

POLICING AND CRIME BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

SUPPLEMENTAL MEMORANDUM BY THE HOME OFFICE

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to provisions contained in the Government amendments tabled for day two of Commons Report stage of the Policing and Crime Bill.

Inspection of fire and rescue authorities

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

Article 8 and Article 1 Protocol 1.

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

both efficient and effective and the reports of section 28 inspectors will fulfil an important role in ensuring this.

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

Anonymity of victims of forced marriage

6. New clause "*Anonymity of victims of forced marriage*" amends the Anti-social Behaviour, Crime and Policing Act 2014 by inserting a new section 122A and new Schedule 6A. These provide for anonymity for the alleged victim where an allegation has been made that an offence of forced marriage has been committed against them. Under the new provisions, the publication of any matter likely to lead members of the public to identify the alleged victim during that person's lifetime is an offence.

Article 10

7. Article 10 provides the right to freedom of expression, including the right to hold opinions and to receive and impart information and ideas without interference.
8. Paragraph 2 of new Schedule 6A makes it an offence to include in any publication any matter likely to lead members of the public to identify a person against whom the offence of forced marriage is alleged to have been committed during that person's lifetime. This engages Article 10.
9. The purpose of the new offence is to provide protection for victims of forced marriage. Forced marriage is a form of so-called 'honour-based' violence (that is, a type of crime which is committed to protect or defend the 'honour' of the family and/or the community), and victims of it may fear that coming forward will expose them to public shame or put them at further risk of harm. In providing them with anonymity both at the investigation stage and at the trial stage, it is hoped that more victims will have the confidence to report this offence to the police without the fear of these consequences.
10. A victim of forced marriage may have suffered other offences before or during the course of the marriage, for example, rape or sexual assault. The victims of these types of offence are already provided with anonymity of the sort that the new provisions provide through provisions in the Sexual Offences (Amendment) Act 1992. In the same way that public knowledge of the indignity and violation that a person suffers through the commission of sexual offences can be extremely distressing so too can public knowledge of a forced marriage.
11. For these reasons, restrictions on reporting matters that would lead to the identification of an alleged victim pursue the legitimate aims under Article 10 of protecting the victim's physical safety and reputation as well as that of preventing crime. Paragraph 1(3) of the new Schedule 6A allows a court to disapply, by

direction, the reporting restriction where: (a) a person's defence would be substantially prejudiced if the direction were not given; or (b) the effect of the anonymity provision is to impose a substantial and unreasonable restriction on the reporting of the proceedings and it is in the public interest to remove or relax the restriction.

12. The Government is therefore satisfied that any restriction on Article 10 rights is justified as a proportionate means of achieving the legitimate aim of protecting a victim's rights and increasing the possibility of bringing proceedings against people accused of forced marriage offences (see by way of analogy *Gordon Brown v UK Appn No 44223/98*, 2 July 2002 (unreported)).

Article 6

13. The offence of breaching the prohibition on publication as drafted is constructed as a strict liability offence with statutory defences. However, the Government recognises that paragraph 3(2) and (3) of new Schedule 6A may be viewed as imposing a reverse legal burden on the defence and so has considered the compatibility of paragraph 3(2) and (3) with Article 6.
14. The imposition of a reverse burden does not in principle represent an infringement of a defendant's rights under Article 6(2) (*Gordon Brown v UK Appn No 44223/98*, 2 July 2002 (unreported)). In *Sheldrake v DPP* [2005] 1 AC 264 the House of Lords held that both *Lambert* [2002] 2 AC 545 and *Johnstone* [2003] 1 WLR 1736 should be regarded as primary domestic authorities on reverse burdens. The domestic authorities make it clear that whether statutory provision imposing a reverse legal burden is compatible with Article 6(2) varies according to the particular offence and underlying policy objective in question. An assessment must be made of whether the provision is objectively justified and proportionate (*Lambert*).
15. According to *Lambert*, the question of whether the reverse burden is compatible with Article 6 should be approached in three stages. First, whether the provision interfered with Article 6(2), secondly whether there was an objective justification for the interference and thirdly whether the interference was proportionate. Regard should be had to the punishment which may result, to the extent and nature of the factual matters which the defendant must prove, how readily provable they are and their relative importance to the matters to be proved by the prosecution (*Johnstone*).
16. The Government is satisfied about the compatibility of these provisions with Article 6, taking into account the case law. There exists a clear and objective justification for the reversal. The policy aim behind the offence is to encourage victims to report forced marriage offences committed against them and to increase the number of prosecutions by helping ensure that the victim feels safe in reporting the crime. There is a strong public interest in achieving this. Forced marriage is a serious crime and this new provision forms part of a wider package of measures to further the Government's commitment to end it. The reverse burden imposed invites the defendant in a particular case to justify their publication of a matter identifying the alleged victim of forced marriage on the basis that they were not aware and did not suspect or have reason to suspect that the allegation had been made or that the

publication included the matter likely to lead members of the public to identify the alleged victim. These matters to be proved on the balance of probabilities are matters within the knowledge of the defendant.

