

# CRIME AND POLICING BILL

## EUROPEAN CONVENTION ON HUMAN RIGHTS

### Sixth Supplementary Memorandum by the Home Office and Ministry of Justice

#### Introduction

1. This memorandum supplements memoranda dated 23 February 2025<sup>1</sup> and 22<sup>2</sup> and 24 April,<sup>3</sup> 10 June 2025,<sup>4</sup> 3 November 2025<sup>5</sup> and 13 February 2026,<sup>6</sup> prepared, variously, by the Home Office, Ministry of Justice, Department for Transport and Ministry of Defence, which addressed issues under the European Convention on Human Rights (“ECHR”) in relation to the Crime and Policing Bill.
2. This supplementary memorandum addresses the issues arising under the ECHR from further Government amendments tabled on 23 February 2026 for Lords Report stage. This memorandum has been prepared by the Home Office and Ministry of Justice.
3. The amendments considered in this memorandum are:
  - a. **New clause “Making or supplying purported intimate image generators”**, which creates offences of making, adapting, supplying or offering to supply a thing for creating, or facilitating the creation of, purported intimate images of a person.

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<sup>1</sup> [ECHRMemo.pdf](#)

<sup>2</sup> [Crime and Policing Bill: ECHR supplementary memorandum 22 April 2025 - GOV.UK](#)

<sup>3</sup> [Crime and Policing Bill: ECHR second supplementary memorandum: 24 April 2025 - GOV.UK](#)

<sup>4</sup> [Crime and Policing Bill: ECHR third supplementary memorandum: 10 June 2025 \(accessible\) - GOV.UK](#)

<sup>5</sup> [Crime and Policing Bill: ECHR fourth supplementary memorandum: 3 November 2025 \(accessible\) - GOV.UK](#)

<sup>6</sup>

- b. **New clause “Domestic abuse protection order”**, which amends the Domestic Abuse Protection Order (“DAPO”) regime provided for in the Domestic Abuse Act 2021 (“DA Act”) in order to:
- i. remove the statutory requirement for courts to name the individual responsible for ensuring a perpetrator’s (“P”) compliance with a positive requirement (“PR”) and removes the requirement for courts to receive evidence about suitability or enforceability of PRs (e.g. intervention programmes);
  - ii. enable all courts to make a PR for P to attend a suitability assessment, and a conditional PR that activates if P is deemed suitable, requiring attendance at an intervention programme; and
  - iii. gives both the magistrates’ and Crown Court the power to vary a DAPO on their own motion, allowing them to list a variation hearing without an application from those listed in section 4(3) of the DA Act.
- c. **New clauses “Guidance about honour-based abuse” and “Meaning of “honour-based abuse”**, which:
- i. confer a power on the Secretary of State to issue statutory guidance to public authorities in relation to ‘Honour’-Based Abuse (“HBA”). Matters covered in the guidance include prevention and identification of honour-based abuse; collection and sharing of information; and multi-agency working;
  - ii. provide for a statutory definition of HBA for the purposes of the statutory guidance; and
  - iii. impose a duty on public authorities to have regard to the guidance when exercising their public functions. The guidance must be published and may be revised.

The definition of HBA is for the purpose of the statutory guidance only, and is defined as a person (“A”) who engages in abusive behaviour towards another person (“B”) to whom A is personally connected; and A is motivated wholly or partly by a perception that B has behaved, is behaving, or may behave in a way that is perceived as shaming or dishonouring A, B, A’s family, B’s family, or A’s

community, and as failing to comply with accepted norms of behaviour within A's community.

"Abusive behaviour" includes physical, sexual, violent, threatening, controlling, coercive, economic, spiritual, psychological, emotional abuse and other abuse, whether consisting of a single incident or a course of conduct.

The concept of "personal connection" is defined so as to include not only familial and intimate relationships but also friends or acquaintances known to each other in person.

- d. **New clause "Sexual activity with an animal"**, which replaces the offence of intercourse with an animal in section 69 of the Sexual Offences Act 2003 ("SOA 2003") with a broader offence that makes it a criminal offence for a person to intentionally touch an animal (whether living or dead), where that touching is sexual.
- e. **Sharing a semen-defaced image:** An amendment to Schedule 11 which inserts new section 66AA into the SOA 2003, containing an offence of sharing a semen-defaced image.
- f. **Creating a copy of an intimate photograph or film shared temporarily:** An amendment to Schedule 11 to insert new sections 66AD and 66AE into the SOA 2003. Section 66AD contains an offence of creating a copy of an intimate photograph or film shared temporarily. Section 66AE contains exemptions to the offence in section 66AD.
- g. **Extending time limits for the offences of sharing a semen-defaced image and creating a copy of an intimate photograph or film shared temporarily:** Amendments to Schedule 11 which amend section 66H of the SOA 2003 (time limits for prosecuting summary offences), in order to extend the time limit for the prosecution of the offences of sharing a semen-defaced image and creating a copy of an intimate photograph or film shared temporarily, beyond what it would otherwise be under section 127(1) of the Magistrates' Courts Act 1980.

- h. **Making deprivation orders available in respect of a copy of an intimate photograph or film shared temporarily:** An amendment which amends section 154A of the Sentencing Act 2020 (“SA 2020”) to provide that the copy of a photograph or film to which the offence relates is to be regarded for the purposes of section 153 of the SA 2020 as used for the purpose of committing the offence. This will ensure that the court has the power under Chapter 4 of Part 7 of the SA 2020 to make an order depriving the offender of the photograph or film in question upon conviction for the offence.
- i. **New clause “*Pornographic images of sex between relatives*”:** inserts new sections into the Criminal Justice and Immigration Act 2008 (“CJIA 2008”) to make it a criminal offence to possess or publish a pornographic image portraying penetrative sex between persons, who a reasonable person would think are related or pretending to be related.

#### **ECHR analysis: general**

- 4. One Government amendment tabled gives rise to substantive ECHR issues, but which have been fully addressed in previous ECHR memoranda for the Bill, and so are not addressed here. Specifically:
  - a. **Amendment to clause 194: Youth Diversion Orders (appeal routes).** This amendment ensures that the appeal routes for Youth Diversion Orders (“YDOs”) are more consistent with established precedent in other civil orders. In particular, the amendment removes the route of appeal to the Court of Appeal so that established appeal routes apply which would allow the respondent or applicant to appeal a YDO decision made in a magistrates’ court to the High Court by way of case stated or the Crown Court, with an onward appeal allowed by way of case stated to the High Court. Consideration of the ECHR issues raised by YDOs are set out in the memorandum dated 25 February 2025 (see paragraphs 364-368 of that memorandum). Electronic monitoring requirements were further considered in the memorandum dated 22 April 2025.

5. It is not considered that any other Government amendments tabled on 23 February 2026 give rise to issues under the ECHR.

### **Offences: Article 5 – Right to liberty; Article 6 – Right to a fair trial**

6. A number of the amendments will create new criminal offences, which may result in an individual's arrest and/or imprisonment and therefore deprivation of their liberty and so engage Article 5 of the ECHR. Proceedings taken in respect of such offences will be criminal in character, and so engage the criminal limb of Article 6 of the ECHR. The Government is satisfied that the measures will be compatible with Articles 5 and 6, for the reasons set out for other new offences in the memorandum dated 25 February 2025. This memorandum addresses those Articles only where the provisions raise particular points of note not already dealt with in previous memoranda.
7. The detail of the ECHR implications arising from this set of amendments, insofar as considered necessary and appropriate to raise here, is set out below, addressed by measure.

### **ECHR Analysis: individual measures**

#### **a. Making or supplying purported intimate image generators**

8. The measure creates offences of making, adapting, supplying or offering to supply a thing for use as a generator of purported intimate images (a thing for creating, or facilitating the creation of, purported intimate images of a person). A person charged has a defence where they prove that they took all reasonable steps to prevent the thing being used for creating, or facilitating the creation of, purported non-consensual intimate images.

