

PUBLIC AUTHORITIES (FRAUD, ERROR AND RECOVERY) BILL
EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

For the Bill as brought from the House of Commons

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Public Authorities (Fraud, Error and Recovery) Bill. It has been prepared by the Department for Work and Pensions (“DWP”) and the Cabinet Office.
2. On introduction of the Bill to the House of Lords, Baroness Sherlock OBE, Department for Work and Pensions made a statement under Section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with Convention rights.
3. The Bill is intended to safeguard public money and protect the economic well-being of the country by reducing public sector fraud, error and debt. The Bill makes provisions to better identify, prevent and deter public sector fraud and error and enable the better recovery of money (debt) owed to the taxpayer where public money has been stolen or overpaid.

Summary of the Bill

Part 1: Functions Exercisable on Behalf of Public Authorities

4. Part 1 of this Bill provides powers for the Cabinet Office, via the Public Sector Fraud Authority (“PSFA”), to tackle fraud against the public sector, and introduces arrangements for the oversight of these powers to drive their effective use and ensure they are not misused. The Cabinet Office will use these powers on behalf of other Departments and wider public bodies. This will result in more money being recovered, more robust action being taken against those who commit fraud against the public sector, and an increased deterrent to potential fraudsters. The measures in Part 1 of the Bill will:
 - a. Provide for the PSFA becoming a statutory body and the ability for the Minister for the Cabinet Office to transfer functions in the Bill (as per the powers below) to be exercised by the PSFA.
 - b. Give Authorised Officers (“AOs”) within the PSFA information sharing and gathering powers. This includes a power to compel information from information holders; issue a financial civil penalty for failure to comply with the request for information; and receive, disseminate and share criminal offence data between government departments.
 - c. Give Authorised Investigators within the PSFA powers to apply to a court for search warrants and production orders and powers to seize and retain evidence, such as documents and electronic devices, enter premises with a warrant issued

by a court, and search for and seize evidence and deal with the evidential chain thereafter.

- d. Enable the PSFA to recover a recoverable amount identified through PSFA investigation. For these purposes a recoverable amount is identified as payments made as a result of fraud or error that:
 - i. The Minister has identified or confirmed during the course of an investigation in respect of suspected fraud against a public authority, and
 - ii. The public authority is entitled to recover.
- 5. The Minister can exercise the recovery powers to recover a recoverable amount either with the consent of the liable person or following a judgment in the Minister's favour. The Minister may also use the recovery powers to recover a civil penalty, but only once the time for appealing the penalty has passed without an appeal being brought or where an appeal against a penalty has been finally determined.
 - a. The recovery powers include the ability to recover such an amount directly from an individual's earnings via a Deduction from Earnings Order, and directly from bank accounts via lump sum direct deduction orders for specified amounts and regular direct deduction orders for regular deductions.
 - b. Introduce a framework of civil penalties for fraud that the Minister can impose, as an alternative mechanism to dealing with fraud cases via criminal prosecution.
 - c. Create a new oversight function for use of the powers in the Bill to help build trust in Government and ensure the correct and appropriate use of the powers.

Part 2: Social Security (Fraud, Error and Debt)

- 6. Part 2 of the Bill makes provision for new powers for the DWP to identify and address incorrect payments arising from fraud and/or error in the social security system. It also makes provision to improve DWP's recovery of debt from those no longer in receipt of benefits. Part 2 of the Bill makes provision to:
 - a. Introduce reforms to existing investigation powers DWP routinely uses. This includes reforms to compel information from all third-party information holders (subject to exemptions) in support of criminal investigations, creating a clear, single, legal framework. The Bill brings any DWP related payment (including grants and National Insurance number related fraud), not just benefit payments, into scope of a criminal investigation. The Bill also makes provision to allow DWP to make and receive requests via a digital portal.

- b. Require banks and other financial institutions (“Banks”) to examine their own datasets to help identify where incorrect benefit payments may be being paid, through the new Eligibility Verification Measure (“EVM”). The Bill makes provision for important safeguards on these powers, including the requirement to consult on and publish a statutory Code of Practice, as well as a duty for the Secretary of State to appoint an independent person to oversee the use of the powers.
 - c. Provide new powers to DWP’s serious and organised fraud investigators when investigating serious and organised crime. These powers make provision for trained and authorised investigators to apply to a court for warrants of search and seizure and obtain production orders; enter and search premises with a warrant and to seize evidence; use reasonable force, if necessary, in the exercise of such powers; and make an application to a court to deal with seized evidence appropriately.
 - d. Broaden existing debt recovery powers to enable the recovery of debt more effectively and fairly from those who are not in receipt of benefits or Pay As You Earn (“PAYE”) earnings who can, but currently do not, make repayments. This brings DWP’s debt recovery powers broadly in line with His Majesty’s Revenue and Customs (“HMRC”) and the Child Maintenance Service. The Bill makes provision for debt recovery directly from bank accounts through RDDOs and lump sum direct deduction orders without a court order. The Bill also makes provision to disqualify a person from holding a driving licence, subject to court approval and where the liable person’s licence is not essential to their ability to earn a living or where suspension of a driving licence would not be inappropriate.
 - e. Change the Administrative Penalty regime so it can be offered for a wider range of DWP payments, not just benefit payments, and remove the loss of benefit when an Administrative Penalty is accepted by a benefit claimant.
 - f. Provide for DWP to appoint an “independent person” to carry out reviews of the functions under Sections 109A-G of the Social Security Administration Act 1992 (“SSAA”) which is amended by this Bill.
7. Part 3 makes general provisions relating to the application and limitations of the Bill, the extent of the Bill, the commencement of the Bill and the short title.

Convention article analysis

8. The following provides analysis of the interaction of the provisions in the Bill with the various Convention Rights engaged. Parts 1 and 2 of the Bill are separately analysed.

Part 1: Functions Exercisable on Behalf of Public Authorities

Article 6 ECHR

Article 6(1) provides that:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The following provisions are considered to engage the right to a fair trial under Article 6:

Article 6(1) provides that:

- i. Chapter 3 (Rights to Recover)
- ii. Chapter 5 (Civil Penalties)
- iii. Clause 101 (Application and Limitation)

Chapter 3 (Rights to Recover)

9. Whilst the right to recover payments are arguably foreseeable insofar as they relate to recovery of losses which were already recoverable by the public authority through the courts, the exercise of the recovery powers in respect of civil penalties arguably create new liabilities engaging Article 6 ECHR. Even if the civil limb of Article 6 ECHR is found to apply to recovery powers more generally, the conditions of Article 6 ECHR are met.
10. Before exercising a recovery power, the Minister must give the liable person a recovery notice containing specified information, including the reasons for the proposed claim and amount. Where a person does not accept there is a recoverable amount to which the public authority is entitled to claim, the claim will be determined through the courts with all the attendant Article 6 ECHR safeguards inherent in the court process. In terms of extending the limitation period for Covid-19 cases, the proposed extension is not creating any new causes of action or changing the liable person's right to a fair trial, it is simply extending the period for which the Minister can bring the claim for the recoverable amount.
11. In respect of recovering civil penalties, the Minister may only exercise the recovery powers where (1) the time for appealing a civil penalty has passed without an appeal being brought or (2) where an appeal against a civil penalty has finally been determined. Therefore, the liable person will have access to a fair trial if they appeal a decision to impose a penalty, thus ensuring that Article 6 obligations are met.