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

United Nations Convention on the Rights of the Child

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

Cross border powers of arrest

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

Article 5

20. The new power of cross-border arrest gives officers the power to arrest and detain a person for up to 36 hours. Article 5 is engaged by the new power. Article 5(1)(c) permits the arrest or detention of a person effected for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so. The express purpose of the

arrest under the new power is to facilitate a subsequent arrest under existing cross-border powers by officers from the investigating jurisdiction or arrest pursuant to a warrant. Arrest and detention are subject to a number of safeguards, which protect the suspect from arbitrariness (*Chahal v. UK* (1997) 23 E.H.R.R. 413, at [118]). The new power of arrest is only available where the officer has reasonable grounds to believe that the person committed an offence which is specified in secondary legislation for this purpose. The suspect can only be held by the arresting force initially for three hours. Detention beyond that period must be authorised by an officer of the rank of inspector or above in both the arresting force and the investigating force, who must be satisfied, among other things, that it is in the interests of justice to hold the suspect. The rights of suspects in each jurisdiction in relation to the information to be provided on arrest, notification of other persons that the person has been arrested and access to legal advice are applied to persons arrested under this new power. This new power of arrest will ensure that suspected criminals cannot evade arrest simply by travelling to another jurisdiction within the UK. The Government considers that arrest and detention under this new power is permitted under Article 5(1)(c).

Article 8

21. Officers using the new power of cross-border arrest will be able to rely on existing powers of entry after arrest, which provides for access to premises. In addition, officers using any cross-border power of arrest will be able to rely on the new power of entry, which provides for access to premises. Both provisions engage Article 8. To the extent that these provisions give rise to any interference with that Article, the Government considers that any such interference is justified. Any interference will be in accordance with law as both powers of entry are clearly defined in primary legislation. The powers of entry will be in pursuance of the legitimate aim of the prevention of disorder or crime, since the powers will be used either for the purpose of arresting a person who there are reasonable grounds to suspect has committed a crime or for the purpose of searching for evidence of the offence.
22. In exercising the power, officers will have to act compatibly with Convention rights. The safeguards attached to the powers of entry mean that they are proportionate to the legitimate aim. The powers of entry for the purpose of arresting persons in England and Wales and Northern Ireland is only available where the officer has reasonable grounds for believing that the person whom he or she is seeking is on the premises and (if there is no warrant for arrest) the offence is an indictable offence. The new power of entry for the purpose of arresting persons in Scotland carries the same safeguards as the powers of entry available to Scottish officers for offences committed in Scotland. The existing power of entry after arrest is only available where the officer has reasonable grounds for believing that there is evidence on the premises relating to the offence for which the was arrested, and the search is only permitted to the extent that is reasonably required for the purpose of discovering any such evidence.
23. Given the nature of these powers and the various safeguards, the Government considers that any interference with Article 8 is necessary and proportionate.

Article 1 Protocol 1

24. The existing powers of entry after arrest are amended to enable seizure of items found on premises during a search. These provisions engage Article 1 Protocol 1. To the extent that these provisions give rise to any interference with that Article, the Government considers that any such interference is justified. Any interference will be in accordance with law because the powers of seizure are clearly defined in primary legislation. The powers of seizure will be in pursuance of the legitimate aim of the prevention and prosecution of crime, since they will be used to seize and retain any item where there are reasonable grounds to believe that it is evidence of an offence, or has been obtained in consequence of the commission of an offence. It is plainly in the public interest to ensure that evidence is seized and retained by the police where it may be used to prosecute an offence. The Government considers that the safeguards on the power of seizure mean that it is proportionate to the legitimate aim. In exercising the power, officers will have to act compatibly with Convention rights. An item may only be seized if the officer has reasonable grounds for believing that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed. Records of seizure must be provided and persons may request access to seized items under the supervision of a constable.
25. Given the nature of these powers and the various safeguards, the Government considers that any interference with Article 1 Protocol 1 is necessary and proportionate.

Powers to seize invalid travel documents

26. New clause "*Powers to seize invalid travel documents*" amends Schedule 8 to the Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act"). This provides for an extension of the existing powers of search and seizure to include searches for foreign travel documents as well as providing a new power of entry in relation to both British passports and foreign travel documents.
27. The extension of the power of search and seizure to include foreign travel documents is proposed in order to disrupt the travel plans of would-be foreign fighters travelling to Syria or other conflict zones. Since December 2014, European Economic Area ("EEA") Member States, plus Switzerland, have been distributing details of such travel documents to law enforcement officers across Europe, asking that the documents be seized. The police and Immigration Enforcement, however, currently have no power to comply with such a request unless the passport is encountered at a port. So police officers and immigration officers who believe an individual is in possession of such an invalidated travel document currently have no power to search for or seize such documents away from a port and these new provisions will rectify that position.
28. The new power of entry for constables will enable constables to enter premises to search for and seize invalid travel documents. This means constables can enter premises to search for invalidated foreign travel documents and British passports that have been cancelled by Her Majesty's Passport Office ("HMPO") on public policy grounds (where the person to whom it has been issued has been involved in

activities so undesirable that it is contrary to the public interest for the person to have access to passport facilities). This is a power that is used primarily to disrupt the travel of British passport holders who wish to travel for terrorist related purposes.