#### **Article 6 – Right to a fair trial**

9. Article 6 ECHR is engaged in particular because:
  - i. the offences introduced are strict liability offences; and

ii. a reverse burden attaches to the “reasonable steps” defence.

10. Strict liability is not in itself incompatible with Article 6.<sup>7</sup> *R v G*<sup>8</sup> confirmed this, and the more general proposition that Article 6(2) does not affect the substance of the matters which may be legitimately proscribed by the content of the criminal law (provided that the burden of proving the matters selected for proscription is on the prosecution).

11. Similarly, the ECtHR has held that presumptions of fact or law operate in every criminal-law system and are not prohibited in principle by the Convention<sup>9</sup> provided that they are confined within reasonable limits and strike a balance between the importance of what is at stake and the rights of the defence. Any interference must be reasonably proportionate to the legitimate aim sought to be achieved.

12. The Government is satisfied that an appropriate balance has been struck between the harms caused by generators of purported intimate images and the defendant’s rights under Article 6. In particular, the prosecution will need to prove, beyond reasonable doubt, that the defendant made, adapted, supplied or offered to supply the thing. Once proven, the prosecution must also establish that a reasonable person would consider, in all the circumstances, that the defendant made or supplied the thing for use as a generator of purported intimate images. The usual safeguards applicable to persons arrested, prosecuted and/or sentenced for an offence will apply.

13. The Government is further satisfied that the measures comply with the criminal limb of Article 6 as regards the reverse burden imposed by the “reasonable steps” defence. Article 6 does not prohibit rules that transfer the burden of proof to the accused to establish a defence, provided that the overall burden of proof remains with the prosecution. The subject matter of the defence will be within the

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<sup>7</sup> *R v Muhamad* [2002] EWCA Crim 1856; *Barnfather v Islington Education Authority* [2003] EWHC 418 (Admin),

<sup>8</sup> [2008] UKHL 37

<sup>9</sup> *Falk v the Netherlands*, Application No. 66273/01.

knowledge and ability of the accused to demonstrate, and it is therefore not unfair to require the accused to discharge this burden. Requiring the prosecution to prove the absence of the defence would impose an unnecessary burden that would significantly limit the ability to prosecute the offence. These provisions fall within the reasonable limits permitted, are justified, and are compatible with the Convention.

Article 1 of Protocol 1 – Right to peaceful enjoyment of property

14. The new offences may engage Article 1, Protocol 1 (“A1P1”) due to a potential impact on access to, and use of, generators of purported intimate images, as well as on businesses involved in their making or supply. If, and to the extent that, Article 8 or A1P1 are engaged, the Government is satisfied that any interference is justified: it will be in accordance with the law (prescribed in primary legislation); necessary for the prevention of disorder and crime (as it seeks to criminalise the making and supply of generators of purported intimate images); and proportionate (as the maker or supplier has a defence where they have taken all reasonable steps to prevent misuse).

**b. Amendments to Domestic Abuse Protection Order (“DAPO”) regime under the Domestic Abuse Act 2021 (“the DA Act”)**

15. The Domestic Abuse Protection Order (“DAPO”) provisions within the Domestic Abuse Act 2021 (the “DA Act 2021”) already permit courts to impose prohibitions and positive requirements, such as behaviour-change programmes or substance misuse treatment. However, section 36 of the DA Act currently requires courts to name a responsible person and receive evidence about the suitability and enforceability of any programme-based PR. In practice, this prevents magistrates’ courts from including intervention PRs particularly in police-led applications, where magistrates’ courts must hold a full DAPO hearing within 48 hours of a Domestic Abuse Protection Notice (“DAPN”) being issued. In practice, this timeframe is too short to identify a programme provider, carry out a suitability assessment with P and provide evidence to the court. Because no DAPO has

yet been made, the court cannot compel P to attend the assessment, leaving participation voluntary and without consequence for non-attendance.

16. This process means weakened protection for victims and delayed access to meaningful interventions. These amendments are designed to remedy this.

Article 5 - Right to liberty and security

17. The amendments may engage Article 5 ECHR because under these provisions, breach of a DAPO, including failure to attend a suitability assessment or, if assessed as suitable, failure to attend an intervention programme, constitutes a criminal offence. A breach may therefore lead to arrest and detention.

18. Article 5(1)(b) permits deprivation of liberty for the lawful arrest or detention of a person for non-compliance with a court order or to secure fulfilment of a legal obligation. Article 5(1)(c) further permits arrest or detention on reasonable suspicion of having committed an offence or where necessary to prevent the commission of an offence. Any arrest for DAPO breach results in the individual being brought promptly before a court, meeting the requirements of Article 5(3).

19. The courts already have the power to impose positive requirements on individuals who have not been convicted of an offence. Under the amended DAPO provisions, this position is maintained, and courts may impose these positive requirements that include a requirement for P to attend a suitability assessment, and a conditional requirement to attend an intervention programme if assessed as suitable, on P even when P has not been convicted of an offence. The Government is satisfied such measures are compatible with Article 5.

20. The amendments preserve judicial discretion as it is for the court to determine the nature and extent of any requirements imposed under a DAPO. Although the amendments remove the previous expectation where the court must receive evidence about the suitability and enforceability of a requirement before including that requirement in a DAPO, this does not alter the court's ability or responsibility to assess suitability of the perpetrator for positive requirements. The court will

continue to consider all relevant information and evidence presented to it when deciding whether to include an assessment requirement and conditional requirement and whether imposing such requirements are necessary, proportionate and compatible with Convention rights.

21. As a result, the Government is satisfied that the amended DAPO regime provides sufficient safeguards to ensure that DAPOs can operate consistently with Article 5 ECHR.

Article 6 - Right to a fair trial

22. These amendments engage Article 6 ECHR, insofar as it may be argued that procedural unfairness could arise where a DAPO containing positive requirements is imposed without the court having to be satisfied to the criminal standard of the underlying allegations. Because a DAPO may be made following an acquittal, a court may decline to convict due to not being sure of the facts to the criminal standard yet still impose a DAPO on the balance of probabilities.

23. The Government considers that the imposition of a DAPO does not amount to the determination of a criminal charge for the purposes of Article 6(2) and (3). The purpose of DAPOs remains preventative, not punitive. Applying the *Engel v Netherlands*<sup>10</sup> criteria: DAPO proceedings continue to be classified as civil, a finding of guilt is not a prerequisite for the order and the court's function is protective rather than punitive, and the requirements including mandatory assessment and (if suitable) attendance at an intervention programme, are preventive measures and cannot be more restrictive than necessary to achieve that purpose.

24. Accordingly, these requirements are not comparable to criminal sanctions, even though breach of the order remains a criminal offence under the DA Act 2021.

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<sup>10</sup> Application Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

25. The Government is therefore satisfied that use of the civil standard of proof is compatible with Article 6. This is supported by caselaw. In *Chief Constable of Lancashire v Wilson and others*<sup>11</sup>, the court applied the criteria when considering a civil order which allowed the imposition of positive requirements without the prerequisite of a conviction. The court held that the proceedings were not criminal in nature and therefore did not attract a criminal burden of proof. In *Jones v Birmingham City Council and another*,<sup>12</sup> the Supreme Court held that Article 6 does not require the criminal standard in civil preventative order proceedings such as gang injunctions. The ECtHR in *Saliba v Malta*<sup>13</sup> has likewise held that while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed (i.e. standards of proof).
26. These amendments also engage Article 6 ECHR, insofar as it might be argued that procedural unfairness could arise once the perpetrator has attended an assessment and been deemed suitable for an intervention programme. At that point, the conditional positive requirement to attend a programme of activities is automatically activated. There is no further hearing at which the court considers the outcome of the assessment, confirms that P is required to attend the programme, or hears any additional representations from P before the programme requirement takes effect.
27. However, the perpetrator will have the opportunity to make representations at the DAPO hearing itself, including in relation to any proposed conditional requirement to attend an assessment, and if assessed as suitable, to engage with an intervention programme. This accords with the ordinary principles of procedural fairness in court proceedings and ensures that the court has the benefit of the perpetrator's position before determining whether the imposition of such a requirement is necessary and proportionate, and necessary to protect the person for whose protection the order is made from domestic abuse or the risk of domestic abuse.