Chapter 5 (Civil Penalties)

Clause 50 (Penalty relating to fraud)

12. The power to impose a civil penalty engages Article 6 ECHR. On balance, the Government considers the imposition of a civil penalty for fraud or conspiracy to defraud, where an authorised officer considers, on the balance of probabilities, that a

person carried out, or conspired to carry out, fraud, is likely to amount to a criminal charge for the purposes of Article 6 ECHR and therefore the protections in Article 6(2) and (3) apply. This is because the civil penalty will:

- a. be for conduct that might otherwise be subject to criminal prosecution as statutory and common law offences of fraud and conspiracy to defraud;
- b. be issued by a public body with statutory powers of enforcement;
- c. have a punitive and deterrent aim;
- d. seek to protect the general interests of society via the protection of public funds in a way that is usually - though not always - protected by the criminal law;
- e. have no maximum penalty - up to 100% of the incorrect payment - and may be imposed in addition to the recovery of the recoverable amount.

13. It is expected that large penalties, potentially in the millions of pounds, will be imposed in addition to the recovery of the recoverable amount itself.

- a. The Government's position is that the application of civil penalties of a "criminal nature" on the basis of the balance of probabilities is permissible under Article 6(2) ECHR and consider the minimum rights in Article 6(3) to be met for the following reasons (*Grayson and Barnham v UK* (2008) (19955/05 & 15085/06); *Phillips v UK* (2001)(41087/98); *Salabiaku v France* (1988) (10519/83)):
- b. Balance of Probabilities: This standard is permissible for civil penalties as long as the burden of proof and evidence requirements are clear, and the defendant has adequate opportunity to challenge the penalty. The burden of proof required, and the opportunities to make representations, appear on the face of the Bill (see "Fairness" below). The Bill provides that the Minister must issue a statutory Code of Practice about how penalties will be administered, including how the Minister will make decisions about the imposition and amount of a penalty. The statutory Code of Practice must comply with Convention rights, including the requirement for "clarity of the law" to meet the "in accordance with law" criterion.
- c. Proportionality: A penalty of up to 100% could raise concerns if it is deemed excessive or punitive, particularly if it effectively mirrors a criminal sanction in severity or effect. The Fraud Act 2006 does not specify a fixed monetary penalty for fraud but instead allows courts to impose fines and/or custodial sentences depending on the severity of the offence. Importantly, there is no cap or maximum on the fine that can be imposed following a successful criminal prosecution (cf. the proposed civil penalties, here, which are limited). In other words, the proposed civil penalties are not harsher than the existing criminal ones in so far as fines are concerned (where criminal penalties can include a custodial sentence, as well as a fine).

- d. Legitimate Aim: The penalty should also align with the legitimate aim of the legislation which, in this case, includes deterring fraud against the public purse.
 - e. Fairness: Safeguards must exist to ensure the individual can contest the penalty and avoid undue hardship. The Bill affords individuals the right to seek an internal review, an external appeal to the appropriate court with its attendant rights of onward appeal. The Bill also contains express provisions restricting how much can be recovered from a liable person in cases of hardship.
14. The minimum requirements applicable in the context of a criminal charge under Article 6(3) are met through the requirement to issue a penalty decision notice with specified information before imposing a penalty, including reasons for the proposed penalty, and the requirement to invite written representation. The availability of an appeal to the appropriate court provides the opportunity for evidence and witnesses to be examined by a Judge.

Clause 53 (Penalty for failing to comply with requirements)

15. The Government considers that applying penalties to the failure to comply with other Bill provisions does not amount to a criminal charge for the purposes of Article 6. Unlike civil penalties for fraud, penalties for failure to comply with requirements imposed under the Bill are intended to incentivise compliance with requirements imposed under the Bill to assist the Minister in investigating fraud and recovering recoverable amounts.
16. Before issuing a penalty, the Minister must give the liable person a notice of intent inviting them to make representations about the proposed penalty. The notice of intent must include the amount of the penalty, the reasons and the means by which representations may be made. The representations must be considered before any decision is made to issue a penalty decision notice. The penalty decision notice must also state the amount of the penalty, the reasons and the means by which a review may be requested. Any review must be considered before a penalty notice is issued. A further right of appeal to the appropriate court ensures that the procedural guarantees of Article 6 ECHR will be met.

Clause 101 (Application and Limitation)

17. Article 6 ECHR will be engaged in cases where the time limit for bringing an action is extended to 12 years. Retroactive extension of time limits in civil matters may be incompatible with Article 6 ECHR where it may impact the preparation of a defence or where it is designed to influence the outcome of an existing dispute.
18. However, whilst the Bill extends the time limits beyond those which a person will have expected to apply at the time the relevant conduct took place, it essentially only extends the period for a further six years for a contract or, potentially, not at all for a deed. Crucially, it will extend the time limit before the original time limit would have

expired. The fact that the limitation period will be extended to twelve years in total, and the extension will take place before the original time limit would have expired, should not have significant impacts on the availability of evidence or the preparation of a defence.

Article 8 ECHR

Article 8 provides that:

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

The following provisions in Part 1 are considered to engage the right to respect of private and family life under Article 8:

- i. Clauses 3-6 (Information) and Clause 19 (Requirement for banks to provide information)
- ii. Clauses 7 and 8 (Powers of entry, search, seizure)

Clauses 3 - 6 (Information), Clause 19 (Requirement for banks to provide information)

19. The proposed information gathering and sharing powers will engage Article 8 ECHR as they involve the processing of personal data. However, such interferences are in accordance with law and pursue the legitimate aims of preventing and detecting fraud and protecting the economic well-being of the country.
20. Reports show that, in 2021/2022, the government detected £823m in fraud and error, of which only £190m was recovered. This equates to only 23% recovery.¹ The information gathering and sharing powers are necessary and proportionate to investigate, and recover, money lost as a result of public sector fraud. These fall squarely within the specified legitimate aims of preventing and detecting crime and protecting the economic well-being of a country.
21. In the case of the power to require bank statements and bank account information, the interference is a necessary and proportionate means to pursue the legitimate aim of recovering public money. This is because, until bank statements are obtained, there will be no reasonable means of determining whether the individual has the means to repay where the liable person is refusing to engage. The purpose of the power to request bank statements is to ensure that a deduction is possible, and that a lump sum or regular deduction would not cause exceptional hardship in meeting essential living expenses by leaving insufficient funds in their account.

¹ <https://www.gov.uk/government/publications/cross-government-fraud-landscape-report-2021-2022/cross-government-fraud-landscape-report-2021-2022-html#:~:text=Detected%20fraud%20and%20error%20relating,reported%20level%20%5Bfootnote%209%5D>.

