

OFFENSIVE WEAPONS BILL
EUROPEAN CONVENTION ON HUMAN RIGHTS
SUPPLEMENTAL MEMORANDUM BY THE HOME OFFICE

Introduction

1. The Home Office published a memorandum addressing issues arising under the European Convention on Human Rights (“ECHR”) on introduction of the Offensive Weapons Bill in the House of Commons on 20 June 2018. This supplementary memorandum addresses the issues arising from Government amendments, tabled on 29 January 2019 for Lords Committee Stage, which provide for Knife Crime Prevention Orders (“KCPOs”). This memorandum has been prepared by the Home Office.
2. This memorandum also considers the new amendments in light of those rights set out in the United Nations Convention on the Rights of the Child (“UNCRC”). In the Government’s view the Bill is consistent with the UNCRC.

Knife Crime Prevention Orders (“KCPO”)

3. The Government amendments insert 19 new clauses which will form Part 5 of the Bill when it is reprinted. These new clauses make provision for a new type of preventative civil order, a KCPO. These provisions may engage Articles 5, 6, 8, 9, 10,11 and Article 1 of Protocol 1 (“A1P1”).
4. A KCPO can be made by the court on application of the prosecution in relation to a person aged 12 or over who has been convicted of a relevant offence⁽¹⁾, if it is considered necessary to protect a person or persons in England and Wales from the risk of harm involving a bladed article⁽²⁾ or to prevent the individual from committing an offence involving a bladed article. A KCPO may also be made by the court on application of the police⁽³⁾, as a freestanding matter, in relation to a person aged 12 or over who has had a bladed article with him on two or more occasions in the relevant period⁽⁴⁾ without good reason or lawful authority, where it is considered necessary to protect the public from harm from knife crime or to prevent offending involving a knife.

(1) An offence is a relevant offence if the offence involved violence and a bladed article was used by the defendant or any other person, in the commission of the offence or the defendant or another person who committed the offence had a bladed article with them when the offence was committed.

(2) An article to which section 139 of the Criminal Justice Act 1988 applies.

(3) A chief officer of police, the chief constable of British Transport Police Force or the chief constable of the Ministry of Defence Police.

(4) The “relevant period” means the period of two years ending with the date on which the order is made; but an event may be taken into account only if it occurred after the coming into force of the relevant provisions.

5. A KCPO may include prohibitions or requirements which assist in preventing harm to persons in England or Wales or the commission by the individual of an offence involving a bladed article. Such prohibitions may include, for example, not having particular articles with them, not entering a particular area, complying with a curfew etc. The requirements may include, for example, attendance at a course to educate individuals on knife crime and its effects to reduce offending. The requirements would be designed to deal with the causes of the individual's behaviour, thus aiming to reduce offending rates in the long term as well as violence involving knives.

6. In relation to KCPOs:
 - the court may make an interim order on both with and without notice applications (new clauses *Interim knife crime prevention order: application without notice* and *Interim knife crime prevention order: application not determined*);
 - the person concerned must comply with limited notification requirements. Failure to comply is an offence. (new clauses *Notification requirements* and *Offences relating to notification*);
 - the person concerned (and others) may apply to vary, renew or discharge an order if circumstances change (new clause *Variation, renewal or discharge of knife crime prevention order etc*);
 - the court may order review hearings to consider the variation or discharge of an order and, if prohibitions or requirements contained in the order exceed one year, must order a review hearing annually (new clause *Review of knife crime prevention order*);
 - the person concerned may appeal the making, variation, renewal or discharge of an order (new clause *Appeal against knife crime prevention order etc*); and
 - breach of an order without reasonable excuse is an offence (new clause *Offence of breaching knife crime prevention order etc*).