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<sup>11</sup> [2015] EWHC 2763 (QB).

<sup>12</sup> [2023] UKSC 27.

<sup>13</sup> Application No 24221/13.

28. At the hearing, the court is required, so far as practicable, to avoid imposing requirements on a perpetrator that conflict with the person's religious beliefs, interfere with their work or attendance at an educational establishment, or conflict with the requirements of any other court order or injunction to which P is subject. Where the court is considering imposing a requirement for P to attend an assessment and, if assessed as suitable, an intervention programme, the court will fairly hear and consider P's representations on these matters.
29. The court is also bound by section 6 Human Rights Act 1998 to act compatibly with Convention Rights when exercising the discretion to make a DAPO or include any PRs.
30. In addition, the statutory rights of appeal against a DAPO (section 46 of the DA Act 2021) and to apply for the variation or discharge of a DAPO (section 44 of the DA Act 2021) provide further procedural safeguards.
31. Accordingly, where a DAPO includes these requirements and P subsequently decides not to attend an assessment, or, having attended the assessment and been informed of the programme for which they are suitable, is no longer willing to attend that programme, P may apply for a variation of the DAPO or appeal against it. Any such application or appeal will be listed for a hearing, at which P will have the opportunity to make representations.
32. The court's power to vary or discharge a DAPO, including by removing a requirement or making it less onerous, constitutes another procedural safeguard for P. While the court may exercise this power only where satisfied that a requirement is no longer necessary to protect the person for whose benefit the order was made, it ensures that requirements can be subject to continuing judicial scrutiny and are not fixed or irreversible. This enables P to seek reconsideration where circumstances change or where a requirement has become disproportionate and guarantees access to a further hearing at which P's representations can be fairly considered.

33. The Government is therefore satisfied that the amendments to the DAPO regime are compatible with Article 6 and that the framework contains adequate measures to ensure procedural fairness.

Article 8 – Right to respect for private and family life, home and correspondence

34. The amendments may engage Article 8 ECHR, as a DAPO containing a requirement to attend a suitability assessment and, where appropriate, an intervention programme may interfere with an individual's right to respect for private and family life, home and correspondence.

35. Any such interference is justified because a DAPO can only be made in accordance with the statutory test in the DA Act, where the court must be satisfied that the order, and any requirements within it, are necessary and proportionate to protect a person from domestic abuse. Only those positive requirements that are required to prevent further abusive behaviour or the risk of abusive behaviour may be imposed.

36. The Act also requires the court, so far as practicable, to ensure that the requirements do not conflict with the perpetrator's work, education, or religious obligations. Programme providers will similarly need to take these factors into account when arranging assessments or interventions.

37. As set out above, the court is also bound by section 6 Human Rights Act 1998 to act compatibly with Convention Rights when exercising the discretion to make a DAPO or include any PRs.

38. Positive requirements will last only for as long as the court considers necessary and may be discharged even while the wider DAPO remains in force. Their duration is therefore properly considered to avoid unjustified interference with Article 8 rights.

39. Any interference with the perpetrator's Article 8 rights serves the legitimate aims of preventing crime and disorder and protecting the rights and freedoms of others.

In light of the statutory necessity and proportionality test, the availability of appeal rights, and the ability to apply to vary or discharge an order, the Government is satisfied that the amendments introduce no greater interference than is proportionate and that the regime complies with Article 8 ECHR.

**c. 'Honour'-Based Abuse ("HBA"): Statutory guidance with accompanying definition**

40. These provisions are intended to improve frontline understanding of 'Honour'-Based Abuse ("HBA"), strengthen victim support, ensure cases are treated with appropriate seriousness, and reduce the risk of critical information being missed, particularly where it may be relevant to criminal accountability.

41. The absence of a shared definition and formal guidance has resulted in inconsistent identification, data collection and safeguarding responses across statutory agencies.

42. The forthcoming statutory guidance, aimed at public authorities exercising public functions such as policing, local government, education and health services, will raise awareness of HBA, explain how to identify and respond to it effectively, promote best practice, and support agencies in meeting existing safeguarding duties. The statutory definition will underpin the guidance to ensure a consistent interpretation of HBA across services.

**Article 8 – Right to respect for private and family life**

43. Article 8 is engaged because the definition of HBA and the guidance relating to identification, safeguarding and information sharing, may affect the private and family life of victims, alleged perpetrators and others, including those in non-familial relationships such as friends or acquaintances.

44. The provisions are prescribed by law. The statutory definition provides clarity and legal certainty as to the meaning of HBA, and the guidance power is clearly circumscribed.

45. The duty on public authorities is to have regard to guidance, which preserves professional judgment and ensures that decisions remain case specific, lawful, and proportionate. The clauses do not create new criminal offences, new civil sanctions, new powers of arrest or detention, or additional duties on public authorities.

46. Any information sharing encouraged by the guidance must take place within existing legal frameworks, including data protection legislation, and will be subject to the requirements of necessity and proportionality.

47. Therefore, the Government considers that any interference with Article 8 rights is necessary as serves the legitimate aims of preventing disorder or crime, for the protection of health or morals, and for the protection of the rights and freedoms of others and is therefore justified and proportionate.

#### Articles 9 – Freedom of thought, conscience and religion

48. HBA may be rationalised by perpetrators by reference to cultural, religious or social norms, including beliefs about family honour, gender roles, sexuality, marriage or obedience.

49. The measure does not regulate belief or religious observance. It targets abusive behaviour, irrespective of the belief or motivation relied upon to justify that behaviour.

50. To the extent that Article 9 is engaged, the conduct in question will frequently fall outside the scope of the ECHR convention protection, as the ECHR does not protect acts which are abusive or which infringe the ECHR rights of others.

51. As affirmed in *Kokkinakis v Greece*<sup>14</sup>, the exercise of this [Article 9] freedom is limited by the need to respect the rights and freedoms of others, and those limits

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(1994) 17 E.H.R.R. 397

are exceeded where belief is manifested through coercion, manipulation, or the forcing of consent. Practices such as brainwashing, interference with the right to work, threats to public health, or the encouragement of harmful conduct are not protected manifestations of religion and may properly be addressed through the application of general criminal and civil law, regardless of any asserted religious justification. While Article 9 protects lawful and voluntary proselytism, it does not extend to conduct involving coercion or the exploitation of minors or adults lacking legal capacity. The HBA definition and statutory guidance provisions operate squarely within these limits. They do not prohibit religious belief or lawful religious persuasion but instead target harmful and abusive conduct that infringes the rights and freedoms of others.

52. Any incidental interference with Article 9 arising from these provisions pursues legitimate aims, namely, the prevention of disorder or crime, the protection of health or morals, and for the protection of the rights and freedoms of others. The measures are necessary in a democratic society because they respond to an identified and serious risk of harm associated with HBA, including violence, coercion and control which directly undermines the autonomy, dignity and equality of victims, particular women and children. When issued, the guidance will be proportionate and will not impede religious belief or lawful religious practice. Instead, it will narrowly focus on addressing the harmful conduct that infringes the fundamental rights of others which is not protected by Article 9. The provisions reflect the Governments obligations to take reasonable measures to protect individuals from harm. Accordingly, any interference with Article 9 is incidental, justified and no more than is necessary to secure the effective protection of the rights and freedoms of others.

