate objectives of the measure (*Micallef v Malta*<sup>3</sup>). The key objective of the DAPN is to provide the victim of domestic abuse with enforceable protection from the perpetrator in the immediate aftermath of an incident. To delay acting until after a hearing would be prejudicial to the objective of providing immediate protection to a victim. Any delay in securing such protection could expose the victim to risk of further abuse and/or significant harm. Notwithstanding the initial absence of a hearing, the right of the perpetrator to have the reasonable opportunity to present his or her case is respected. Before giving a DAPN, the senior police officer must, by virtue of clause 21, consider any representations made by the perpetrator about the giving of the notice.
18. Further, although there is no right of appeal against the giving of a notice, a hearing will be listed within 48 hours at which the perpetrator may make (further) representations and challenge the making of a DAPO.
19. Any interference with Article 6, by virtue of the summary issuance of a notice, is considered to be proportionate and justified. The notice continues in effect only until the application for a DAPO is determined (or withdrawn), and this application will be heard within 48 hours. The need to give a notice otherwise than at a hearing is justified in order to protect the victim from further and/or the risk of abuse after the incident giving rise to police involvement. The perpetrator will have the opportunity to make representations about the giving of a notice *before* it is given.
20. Whilst a DAPO may be made without notice to the perpetrator in closely defined circumstances, clause 31(4) guarantees the right of that person to make representations about the order at a subsequent hearing (which will be listed 'as soon as just and convenient', that is, within a reasonable time and 'of which notice has been given'). At that hearing, an order may be varied or discharged, where the court considers the requirements imposed are not or are no longer necessary to protect the victim. The perpetrator may also appeal against the making of a DAPO in the usual way. The Government therefore considers that the Article 6(1) right to a fair hearing is adequately protected.

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<sup>2</sup> (1980) 2 EHRR 330

<sup>3</sup> (2010) 50 EHRR 37

21. These provisions also engage Article 6 to the extent that it might be argued that procedural unfairness could arise from a DAPO being imposed without the court having to be satisfied to a criminal standard of proof of the acts alleged before making an order which could involve the imposition of positive requirements. DAPOs will be available on acquittal so could involve a situation where a court is not satisfied of a particular set of facts to the criminal standard, and thus unable to convict for an offence, but is satisfied to the civil standard such that they feel able to impose a DAPO.
22. The Government is satisfied that DAPOs do not involve a determination of a criminal charge for the purpose of Article 6. Under clause 29(2) of the Bill, the standard of proof for the making of a DAPO is the civil standard (on the balance of probabilities). There are three established criteria for determining whether a case involves the determination of a criminal charge and therefore the application of the criminal standard of proof: (i) domestic classification of proceedings (not determinative); (ii) nature of the offence; and (iii) degree of severity of the penalty (*Engel v Netherlands* [1976] 1 EHRR 647). The court in *Chief Constable of Lancashire v Wilson and others* [2015] EWHC 2763 (QB), which involved consideration of a civil order which allowed the imposition of positive requirements without the pre-requisite of a conviction, concluded that the proceedings were not criminal in nature and did not attract a criminal burden of proof applying the three criteria in *Engel*. The court reasoned that although the conduct alleged may be criminal it is not necessarily so (and even if it is that is not in itself decisive) and the purpose of the order is not punitive. The same applies to DAPOs. A DAPO is not, in the Government's view, a penalty: the legislative aim underpinning the creation of DAPOs is the prevention of, and diversion from, domestic abuse rather than the punishment of perpetrators and the conditions for making a DAPO are statutorily confined to circumstances where an order is "necessary and proportionate" for protective purposes (clause 29(3)). The Courts have supported this assessment in relation to other civil orders, including former anti-social behaviour orders in *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 and non-derogating control orders (now replaced by TPIMs) in *MB v Secretary of State for the Home Department* [2008] 1 AC 440.
23. 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 procedure which governs the applications for orders ensures participation of the person concerned in the court process, and the existence of a right of appeal and ability to apply to the court to vary or discharge the order affords the further safeguards envisaged by Article 6.

#### *Article 7*

24. The Government has considered whether these provisions breach Article 7 of the ECHR and believe that they do not.
25. An argument that Article 7 is engaged could be made on two bases.
26. First, that the orders are criminal in nature, and the making of an order amounts to the determination of a criminal charge for the purposes of that article. If that is right,

acts committed before the commencement of the relevant sections could not be taken into account as to do so would breach Article 7.

27. Second, that because the breach of an order is a criminal offence and the making of that order may have depended on acts committed before the commencement of the relevant sections that too amounts to a breach of Article 7.
28. If the first argument fails, the Government considers it inevitable that the second must too. If the first does not amount to a criminal charge for the purposes of Article 7, then the breach of an order that results, cannot either. Nevertheless, the Government has considered the application of Article 7 to the second situation even on the basis that it is not engaged in the first. Dealing with each argument in turn:
29. The three established criteria for determining whether a case involves the determination of a criminal charge are set out at paragraph 22 above.
30. In this case, an application for an order is a civil matter, albeit an order can also be made on conviction or acquittal in criminal proceedings. The orders are aimed at protecting people from future behaviour. The severity of the “penalty” (here, the terms of an order) depends entirely on what is necessary and proportionate to protect a person from the risk. There is no punishment unless the order is breached which will be punishable as a criminal offence or civil contempt of court. However, the Government accepts that the terms of the order could entail some element of a restriction on a person’s freedom, either because it prevents them doing something or it requires them to do something. It is difficult to assess the extent of that because, as noted above, it may only be such as is necessary and proportionate to address the risk.
31. Domestic law supports the conclusion that the making of an order does not constitute a criminal charge. In *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787, whilst the House of Lords decided in the context of that case that the criminal standard of proof was appropriate, it held that an application for an anti-social behaviour order under section 1 of the Crime and Disorder Act 1998, did not amount to a criminal charge for the purposes of Article 6 ECHR.
32. Similarly, in *Gough v Chief Constable of the Derbyshire Constabulary* [2002] QB 459 football banning orders under the Football Spectators Act 1989 were held not to involve criminal penalties and were therefore of civil character.
33. More recently, in *Chief Constable of Lancashire v Wilson* [2015] EWHC 2763 the court held that proceedings under the Policing and Crime Act 2009 for gang-related injunctions did not amount to a criminal charge for the purposes of Article 6 ECHR. It found that the purpose of the injunctions is not punitive but preventative. In determining whether Article 6 applied, the Court considered what it described as the “grave consequences” for injunctioned persons, including positive requirements to undertake particular activities, but concluded that these did not engage the protections in respect of criminal proceedings under Article 6. The principles were most recently affirmed in *Jones v Birmingham City Council* [2018] EWCA Civ 1189.