Article 5

7. The provisions engage Article 5 as breach of an order and failure to comply with the notification requirement are criminal offences, which can result in the arrest and detention of an individual. The applicable power of arrest lies in section 24 of the Police and Criminal Evidence Act 1984: constables may only carry out an arrest if they have a reasonable suspicion of the commission of an offence. The penalty for breach is set out in primary legislation (new clause *Offence of breaching knife crime prevention order etc*). As such, the penalty and power of arrest, is in accordance with a procedure prescribed by law, and falls within the permissible grounds in Article 5(1): the lawful detention of a person after conviction (Article 5(1)(a)); the lawful arrest or detention of a person for non-compliance with the lawful order of a court (Article 5(1)(b)); and the lawful arrest or detention of a person effected for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence (Article 5(1)(c)). The protections provided for by Article 5 (3) in respect of arrest are met. The subject of the order will be able to appeal against conviction and the resulting sentence in the usual way.

8. Importantly, Article 5 is concerned with the deprivation of liberty and not with mere restrictions on freedom of movement. The provisions give the court discretion to impose prohibitions and/or positive requirements on an individual in circumstances where they have not been convicted of an offence. But, if doing so, the court may only impose prohibitions or requirements restricting an individual's movements (e.g. curfew, attendance at a particular location, geographical restrictions). The ECtHR has held, in Guzzardi v Italy, that the difference between restriction on movement and deprivation of liberty is one of degree or intensity, rather than nature or substance⁽⁵⁾. The domestic courts have held, in individual cases, that no deprivation of liberty arose from control orders imposing a curfew alongside other restrictions on conduct (in E v Secretary of State for the Home Department and MB⁽⁶⁾). This analysis applies to KCPOs. The KCPO provisions allow courts to determine appropriate prohibitions and/or requirements which do not amount to the kind of arbitrary detention proscribed by Article 5.

9. Accordingly, the Government is of the view that the provisions are compatible with Article 5.

Article 6

10. Article 6 of the ECHR deals with the determination of civil rights and obligations on the one hand and criminal charges on the other. The burden of proof for the making of a KCPO is the civil standard (on the balance of probabilities). The Government is satisfied that proceedings for making KCPOs do not involve determination of a criminal charge. There are three established criteria for determining whether a case involves such determination and therefore the application of the provisions of Article 6(2) and (3): (a) domestic classification of proceedings (not determinative); (b) nature of the offence; and (c) nature and severity of the penalty⁽⁷⁾. The domestic classification of KCPO proceedings is civil. Whilst the conduct alleged on the part of those against whom a KCPO is sought may be criminal, it is not necessarily so. A KCPO is not, in the Government's view, a penalty: the legislative aim underpinning the creation of KCPOs is the prevention of, and diversion from, knife-crime rather than the punishment of perpetrators and the terms of a KCPO are statutorily confined to those "necessary" for protective purposes⁽⁸⁾. The Courts have supported this assessment in relation to like civil orders, including former anti-social behaviour orders in R (McCann & Others) v Crown Court at Manchester⁽⁹⁾ and non-

⁽⁵⁾ Guzzardi v Italy (1980) 3 EHRR 333. See also De Tommaso v. Italy (Application no. 43395/09) and Stanev v. Bulgaria (Application no. 36760/06).

⁽⁶⁾ E v Secretary of State for the Home Department [2007] UKHL 47. Secretary of State for the Home Department v MB (FC) [2007] UKHL 46. See also P v Cheshire West and Chester Council [2014] UKSC, 19.

⁽⁷⁾ Engel v Netherlands (1979-80) 1 EHRR 647.

⁽⁸⁾ See R (McCann) v Crown Court at Manchester [2003] 1 AC 787; Secretary of State for the Home Department v MB [2007] UKHL 46; Chief Constable of Lancashire v Wilson and others [2015] EWHC 2763; Jones v Birmingham City Council [2018] EWCA Civ 1189; and ECtHR authorities Mafiosi (Guzzardi v Italy (1981) 3 EHRR 33, Ciulla v Italy (1991) 13 EHRR 346, M v Italy (1991) 70 DR 59, Raimondo v Italy (1994) 18 EHRR 237; Tomasso v Italy [2017] ECHR 205.

⁽⁹⁾ R (McCann) v Crown Court at Manchester [2003] 1 AC 787

derogating control orders (now replaced by TPIMs) in Secretary of State for the Home Department v MB⁽¹⁰⁾.