53. The Government is satisfied the provisions are compatible with Article 9.

#### Article 14 – Prohibition of discrimination

54. Article 14 is engaged in conjunction with Article 8. While HBA disproportionately affects certain groups, particularly women and girls as victims, it is not confined to any particular community, and perpetrators do not disproportionately represent

any single religion, ethnicity, nationality or cultural group. HBA is a pattern of harmful behaviour that may arise across diverse social, cultural, and familial contexts, and may be perpetrated by individuals of any sex, ethnicity, religion, age, disability status or sexual orientation.

55. The statutory definition of HBA is neutral and behaviour based. It does not presume or imply that abusive behaviour is associated with any particular group, nor does it rely on cultural, religious, or ethnic characteristics. The definition applies solely by reference to abusive behaviour and therefore does not interfere with the Article 8 rights of any group of alleged or actual perpetrators.

56. The guidance power is to be exercised in accordance with the public sector equality duty under section 149 of the Equality Act 2010 and will emphasise non-discriminatory practice and the avoidance of stereotyping. This will include the need to ensure that interventions are based on evidence of conduct rather than assumptions about culture, religion or community background.

57. Any differential impact arising from the application of the provisions would pursue legitimate aims including the protection of the rights and freedoms of others and would be objectively justified and proportionate.

58. Any incidental interference with Article 8 rights of perpetrators arises not from their membership of a particular group but from their engagement in harmful conduct and is limited to what is necessary to prevent abuse and safeguard victims.

59. The measures achieve a fair balance between the rights of those affected by the provisions and the Government's duty to safeguard others from harm. The Government therefore considers that the provisions do not discriminate, directly or indirectly, against any protected group and are compatible with Article 14, read in conjunction with Article 8.

**d. Sexual activity with an animal**

60. New clause “sexual activity with an animal” will replace the existing offence at section 69 of the SOA 2003 that criminalises penetrative sex with a living animal in England and Wales. The broader offence, which will be set out in the replacement section 69, will make it an offence if: a person intentionally touches an animal (whether living or dead); the person knows that, or is reckless as to whether, that is what is touched; and the touching is sexual. The touching is sexual if a reasonable person would consider that because of its nature it may be sexual, and because of its circumstances or the purpose of the person in relation to it (or both) it is sexual.

61. The ECHR rights potentially engaged are those in Articles 5, 7 and 8.

**Article 5 - Right to liberty and security**

62. Article 5 is engaged as the maximum penalty upon conviction is imprisonment for a term not exceeding 2 years. Whilst it is for member states, not the Court, to decide what the appropriate sentence for any given offence is, the maximum penalty must not be arbitrary. The maximum penalty is in line with the existing maximum penalty for section 69 of the SOA 2003 and while the new offence is capturing a broader range of conduct, any sexual activity with an animal is wrong, whether that animal is dead or alive. It is therefore considered that the proposed maximum penalty is proportionate to the nature and severity of the offending. Further, the Court will be able to take account of all the relevant circumstances of the offence and the offender in the usual way when handing down a sentence. This provides an important safeguard, and the Government is satisfied that the measure is compatible with Article 5.

**Article 7 - No punishment without law**

63. Article 7 is engaged in so far as it requires the offence and corresponding penalty to be clearly defined in law. Several of the key terms are clearly defined on the face of the legislation. For example, the definition of “touching” is provided at

section 79(8) of the SOA 2003. The definition of what makes touching “sexual” is provided in the new offence itself and this is that a reasonable person would consider that because of its nature it may be sexual, and because of its circumstance or the purpose of any person in relation to it (or both) it is sexual. This mirrors part of the existing definition of “sexual” at section 78(b) of the SOA 2003, which is longstanding and well understood. It is acknowledged that what might be considered sexual in the context of animal sexual abuse could be different than for human sexual abuse, but the concepts are not new. Where the circumstance or purpose of the person are such that the touching is not in fact ‘sexual’ (for example, masturbating a bull to extract semen for breeding purposes), it is therefore clear that such behaviour is not criminalised.

64. A person will be aware of the circumstances and their purposes in relation to the touching of an animal and therefore could reasonably have foreseen whether they risked being convicted of the offence. Where terms are not defined, it is considered they will be readily understood. The maximum penalties that apply are also clearly set out. The amendments will not have any retrospective effect. The Government is therefore satisfied the measure is compatible with Article 7.

*Article 8 - Right to respect for private and family life, home and correspondence*

65. The new offence itself does not interfere with Article 8, as Article 8 does not confer the right for a person to participate in sexual activity with an animal. However, Article 8 is engaged as notification requirements attach to the new offence as it is listed in Schedule 3 to the SOA 2003. The existing section 69 offence is also set out in Schedule 3, but given that the new offence captures a broader range of conduct, notification requirements will be imposed in cases where currently they cannot be. However, notification requirements continue to be subject to the same triggering conditions, in that they only attach when the offender is under 18 and scheduled to a term of imprisonment of at least 12 months or for any other offender where they have been sentenced to imprisonment or detained in hospital. This ensures they are only imposed in the more serious cases.

66. There is a clear and rational connection between the offending behaviour and the objectives of the notification requirements which are intended to protect the public. Consequently, the Government is satisfied that the imposition of notification requirements is justified under Article 8(2) in that it is necessary in a democratic society in furtherance of the legitimate aim of the prevention of crime.

**e. Sharing a semen-defaced image**

67. New paragraph 1A of Part 1 of Schedule 11 (amendments of the SOA 2003), as inserted by the amendment, will insert new section 66AA into the SOA 2003.

68. Section 66AA will create an offence that will be committed in the following circumstances:

- a. A person (A) intentionally shares a photograph or film which shows, or appears to show, another person (B), and has, or appears to have, semen on it or in its immediate vicinity (a “semen-defaced image”),
- b. B does not consent to the sharing of the semen-defaced image, and
- c. A does not reasonably believe that B consents.

69. The maximum penalty will be imprisonment for a term not exceeding the maximum term for summary offences or a fine (or both).

70. This offence will be subject to a defence where the person charged with the offence can prove on the balance of probabilities that they had a reasonable excuse for sharing the image, as well as an exemption where the semen-defaced image had, or A reasonably believes that the image had, been previously publicly shared, and B had, or A reasonably believes that B had, consented to the previous sharing.

**Article 5 – Right to liberty and security**

71. Since the amendment creates a criminal offence punishable with imprisonment, Article 5 ECHR is engaged. The measure creates a summary-only offence that carries a maximum penalty of imprisonment for a term not exceeding the

maximum term for summary offences (currently six months). Whilst it is for member states, not the Court, to decide what the appropriate sentence for any given offence is, the maximum penalty must not be arbitrary. The proposed penalty for the offence is proportionate to the nature and severity of the offending, and any deprivation of liberty resulting from a sentence of imprisonment will therefore not be arbitrary. The penalty is in line with those for the comparable 'sharing' offence at section 66B(1) of the SOA 2003, which targets a different kind of behaviour and harm, but is comparable in terms of seriousness. Further, the Court will be able to take account of all the relevant circumstances of the offence and the offender in the usual way when handing down a sentence. This provides an important safeguard and the Government is satisfied that the measure is therefore compatible with Article 5.

#### Article 6 – Right to a fair trial

72. The Article 6(2) ECHR presumption of innocence is engaged by the amendment because:

- a. There is a reverse burden attaching to the reasonable excuse defence;
- and
- b. The defendant carries the evidential burden attaching to the 'previous public sharing' exemption.