34. The Government does not believe there is any reason to believe that a court would come to a different conclusion on the civil nature of the orders under the Bill.
35. Once the order has been made, the conduct which was a necessary pre-condition to it being made is irrelevant in determining whether the order itself has been breached. And a person only commits an offence if they breach an order.

#### *Article 8*

36. Article 8 may be engaged so far as a DAPN or DAPO concern the individual's right to respect for his or her private and family life, home and correspondence. The right and ability to maintain family relationships falls within the scope of Article 8; the notion of "family" is not confined solely to marriage and is a question of fact depending on the existence of close personal ties (*Kroon v Netherlands*<sup>4</sup>). The notion of "home" is likewise an autonomous concept and does not depend on the classification under domestic law. Whether a habitation constitutes an individual's "home" depends on the existence of sufficient and continuous links with a specific place (*Buckley v UK*<sup>5</sup>) and is therefore fact-specific in each case.
37. Provisions in either a DAPN and/or DAPO which restrict an individual's right to see or contact his or her partner (including children, where relevant) or another person with whom he or she is 'personally connected' (and therefore may share a family relationship) are likely to interfere with Article 8, as would provisions which prevent an individual from accessing their home for a specified period (*Cyprus v Turkey*<sup>6</sup>). Similarly, the notification requirements in clauses 38 and 39 which require the individual to notify the police of any changes to their name or address, or provide fingerprints or be photographed, may interfere with that person's right to privacy.
38. A DAPO may be made without the victim's consent, although the court is obliged to take into account any views of the victim (amongst other matters) before making an order. The court will need to assess these views when considering the appropriateness and practicability of attaching particular conditions to a DAPO (including in cases where the victim wishes to continue the relationship or maintain the perpetrator's relationship with their children). The ability of the court to make orders where the victim is not supportive is to safeguard against the risk that a victim may be subject to coercion from or pressure by the perpetrator into withdrawing or withholding their consent. Making an order against the victim's wishes is likely to interfere with their Article 8 right for as long as the order remains effective. As explained below, however, the court will only make an order for as long as is deemed necessary and proportionate to protect the victim from abuse or the risk of abuse.
39. The Government considers that each of the potential interferences referred to above are justified in accordance with Article 8(2). The provisions will be in accordance with law, will be in pursuit of a legitimate aim and necessary in a democratic society. This is because a DAPN or DAPO will only be given or made in accordance with express powers in primary legislation (that is, where it is

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<sup>4</sup> (1995) 19 EHRR 263

<sup>5</sup> (1996) 23 EHRR 101

<sup>6</sup> (1983) 15 EHRR 509



'necessary' (in the case of a DAPN) or 'necessary and proportionate' (in the case of a DAPO) to protect a person from abuse or the risk of abuse – clauses 19 and 29 respectively), and only those requirements which are necessary to protect the other person from abusive behaviour will be imposed. A court must also ensure that the requirements, so far as practicable, avoid conflicting or interfering with the perpetrator's work, education or religious beliefs. In addition, a court may vary or remove certain requirements or discharge the order entirely where it is satisfied that they are no longer necessary to protect the other person (clause 41). Certain requirements/prohibitions in the order may end before expiry of the DAPO itself where appropriate. Any interference with the perpetrator's Article 8 rights are in pursuit of the legitimate aim of preventing crime and disorder or the protection from abuse or risk of abuse (in relation to a non-consenting victim), and given the procedural safeguards contained within the Bill (necessity of provisions, appeal rights etc) the interferences are considered to be proportionate to those aims.

40. Article 8 also imposes positive requirements on the state to ensure an individual's private and family life, home and correspondence are respected. This obligation extends to protecting individuals from each other (*X and Y v Netherlands*<sup>7</sup>). Any interferences with the perpetrator's rights flowing from these provisions are considered to be outweighed by the state's positive obligation to protect the Article 8 rights of the victim. As explained above, the interference with the victim's rights will last only as long as the court deems an order is both necessary and proportionate to protect the victim. The victim has the opportunity to explain their views to the court before the order is made. They may also apply to vary or discharge the order and have a right of appeal against the decision of a court following any such application. The Government considers that the Article 8 right of the victim, in cases where they do not consent to the order, is adequately protected.
41. An electronic monitoring requirement under a DAPO is also likely to engage the Article 8 rights of the individual being monitored. The physical wearing of a tag and the collection of data of an individual's whereabouts (24 hours a day) will interfere with the Article 8 rights of the individual. Any interference could be seen as the Government taking steps, as a positive obligation, to prevent crime and disorder, protect public safety and the protection of the rights and freedoms of others. The legislation is precise and accessible as envisaged by *Malone v United Kingdom* [1985] 7 EHRR 14. An independent court would be responsible for imposing the requirement and has full discretion in making a relevant order. The court would therefore need to ensure that on the particular circumstances of the individual case that any interference with Article 8 rights was justified to ensure the compliance with other measures, and that the imposition of the requirement was a necessary and a proportionate means of achieving the aim. Any such imposition would be subject to the safeguards of the appellate courts. It is therefore the Government position that any interference with Article 8 rights brought about by the legislation on electronic monitoring of a DAPO will be justified and compliant with the ECHR.

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<sup>7</sup> [1985] ECHR 4

## Article 10

42. Article 10 may be engaged if provisions in the DAPN or DAPO restrict the perpetrator's ability to express opinions, including on social media (*Hewson v Commissioner of Police of the Metropolis*<sup>8</sup>), to the extent that such expressions would amount to abusive behaviour within the meaning of clause 1. Whether Article 10 is in fact engaged will always depend on the individual circumstances of each case.
43. The Government considers that any interference with Article 10 rights is justified. The provisions restricting the perpetrator's ability to hold or express opinion are prescribed by law (in the Bill and other enactments, such as the Protection from Harassment Act 1997 and Malicious Communications Act 1988). The legitimate aims in restricting freedom of expression are to prevent crime and disorder and to protect the reputation (in appropriate cases and including where the victim is abused via social media) or rights and safety of the person to be protected by the notice or order. In certain cases, preventing the perpetrator from perpetuating the abuse, which may be psychological, via social media will be necessary to achieve that aim and to protect the victim, and such restriction is very unlikely to be imposed as a matter of course in cases where it is not necessary. Any restriction will be limited to a specified duration and to specific activities, and may be removed by the court if it is not satisfied that regulating the perpetrator's behaviour in this way is necessary and proportionate to protect the victim. Widespread censure of the perpetrator is unlikely to be imposed (save in cases where that is necessary) and it is anticipated that the court will only impose sensible and proportionate provisions in the DAPO.