11. Consequently, in relation to Article 6, the Government considers that these civil proceedings clearly satisfy any fair trial requirements arising under the civil limb of Article 6(1). The rules which govern applications for an order, whether under new clause *Knife crime prevention order made otherwise than on conviction* and *Requirements for application for order under section (Knife crime prevention order made otherwise than on conviction)* or *Knife crime prevention order made on conviction*, ensure participation of the person concerned in the court process, and the existence of a prescribed right of appeal and ability to subsequently apply to the court to vary or discharge the order affords further safeguards. Before applying for an order against a person aged under 18, the applicant must consult with the local youth offending team. Provision is made for legal aid. In relation to the application of civil (as opposed to the criminal) standard of proof, the Government is satisfied that the use of the civil standard does not violate article 6 and adequate safeguards are provided to ensure procedural fairness; this view has recently been supported by the courts in similar civil preventative orders in the Chief Constable of Lancashire v Wilson and others and Jones v Birmingham City Council ⁽¹¹⁾.
12. An application for a KCPO may be made without notice being given to the respondent. Without notice applications would, in practice, only be made in exceptional or urgent circumstances and the applicant would need to provide evidence to the court as to why a without notice hearing was necessary. If an application is made without notice the court must adjourn the proceedings and make an interim KCPO, adjourn the proceedings without making an interim KCPO or dismiss the application (clause *Application without notice*). Statutory safeguards are provided in respect of without notice applications: the respondent may apply to the court to have the order varied or discharged; the interim KCPO lasts only until the hearing of the full order (which must be on notice); and the respondent may appeal against the making of the interim KCPO.
13. Breach of a KCPO amounts to a criminal offence, punishable on summary conviction by a term of imprisonment of up to six months and on conviction on indictment by a term of imprisonment of up to two years. Proceedings taken for breach of a KCPO are criminal in character under domestic law and constitute a ‘criminal charge’. The usual processes and appeal routes apply for criminal proceedings, and the Government is satisfied that existing safeguards for criminal court hearings meet the criminal limb of Article 6.
14. The Government is therefore satisfied that the processes fully respect Article 6 rights.

⁽¹⁰⁾ *Secretary of State for the Home Department v MB* [2007] UKHL 46

⁽¹¹⁾ *Chief Constable of Lancashire v Wilson and others* [2015] EWHC 2763; *Jones v Birmingham City Council* [2018] EWCA Civ 1189

Article 8

15. These provisions engage Article 8(1). The effect of an individual being made the subject of a KCPO will constitute an interference with that individual's Article 8(1) rights: the limited mandatory notification requirement (new clause *Notification Requirements*) may interfere with an individual's right to privacy, and prohibitions or requirements (new clause *Provisions of knife crime prevention order*) such as curfews, non-association provisions, attendance at mandatory training, limitations on use of social media etc. may interfere with an individual's right to private and family life, home and correspondence. Article 8 is a qualified right. The issue by virtue of Article 8(2) is therefore whether such an interference is in accordance with the law and is necessary in a democratic society in the interests of public safety, the prevention of crime or for the protection of rights and freedoms of others.
16. The Government considers that each of the potential interferences identified may be justified in accordance with Article 8(2). The interference will be in accordance with the law: a KCPO may only be made in accordance with the powers provided in primary legislation (that is, where it is 'necessary' to protect person(s) from a risk of harm involving a bladed article or to prevent the commission of an offence involving a bladed article) only those prohibitions and requirements (for which a statutory illustrative non-exhaustive list is provided) necessary for the same protective purposes will be imposed, the Secretary of State will publish statutory guidance containing further information on the sorts of prohibitions and requirements that may be available under a KCPO and such prohibitions and requirements will be clearly set out in the order. The national law will therefore be clear, foreseeable and adequately accessible. Any interference will be in pursuit of the legitimate aims of public safety, preventing crime and disorder and for the protection of the rights and freedoms of others, reducing the risk of violence, serious injury and death from the use of knives.
17. In relation to proportionality, the court has a discretion whether to grant a KCPO at all, as well as in relation to any prohibitions and requirements to be imposed under the KCPO. Under section 6 of the Human Rights Act 1998, the courts, as public bodies, must exercise their discretion to impose prohibitions or requirements in a way that is compatible with ECHR rights, including Article 8. The statutory provisions also require that a court must ensure that the prohibitions and requirements, so far as practicable, avoid conflicting or interfering with the individual's work, education or religious beliefs. Evidence as to the suitability and enforceability of a requirement must be provided to the court and a KCPO containing mutually incompatible requirements cannot be imposed (clause *Requirements included in knife crime prevention order*). In addition, the requirements and prohibitions will last only for such duration as is considered necessary by the court. The court may vary or discharge an order, and the duty of the court to review prohibitions or requirements in KCPOs lasting in excess of one year will provide an opportunity to assess the continued need and proportionality of the KCPO. These safeguards will, in the Government's view, protect against arbitrary interference with individuals' Article 8 rights.