#### *Reverse burden*

73. The reverse burden attaching to the proposed reasonable excuse defence is compatible with Article 6(2) ECHR. As in *R v Navabi*<sup>15</sup>, the circumstances surrounding the sharing of the image and the reasons for doing so (i.e. the relevant information) are within the knowledge and possession of the defendant. It is therefore proportionate that a defendant wishing to avail themselves of the reasonable excuse defence should therefore be required to provide the relevant information and prove it on the balance of probabilities. If the defence imposed only an evidential burden on the defendant, this would require the prosecution to

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<sup>15</sup> [2005] EWCA Crim 2865

then prove that the circumstances did not exist, which is disproportionate. Finally, since the maximum penalty for the offence is 6 months' imprisonment, per Johnstone<sup>16</sup>, the arguments in favour of a reverse burden need not be overwhelmingly compelling.

### *Evidential burden*

74. Each defendant will bear the evidential burden of raising sufficient evidence concerning the existence of the exemption (where it applies) to satisfy the court that the issue should be left to the court to decide: see section 101 of the Magistrates' Court Act 1980 ("MCA 1980"). If the defendant discharges that evidential burden, the legal burden of disproving it will be on the prosecution (see, for example, *Lobell*<sup>17</sup>). This has been held to be compatible with Article 6 (see, for example, *DPP v Wright*<sup>18</sup>).

75. As such, the Government is satisfied the measure is compatible with Article 6 of the ECHR.

76. In order to comply with Article 7, an offence and corresponding penalty must be clearly defined in law. The elements of the offence, and the maximum penalty for the offence, are clearly set out in a way in which a member of the public can understand. Relevant concepts are defined in the offence or are widely understood. The amendment will not have any retrospective effect, as it will only apply to actions taken after commencement. The Government is satisfied that the measure is therefore compatible with Article 7.

### *Article 8 - Right to respect for private and family life, home and correspondence*

77. The subject matter of the measure engages Article 8 given its relation to the privacy of Person B (the person who is depicted in the semen-defaced image). Right to one's image and photographs is a well-recognised element of Article 8,

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<sup>16</sup> [2003] UKHL 28

<sup>17</sup> [1957] 1 QB 547

<sup>18</sup> [2009] EWHC 105

and non-consensual sharing of an image of a person, which has been sexualised through its evident or implied involvement in a sexual act will go against these protections. As such, it is considered that the offence enhances the protection of Article 8 rights. To the extent that the defence and exemption could be considered to infringe Article 8, our view is that they are justified within Article 8(2) in that they serve to achieve a proportionate approach to what should, and should not, be criminalised. The defence and exemption strike the right balance between carving out scenarios where criminalisation of behaviour would not be appropriate or legitimate, and ensuring that harmful behaviour is captured by the offences.

78. Further, the amendment engages the defendant's right to correspondence, which is protected by Article 8, as 'correspondence' can cover the sharing of images (*Sutherland v HM Advocate (Scotland)*<sup>19</sup>). However, the Government considers that the nature of a communication involving the non-consensual sharing of a semen-defaced image is not such as is capable of making it worthy of respect for the purposes of the application of the ECHR, and neither does the defendant have a reasonable expectation of privacy in relation to that communication. By analogy with *Sutherland* the Government is therefore satisfied that the amendment does not interfere with the Article 8 rights of the defendant.

79. However, if it were held to constitute an interference, the Government is also satisfied that it would be justified as a proportionate means of achieving the legitimate aims of the protection of the rights and freedoms of others, and the protection of morals.

80. The Government is therefore satisfied the measure is compatible with Article 8.

#### Article 10 – Right to freedom of expression

81. The amendment also potentially engages Article 10, which provides the right to freedom of expression, given that the offence relates to communications. The legitimate aims underpinning any interference with the defendant's Article 10

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<sup>19</sup> [2020] UKSC 32

rights are the protections of the rights and freedoms of others and the protection of morals: to protect the person depicted from the harm such offending can cause and from the interference with their Article 8 right to privacy; and to protect society more generally from the broad harms caused (beyond those to the person depicted) by the sharing of degrading and non-consensually sexualised images.

82. The offence does not target the sharing of semen-defaced images with the consent of the person depicted. Nor does it target the sharing of such images where there has been previous consent to public sharing. The measure goes no further than necessary and is therefore proportionate. For these reasons, to the extent Article 10 is interfered with, the Government is satisfied that the measure is necessary in a democratic society, in pursuit of legitimate aims, and compatible with Article 10.

f. **Creating a copy of an intimate photograph or film shared temporarily**

83. The amendment will amend paragraph 2 of Schedule 11 (amendments of the SOA 2003) to insert new sections 66AD and 66AE into the SOA 2003.

84. Section 66AD will create an offence that will be committed in the following circumstances:

- a. One person (B) shares with another person (A) a photograph or film which shows, or appears to show, B in an intimate state, and does so in such a way that A can view the photograph or film for a limited time, but cannot send it to another person,
- b. A intentionally creates a copy of the photograph or film that A can view at other times,
- c. A knows that the photograph or film is shared with A by B,
- d. B does not consent to the creation of the copy, and
- e. A does not reasonably believe that B consents to the creation of the copy.

85. The maximum penalty will be imprisonment for a term not exceeding the maximum term for summary offences or a fine (or both).

86. This offence will be subject to a defence where the person charged with the offence can prove on the balance of probabilities that they had a reasonable excuse for copying the image. In addition, two exemptions are set out at section 66AE:

a. Where—

- i. the photograph or film in question was (or A reasonably believes that it was) taken or recorded in a place to which the public (or a section of the public) have or are permitted to have access,
- ii. B had no reasonable expectation of privacy from such a photograph or film being taken or recorded, and
- iii. B was (or A reasonably believes that B was), in the intimate state voluntarily; and

b. Where—

- i. the photograph or film had, or A reasonably believes that the photograph or film had, been previously publicly shared, and
- ii. B had, or A reasonably believes that B had, consented to the previous sharing.

87. Section 76 of the SOA 2003 (conclusive presumptions) will apply to this offence.

#### Article 5 – Right to liberty and security

88. Since this measure creates a criminal offence punishable with imprisonment, Article 5 ECHR is engaged. The measure creates a summary-only offence that carries a maximum penalty of imprisonment for a term not exceeding the maximum term for summary offences (currently six months). Whilst it is for member states, not the Court, to decide what the appropriate sentence for any given offence is, the maximum penalty must not be arbitrary. The proposed penalty for the offence is proportionate to the nature and severity of the offending, and any deprivation of liberty resulting from a sentence of imprisonment will therefore not be arbitrary. The penalty is in line with those for the comparable ‘taking’ offence at new section 66AA(1) of the SOA 2003 (as inserted by this Bill), the comparable ‘sharing’ offence at section 66B(1), and the comparable ‘creating’

offence at section 66E(1) (as inserted by section 138 of the Data (Use and Access) Act 2025). Further, the Court will be able to take account of all the relevant circumstances of the offence and the offender in the usual way when handing down a sentence. This provides an important safeguard and the Government is satisfied the measure is therefore compatible with Article 5.

### Article 6 – Right to a fair trial

89. The Article 6(2) ECHR presumption of innocence is engaged by the amendment because:

- a. There is a reverse burden attaching to the reasonable excuse defence;
- b. The defendant carries the evidential burden attaching to the ‘previous public sharing’ and ‘no reasonable expectation of privacy’ exemptions; and
- c. The conclusive presumption about the absence of consent in section 76 of the SOA 2003 applies to the offence.