## Article 11

44. The right to freedom of assembly and association may be engaged insofar as a DAPN or DAPO restricts the movements of the person against whom it is made. Provision may, for example, prohibit that person from attending an event or building at which the person protected by the notice/order may be present.
45. As identified above in respect of other fundamental rights, any interference with Article 11 in relevant cases is considered to be justified. The restrictions on this right are prescribed by law, to the extent that they fall within the criteria for DAPN/DAPO as set out in the Bill. Any restrictions on the perpetrator's freedom to assemble and associate with others are in pursuit of the legitimate aim of preventing crime and disorder. As above, any provision in a DAPN/DAPO will only be imposed where it is necessary to protect the other person from abuse or the risk of abuse. Whether such provision is necessary will be a matter of fact to be determined by the court. It is considered that a provision prohibiting the perpetrator from attending an event or building (that would otherwise be protected by Article 11) for a specified period is proportionate to the wider aim of protecting the victim from further acts of domestic abuse, and generally preventing crime and disorder. The restriction can be removed once the court is satisfied that it is no longer required to meet those aims.

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<sup>8</sup> [2018] EWHC 471 (Admin)

## Article 1 of Protocol 1 (A1P1)

46. A1P1 may likewise be engaged to the extent that provision in a DAPN or DAPO prohibits the perpetrator from entering his or her home. It is considered that irrespective of whether the perpetrator is the legal *owner* of the property, an inability to gain access to property which he or she occupies with legal title<sup>9</sup> may amount to an interference with his or her peaceful enjoyment of that property (*Loizidou v Turkey*<sup>10</sup>) (but to the extent there is an interference, this would likely be considered a lawful control of use rather than deprivation of property).
47. Any interference with the right to property may be justified if it serves a legitimate objective in the public or general interest and is proportionate. It is clear from the Bill that restrictions in DAPNs or DAPOs will be only be imposed where necessary to protect a person from domestic abuse or the risk of domestic abuse. Public authorities enjoy a wide margin of appreciation in determining what is in the general / public interest. The Government considers that an access restriction in a notice or order, together with other safeguards contained in the Bill as regards necessity of the provision and appeal rights, will strike a fair balance between the rights of the person against whom the restriction is placed and the protection of the victim. Whilst there is no need for the public in general to benefit from an A1P1 interference (*James v United Kingdom*<sup>11</sup>) preventing domestic abuse generally is said to be in the public interest of the community.

### Special measures directions in cases involving domestic abuse (clause 58)

48. Chapter 1 of Part 2 of the Youth Justice and Criminal Evidence Act 1999 (“YJCEA”)<sup>12</sup> provides for a range of special measures to support vulnerable and intimidated witnesses (other than the accused) so as to assist them to give their best evidence in criminal proceedings. The ethos behind these measures is that the orthodox procedures of the adversarial trial must be adapted to the needs of witnesses who require assistance. Witnesses can be eligible for special measures on two grounds:
- a. vulnerability – that is, on the grounds of age (i.e. being under 18) or the witness’s physical or mental incapacity; or
  - b. intimidation – that is, on the grounds that the quality of the witness’s evidence would likely be diminished due to their fear or distress about testifying.
49. Certain types of witness are deemed automatically to be eligible for assistance on the grounds of fear and distress if they want to be. These are complainants of sexual offences and modern slavery offences and witnesses in proceedings relating to certain offences involving knives or guns. The Bill adds to this list complainants in respect of any other offence where it is alleged that the behaviour of the accused amounted to domestic abuse (as defined).

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<sup>9</sup> The mere fact that P lives at a property will not amount to a ‘possession’ for the purposes of engaging A1P1 – legal title is required (*S v United Kingdom* (1986) 47 DR 274).

<sup>10</sup> (1996) 23 EHRR 513

<sup>11</sup> (1986) 8 EHRR 123

<sup>12</sup> Save where otherwise stated all statutory provisions refer to YJCEA.

50. Once eligibility is established, the litmus test as to whether or not a special measure is granted is whether the court considers any particular measure (or combination of measures) is likely to improve the quality of the witness' evidence: section 19(2). In making that assessment the court must consider all the circumstances of the case, including in particular any views expressed by the witness and whether the measure or measures might tend to inhibit the witness's evidence being effectively tested by a party to the proceedings: section 19(3).
51. Section 19(2) makes it clear that the measures should be tailored to the needs of the individual witness. Also, Criminal Practice Directions<sup>13</sup> encourage flexibility in devising a combination of appropriate special measures based on an evaluation of the specific needs and preferences of the witness.
52. The range of special measures which a court can direct in respect of an intimidated witness include:
- a) Screening a witness from seeing the defendant: section 23.
  - b) Allowing a witness to give evidence by live video link, accompanied by a supporter: section 24.
  - c) Hearing a witness in private, available for cases where sex offences or certain modern slavery offences are charged, or where there are reasonable grounds for believing that any person other than the accused has sought, or will seek, to intimidate the witness in connection with testifying: section 25. The Bill will add to this list cases where it is alleged the behaviour of the accused amounted to domestic abuse (as defined).
  - d) Dispensing with wearing of wigs and gowns while the witness gives evidence (generally used in respect of vulnerable witnesses i.e. very young witnesses): section 26.
  - e) Admitting video-recorded interview with a witness as evidence-in-chief: section 27.
  - f) Admitting video-recording of cross-examination and re-examination: section 28.

#### *Article 6*

53. Procedures for the determination of a criminal charge engage Article 6 of the ECHR and common law fair trial rights. The Bill amends the law concerning eligibility for and availability of special measures, but it does not provide automatic access to special measures for any witness. The accused's right to a fair trial will therefore be protected in each case by the court. In particular:
- a) The court retains discretion as to whether to make a special measures direction in relation to an eligible witness, and which measure(s) to direct, under section 19(2) of the YJCEA.

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<sup>13</sup> Criminal Practice Direction I, paragraph 3D.2, and Criminal Practice Direction V, paragraphs 18A.1 and 18A.2.

- b) Even once it has made a special measures direction, the court may discharge or vary the direction if it appears to the court to be in the interests of justice to do so: section 20(2) of the YJCEA.

54. In making those determinations, the court is prohibited by section 6 of the Human Rights Act 1998 from acting in a way which is incompatible with a Convention right. Under section 19(3) of the YJCEA the court is also specifically required, when deciding whether to make a special measures direction, to consider whether the measure or measures in question might tend to inhibit the witness's evidence being effectively tested by a party to the proceedings.