22. In the case of joint account holders, the power to require bank statements to disclose the personal income and expenditure of a person who has not received a recoverable amount (including an 'incorrect payment'), or who has not had a civil penalty, or any late payment interest due in respect of a civil penalty, imposed against them engages Article 8. Consideration has been given to whether less intrusive means are possible to achieve the aim of recovering public money, such as obtaining aggregate or summarised data from the bank (such as average total deposits and credits, or redacted information). However, it would be impossible to accurately or effectively determine the amount of any lump sum or regular deduction to be taken without having sight of information contained in the statement, such as: the source and reference of monies; whether they appear to be one-off or periodic payments, and; the apparent nature of the transactions. Relying on the liable person to provide evidence themselves is not an alternative. In the context of a recoverable amount, the power to obtain information from banks will only be used where the liable person has agreed that the recoverable amount is recoverable and has failed to engage with the voluntary repayment process or where a court has determined that a recoverable amount is recoverable. In the case of civil penalties, the power can only be exercised when the time to bring an appeal against the penalty has passed or where an appeal against the penalty has been finally determined.
23. It should be noted that there are procedural safeguards on the face of the Bill which exempt legally privileged information and information which might incriminate a spouse or civil partner.
24. These are powers to request specific information for a specified purpose to achieve the aims of preventing and detecting fraud and protecting public money and economic well-being, rather than ongoing surveillance for these purposes.
25. Information gathered and processed by the Cabinet Office will also be subject to the robust safeguards in existing data protection legislation, which provides further safeguards in relation to the circumstances in which data can be collected, used and retained. It also includes oversight by the Information Commissioner's Office ("ICO") in relation to the use of powers to gather, process and share information (sections 115 & 116, Data Protection Act 2018). Where information has been requested via an information notice, the requestee has a right to review. The collection and use of communications data will be overseen by the Investigatory Powers Commissioner's Office.
26. The Government considers the measures to be clearly set out on the face of the Bill and a proportionate means of achieving the legitimate aims of preventing fraud and protecting public money and the economic well-being of the country.

Clauses 7 and 8 (Powers of entry, search and seizure etc)

27. Powers to search premises and seize property during such searches engage Article 8 ECHR. The interference is, however, in accordance with law, in furtherance of a legitimate aim, and necessary and proportionate to the legitimate aim pursued.
28. The interference by these powers is “in accordance with law” as it is provided in primary legislation and will also be subject to authorisation by a magistrate. The interference serves the legitimate aims of effectively investigating and combatting fraud committed against the public sector which is estimated to cost the public sector at least £40 billion a year. It is well-established that search and seizure measures are necessary to achieve the legitimate aim in order to obtain physical evidence of certain offences. Combatting economic crime has been accepted by the European Court of Human Rights as a legitimate aim justifying Article 8 ECHR interference associated with search and seizure. Judicial oversight will ensure that these powers are exercised only when necessary and to investigate suspected economic crime, also ensuring there are sufficient safeguards to ensure interference is proportionate. Statutory guidance in the form of Police and Criminal Evidence Act 1984 (“PACE”) Code B governs the exercise of these powers and their exercise will be overseen by the Independent Office for Police Conduct in relation to complaints and the Minister must appoint an independent person to oversee the exercise of PACE powers.

Article 1 Protocol 1 ECHR

Article 1 of Protocol 1 (“A1P1”) provides that:

“(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The following provisions are considered to engage A1P1 rights:

- i. Clauses 7 and 8 (Powers of entry, search and seizure etc)
- ii. Chapter 4 (Methods of Recovery)
- iii. Chapter 5 (Civil Penalties)
- iv. Clause 101 (Application and limitation)

Clauses 7 and 8 (Powers of entry, search and seizure etc)

29. The powers to seize and dispose of property in the context of an ongoing criminal investigation can amount to a “control of use” of property engaging A1P1. Where the State seizes property in the context of a dispute, such as where there has been

alleged fraud against public authorities, this may give rise to a positive obligation under A1P1 in the form of a duty of care in respect of the property and liability for damage or loss of such property. Whilst this duty has arisen in the context of eviction or repossession and expropriation, A1P1 may be engaged by analogy through the powers to seize and dispose of property. Interference with the right to peaceful enjoyment of property is permitted if it is provided for by law and it is a proportionate means of pursuing a legitimate aim.

30. The exercise of the powers will depend on consent or obtaining a warrant for entry authorised by a court. The measures are necessary to pursue the legitimate aims of effectively investigating and detecting fraud committed against the public sector. Seizure of evidence is necessary to prevent further offending and ensure that evidence is not destroyed pending any criminal proceedings. The power of seizure may only be exercised where it is necessary to seize it to prevent evidence being concealed, lost, altered or destroyed (Section 19 PACE).
31. In relation to disposal powers, the power can only be exercised on application to the court where the court considers disposal necessary because either (1) it will avoid or reduce the risk of the property being used in the commission of an offence, or (2) an owner cannot be identified. There are a number of safeguards built into the face of the Bill to ensure that the interference is no more than necessary and that reasonable measures are taken for preservation where an owner cannot be identified. In particular, where an owner cannot be identified, destruction of the property cannot take place until six months after the date on which the order is made by the court.
32. Judicial oversight over these powers will ensure that property is seized and disposed of only when necessary and there are sufficient safeguards to ensure interference is proportionate. The exercise of these powers will also be overseen by the Independent Office for Police Conduct and an independent person.
33. The Government considers the measures to be clearly set out on the face of the Bill and to be a proportionate means of achieving the legitimate aims of investigating and preventing fraud and protecting public money and the economic well-being of the country.

Chapter 4 (Methods of Recovery)

34. Where a person has received a recoverable amount (including an incorrect payment) due to fraud or receiving public money to which they were not entitled, it would be perverse if the person could then acquire an assertable right to that payment. To hold otherwise would enable recipients of a recoverable amount (including an incorrect payment) to profit from their own acts or omissions and, in some cases, fraud.
35. Given that, before the recovery powers can be exercised, either a court will have found, or a person will have accepted, there is a recoverable amount which the public

authority was entitled to recover, it is unlikely that recoverable amounts are likely to amount to a possession for the purposes of A1P1.