### *Reverse burden*

90. The reverse burden attaching to the proposed reasonable excuse defence is compatible with Article 6(2) ECHR. As in *R v Navabi*<sup>20</sup>, the circumstances surrounding the sharing of the image and the reasons for doing so (i.e. the relevant information) are within the knowledge and possession of the defendant. It is therefore proportionate that a defendant wishing to avail themselves of the reasonable excuse defence should therefore be required to provide the relevant information and prove it on the balance of probabilities. If the defence imposed only an evidential burden on the defendant, this would require the prosecution to then prove that the circumstances did not exist, which is disproportionate. Finally, since the maximum penalty for the offence is 6 months’ imprisonment, per *Johnstone*<sup>21</sup>, the arguments in favour of a reverse burden need not be overwhelmingly compelling.

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<sup>20</sup> [2005] EWCA Crim 2865

<sup>21</sup> [2003] UKHL 28

### *Evidential burden*

91. Each defendant will bear the evidential burden of raising sufficient evidence concerning the existence of an exemption (where they apply) to satisfy the court that the issue should be left to the court to decide: see section 101 of the MCA 1980. If the defendant discharges that evidential burden, the legal burden of disproving it will be on the prosecution (see, for example, *Lobell*<sup>22</sup>). This has been held to be compatible with Article 6 (see, for example, *DPP v Wright*<sup>23</sup>).

### *Conclusive presumption*

92. Section 76 of the SOA 2003 sets out the conclusive presumption around the absence of consent or a reasonable belief in consent. Section 76 will apply to the offence. Whilst conclusive presumptions engage Article 6 and the issue of presumption of innocence, the presumption of innocence is not absolute: *Falk v. the Netherlands*<sup>24</sup>. An interference with the presumption of innocence must be reasonably proportionate to the legitimate aim sought to be achieved (*Janosevic v Sweden*<sup>25</sup>). The application of the conclusive presumption in section 76 of the SOA 2003 to the offence is compatible with Article 6(2), for the following reasons:

- a. The conclusive presumption is limited to two very specific scenarios: both require proof that the defendant intentionally deceived the complainant in respect of key issues and therefore it will be obvious that the complainant could not have provided consent to the relevant act. Requiring the prosecution to prove otherwise would be disproportionate.
- b. It is already the case that a person charged with an offence under sections 1 to 4 of the SOA 2003 will automatically be convicted once a presumption is successfully applied. In our view the interference is less substantial in the case of this offence, which as a summary offence attracts a far shorter maximum penalty than those offences.

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<sup>22</sup> [1957] 1 QB 547

<sup>23</sup> [2009] EWHC 105

<sup>24</sup> Application No. 66273/01

<sup>25</sup> Application No. 34619/97

Furthermore, the exemptions and defence would still be available to the defendant even where a presumption is successfully applied.

93. The presumption is therefore confined to reasonable limits and strikes the right balance between the rights of the complainant and the defendant. Applying the presumption is therefore a proportionate means of achieving the legitimate aim.

94. As such, the Government is satisfied that the measure is compatible with Article 6 of the ECHR.

#### Article 7 – No punishment without law

95. In order to comply with Article 7, an offence and corresponding penalty must be clearly defined in law. The elements of the offence, and the maximum penalty for the offence, are clearly set out in a way in which a member of the public can understand. Relevant concepts are defined in the offence or are widely understood. The amendment will not have any retrospective effect, as it will only apply to actions taken after commencement. The Government is satisfied that the measure is therefore compatible with Article 7.

#### **g. Extending time limits for the offences of sharing a semen-defaced image and creating a copy of an intimate photograph or film shared temporarily**

96. The amendments will amend paragraph 7 of Schedule 11, which amends section 66H of the SOA 2003 (time limits for prosecuting summary offences), in order to extend the time limit for the prosecution of the offences of sharing a semen-defaced image and creating a copy of an intimate photograph or film shared temporarily, beyond what it would otherwise be under section 127(1) of the MCA 1980.

97. Section 66H creates an exception to the time limit for prosecuting summary-only offences in section 127(1) of the MCA 1980, of six months from the commission of an offence. This exception allows prosecutions to instead be brought within six months of evidence coming to the prosecutor's knowledge which the prosecutor

thought was sufficient to justify a prosecution, so long as this is no longer than three years since the offence was committed. It further provides that a certificate signed by or on behalf of a prosecutor, stating the date on which evidence which the prosecutor thinks is sufficient to justify a prosecution came to their knowledge, is conclusive evidence of that fact. This measure will amend section 66H of the SOA 2003 to extend the same exception to section 127(1) of the MCA 1980 to the new offences to be inserted at section 66AA and 66AD of the SOA 2003.

### Article 6 – Right to a fair trial

98. Article 6 may be engaged by the amendments as they extend the time limit for the prosecution of these offences, which would otherwise be six months from the commission of the offence, to any time which is within six months of evidence coming to the prosecutor’s knowledge which the prosecutor thought was sufficient to justify a prosecution, so long as this is no longer than three years since the offence was committed.

99. Article 6(1) provides, among other things, that in the determination of any criminal charge against them, everyone is entitled to a fair and public hearing within a reasonable time. That “reasonable time guarantee” runs from the date of charge (*Neumeister v Austria*<sup>26</sup>) until its final determination, including the exhaustion of all ordinary avenues of appeal (*Delcourt v Belgium*<sup>27</sup>; *König v Germany*<sup>28</sup>, § 98; *V v United Kingdom*<sup>29</sup>).

100. However, a person is deemed to be subject to a “charge” within the meaning of Article 6 when they are “officially notified” of the allegation, or “substantially affected” by the proceedings taken against them (*Deweert v Belgium*<sup>30</sup>). It could therefore be argued that, in some circumstances (for example, release on pre-charge bail with conditions), the reasonable time guarantee begins to run from before the formal date of charge.

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<sup>26</sup> Application No. 1936/53, § 18

<sup>27</sup> Application No. 2689/65, §§ 25-26

<sup>28</sup> Application No. 6232/73

<sup>29</sup> Application No. 24888/94 [GC], § 109

<sup>30</sup> Application No. 6903/75, § 46

101. The amendments extends the time limit for bringing prosecutions for the offence beyond what it would otherwise be, and therefore increase the time that may elapse between the date of commission of the offence and the date of formal charge. Should circumstances mean that the reasonable time guarantee begins to run some time before formal charge this means that the time to conclude proceedings could be increased. Article 6 is therefore arguably engaged.

102. However, to the extent that Article 6 is engaged, the Government is satisfied that any interference is justified, necessary and proportionate for the following reasons:

- a. The length of any increase in the period of time covered by the reasonable time guarantee would be limited by the date of formal charge also needing to be within six months of evidence coming to the prosecutor's knowledge which the prosecutor thought was sufficient to justify a prosecution;
- b. In the majority of cases, the defendant is either charged promptly after arrest, or released without bail such that the person is not deemed to be subject to a "charge". In such cases, the increase in the time that may elapse between the date of the commission of the offence and the date of formal charge will have no effect on the time period covered by the reasonable time guarantee, because the reasonable time guarantee will only begin to run from the date of formal charge.
- c. Moreover, the reasonableness of the time period under Article 6(1) is assessed across the entirety of the proceedings, including any appeal, and not solely at the pre-charge or early investigative stage. As demonstrated in recent cases such as *Pretto v Italy*,<sup>31</sup> a modest extension at the outset is unlikely, in itself, to render the overall duration unreasonable.

103. As such, the Government is satisfied the measure is compatible with Article 6 of the ECHR.

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<sup>31</sup> Application No. 7984/77

**h. Making deprivation orders available in respect of a copy of an intimate photograph or film shared temporarily**

104. The amendment will amend paragraph 22, of Schedule 11, which amends Chapter 4 of Part 7 of the SA 2020, to ensure that the deprivation order power under section 153 of that Act will extend to photographs and films that relate to the offence of creating a copy of an intimate photograph or film shared temporarily. It will do so by amending section 154A so that it provides that such a photograph or film is to be regarded for the purposes of section 153 as used for the purposes of committing the relevant offence.