### **Prohibition of cross-examination in person in family proceedings (clause 59)**

55. Clause 59 inserts new Part 4B (comprising new sections 31Q to 31Z) into the Matrimonial and Family Proceedings Act 1984 ("MFPA 1984") to make provision about the cross-examination of vulnerable witnesses in family proceedings in England and Wales.

56. New section 31R of the MFPA 1984 provides that no party to family proceedings who has been convicted of or given a caution for, or is charged with, a specified offence may cross-examine in person a witness who is the victim, or alleged victim, of that offence. Relevant offences will be specified in secondary legislation. In turn, the (alleged) victim may not cross-examine the person convicted, cautioned or charged. The provision will not apply where a person has a conviction or caution that is spent for the purposes of the Rehabilitation of Offenders Act 1974 ("ROA 1974"), unless evidence of that conviction or caution is admissible or may be required in the proceedings by virtue of section 7(2), (3) or (4) of the ROA 1974.

57. New section 31S of the MFPA 1984 provides that no party to the proceedings against whom an on-notice protective injunction is in force may cross-examine in person a witness protected by the injunction, or vice versa.

58. Where there is specified evidence that a person who is a witness has been the victim of domestic abuse (as defined in clause 1 of the Bill) carried out by a party to the proceedings (or vice versa), new section 31T prevents that party from cross-examining the witness in person. The evidence that will trigger the bar will be specified in secondary legislation. The Government's intention is to broadly replicate the list of evidence of domestic violence that is currently specified for the purposes of accessing civil legal aid (set out in Schedule 1 to the Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098), as amended).

59. New section 31U provides that in any family proceedings where one of the statutory prohibitions under new section 31R to 31T does not operate to prevent a party from cross-examining a witness, the court has the discretion in specified circumstances to give a direction prohibiting a party to the proceedings from cross-examining a particular witness in person if certain conditions are met.

60. Where a person is prohibited from cross-examining another in person, new section 31W of the MFPA 1984 makes provision for the court to consider whether there are satisfactory alternatives to cross-examination in person. If the court considers there are none, then it must invite the person affected to arrange for a qualified

legal representative to act for him or her for the purpose of cross-examining the witness and require them to notify the court by the end of a specified period whether a qualified legal representative is to act for them for that purpose. If the person does not do so, then the court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a qualified legal representative, and if so, the court must appoint a qualified legal representative for that purpose. The Lord Chancellor will issue guidance about the role the court-appointed representative is to play in family proceedings (new section 31Y). The costs of such a representative will be met from central funds. This will be provided for in secondary legislation made under new section 31X of the MFPA 1984.

## Article 6

61. Private law family disputes may fall within the scope of Article 6 (the right to a fair trial) (Keenan v Ireland<sup>14</sup>); the right of access to and custody of one's child (which arises both in public family law proceedings as well as private law proceedings<sup>15</sup>) has been held to constitute a 'civil right' for the purposes of Article 6 (R v United Kingdom<sup>16</sup>), although more distant relatives such as grandparents will not necessarily be able to establish equivalent 'civil rights' (W v United Kingdom<sup>17</sup>).
62. The Government has assumed that *in principle* it is possible that Article 6 is engaged throughout the process by which family law rights or obligations are ultimately determined. Whether *in fact* Article 6 is engaged at any particular stage of the process depends on the particular case and the decision in question. Consideration has been given to the position of both the party who would undertake cross-examination and the witness who would be cross-examined (who may also be a party).
63. Currently, there is no express legislative provision which prevents a party from cross-examining in person a witness, although the court may provide alternatives to cross-examination using its general case management powers. However, there is no power to order the appointment of a publicly funded legal representative to undertake cross-examination on behalf of a party. It is evident from legislation and case law (Re K and H (Private Law: Public Funding)<sup>18</sup>, Re W<sup>19</sup>) that the current position does not amount to a breach of Article 6 rights because the court can use other case management options as alternatives to cross-examination in person, such as the judge or a justices' clerk asking questions of the witness instead. However, the Court of Appeal in Re K and H indicated that there may be some circumstances in which the alternative measures might not be adequate to prevent a breach of Article 6 rights of the person prevented from conducting cross-examination in person. The Court invited the Government to consider legislation to enable courts to appoint and fund legal representatives in certain circumstances.
64. The effect of the legislative amendments introduced in clause 59 is to impose a bar on a party cross-examining in person a witness in specified circumstances; and to

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<sup>14</sup> (1994) 18 EHRR 342

<sup>15</sup> P, C and S v UK (2002) (Application no. [56547/00](#))

<sup>16</sup> (1987) 10 EHRR 74 §82 and 83

<sup>17</sup> (1987) 10 EHRR 29 §72 to 79

<sup>18</sup> [2015] EWCA Civ 543

<sup>19</sup> (2010) UKSC 12

give a discretion to the court to prohibit cross-examination in person where certain conditions apply. The Government does not consider that this is incompatible with the Article 6 rights of the party who would otherwise undertake the cross-examination for the reasons set out below.

65. A bar on a party cross-examining in person will apply where a person has been convicted of or given a caution for, or is charged with, a “specified offence” (to be defined in regulations). The party will not be able to cross-examine in person the (alleged) victim of that offence. Nor will the victim be able to cross-examine the person who (allegedly) committed the offence. This bar will apply where a conviction or caution is unspent for the purposes of the ROA 1974, or where it is spent but evidence of that conviction or caution is admissible in the proceedings by virtue of existing provisions in that Act. A bar will also apply where there is in force against the party an on-notice protective injunction protecting the witness (or vice versa) or where there is specified evidence of domestic abuse between the party and a witness to whom they are personally connected and intend to cross-examine (and vice versa). The types of injunctions will be specified in regulations, as will the evidence.
66. The circumstances in which the bars apply are considered to be sufficiently serious that their existence warrants an absolute bar (rather than a discretion for the court).
67. The evidence which the Government intends to specify in regulations made under section 31T has already been scrutinised and accepted by Parliament<sup>20</sup> as satisfactory documentary evidence that domestic violence<sup>21</sup> has occurred. The threshold at which the absolute bar will apply is therefore consistent with existing law and policy and its application should be foreseeable to those subject to it: an unrepresented party to proceedings will only be automatically prohibited from cross-examining a witness where there is clear evidence, as specified in the regulations and consistently with other similar legislation, that domestic abuse has occurred between them.
68. The court will only exercise its discretion to prohibit cross-examination in person in certain circumstances – either to improve the quality of a witness’s evidence on cross-examination, or where it is satisfied that cross-examination in person would cause significant distress to the witness, and that such distress would be more significant than if the witness were cross-examined other than by the party in person. Additionally, the discretionary prohibition can only be applied where it would not be contrary to the interests of justice.
69. Where a party is barred from cross-examining in person, or where the court exercises its discretion to prohibit cross-examination in person, the court will have to actively consider whether there are satisfactory alternatives to such cross-examination. If there are none, then the court must invite the party affected to arrange for a qualified legal representative to undertake the cross-examination. If the party does not do so, the court must consider whether it is necessary in the

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<sup>20</sup> The Civil Legal Aid (Procedure) Regulations 2012, made under s.12 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and subsequent amendments were subject to annulment in pursuance of a resolution of either House of Parliament (s. 41(5) of that Act).