36. The same principle applies with respect to a deduction from earnings order. If the person has already disposed of the money to which they were not entitled, it would not be just that the money could not be recovered through other means. The liable person has already received the benefit, so in essence the recovery of those sums through a person's earnings is seeking to balance the loss to the public purse. There are sufficient safeguards on the face of the Bill to protect employees, and to ensure the interference with A1P1 is a proportionate means of achieving the legitimate aim of protecting and recovering public money.
37. For orders concerning joint accounts, there are safeguards to ensure that any A1P1 interference with monies held in a joint account is a necessary and proportionate means to recover public money owed. The Minister may only make deductions from a joint account where the liable person does not have a sole account. Only monies which beneficially belong to the liable person can be deducted. The face of the Bill requires the Minister to make an assessment of the liable person's beneficial interest in the account, having regard to the bank statements obtained. Before making deductions, both the liable person and the joint account holder can make representations, including in relation to any beneficial entitlement to joint account monies. The joint account holder also has the right to request an internal review and bring an appeal to the First Tier Tribunal against a decision to impose a deduction order on a joint account.
38. Where recovery powers are exercised in respect of civil penalties imposed under the Bill, a new liability has been created which engages A1P1. The circumstances in which penalties can be imposed are clearly circumscribed on the face of the Bill as being where a person has carried out fraud or failed to comply with requirements in the Bill. A penalty can only be recovered using the recovery powers only where the time for appealing a penalty has passed. The method through which these can be recovered—recovery orders via the courts, direct deduction orders, deduction from earnings orders—are also clearly circumscribed on the face of the Bill. The purpose of recovering civil penalties is in the public interest of protecting economic well-being through efficient collection of public money owed.
39. In terms of recovery of reasonable costs incurred in recovery, this can be justified as similar costs would be recoverable under standard court procedures. If the relevant department or public authority (which the Cabinet Office are acting on behalf of) were to make a claim under the usual court processes, they would be entitled, at the very least, to seek to claim the standard interest rate the court thinks fit or as may be prescribed (section 69 of the County Courts Act 1984). Where a person consents to the amount, the recovery costs will be lower than the costs recoverable in a lengthy and expensive court proceeding. In the case of recovery of a recoverable amount (including an incorrect payment) and penalties for incorrect payments, the person was

not entitled to have received the money in the first place, so it is reasonable that the public money used to seek recovery of the recoverable amount (including an incorrect payment), and any penalties imposed is recoverable.

40. The ability to recover the costs awarded by a court in relation to a claim for a recoverable amount is not creating a new liability. This is a pre-existing right for any successful party in the court process. There are sufficient safeguards on the face of the Bill to protect the interests of both the liable persons and joint account holders. As such, the interference with A1P1 is a proportionate means of achieving the legitimate aim of protecting public money.

Chapter 5 (Civil Penalties)

41. Given the penalties will result in the permanent confiscation of money, the exercise of civil penalty powers may involve a “deprivation of possession” for the purposes of A1P1 and must be in accordance with law, in the public interest, and be a proportionate means of pursuing a legitimate aim. The interference is provided for in primary legislation, and arbitrariness is prevented via layers of internal review before penalties are imposed and scope to appeal to the appropriate court.
42. The penalties pursue the legitimate aim of protecting the public purse by deterring fraud and encouraging compliance with the investigation as well as facilitating recovery of recoverable amounts. Fraud and error causes significant financial impacts, costing the public purse at least £40bn per year. The European Court of Human Rights has held that the following are legitimate public interest aims, and both are relevant here: confiscation of monies acquired unlawfully (*Honecker and Others v. Germany (2001) (53991/00 & 54999/00)*); and ensuring the smooth operation of the justice system, with further references to the importance of administering justice without delays which might jeopardise its effectiveness and credibility (*Konstantin Stefanov v. Bulgaria (2015) (35399/05), § 64*).
43. Penalties of 100%, in addition to use of the powers to recover any amounts a public authority is entitled to recover in respect of fraud, are intended to punish the most egregious offences, where no cooperation is forthcoming. The Bill requires the Minister to issue a statutory Code of Practice setting out how the level of penalties will be set, and including provision for reductions based on cooperation and disclosure.
44. Penalties of up to 100% are proportionate because the amount is directly proportional to the scale of the fraud. As outlined above, the penalties are also not excessive or disproportionate in that they do not exceed the criminal sanction available for the same conduct.

Clause 101 (Application and Limitation)

45. The intention of the extension of the limitation period is to enable successful recovery of money incorrectly received—either by agreeing to pay upon receipt of a recovery notice or by enabling determination of claim—which will, in turn, result in the deprivation of money. It does not create any new cause of action but rather extends the period for actions for recoverable amounts, including money incorrectly received. As above, where a person was not entitled to that money or wrongfully caused a loss, it would be perverse if a person could acquire an assertable right to that money. To hold otherwise would enable recipients of incorrect payments to profit from their own omissions and, in some cases, fraud. Given that either a court will order, or a person will have to accept, there is a recoverable amount which the public authority was entitled to recover, it is unlikely that recoverable amounts are likely to amount to a possession for the purposes of A1P1.
46. Even if A1P1 is engaged, the interference is in accordance with law and in the public interest of recouping public money incorrectly paid or lost due to wrongful action. Additionally, there is a clear public interest in allowing the Government to have adequate time to investigate complex fraudulent activity against the public sector and, where found, to recover funds claimed fraudulently during the pandemic. The extension of the limitation period is clearly rationally connected to the aim of enabling the recovery of public money and deterring fraudulent activity. The short extension of the limitation period by, essentially, a further six years at most, is a proportionate means of achieving these legitimate aims.

Article 4 Protocol 7 ECHR

Article 4 of Protocol 7 (“A4P7”) provides that:

“(1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

“(2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.”

The following provisions are considered to engage A4P7 rights:

- i. Chapter 5 (Civil Penalties)

Chapter 5 (Civil Penalties)

47. Article 4 of Protocol 7 provides that no one shall be liable to be tried or punished for an offence for which he has already been tried. To make it clear that the Bill complies with this section, the Bill provides that a penalty notice cannot be given to a person in relation to an act or omission where a person has been found guilty of an offence in relation to that act or omission. Similarly, it provides that a person cannot be found

guilty of an offence where a penalty has already been paid in relation to that act or omission.

Part 2: Social Security (Fraud, Error and Debt)

Article 6 ECHR

Article 6(1) provides that:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The following provisions are considered to engage the right to a fair trial under Article 6:

- i. Clause 72 (Information notices)
- ii. Clauses 76 and 77 (Entry, search and seizure England, Wales and Scotland)
- iii. Clause 80 (Disposal of property)
- iv. Chapter 4 (Overpayments: Recovery and Enforcement) and Schedule 5 (Recovery from bank accounts etc...) and Schedule 6 (Disqualification from driving)
- v. Clauses 97 and 98 (Offences and Penalties)

Clauses 72, 76, 77 and 80 (Information notices, Powers of entry, search and seizure England and Wales and Scotland and Disposal of Property)

48. Article 6 is engaged by the investigation and prosecution of the offences that may follow the deployment of DWP's powers in s.109A SSAA et seq. (as amended by this Bill). The normal safeguards that apply in the criminal justice system such as the presumption of innocence, the standard of proof (beyond reasonable doubt) in criminal trials and the provision of a fair hearing in front of an impartial Judge and/or jury, will apply to any prosecutions that follow the use of these powers. As such, the Government considers that the changes are compatible with Article 6.