**Article 1 Protocol 1 - Right to peaceful enjoyment of property**

105. The amendment will amend section 154A of the SA 2020 to provide that the copy of a photograph or film to which the offence relates is to be regarded for the purposes of section 153 of the SA 2020 as used for the purpose of committing the offence. This will ensure that the court has the power under Chapter 4 of Part 7 of the SA 2020 to make an order depriving the offender of the photograph or film in question upon conviction for the offence. It will therefore engage Article 1 of Protocol 1.

106. This is necessary to avoid causing additional harm to victims, arising from knowledge that the offender retains the copies of photographs and films that they unlawfully created, and is therefore in the public interest.

107. The effect of the order will be that the property will be taken into the possession of the police (section 156 of the SA 2020). If a third party has a claim to the property, they may, within 6 months of the date of the order, seek an order of a magistrates' court for return of the property.

108. The measure will mean that the court has the power to make a deprivation order under its existing powers in Chapter 4 of Part 7 of the SA 2020. Deprivation orders under the SA 2020 are not to be made as a matter of routine and can only be

made when there has been a sufficient investigation to justify a finding that the property is the product of one of the offences and where the court is satisfied that the order is proportionate and justified (*R v Wright-Hadley (Stephen)*<sup>32</sup>). Consequently, not only is the measure itself justified, the courts will apply it in a way which ensures that the power is exercised in a proportionate way.

109. Therefore, to the extent that the measure engages Article 1 of Protocol 1, the interference is considered to be a proportionate means of achieving the legitimate aim of the protection of the rights of others.

**i. Criminalising the possession and publication of pornographic images of sex between relatives**

110. New clause "*Pornographic images of sex between relatives*" will make it an offence to possess or publish an image if: the image is pornographic; it portrays, in an explicit and realistic way, penetrative sexual activity (A sexually penetrating the vagina or anus of B with any part of A's body or anything else, or A penetrating B's mouth with A's penis); a reasonable person looking at the image would think the persons were real; and a reasonable person looking at the image and taking into account any sound or information associated with the image would think the persons were related, or pretending to be related.

111. The relevant familial relationships are: parent (including adopted parent), grandparent, child (including adopted child), grandchild, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece. For the purposes of the reasonable person test, only the sound or information associated with the image that is in the person's possession or published with the image can be taken into account and the persons are not to be taken as pretending to be related if it is fanciful that they are actually related in the way pretended.

112. For both the possession and publication offence, it will be a defence for the defendant to prove that: they had a legitimate reason for possessing or publishing

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<sup>32</sup> [2010] EWCA Crim 1929

the image; they had not seen the image and did not know (or have any cause to suspect) it to be a pornographic image portraying sex between relatives; or they directly participated in the act portrayed, the act did not involve the infliction of any non-consensual harm and they were not in fact related to the other persons (and in the case of publication they only published the image to others who directly participated). Additionally, for the possession offence, it will be a defence if the defendant was sent the image without request and did not keep it for an unreasonable time.

113. The ECHR rights potentially engaged are those in Articles 5, 6, 7, 8, 10 and Article 1 of Protocol 1.

Article 5 - Right to liberty and security

114. Article 5 is engaged as the maximum penalty upon conviction is imprisonment for a term not exceeding 2 years for the new possession offence and a term not exceeding 5 years for the new publication offence. Whilst it is for member states, not the Court, to decide what the appropriate sentence for any given offence is, the maximum penalty must not be arbitrary.

115. For the new possession offence, the maximum penalty is in line with the offence of possessing pornographic images depicting necrophilia and bestiality at section 67(3) of CJA 2008 and for the new publication offence, the maximum penalty is the same as the publication of obscene articles offence under the Obscene Publications Act 1959. It is considered the new offences are of a similar level of seriousness and therefore the maximum penalties are proportionate to the nature and severity of offending. Further, the Court will be able to take account of all the relevant circumstances of the offence and the offender in the usual way when handing down a sentence. This provides an important safeguard, and the Government is satisfied that the measure is therefore compatible with Article 5.

Article 6 – right to a fair trial

116. The Article 6(2) presumption of innocence is engaged as both the legal and evidential burden are transferred to the defendant in respect of the defences. However, the Government is satisfied that transferring the burdens for these defences is proportionate and legitimate, subject to reasonable limits, is not arbitrary, and is therefore justified.

117. Transferring both the evidential and legal burden does not place an undue burden on the defendant. This is because the material information required to prove the defences is solely or primarily within the knowledge of the defendant (*Sheldrake v Director of Public Prosecutions Attorney General's Reference*<sup>33</sup>). For example, the defendant should know that they: had a legitimate reason for possessing or publishing the image; had not seen the image and did not know it was a pornographic image; had been sent the image without asking and did not keep it for an unreasonable time; or that they directly participated in the act portrayed, no non-consensual harm was caused and they are not related to the other persons. Such circumstances are specific to, and within the knowledge of, the defendant and therefore, requiring the defendant to produce this information and then prove it on the balance of probabilities is proportionate. In contrast, requiring the prosecution to prove that these circumstances did not exist would be an unnecessary burden and significantly limit the ability to prosecute the offences.

118. Additionally, the defences for the new offences are based on well-established defences that already exist for the possession of extreme pornography offence at sections 65 and 66 of the CJA 2008. There is relevant precedent for transferring both burdens to the defendant in such situations where the information is within their knowledge<sup>34</sup> and those defences are considered compatible with Article 6(2). The Government is therefore satisfied that the measure is compatible with Article 6.

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<sup>33</sup> (No 4 of 2002) [2003] EWCA Crim 762

<sup>34</sup> *Pin Chen Cheung* [2009] EWCA Crim 2963

### Article 7 – No punishment without law

119. Article 7 is engaged in so far as it requires the offences and corresponding penalties to be clearly defined in law. Several of the key terms are clearly defined on the face of the legislation. For example, the measure is clear on what an “image” is, what makes such an image “pornographic”, what penetrative sexual activity the image must portray and what the relevant real or pretend family relationships are. There is reference to the term “publish” including giving or making an image available to another person by any means and the available defences and exclusions are also clearly set out. Where terms are not defined, it is considered they will be readily understood. For example, the term “possession” is used undefined in the well-established possession of extreme pornography offence at section 63 of the CJIA 2003 and the term “fanciful” carries its ordinary meaning, which is generally understood to be contrastable to “real”. The maximum penalties that apply are also clearly articulated.

120. The offences are prospective. However, possession is a continuing act and similarly where something is published online, this publication can also be continuing. This means that a person in possession of an image portraying sex between relatives will have to permanently delete or otherwise get rid of the image before the offence comes into force or to the extent a person is continually publishing an image online, they would have to cease this publication to avoid committing the offence. Communications before commencement will make this clear.

121. A person could therefore reasonably foresee they risked committing the offence and the Government is satisfied that the measure is compatible with Article 7.

### Article 8 – Right to respect for private and family life, home and correspondence

122. Article 8 is engaged as the new possession offence criminalises the private possession of pornography portraying penetrative sex between persons, who a reasonable person would think are related or pretending to be related. The offence will be clearly set out in primary legislation and any interference with an

individual's right to private life is justified under Article 8(2) in that the offences are necessary in a democratic society in furtherance of the legitimate aims of the protection of morals, the prevention of crime and the protection of the rights and freedoms of others.

123. *Chocholac v Slovakia*<sup>35</sup> found that a ban on prisoners possessing any pornographic material for their private use breached Article 8 in that the ban was general and indiscriminate, and it did not permit the required proportionality assessment in an individual case. Criminalising the possession of a pornographic image that portrays penetrative sexual activity between persons who are related, or pretending to be related, is not a general and indiscriminate ban on possessing pornographic material. Instead, the new offence is clearly targeted, criminalising the possession of a specific type of pornographic image in furtherance of the legitimate aims.