<sup>21</sup> The definition of ‘domestic violence’ in paragraph 12 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 forms part of the new statutory definition of ‘domestic abuse’ provided in section 1 of this Bill.

interests of justice for the witness to be cross-examined by a qualified legal representative appointed by the court and, if so, must appoint such a legal representative to cross-examine the witness in the interests of the party. The 'interests of justice' test will involve the court weighing whether the party's Article 6 and/or 8 rights will be breached if they cannot cross-examine the witness and if any other methods are used (such as the judge or a justices' clerk putting questions to the witness).

70. The Lord Chancellor will issue statutory guidance about the scope and nature of the role of the court-appointed qualified legal representative. It is intended that the guidance will elaborate what a representative may or may not be required or expected to do in the proceedings depending partly on the circumstances of the case. This guidance will assist the representatives, the parties and the court in knowing the scope of the role to be played and, to the extent that it provides guidance on what need not be done which might ordinarily be carried out by a legal representative who is responsible to a party (which a qualified legal representative is not under section 31W(7)), the Lord Chancellor will be required to consider the prohibited party's rights under Articles 6 and 8 ECHR when preparing the guidance.
71. The fees and costs of the court-appointed legal representative will be paid for from central funds. Taken as a whole, these provisions should ensure that the person's Article 6 rights are not prejudiced because he or she cannot undertake the cross-examination in person.
72. The rights of other parties (including the witness who is to be cross-examined if they are also a party) will also be better protected as the quality of evidence and conduct of the hearing will be improved as a result.
73. The Government does not consider these provisions amount to a limitation on Article 6 rights; rather they are ensuring a fair hearing for all parties.

#### *Article 8*

74. Article 8 may be engaged in so far as these proposals may interfere with the right to respect for private or family life. Whether private or family life exists in a given case or not will depend on the nature of the relationship between the individuals involved in a matter, not upon their legal status: it is a question of fact, depending on the real existence of close personal ties (*K v UK*<sup>22</sup>).
75. Where private or family life exists, there may be positive obligations inherent in an effective respect for that family life; and effective respect for family life may require the provision of civil law remedies (*Rasmussen v Denmark*<sup>23</sup>). However, the State has a wide margin of appreciation as to the need for, and content of, any measures taken to ensure respect (*Abdulaziz, Cabakes and Balkandali v UK*<sup>24</sup>).
76. The Government considers that, to the extent that it is necessary, the court's existing powers to make orders in relation to the protection of family life already

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<sup>22</sup> (1986) App. No. 11468/85.

<sup>23</sup> (1984) 7 EHRR 371.

<sup>24</sup> (1985) 7 EHRR 471.



protect Article 8 rights. For example, the Children Act 1989 gives the court powers which could be exercised to ensure a child has contact with his/her father where that is in the best interests of the child<sup>25</sup>.

77. Where protection can be sought from the courts, Article 8 may oblige a State to make this means of protection effectively accessible, where appropriate, to anyone who may wish to have recourse to it (*R (Gudanaviciene and Others) v Director of Legal Casework and Another*<sup>26</sup>). However, again the State has a wide margin of appreciation as to the need for, and content of, any measures taken to ensure respect for private and family life (*Abdulaziz, Cabakes and Balkandali v UK*<sup>27</sup>).

78. The Article 8 rights of the party who would undertake any cross-examination, and of other parties (whether they are to be cross-examined or not), are best protected by the court coming to the 'right' decision. This is best achieved if all witnesses are able to give the best quality evidence. The Government therefore considers that this clause ensures that the Article 8 rights of all involved in the case are protected.

### **Extraterritorial jurisdiction for section 1 of the Infant Life (Preservation) Act 1929 (clause 60)**

79. The Council of Europe Convention on preventing and combating violence against women and domestic violence ("the Istanbul Convention") requires extraterritorial jurisdiction to be extended to criminal conduct as set out within the Istanbul Convention for the specific purpose of protecting women against all forms of violence. Article 39(a) prohibits forced abortion.

80. Clause 60 gives effect to Article 39(a) in England and Wales by extending extraterritorial jurisdiction over the offences of actual bodily harm and grievous bodily harm (which themselves also give effect to Articles 33 and 35 of the Istanbul Convention), child destruction (contained within section 1 of the Infant Life (Preservation) Act 1929 ("ILPA 1929")) and maliciously administering a "noxious thing" (poison, etc), so as to endanger life or inflict grievous bodily harm or with intent to injure any other person (sections 23 and 24 of the Offences Against the Person Act 1861).

### *Article 8*

81. The Government considers that section 1 of the ILPA 1929 would fall within the ambit of Article 8 ECHR as it creates an offence of wilfully causing a miscarriage/abortion of a viable foetus (unless it was done in good faith to save the mother's life), which relates to the right to respect for private life. However, the Government considers that there is likely to be no, or at least only a very limited, interference with a woman's Article 8 rights caused by extending extraterritorial jurisdiction to this offence, with any interference being justifiable.

82. The Government considers that any interference would be limited because section 1 of the ILPA 1929 only applies to late stage pregnancies when the foetus is viable, and not to all stages of pregnancy. Further, the Government will be extending

<sup>25</sup> See sections 1 and 8 Children Act 1989.

<sup>26</sup> (2014) EWCA Civ 1622 §70 as cited in *Re K & H (Private Law: Public Funding)* § 50

<sup>27</sup> (1985) 7 EHHR 471.

extraterritorial jurisdiction to all offences contained within clauses 60 and Part 1 of Schedule 2 when they are committed *by*, but not against, a UK national or a person habitually resident in England and Wales – that is, they will only apply to offenders who are a UK national or a person habitually resident in England and Wales (“active nationality jurisdiction”) and not to victims who are a UK national or a person habitually resident in England and Wales (“passive nationality jurisdiction”). Extending extraterritorial jurisdiction for section 1 of the ILPA 1929 would not, therefore, prevent women who are UK nationals or persons habitually resident in England and Wales from seeking an abortion outside of the UK, or prevent women in other countries from seeking an abortion from a doctor who is a UK national or a UK resident.