18. 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⁽¹²⁾ (in the case of KCPOs, a core purpose is to protect the public from risk of harm involving a bladed article – their “physical and psychological integrity”⁽¹³⁾). In the individual case, interference with the subject of the KCPO's rights may, therefore, be outweighed by the state's positive obligations to protect the Article 8 rights of specified individuals and/or the public at large.
19. The Government is therefore satisfied that these provisions are compatible with Article 8, and are a proportionate measure for tackling the significant threat of violence, serious injury and death posed by knife crime.

Articles 9, 10 and 11

20. The provisions may engage Articles 9, 10 and 11 as prohibitions and requirements imposed by a KCPO may interfere with individuals' rights to freedom of thought, conscience and religion and freedom of expression, assembly and association. Whether these articles are, in fact, engaged will depend on the individual circumstances of each case. The issue is, as with Article 8, whether interference is in accordance with the law and is necessary in a democratic society. The Government considers that each of the potential interferences identified may be justified in accordance with Articles 9(2), 10(2) and 11(2). The safeguards as to legal certainty, necessity and proportionality identified in relation to Article 8, as well as the identified legitimate aims of public safety, the prevention of disorder or crime and the protection of the rights and freedoms of others (by preventing risk of harm from knife crime) apply equally to these articles.
21. In relation to Article 9, prohibitions or requirements such as curfews or geographical restrictions, or prohibitions from carrying religious articles, may interfere with an individual's right to manifest their religion or belief (for example, excluding an individual from their regular place of worship). The provisions expressly require that in imposing any prohibitions or requirements the court must try to avoid, so far as practicable, any conflict with the individual's religious beliefs (new clause *Provisions of knife crime prevention order*). Domestic courts have held that interference with an individual's right to freedom of religion may be justified on grounds of public safety, prevention of crime and disorder and the protection of rights and freedoms of others in Hackney London Borough Council v Rottenberg and R (Singh) v Chief Constable of West Midlands Police¹⁴.
22. To a lesser extent, prohibitions or requirements may also interfere with individuals' rights in relation to freedom of association and assembly under Article 11 (for example if there is a non-association clause or restriction of movement) or rights to freedom of expression

⁽¹²⁾ See *X and Y v Netherlands* [1985] ECHR 4

⁽¹³⁾ See *Stubbings v UK.*, 23 E.H.R.R. 213 and *Bota v Italy*, 26 E.H.R.R. 241.

⁽¹⁴⁾ *R (on the application of Singh) v Chief Constable of West Midlands Police* [2006] EWCA Civ 1118 and *Hackney London Borough Council v Rottenberg* [2007] EWHC 166 (Admin).

under Article 10 (for example, if provisions restrict an individual's use of social media). The ECtHR has held that expression that incites violence or the commission of a crime may be restricted on the grounds of public safety, for example in Roj TV A/S v. Denmark and Marlow v UK¹⁵. It is clearly established that Article 11 does not protect assemblies where participants have violent intentions that result in violent disorder and that measures intended to prevent crime or disorder will pursue a legitimate aim, for example in G v Germany and Mayor of London (Greater London Authority) v Hall⁽¹⁶⁾. It is the Governments view that, in practice, interference with these rights for habitual knife carriers is likely to fall outwith the protection of the Convention Rights. In the event that the individual's rights are engaged, as identified in relation to Article 8, the Government is satisfied that the provisions are compatible with these qualified rights: measures imposed by KCPOs must be necessary for the purposes of preventing the public from the risk of harm from a bladed article or preventing the individual from committing offences involving a bladed article. A KCPO would only include provisions which interfere with the individual's Article 10 or 11 rights in circumstances where such association or expression posed a risk of harm, and where the court considered it a necessary and proportionate means of achieving a legitimate aim. Any restriction will be limited to a specified duration and to specific activities, and subject to review as well as rights of appeal, variation and discharge.