124. The new offence only criminalises the possession of images that portray illegal sexual activity between family members. If the persons were in fact related, the sexual activity would be illegal under the familial child sex offences at sections 24 and 25 of the SOA 2003 or under the adult relative offences at section 64 and 65 of the SOA 2003. There is a clear public policy interest in reinforcing the message that having sex with a family member is illegal and to push back against the risk of normalising this criminal behaviour. Even if the familial relationship is 'pretend', it is proportionate to limit access to material that has been produced for the purpose of sexual arousal. Further, it is possible that watching such pornography could encourage a sexual interest in a family member (including a child family member) and legitimise methods that are used to abuse people in real life. Therefore, the new possession offence pursues the legitimate aim of protecting morals and preventing crime. As such, the public interest outweighs any private right to possess such material.

125. Significantly, persons are not taken to be related in the pornographic image if it is "fanciful" that they are related in the way pretended. It would therefore not be a

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<sup>35</sup> [2022] Application No.81292/17

criminal offence to possess an image that shows, for example, an adult man dressed in a nappy and pretending to be another person's baby. Such behaviour is not illegal in real life and is not about the sexualisation of family members or children. The offence is the least restrictive way of addressing the legitimate aims.

126. The possession offence is subject to defences, which ensure that the offence is proportionate. Particularly relevant to Article 8 is the fact that a person can still privately possess pornography that they have directly participated in, so long as they are not in fact related to the other person in the image, and no serious harm is caused. This defence is considered appropriate as private possession of your own image does not go to the core harm that the policy intends to address – minimising the mainstream dissemination of this material.

127. Additionally, the new offences enhance the protection of Article 8 rights to the extent the person has not consented to their image being possessed or published. The right to one's image and photographs is a well-recognised element of Article 8, and possession and publication of pornographic images without consent of the person(s) in the image will go against these protections. In the case of the non-consensual sharing of sexually explicit images, the ECtHR considered the protection of Article 8 required a criminal law response (*M.S.D v Romania*, 2024).

128. Therefore, the Government is satisfied that the measure is compatible with Article 8.

### Article 10 – Right to freedom of expression

#### *Publication offence*

129. Article 10 is engaged because the new publication offence prohibits a person from publishing images showing sex between relatives, or those pretending to be relatives and this has an impact on that person's ability to communicate. This is particularly relevant in terms of publication online, where Article 10 applies to

communication on the internet, whatever the type of message being conveyed (including photographs) and even when the purpose is profit making.<sup>36</sup>

130. There is also an argument that Article 10 is engaged as the new publication offence prohibits a person from publishing their own pornographic image and this could be categorised as restricting their artistic expression. Artistic expression is covered by the Article 10 protections (*Muller & others v Switzerland*<sup>37</sup>) and the ECtHR has accepted that publication of obscene images engages Article 10, but that criminal prohibitions may nonetheless be justified (*Hoare v The United Kingdom*<sup>38</sup>; *Perrin v The United Kingdom*<sup>39</sup>; *Karttunen v Finland*<sup>40</sup>).

131. On the basis Article 10 is engaged, the publication offence will be clearly set out in primary legislation and the offence is necessary in a democratic society in furtherance of the legitimate aims of the protection of morals, the prevention of crime and the protection of the rights and freedoms of others. The analysis set out above concerning the justifications for criminalising possession of such images applies equally to the analysis for the new publication offence for Article 10 purposes. For the same reasons therefore, there is a clear link between the new publication offence and the legitimate aims and as such, the public interest outweighs any private right to publish such material.

132. Any interference with Article 10 must be balanced with the protection of others' Article 8 rights, where that is relevant in any individual case.

133. The available defences, and the exclusion for classified works, ensure that the new publication offence is the least restrictive way of achieving the legitimate aims and is therefore proportionate. Particularly relevant for these purposes is the defence that allows a person to exercise their right to freedom of expression by creating such images of themselves and sharing those images with the other person(s) who are directly participating, so long as they are not in fact related and

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<sup>36</sup> *Ashby Donald and Others v France*, 2013.

<sup>37</sup> Application No. 10737/84

<sup>38</sup> Application No. 31211/96

<sup>39</sup> Application No. 5446/03

<sup>40</sup> Application No. 1685/10

no serious harm is caused. Additionally, images that are contained within work that has been classified by the British Board of Film Classification are excluded from the publication offence (so long as they are not extracted for the purposes of sexual arousal). This ensures that a filmmaker is not prevented from expressing themselves by publishing a non-pornographic film where the particular scene depicting sex between relatives is part of the narrative of the film.

### *Possession offence*

134. Once you create an image, you possess it, so the effect of the new possession offence is to generally prohibit the creation of pornographic images of sex between relatives, or those pretending to be relatives. There is an argument therefore that the new possession offence indirectly engages Article 10 as it could be seen as inhibiting a person's artistic expression in creating the images. However, this indirect impact is too remote to engage Article 10, particularly given the available defence that permits the possession of pornography that you have created with a person who is not your family member, so long as serious harm is not caused. In the event the new possession offence was found to engage Article 10, this would be justified for the same reasons as the new publication offence.

135. As such, the Government considers the measure is compatible with Article 10.

### *Article 1 of Protocol No 1 – Protection of property*

136. Article 1 of Protocol 1 to the ECHR entitles legal persons to the peaceful enjoyment of their possessions, including images. The new possession offence will be prospective, however A1P1 is engaged because due to possession being a continuing act a person will have to permanently delete or otherwise permanently get rid of such pornographic images to avoid committing the offence when it comes into force.

137. Additionally, it is acknowledged that the new publication offence directly targets those who publish images, including where they do so for commercial gain. Given the intent is to limit the proliferation of pornographic images of sex between

relatives, or those pretending to be relatives, there may be an indirect impact (although this is difficult to assess or quantify) on the income of those individuals or commercial pornography platforms publishing such images. Also, the new offences will be priority offences under the Online Safety Act 2023 and therefore if a service provider generates income from content published by its users, then since it will have proactive duties to proportionately prevent and remove such priority illegal content, they may be deprived of any income that could be made from the image. There is an argument therefore that A1P1 is engaged to the extent that the income of individuals or commercial pornography providers is reduced because of the new offences coming into force.

138. Any direct interference (or to the extent that such indirect interferences with A1P1 are protected) is a proportionate means of achieving the legitimate aims of protection of morals, the prevention of crime and protecting the rights and freedoms of others, on the same basis as Article 8 and 10.

139. Requiring persons to permanently delete or otherwise get rid of images portraying illegal sexual activity between family members that they possess before the offence comes into force is consistent with the position that possession of such images should be limited in the public interest. The possession of extreme pornography offence at section 63 of the CJIA 2008 was amended by the Criminal Justice and Courts Act 2015 to criminalise pornographic images depicting rape and the decision then was that persons in possession of such images had to delete or otherwise get rid of them to avoid committing a criminal offence. There is therefore relevant precedent for this approach.

140. Persons will be able to continue to possess pornography that does not portray sex between relatives and due to the available defences, a person will be able to continue to possess such a pornographic image when they have a legitimate reason for doing so and where they directly participated in the act portrayed and no serious harm is caused, so as they are not in fact related to the other persons directly participating. The new possession offence is therefore the least restrictive way of achieving the legitimate aims and are therefore proportionate.

141. Additionally, it is possible that the persons in the image have not consented to being in the image and any interference with A1P1 must be balanced with the protection of others' Article 8 rights, where that is relevant in any individual case.

142. Additionally, individuals and commercial producers of pornography will be able to continue producing other pornography, such that this is the least restrictive means of achieving the objective.

143. As such, the Government is satisfied the measure is compatible with A1P1.

**Home Office and Ministry of Justice**

**23 February 2026**