Clause 91 (Chapter 4) and Schedule 5 (Recovery from bank accounts etc), Clause 92 (Chapter 4) and Schedule 6 (Disqualification from driving), Clause 93 (Code of Practice)

49. The DWP debt recovery measures introduce two new methods of recovery where social security payments were wrongly paid to a person ("the liable person") as a result of fraud or error.
50. The two new recovery methods are:

- a. administrative deduction orders (RDDOs and lump sum direct deduction orders), where lump sum or regular amounts will be deducted from a liable person's bank account (or, where a joint account, the liable person's share of monies in the account) and paid directly to DWP by the bank; and
 - b. driving disqualification orders, where a court (at its discretion and subject to safeguards) would order the liable person who can afford to make payments to DWP (but where some or all of the recoverable amount has not been paid) to make affordable payments or be subject to periods of disqualification (beginning at up to six months, and never more than 24 months) to encourage or compel repayment.
51. The deduction order power will be administratively exercised rather than ordered by a court. The liable person, bank and any joint account holder will have rights to make representations in the 28 days before any final order is made which DWP must consider. Where a deduction order is made there will be a right of appeal to the First Tier Tribunal. There will be specific grounds on which a liable person can challenge a deduction order as follows: the deduction order would place the liable person under exceptional hardship; there are insufficient funds to satisfy the proposed deductions; the repayment amount said to be outstanding is incorrect; the order is technically defective; a part or whole of the money that is proposed to be deducted does not belong to the liable person. In the case of regular deduction orders, there will be a right to request a review of the deduction order (such as where there has been a material change of circumstances). There is a requirement in clause 93 for the Secretary of State to publish, keep under review and have regard to a Code of Practice regarding the exercise of her powers to make deduction orders.
52. The power to disqualify a liable person's driving licence will only be used as a power of last resort where other methods of recovery have failed. There will be a de minimis level of debt where the power can be used on the face of the Bill to ensure that it is not disproportionately used for trivial debts. The power to make the order will rest with the court who must only impose the disqualification when independently satisfied, on the balance of probabilities, the liable person has the present and future means to pay, and that the repayment terms it orders are affordable. Where the person has an essential need to drive, including to earn a living, the court cannot make the disqualification order (as set out on the face of the Bill).
53. It is accepted that Article 6 rights will be engaged by the powers and the Government's position is that given the safeguards in place such as the right of review, Code of Practice and a right of appeal to the First Tier Tribunal (and onwards) and the power to make a disqualification order resting with the court, the provisions are compatible with Article 6.

Clause 97 (Offences: non-benefit payments)

54. Within the current legislative framework, there are offences of dishonest representation (see Section 111A(1) of the SSAA) and the offence of false representation (see Section 112 of the SSAA). However, those only extend to benefit payments. Clause 97 will extend the scope of the existing offences to include non-benefit payments. The expansion of the scope of these offences will engage Article 6 ECHR as they amount to criminal charges and meet the criteria set out in paragraphs 82 and 83 by the ECtHR in *Engels & Others v Netherlands* (1976) (5370/72).
55. The Government's position is that this provision is compliant with Article 6. This provision pursues the legitimate aim of deterring behaviour that would be detrimental to the public purse if allowed to continue. The measure is connected to that aim and limited to expanding the type of payment to which an Administrative Penalty can be offered for underlying criminal conduct. This interference is justified as it ensures there is clarity for all as to what payments fall within the ambit of fraudulent overpayments. It also allows DWP to investigate fraud in a timely manner. The ability to seek a mandatory reconsideration and an appeal to the First Tier Tribunal (as internal and external safeguards) is a proportionate mitigation that ensures this provision is Article 6 compliant.

Clause 98 (Penalty as alternative to prosecution: extension to non-benefit payments)

56. Within the current legislative framework there is provision for a person or colluding employer to accept an Administrative Penalty as an alternative to prosecution where the Secretary of State considers there is sufficient evidence to prosecute for benefit fraud (including where a person has claimed benefit falsely but has not obtained a benefit overpayment). Clause 98 will extend the possibility of offering an Administrative Penalty for offences related to non-benefit payments made by the Secretary of State.
57. The extension to include non-benefit payments within the Administrative Penalty regime may interfere with Article 6 rights (as discussed above). It is the Government's position that this provision is compliant with Article 6. This provision pursues the legitimate aim of deterring behaviour that would be detrimental to the public purse if allowed to continue with no consequence. The measure is connected to that aim and limited to expanding the type of offence that can fall within the current enforcement regime so that a person or colluding employer may accept a penalty as an alternative to a criminal prosecution. The safeguards in place will mirror those currently operating under the existing legislation (SSAA). That means a full criminal investigation will need to be concluded and a decision reached that there is sufficient evidence to commence proceedings before the Administrative Penalty is offered as an option for the individual (or colluding employer). There will be a review process in place and an ability to refer to the First Tier Tribunal which will ensure that there are appropriate judicial protections in place. This provides a proportionate mitigation to ensure that this measure is Article 6 compliant.

Article 7 ECHR

Article 7 provides that:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

58. In addition to preventing retrospective criminal offences, this principle means that only the law can define a crime and prescribe a penalty. Further, the rule of law requires that relevant legal provisions be sufficiently precise, accessible and foreseeable.

The following provisions are considered to engage Article 7 (no punishment without law):

- i. Clause 72 (Information notices)
- ii. Clause 76 (Entry, search and seizure in England and Wales)
- iii. Clause 77 (Entry search and seizure in Scotland)
- iv. Clauses 97 and 98 (Offences and Penalties)

Clauses 72, 76 and 77 (Information notices, Entry, search and seizure England and Wales and Scotland)

59. DWP has a long-established process that provides for dealing with and referring allegations of social security fraud to the Crown Prosecution Service in England and Wales and the Crown Office and Procurator Fiscal Service in Scotland. There is no intention in the Bill that any criminal punishment will be imposed without the involvement of the justice system. Therefore, DWP considers that the provision will meet the requirements of Article 7.

Clauses 97 and 98 (Offences and Penalties)

60. The reforms will expand the types of payments which fall within the Administrative Penalties regime to include non-benefit payments. This will allow a person the choice to accept an Administrative Penalty where DWP consider this to be an appropriate course of action as an alternative to prosecution. The expansion of the Administrative Penalty regime will apply prospectively i.e. to payments fraudulently made (or fraudulently applied for) after the date of Royal Assent. In the light of this, it is the Government's position that these clauses are compatible with Article 7.

Article 8 ECHR

Article 8 provides that:

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

The following provisions are considered to engage the right to respect of private and family life under Article 8:

- i. Clause 72 (Information notices)
- ii. Clause 73 (Code of Practice)
- iii. Clause 74 (Eligibility verification)
- iv. Clause 75 (Eligibility verification: independent review)
- v. Chapter 2 (Powers of entry, search and seizure etc)
- vi. Clause 86 (Disclosure of information etc: interaction with external constraints)
- vii. Clause 88 (Independent review)
- viii. Clause 91 (Recovery from bank accounts etc)
- ix. Clause 92 (Disqualification from driving)
- x. Clause 93 (Code of Practice)
- xi. Schedule 3 (Eligibility verification etc)
- xii. Schedule 4 (Social security fraud: search and seizure powers etc)
- xiii. Schedule 5 (Recovery from bank accounts etc)
- xiv. Schedule 6 (Disqualification from driving)

Clause 72 (Information notices) and Clause 73 (Consequential amendments to the Social Security Fraud Act 2001)

- 61. Clause 72 inserts a new section 109BZB into the SSAA. New section 109BZB widens the range of third-party information holders from which AOs in DWP can compel information and enables information to be provided digitally. It covers all types of investigations conducted by DWP including grant and National Insurance number application fraud. The justification for expanding the power is that the current prescriptive list of information providers from which DWP can compel information means certain organisations and emerging sectors which may hold relevant information are not able to be immediately included, such as investment managers, estate agents and transport providers. Relevant information will be determined on a case-by-case basis and will be relevant to the particular eligibility criteria for the benefit, payment (or National Insurance application) that is under suspicion of being fraudulently obtained.
- 62. There are various safeguards including a requirement in clause 73 (which amends the Social Security Fraud Act 2001) for the Secretary of State to publish a new Code of Practice in relation to the strengthened information gathering powers. The proposals do not seek to authorise or require the disclosure of personal data which

contravenes data protection legislation, or a disclosure which is prohibited by the Investigatory Powers Act 2016 (“IPA”) (see clause 86).