23. The Government is therefore satisfied that these provisions are compatible with Articles 9, 10 and 11.

Article 14

24. KCPOs will be available in respect of all individuals. The threshold test for the making of a KCPO is predicated on objective factors unrelated to religion, race or other protected characteristic, namely the facts of the knife-crime related risk posed by the individual. The Government has provided a specific statutory requirement that the requirements or prohibitions which are imposed on an individual under a KCPO must, so far as practicable, avoid any conflict with the individual's beliefs.
25. In the event that the rights of those of a particular religious affiliation, gender, race, or other national or social origin, may indirectly be disproportionately affected in comparison to other members of society the Government is of the view that there is reasonable and objective justification (namely, the prevention of disorder and crime and the threat posed to public safety by knife crime).

(15) See Roj TV A/S v. Denmark (Application No. 24683/14), and Marlow v United Kingdom [2006] ECHR 42015/98

(16) See Mayor of London (on behalf of the Greater London Authority) v Hall [2010] EWCA Civ 817 and G v Germany (1989) 60 DR 256, EComHR.

Article 1 of Protocol 1 (A1P1)

26. A1P1 may be engaged to the extent that any provision in a KCPO interferes with the individual's peaceful enjoyment of their property. Any interference may be justified if it is in the "public interest", subject to conditions provided by law and the general principles of international law, and is proportionate. As these measures are being introduced by primary legislation, the Government is content that they will be subject to conditions prescribed by law. The Government is also content that these measures are in the public interest as they are intended to promote public safety and prevent knife crime. KCPOs may only impose prohibitions which have the effect of controlling an individual's use of property (e.g. a prohibition on using or carrying a particular article, such as a pocket-knife, see new clause *Provisions of knife crime prevention order*), where such requirement is necessary to protect the public from risk of harm or offending involving a bladed article.
27. The Government considers that such access restriction, with the procedural safeguards contained in the provisions, are capable of striking a fair balance between the rights of the individual and the protection of the public. These measures are accordingly compatible with A1P1.

UN Convention on the Rights of the Child

28. The Government considers that the provisions in new Part 5 will enhance the relevant rights of the child under the UNCRC. It is known that children are particularly vulnerable to knife crime both as victims and as offenders. KCPOs are a key preventative and diversionary measure to enhance the relevant rights of the child, importantly protection from physical or psychological harm.
29. KCPOs may be made against individuals aged 12 years or above. In the law of England and Wales, criminal responsibility arises from the age of 10 as it is considered children aged 10 or over are able to understand they are doing something wrong. The primary purpose of KCPOs is to protect the public in England and Wales (including any child respondent) from harm involving a bladed article. Particular regard has been had to Article 3 of the UNCRC, which requires the best interests of the child to be a primary consideration in all actions concerning children. To that end, the local youth offending team must be consulted prior to application for a KCPO (see new clause *Requirements for application for order under section (Knife crime prevention order made otherwise than on conviction* and new clause *Requirement to consult on application for order under section (Knife crime prevention order made on conviction)*). In considering the requirements and prohibitions imposed by a KCPO the court must similarly have regard to the child's best interests. This enables the court, for example, to determine that requirement to attend an educational scheme is appropriate to divert the child from offending and the criminal justice system.
30. Article 37 of the UNCRC provides that the detention of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. Whilst breach of a KCPO without reasonable excuse is a criminal offence,

potentially attracting detention, the Government is satisfied that existing safeguards provided by the youth justice system (for example, in prosecution by the CPS Youth Offenders Guidance and in sentencing by the Youth Courts) will ensure compliance with Article 37.

31. The Government considers, therefore, that the provisions in these amendments are compatible with the ECHR and the UNCRC.

Home Office
January 2019