29. The existing requirement in the 2014 Act for Secretary of State authorisation to use the Schedule 8 powers in relation to British passports cancelled under the Royal Prerogative for national security reasons will be removed in order to ensure that the power can be used more flexibly during operations and to align the powers relating to British passports with those in relation to foreign travel documents. This change will enable the police to act quickly to seize a cancelled British passport where it is necessary to do so; any decision to cancel a British passport on public interest grounds would, as now, continue to need the Home Secretary's agreement. In addition, as an authorisation is not appropriate in relation to foreign travel documents, leaving it in place would result in a mis-match between the powers in relation to British passports as compared to those in relation to foreign travel documents.

Article 5

30. The power to search a person for a cancelled British passport already exists. This may be exercised at a port by a constable, an immigration officer or a customs officer or away from a port by a constable. The new provisions would allow immigration officers to search a person away from a port and would allow both immigration officers and constables to search for a wider range of documents – foreign travel documents invalidated by the issuing authorities. These searches are likely to be carried out very rarely and are likely to require only a very short detention of the person searched. Article 5 will be engaged by such searches and the case law (for example, *Gillan & Quinton*¹) has held that such searches must be lawful and in accordance with a procedure prescribed by law. The Government considers that the short period of detention necessary to carry out a search of a person is necessary and proportionate to the aim of disrupting the travel of those suspected of serious criminal intent and will, if carried out in accordance with these powers as set out, be in accordance with the law.

Article 8

31. The new power of entry into premises to search for and seize invalid travel documents will engage Article 8. The numbers of such searches are likely to be small and the pre-conditions that must arise before any such search is carried out are likely to occur only rarely. In relation to foreign travel documents the issuing state will have actively decided to invalidate the document on public protection grounds and requested all other EEA member states to seize and return the document. Without this new power being available the person in possession could retain the document and continue to use it to travel abroad or prove identity even though there is good reason to believe that such travel may be for terrorist-related purposes.

¹ *Gillan and Quinton v. United Kingdom* - 4158/05 [2010] ECHR 28

32. In relation to British passports, the Secretary of State will have made a decision on public policy grounds – most commonly that the person should not hold a British passport on the grounds that it may be used for terrorist-related travel. Once a passport has been cancelled by HMPO it is necessary to retrieve the document in order to ensure that it cannot continue to be used. Without the power of entry the police have no effective way of ensuring that the document is retrieved and put beyond use.
33. Given the nature of these powers and the various safeguards, the Government considers that any interference with Article 8 is necessary and proportionate. Any power of entry must be justified and necessary and in accordance with law for a legitimate aim. The Government believes that this power is justified in the interests of national security and for the prevention of crime.
34. In addition to the safeguards provided for in this Bill, any constable effecting a power of entry will be subject to the requirements of the Home Office code of practice on powers of entry² which provides detailed guidance on the exercise of powers of entry.
35. It is likely that such entry will be a measure of last resort where the document has not been returned voluntarily and it is believed that there is a real risk of its use for criminal purposes.

Article 1 Protocol 1

36. British passports remain the property of the Crown at all times and therefore their seizure in the exercise of these powers will not directly engage Article 1 Protocol 1. In relation to foreign travel documents, the only documents to be seized under these powers will be those actively invalidated by the issuing authorities where the state concerned has requested their seizure and return by way of an Article 38 Schengen Information System³ alert. These documents will be returned to those states at their request. If it is the case that these documents are legally the property of the person to whom they have been issued, there will be an interference with that person's Article 1 Protocol 1 rights but such interference will be necessary and proportionate in order to comply with the request of the issuing state and to disrupt travel of the person in the public interest.

Retention of Fingerprints and DNA

37. New clause (*Retention of fingerprints and DNA profiles: PACE*) amends the Police and Criminal Evidence Act 1984 ("PACE") to enable DNA profiles and fingerprint samples ('biometric material') to be retained on the basis of convictions *outside* England and Wales in the same way as for convictions in England and Wales (the retention power would not apply in cases where the conviction elsewhere is for an

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/383079/Code_of_Practice_-_Powers_of_Entry__web_.pdf

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:205:0063:0084:EN:PDF>

act which is not an offence here). Currently, biometric material may only be retained from persons convicted of an offence outside of England and Wales in limited circumstances, so this clause will close this gap and ensure consistency in the treatment of offenders.

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

Article 8

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

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

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

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

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

Home Office
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