63. The disclosure of information will only be authorised for the limited purposes set out in the legislation and the information-sharing requirements will be subject to statutory restrictions on disclosure of information set out in clause 86. This includes exemptions for specific types of information such as legal professional privilege, human tissue and journalistic information. There is an exemption aimed at situations where the disclosure of information may cause potential endangerment to the subject of the request, for example, information held by voluntary organisations for victims of domestic abuse. Clause 86 also provides that the new powers do not require the disclosure of information which would contravene the Data Protection Act 2018 or the IPA.
64. The wider power to compel information will apply to anyone that the AO has a reasonable belief holds information that is relevant to the criminal investigation and where there is a suspicion of fraud in relation to a person (identified by name or description).
65. There will be oversight of the new information gathering powers (see clause 88 – independent review) which places a duty on the Secretary of State to appoint an independent person to carry out a review in the exercise of such functions.
66. Article 8 may be engaged by the new section 109BZB. The processing of information gathered (particularly certain categories of sensitive personal information and confidential information), involving an expanded group of data holders, is likely to include personal data and may therefore relate to an individual's private life.
67. It is the Government's position that to the extent that the use of this power interferes with individuals' privacy rights, any interference is lawful. The extent of the powers and the exclusions are set out clearly in the legislation such that the power is sufficiently clear, precise and foreseeable. Any interference is necessary and pursues the legitimate aim of preventing and detecting crime. DWP has a legitimate aim to protect public funds. Accessing and inspecting information is a necessary step for preventing and detecting fraud and ensuring the integrity of the welfare benefits system. Overall, the Government considers that the balancing of interests between the exercise of individuals' rights to a private and family life and the legitimate aims related to crime prevention and public interest, along with safeguards set out in a statutory Code of Practice and independent oversight, mean that any interference with Article 8 rights is justified and proportionate.

Clause 74 and Schedule 3 (Eligibility Verification) and Clause 75 (Independent review)

68. Clause 74 introduces Schedule 3 which will become new Schedule 3B to the SSAA (“Schedule 3B”) and will require Banks to share data with DWP for the purposes of identifying or helping identify the incorrect payment of certain benefits. Information

provided to DWP through the EVM will not be shared on the presumption or suspicion that an individual is guilty of any offence and the information, on its own, will not be used to make any final decision about benefit entitlement. An eligibility verification notice (“Notice”) sent by DWP to Banks will set out criteria (“eligibility indicators”) that relate to benefit eligibility. Banks will be required to search their data and may be required to provide information at specified intervals for a specified period to identify accounts into which certain DWP payments have been made or may be made which match the criteria set out in the Notice.

69. The eligibility indicators are the criteria that can help DWP identify whether a specified benefit is being incorrectly paid. For example, in Universal Credit, an individual cannot hold more than £16,000 in savings (capital) and remain eligible for Universal Credit, unless the capital is a result of a specified exception. Banks will be required to return specific data items on accounts matching the specified criteria. DWP will then use the EVM information received to identify the customer. The legislation illustrates how DWP may use the EVM information to meet the specified lawful purpose.
70. The Government recognises that Article 8 is engaged where a Notice is received requiring Banks to take specified steps including applying specified selectors provided by DWP to the data they hold, as well as when the filtered data is transferred to DWP for consideration of whether incorrect payments are being made and then in relation to the retention of the data and its subsequent use.²
71. The Government accepts that the privacy rights of benefit customers and the privacy rights of appointees (i.e. persons who receive benefit on a customer’s behalf, for example, where the customer lacks capacity), are engaged by these measures. The measures also require Banks to search data against specified benefit receiving accounts and individual’s linked accounts (which refers to other accounts held by the benefit recipient). The definition of accounts includes accounts held jointly. Therefore, the privacy rights of persons within this group will also be affected (in a joint account DWP assumes that any capital held jointly is split equally).
72. The Government’s position is that the interference with Article 8 rights is lawful and proportionate, pursuing the legitimate aim of safeguarding the economic well-being of the country by ensuring the proper allocation of scarce public resources in accordance with the legally prescribed criteria for state support through welfare benefits. EVM corresponds to the pressing social need to address the increasing trend of social security payment inaccuracies (arising from fraud and error). Alternative options to EVM have been carefully considered. Currently, claimants are required to self-report their compliance with eligibility rules as this can affect their entitlement to benefits and how much they receive. Where possible, DWP uses data to verify eligibility criteria. However, in some instances, DWP is unable to

² By analogy, *BIG BROTHER WATCH AND OTHERS v. THE UNITED KINGDOM* (Applications nos. 58170/13, 62322/14 and 24960/15) 2021) (“BBW v UK”).

independently validate this information routinely using an external data source and is reliant on claimants reporting their circumstances accurately.

73. Banks hold data which can help find incorrect payments. DWP can currently only access this data on an individual basis for cases where fraudulent activity is suspected as part of a criminal investigation. EVM will improve DWP's ability to verify whether individuals meet the eligibility criteria for key benefits and help ensure the accuracy of benefit payments. This further ensures that the build-up of debt is minimised for individuals.
74. This legislation provides the specific domestic lawful basis for the interference. It is considered accessible to the individuals concerned as it enables people to foresee how the measure may affect them. For example, it sets out the circumstances in which a Notice may be issued; the criteria which must constitute an eligibility indicator; the types of data that must not be included or returned in response to a Notice; and the restrictions on the processing of information gathered as a result of the measure. It is accepted that, similar to the bulk interception context, foreseeability (in the EVM context) cannot mean that individuals should be able to "foresee when authorities are likely to resort to such measures so that they can adapt their conduct accordingly."³
75. DWP has sought to reduce the risks of any potential arbitrariness of the EVM powers by having clear, detailed domestic rules on the measure's use⁴ set out in legislation and the accompanying Code of Practice. EVM is less invasive than the bulk interception regimes operated by the security and intelligence agencies and related departments. It has a narrower purpose and scope and the information returned aligns with matters that individuals are expected to keep DWP updated on relating to benefit eligibility. Data gathered under bulk interception regimes can indicate when, how and with whom an individual communicates. In contrast, EVM is targeted and will not give DWP insight into someone's private life. The legislation expressly prohibits DWP from requesting, and Banks from sharing, transaction information or special category data (see paragraph 1(4) of Schedule 3B). There is a narrow exception to this in paragraph 1(5) which provides that the prohibition does not prevent the sharing of data that establishes the fact that someone is in receipt of the relevant benefit specified in the Notice.
76. In addition, the legislation includes important safeguards concerning the use of data received in response to a Notice, helping to ensure any interference with Article 8 rights is proportionate.
77. Paragraph 5 of Schedule 3B provides that information given to the Secretary of State in response to a Notice may be used only to identify or assist in identifying incorrect payments of a benefit. Paragraph 6 of Schedule 3B sets out the restrictions on the processing of data and data protection matters, namely that the processing of

³ BBW v UK para 333.