83. Additionally, the Government will be extending extraterritorial jurisdiction over section 1 ILPA 1929 on a dual criminality basis. As such, the offence would only apply if the country where a woman sought an abortion also had an offence similar to section 1 of the ILPA 1929.

84. The Government considers that any interference would be justified. This is because in the interests of preventing crime, combating violence against women and protecting women’s rights, it would be necessary to extend extraterritorial jurisdiction in order to criminalise unlawful acts that cause an abortion/miscarriage at a late stage of the pregnancy, committed by a UK national or a person habitually resident in England and Wales against a woman in other countries. It is not envisaged that any such interference will impact on a woman willingly consenting to an abortion, rather it will impact upon unlawful abortions carried out against the woman’s wishes and therefore without her prior and informed consent – which is in line with Article 39(a) of the Istanbul Convention. The interference would therefore be a proportionate one which is necessary to ensure the UK complies with its obligations under the Istanbul Convention.

#### **Extraterritorial jurisdiction for section 25 of the Criminal Justice (Northern Ireland) Act 1945 (clause 61)**

85. The Istanbul Convention requires extraterritorial jurisdiction to be extended to criminal conduct as set out within the Convention for the specific purpose of protecting women against all forms of violence. Article 39(a) prohibits forced abortion.

86. Clause 61 gives effect to Article 39(a) in Northern Ireland by relying on extending extraterritorial jurisdiction for the offences of actual bodily harm and grievous bodily harm, and taking extraterritorial jurisdiction over the offences of child destruction (contained in section 25 of the Criminal Justice (Northern Ireland) Act 1945 (“CJA (NI) 1945”)) and maliciously administering a noxious thing (poison etc), so as to endanger life or inflict GBH or with intent to injure any other person (sections 23 and 24 of the OAPA 1861).

#### *Article 8*

87. It is considered that section 25 of the CJA (NI) 1945 would fall within the ambit of Article 8 ECHR as it creates an offence of wilfully causing a miscarriage/abortion of a viable foetus (unless it was done in good faith to save the life of the mother),

which relates to the right to respect for private life. It is considered that there is likely to be no, or at least only a very limited, interference with a woman's Article 8 rights caused by extending extraterritorial jurisdiction to this offence, with any interference being justifiable.

88. Any interference would be limited as section 25 of CJA (NI) 1945, like IPLA 1929, only applies to the late stages of pregnancy when the foetus is viable, and not all stages of pregnancy. The Bill will extend extraterritorial jurisdiction to all offences contained within clauses 61 and Part 3 of Schedule 2 when they are committed by and not against, a UK national or a person habitually resident in Northern Ireland ("active nationality jurisdiction") and not to victims who are a UK national or a person habitually resident in Northern Ireland ("passive nationality jurisdiction").
89. Extending extraterritorial jurisdiction for section 45 of CJA (NI) 1945 would not, therefore, prevent women who are UK nationals or persons habitually resident in Northern Ireland from seeking an abortion outside of the UK, or prevent women in other countries from seeking an abortion from a doctor who is a UK national or a UK resident.
90. The extension of extraterritorial jurisdiction over section 25 of CJA (NI) 1945 will also be on a dual criminality basis and the offence will only apply if the country where a woman sought an abortion also had an offence similar to section 25 of CJ (NI) 1945.
91. It is further considered that any interference would be justified for the reasons set out in paragraph 84 above.

### **Polygraph conditions for offenders released on licence (clause 63)**

92. Clause 63 extends the current provisions of section 28 of the Offender Management Act 2007, which provides for relevant sex offenders to have a polygraph testing condition included in their licence, to allow the Secretary of State to include such a condition in the licence of offenders who have committed certain offences in a domestic abuse context.
93. In practice, an offender with a polygraph testing condition on their licence will be compelled to answer questions in relation to their behaviour in the community whilst being assessed by experienced qualified probation officers who are trained as polygraph examiners to the standards set by the American Polygraph Association. The results of the tests are used to monitor compliance with other licence conditions, and to monitor dynamic risk factors. The information and results of the test are used by offender managers to refine and improve risk management plans.
94. Offenders who are subject to testing as part of their licence conditions cannot be recalled to custody for failing a polygraph test, that is where deception is indicated, however, they can be recalled for non-compliance or for making disclosures during the testing that they have breached other licence conditions, or that their risk has escalated to a level whereby they can no longer be safely managed in the community. Information gathered from an examination can be shared with the

police who are able to conduct further investigations into possible offences, but the information obtained during the polygraph may not be used in any proceedings against the released person for an offence, nor can the test be used to interrogate offenders about an ongoing investigation. As polygraph conditions will only be included on the licence of the most serious domestic abuse offenders, the majority of these offenders will be managed by the Multi-Agency Public Protection Arrangements (“MAPPA”). MAPPA (under the Criminal Justice Act 2003) provides for the prison and probation services, and police, to work together with other agencies to manage violent and sexual offenders in the community. This duty to act in cooperation includes the statutory ability to share information to manage the offender’s risk, which allows for the results of polygraph tests to be shared with the police where the results are relevant to the offender’s level of risk, and the sharing of the information is necessary and proportionate. Polygraph information relating to non-MAPPA offenders may be lawfully shared where provided for by statute (such as under section 14 of the Offender Management Act 2007) and where necessary and proportionate.

95. The Polygraph Rules 2009 (SI 2009/619) and the current polygraph policy set out the strict parameters of a polygraph test which must be followed by polygraph operators in order to maintain accuracy of testing and to control the questions to be asked within each session. Polygraph operators must be independent from the case and cannot have been involved in the management of the offender in any other capacity. All sessions are audio-visually recorded and reviewed by independent Polygraph supervisors who quality assure one in five examinations. Polygraph examiners also have their work reviewed in Quality Assurance sessions three times per annum. This includes reviewing the electronically recorded session and reviewing the report drafted by the operator as a result of the session. During the examinations, the operator must ask one or more comparison questions (questions asked to establish a baseline reaction) and one, but no more than four, relevant questions. The examination may be repeated for comparison of reactions and to ensure accuracy of response. The whole session includes a pre-test interview, the polygraph examinations and the post-test interview. During the pre-test interview, the operator will inform the offender of the questions to be asked, and the offender may make any admissions at this stage. In addition, the examiner will go through the licence conditions with the offender to make sure they clearly understand what each condition means. During the post-test interview, the offender is given opportunities to discuss the results of the test and give reasons which explain any results.