⁴ BBW v UK para 333.

information carried out in compliance with a Notice must not breach any obligation of confidence owed by the processor or any other restriction, and that the processing of personal data in exercising the power to issue a Notice must not breach data protection legislation. The Department will discard all irrelevant personal data received (including relating to joint account holders and appointees).

78. The Code of Practice, which the Secretary of State is obliged to issue before the first Notice is sent (see paragraph 17(1)), is provided for in the legislation, which also details the Code's required content. These specifications seek to limit the intrusiveness of the measures, protect against its arbitrary use and aid foreseeability and transparency (without compromising the measure's effectiveness) by detailing and clarifying the exercise of the powers of the Secretary of State, Banks and other key stakeholders, such as the ICO. The Code of Practice is an important aspect of the measure's accountability framework targeted at guarding against the measure's arbitrary use.
79. The legislation provides that the Secretary of State must appoint an "independent person" to undertake yearly retrospective reviews of DWP's exercise of EVM, as detailed in the Bill. Each review is followed by a report to be laid in Parliament. The first report by the independent person will be published no later than one year after the date the powers are commenced and must report annually thereafter to the Secretary of State.
80. DWP has consulted with the ICO to ensure compliance with UK General Data Protection Regulation ("UK GDPR") and the Data Protection Act 2018. The independent person must consider, in each review, the extent to which the Banks' actions comply with the requirements of the measure.
81. The legislation provides specific safeguards which seek to ensure the Banks' compliance with the measure. For example, Part 2 of Schedule 3B sets out penalties which may be imposed on Banks where they fail to comply with a Notice or provide inaccurate or prohibited information in response to a Notice.
82. Individuals may not be aware that their rights have been interfered with or the specific details of the Article 8 interference (e.g. the content or date of the Notice), which means that there is no contemporaneous right of direct challenge for individuals. DWP will provide information to aid transparency which will be balanced against the need for operational effectiveness.
83. Individuals have various avenues to obtain information about the use of their data. They can complain directly to the ICO about the handling of their personal information. Individuals can make a data subject access request under Article 15 UK GDPR to either the DWP or the Bank. In relation to Banks, Article 13(3) UK GDPR may require Banks to inform data subjects of changes in their reason for processing. Individuals can also raise queries and complaints directly with DWP and Banks. Where an incorrect payment is found, individuals who are unhappy with a resulting decision will

have the option to apply for mandatory reconsideration (and onwards appeal to the First Tier Tribunal) in accordance with DWP's existing published practices.

84. In conclusion, it is the Government's position that due to the safeguards, as illustrated, the interference with individual's privacy rights is lawful and proportionate in accordance with the legitimate aim of the economic wellbeing of the country.

Chapter 2 (Powers of Entry, Search and Seizure etc) Schedule 4 (inserts new Schedules 3ZC and 3ZD) (Social security fraud: search and seizure powers etc for England and Wales and Scotland)) and Clause 88 (Independent review)

85. The Government recognises that the use of search powers is likely to intrude into an individual's personal or work life, in interference with their Article 8 rights. However, the Government considers that providing DWP Authorised Investigators with these powers (and equivalent powers for officers in Scotland) is both necessary and proportionate. Subsection 4 of new section 109D of the SSAA sets out the specific powers under PACE that will be able to be exercised by Authorised Investigators as part of a fraud investigation where the specific conditions in each of the sections are met and followed. This means there are strict parameters for which powers apply to DWP and what safeguards apply for each power. The sections of PACE that are relevant and applicable to DWP are the parts related to the searching and entering of premises, as well as the seizing of evidence.
86. Before any of the powers can be exercised by DWP officers, an application for a warrant will need to be made to the relevant court and it will be for the court to determine whether to grant the warrant and place any appropriate limitation or condition on the exercise of the power. Subsection 5 of new section 109D provides that a warrant may only be applied for by an individual who has received authorisation from the Secretary of State (of at least equivalent grade to a police officer) and is employed at the appropriate grade and in a specified role. Particular care will be taken where the owner of property is vulnerable.
87. Clause 88 provides for independent oversight by an "independent person" to provide a report to Parliament on the effectiveness of the powers. There will also be the ability for individuals to complain to the Independent Office for Police Conduct ("IOPC") (Clause 82, which provides for a power to make regulations conferring functions on the Director General and Parliamentary Commissioner to investigate matters in relation to PACE powers). The IOPC investigates serious complaints and allegations of misconduct made against police officers in England and Wales. Clause 83 provides for a similar function for Scotland and the equivalent body to the IOPC in Scotland - the Police Investigation and Review Commissioner ("PIRC"). It is anticipated that the IOPC and PIRC's roles will be limited to cases where death or serious injury has arisen from DWP officers exercising powers of search and seizure.
88. Given the safeguards in place, it is the Government's position that any interference with Article 8 rights by the use of this power will be lawful and proportionate in line

with the legitimate aims of the economic well-being of the country and for the prevention of disorder or crime, as these powers will only be used where the conditions in Section 109A of the SSAA are met (i.e. where DWP officers suspect a benefit offence).

Clause 91 and Schedule 5 (Recovery from bank accounts etc), Clause 92 and Schedule 6 (Disqualification from driving) and Clause 93 (Code of Practice)

89. Article 8 will be engaged by DWP obtaining the information, balances and/or account statements on the liable person's bank account(s). This includes in circumstances where the account is jointly held with a non-liable account holder, which further includes DWP obtaining the full name and correspondence address of the non-liable account holder(s).
90. In the case of joint account holders, this may disclose the personal income and expenditure of a person who is not the liable person and may not have any dealings at all with DWP. In the case of accounts which are used for business purposes by the liable person (but not by any corporate body), this information could potentially include commercially sensitive information about a sole trader or (unlimited) business partnership.
91. DWP considers interference with Article 8 ECHR is justified on the basis that the recovery of a debt of public money is in the interests of the economic well-being of the country. The information can only be obtained where it is reasonably necessary to do so. There is a further safeguard in the form of the requirement on the Secretary of State to issue a Code of Practice (clause 93). The deduction power will only be used where the liable person has refused to cooperate with DWP, which in many cases will be preceded by little or no engagement from the liable person over a period of months or years. The deduction order powers can only be used where the individual is not in receipt of benefits or in PAYE earnings. Obtaining the financial information is considered to be necessary and proportionate so that DWP can fairly and accurately undertake its duties to ensure any deduction is appropriate, which includes ensuring it does not cause the liable person to suffer from exceptional hardship (until either the liable person engages with DWP officers or their recent bank statements are reviewed, there is no means of determining when the power might be applicable). While there is no right of appeal against the issuing of an information notice itself, the balance is provided by the right of appeal to the First Tier Tribunal against the deduction order.
92. For final deduction orders, safeguards including limits on the amounts which can be taken from regular income, or minimum account balances in the case of lump sum deductions, will aim to prevent deductions from causing exceptional hardship to the liable person. As a matter of guidance, and as per DWP's existing policy and practices, the interests of any dependents will also be considered. In calculating whether the terms of a deduction order would cause hardship, DWP would be

expected to have regard to the banks' administrative charges which would be deducted from the account alongside the amount to be paid to DWP.