96. The offender will be asked both relevant questions and comparison or control questions during the examination. The comparison or control questions are used to establish the offender’s physiological responses to questions not relevant to the issues of concern and provide a baseline reading, whilst the relevant questions are used to deal with the issues that are of concern. Section 29 of the Offender Management Act 2007 sets out that questions may be asked which aim to: monitor compliance with other conditions, for example an exclusion zone or non-contact with a victim; and improve the way in which the offender is managed in the community. The Offender Manager will highlight areas of concern regarding the offender’s compliance, behaviour or management in the community, and it is the

polygraph operator's role to formulate questions to assist the Offender Manager to manage the offender in the community.

97. Article 5 is engaged because domestic abuse offenders being polygraph tested may be recalled to prison as a result of a test, or based on evidence adduced from information obtained from a test. Article 6 is engaged as information from the tests may be passed on to police and although the information is not admissible in court against a domestic abuse offender, it can be used for investigative purposes and could potentially lead to further charges. Article 7 is engaged because the provisions will be applied retrospectively to all relevant offenders who already have relevant sentences imposed at the point of commencement. Article 8 is engaged as the licence condition directly relates to offenders' private lives.

#### *Article 5*

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

99. The powers to recall are very wide, and there is no duty on the Secretary of State to further investigate or test the evidence before recalling (*R (Abedin) v Secretary of State and West Midlands Probation Trust* [2014] EWHC 78). The entirety of a determinate sentence prisoner's sentence is decided by the sentencing court and is in accordance with a procedure prescribed by law under Article 5(1). Furthermore, case law has determined that Article 5(4) does not apply to recalls of any determinate sentence prisoners (*R (Whiston) v Secretary of State* [2014] UKSC 39 and *Brown v Parole Board for Scotland v Parole Board for Scotland and another* [2017] UKSC 69). There is, however, an additional safeguard in place wherein determinate sentence prisoners who are recalled will have their case considered by the Parole Board, who can direct the Secretary of State to release if the offender's risk no longer requires them to be confined. Article 5(4) does apply to indeterminate sentence prisoners, but all indeterminate sentence prisoners who are recalled have their case considered by the Parole Board in an Article 5(4) compliant process. The Parole Board take into consideration all evidence, including the reasons for recall, and determine whether the offender is safe to be released (*R (Gulliver) v Parole Board* [2007] EWCA Civ 1386, *R (Calder) v Secretary of State for Justice* [2015] EWCA Civ 1050).

100. It is therefore the Government's position that all of the processes and safeguards in place prevent there being an unlawful interference with Article 5.

#### *Article 6*

101. Information from polygraph tests can be shared with police by way of MAPPA arrangements. Police can use the information shared from the test to conduct further investigations into whether criminal offences have taken place. This may raise concerns regarding interference with Article 6. However, protections against any unlawful interference with Article 6 in relation to criminal charges are built into

the Offender Management Act 2007 - section 30 of which contains express provision prohibiting the use in criminal proceedings of information obtained from a polygraph test.

102. As set out above in paragraph 96 above, section 29 of the Offender Management Act 2007 means that questions should be limited to questions that aim to monitor compliance with other conditions of the offender's licence, and questions that will improve the way the offender is managed in the community. This can include the offender's behaviour in the community, but the test cannot be used to ask questions concerning an ongoing investigation into an offence.

103. Section 30 sets out that any statement made by an offender while participating in a polygraph session, and any physiological reaction of the offender while being questioned in the course of a polygraph question, may not be used in any proceedings for an offence.

104. Article 6 could be engaged in relation to civil rights if information from the tests was used to apply for a civil order against the offender, for example a DAPO. However, it is the Government's position that this would not breach the offender's Article 6 rights as the evidence presented would need to meet the relevant test for the order, and the result of a failed polygraph test would not be the only evidence provided in such an application but would be supported by other evidence. There would also be further safeguards in the judicial process, as the court would be able to assess the evidence as presented and could refuse to grant the order or make the evidence inadmissible, if it would be unfair to the offender to admit it.

105. In considering these issues the court would be bound to act in compliance with the Human Rights Act 1998. Consequently, if the court concluded, taking into account relevant public interest matters, that making any such order based on information from a polygraph test would breach the offender's Article 6 rights it would be obliged to refuse the application for the order. It is noted also that the focus of the Article 6 case law on the rule against self-incrimination relates to criminal and not civil proceedings and that Article 6 can be limited where there is justification for so doing.

#### *Article 7*

106. As the provisions are to apply to all offenders serving a relevant custodial sentence, and will therefore work retrospectively, Article 7 has been considered. However, it is not the intention that domestic abuse offenders who have already been released will have the condition added to their licence, unless their risk of harm substantially increases so that it is necessary and proportionate to do so to manage them in the community. There is an established body of case-law to the effect that release provisions (including the imposition of licence conditions) are the administration of the sentence and do not form part of the penalty for the purposes of Article 7 of the ECHR (the right not to be subject to a heavier penalty than applicable at the time of conviction) - Uttley v UK (Application No. 3694/03) Coszanski v Sweden (Application No. 22318/02), and M v Germany M v Germany (Application 19359/04). See also Kafkaris v Cyprus (Application No 21906/04) at paragraph 151 of the judgment.

107. 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: release arrangements are part of the execution of the penalty, not the penalty itself. When the nature and purpose of a measure relate to a change in a regime for early release, this does not form part of the ‘penalty’ within the meaning of Article 7 (*Hogben v United Kingdom* (Application No. 11653/85, 3 March 1986); *Del Rio Prada v Spain* (Application No 42750/09, 21 October 2013)).
108. Domestically, the changes are in line with the judgment in *R(Uttley) v Secretary of State for the Home Department* [2003] EWCA Civ 1130 in that it is a change to the administration of the sentence and not to the sentence itself as imposed by the court. The case concerned a post-sentence change in release provisions that required the applicant to be released on licence rather than unconditionally. The House of Lords found that there was no breach of Article 7 as the early release provisions “mitigates rather than augments the severity of the sentence of imprisonment which would otherwise be served”. The Supreme Court also affirmed the position in *R v Docherty* [2017] 1 WLR 181 that the release conditions applied to a sentence are not part of the “penalty” for the purposes of Article 7.

#### *Article 8*

109. Mandatory polygraph testing engages Article 8 and it is accepted that the licence condition will interfere with the Article 8 rights of the individuals required to take part in the testing as part of their licence. When the imposition of polygraph condition for sexual offenders was debated during the passage of the now Offender Management Act 2007, it was the then Government’s position that any interference with an offender’s Article 8 rights caused by mandatory polygraph testing would be justified because the pilot and any subsequent roll-out would be in accordance with the law, and in the interests of public safety. This remains the position for the provision being extended to domestic abuse offenders - any interference with Article 8 will be in pursuit of a legitimate aim, namely: public safety, the prevention of crime/disorder, and the protection of the rights and freedoms of others.
110. It is the Government’s intention that the condition will only be imposed on offenders who are assessed as high/very high risk of causing serious harm in their static risk assessment, or on a discretionary basis on offenders who are not assessed as high/very high risk, but the polygraph condition is necessary and proportionate in order to manage them in the community. These cases will only arise in limited circumstances where offenders have not been assessed as high or very high risk of serious harm in their static risk assessment but there is evidence of dynamic risk factors that indicate an imminent risk of serious harm upon release. It is therefore the Government’s position that any interference with offenders’ Article 8 rights will be compliant with the ECHR.

#### **Domestic violence disclosure scheme: statutory guidance (clause 64)**

111. Clause 64 puts the guidance issued by the Secretary of State supporting the domestic violence disclosure scheme on a statutory footing. This is with a view to

encouraging greater, consistent and transparent use of the scheme by police chief officers.

112. Under the existing non-statutory scheme, the police may already disclose personal information, including conviction records, to third parties. In order to make such disclosures, the police rely (and will continue to rely) on their common law powers that enable them to make disclosures where it is necessary to prevent crime. Their common law powers to share information with the public have been thoroughly and consistently recognised by the courts so long as any disclosure meets the thresholds of relevancy and proportionality. The statutory Code of Conduct, set out in police regulations, requires police officers to treat information with respect and to access or disclose it only in the proper course of police duties. The police may make limited, reasonable disclosures of confidential information, but only to the extent that such disclosures are necessary, in purpose and degree, to carry out the public duties of the police. Any disclosure by the police under the scheme must also be in accordance with existing legal framework and, in particular, the Human Rights Act 1998, data protection legislation and the Rehabilitation of Offenders Act (“ROA”) 1974.

113. For the reasons set out above and because of the obligation on chief officers of police, when processing the data in connection with the investigation of domestic abuse, to comply with Part 3 of the Data Protection Act 2018, the power to disclose this personal information under the scheme is ECHR compliant. The rules and exemptions applicable to the processing of personal data under Part 3 of the Data Protection Act 2018 reflect the balancing exercise inherent in Article 8 and compliance with those rules will generally ensure respect for data subjects’ rights under Article 8. There should be no interference with the right to respect for private and family life (which includes an individual’s ability to relate to the world and their reputation) except in accordance with the law and as is necessary for the prevention of crime; in other words disclosure of personal information which constitutes an interference with an individual’s private and family life must be in pursuit of a legitimate aim under Article 8(2) such as the prevention of crime.

#### **Secure tenancies granted to victims of domestic abuse (clause 65)**

114. Clause 65 imposes requirements on local authorities in relation to the grant of a secure tenancy to a victim of domestic abuse in certain circumstances.

115. Currently, under the Housing Act 1985 (“the 1985 Act”), local authority landlords that grant a secure tenancy may grant either a secure periodic tenancy (“lifetime tenancy”) or a secure flexible tenancy.

116. Lifetime tenancies have no fixed end date and can only be brought to an end by the landlord obtaining a possession order on one of the grounds for possession set out in Schedule 2 to the 1985 Act, which are mainly fault grounds. Flexible tenancies, which were introduced by the Localism Act 2011, are tenancies granted for a fixed term of not less than two years. It is for the local authority to decide which type of tenancy to grant.

117. The purpose of this clause is to require a local authority to grant a new lifetime tenancy rather than a flexible tenancy if they grant a new secure tenancy to a person



who has been a victim of domestic abuse, who is or was the tenant or joint tenant of a local authority or private registered provider of social housing under a secure lifetime or assured tenancy (other than an assured shorthold tenancy) and the new secure tenancy is granted for reasons connected with the abuse.

118. The provision made in this clause will have effect until the day on which paragraph 4 of Schedule 7 to the Housing and Planning Act 2016 comes fully into force. The equivalent provision from that day is made by the Secure Tenancies (Victims of Domestic Abuse) Act 2018.

#### *Article 6*

119. It may be argued that Article 6 is engaged by the decision by a local authority as to whether to grant a secure tenancy, following the ECHR decision in *Ali v United Kingdom* [2015] ECHR 40378/10.

120. However, the domestic legal position has departed from that of the European Court. In *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36, the Supreme Court held that the decision in *Ali v UK* was not a sufficient reason to depart from its fully considered and unanimous conclusion in *Ali v Birmingham* [2010] UKSC 8 that Article 6 is not engaged by the allocation of social housing. The domestic legal position is that the allocation of social housing is a welfare benefit which does not amount to a civil right protected by Article 6 because it is dependent upon the exercise of judgment by the relevant authority.

121. However, in any event, the Government considers that were Article 6 engaged there would be no interference with the Article 6 right because the requirement of a fair hearing before an impartial tribunal may be satisfied by a combination of due enquiry into the facts at the administrative adjudicative stage and recourse to the court by way of judicial review in the case of dispute in relation to the local authority's decision (*Ali v UK*).

#### *Article 8*

122. Article 8 is engaged by the secure tenancy provision as the ECHR has previously held, in various contexts, that the concept of private life includes a person's physical and psychological integrity (*Bevacqua and S. v. Bulgaria*) which are threatened by domestic abuse. The Government considers that this clause enhances the protection of domestic abuse victims by requiring a local authority that is rehousing a domestic abuse victim in a secure tenancy for reasons connected with that abuse to give them equivalent security of tenure to that they enjoyed under a current or previous secure or assured social tenancy (other than an assured shorthold tenancy). The aim is to help enable victims of domestic abuse to pursue a safe and secure family and private life.

#### *A1P1*

123. A1P1 is engaged as a tenancy is a possession for the purposes of the Article. However, the right is not interfered with as this clause does not require a local authority to bring a tenancy to an end or enable them to do so in circumstances

where this would otherwise breach any joint tenant's A1P1 rights. Rather it makes provision for the circumstance in which the tenant needs to be rehoused or to be granted a new tenancy for reasons connected with domestic abuse. It enhances the rights of such a tenant as it requires a local authority who grants a new secure tenancy in this circumstance to provide equivalent security of tenure to that that the tenant enjoyed under a current or previous secure or assured social tenancy (other than an assured shorthold tenancy). The rights of any joint tenant of the victim are unaffected by this measure.

**Home Office / Ministry of Justice / MHCLG  
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