93. Before any bank statements are requested or obtained, the liable person will have been warned in writing that DWP has the power to take this action. This will provide the liable person another opportunity to voluntarily engage DWP in reaching a repayment plan, to dispute that any money remains owed, or to voluntarily provide evidence of financial means and needs.
94. There will be a representations stage before any funds are deducted, followed by the opportunity to request a review before the direct deduction order is given effect. Where either the liable person or non-liable account holder has challenged through making representations or requesting a review to DWP, they may appeal the direct deduction order to the First Tier Tribunal on, for amongst other reasons, hardship grounds. DWP considers the requirement that the Secretary of State is satisfied the proposed deduction order will not cause hardship (having regard to both the bank statements obtained and the information or evidence provided by the account holders in representations), and the right of appeal to the First Tier Tribunal, means that the provision is compatible with Article 8 on the basis that any interference with Article 8 rights is lawful and proportionate.
95. In relation to the driving disqualification power, there is very limited Article 8 engagement where information is shared between DWP, DVLA and the courts regarding the status of the liable person's driving licence. Such information exchange is necessary, and therefore any interference is justified so as to ensure DWP does not bring proceedings which have no grounds of success because the liable person is already disqualified for other reasons, and to give effect to any order by the court (to make, suspend or revoke a disqualification order). DWP considers that where driving may assist in, but is not necessary for, participation in essential economic, social, cultural and leisure activities, it is unlikely Article 8 is engaged due to restrictions on the use of the power on the face of the Bill. Most notably, the court may not make a disqualification order (suspended or otherwise) where the liable person has an "essential need" to drive. That expressly includes where the person needs to drive to earn a living but also leaves open other essential needs such as where the person resides in particularly rural areas without public transport links or has mobility issues preventing them from participating without the means to drive (especially when read together with Article 14 ECHR). The court is well-placed to exercise that discretion and make any necessary determinations, such that no interference should arise in these circumstances.
96. The Government considers that the only risk of interference is therefore where a disqualification order is made *in absentia*, because the liable person declined to attend the court to make representations when given the opportunity to do so. Even then, the requirement that the disqualification order be suspended in the first instance

provides the liable person the opportunity to challenge the validity of the order before any interference (through actual disqualification) occurred.

97. Finally, the Government does not consider there to be any affordability concerns in respect of the disqualification order, such that Article 8 ECHR would be further engaged. The court must only make the disqualification order when independently satisfied, on the balance of probabilities, the liable person has the present and future means to pay, and that the repayment terms it orders are affordable. Even where the order is made *in absentia*, the court must only do so on the basis of evidence of the person's means.
98. Should Article 8 be engaged in wider circumstances where driving is not necessary, but merely helpful in allowing that participation, the Government considers such interference would be justified and proportionate. The method of recovery is likely to be effective precisely because it causes an inconvenience to the liable person, without detrimentally interfering with their wider personal and proprietary rights. As the power is only used as a last resort, where the person has the means to pay but has put those means out of reach to avoid repaying the debt, the interference from that inconvenience is a proportional deterrent and, where disqualification occurs, provides a direct incentive and motivation for them to comply with payments. An immediate order giving effect to disqualification is always temporary, avoidable (by the liable person making payment) and must always be revoked when the debt is fully repaid. We again consider the risk of incompatibility in this respect to be low. Further safeguards are in place in the form of a requirement to issue a Code of Practice (clause 93) on how the driving disqualification functions will be exercised.

Article 1 Protocol 1 ECHR

Article 1 of Protocol 1 ("A1P1") provides that:

"(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The following provisions are considered to engage A1P1 rights:

- i. Clause 72 (Information notices)
- ii. Chapter 2 (Powers of Entry, search and seizure etc)
- iii. Clause 88 (Independent review)

- iv. Clause 89 (Enforcement of non-benefit payments)
- v. Clause 90 (Recovery and enforcement mechanisms)
- vi. Clause 91 (Recovery from bank accounts etc)
- vii. Clause 92 (Disqualification from driving)
- viii. Clause 97 (Offences: non-benefit payments)
- ix. Clause 98 (Penalty as alternative to prosecution: extension to non-benefit payments)
- x. Schedule 4 (Social security fraud: search and seizure powers etc)
- xi. Schedule 5 (Recovery from bank accounts)
- xii. Schedule 6 (Disqualification from driving)

Clause 72 (information notices)

99. This Clause gives DWP's AOs power to compel information from a wider range of third parties as described above at paragraph 62. Information relating to people may potentially be a possession for the purposes of A1P1 (*Veolia ES Nottinghamshire v Nottingham CC* [2010] EWCA Civ 1214). The Government's assessment is that any interference with the right to peaceful enjoyment of property is justified by the public interest in the prevention and detection of crime. DWP has a legitimate aim to protect public funds. Accessing and inspecting information is a necessary step for preventing and detecting fraud and ensuring the integrity of the welfare system. Any interference with property rights will be proportionate and subject to safeguards, such as only being used by a specifically trained and authorised DWP officer when information is being requested in support of an ongoing criminal investigation.

Chapter 2 (Powers of entry, search and seizure) and Schedule 4 (Social security fraud: search and seizure powers etc) and Clause 88 (Independent review)

100. Clauses 76 and 77 allow DWP to enter a premises with a warrant and remove items from that location. Where DWP have executed a warrant that enabled an Authorised Investigator to seize items from a premises as part of a DWP investigation, there will usually come a time when DWP will be able to return it to the owner if it is no longer needed for an ongoing investigation. In some cases, there may be reasons where it would not be appropriate to return an item, for example, because the person from whom the item was taken may not be the real owner, or the owner may not be able to be traced. There may also be a risk that the item seized, if it was returned, could be used for a criminal purpose. For these reasons DWP needs to have a way to lawfully allow certain types of action to be taken in relation to seized items. This will ensure that DWP has a lawful route that allows for them not to have to return seized

items to a person, where there is a strong belief that those items could then be used for the furtherance of crime. Clause 80 inserts a new section 109G into the SSAA and allows DWP to apply to a magistrate's court for action regarding seized items including disposal of the item.

101. The exercise of search, seizure and property confiscation powers may involve a "deprivation of possession" for the purposes of A1P1. The interference with these rights is provided for in primary legislation and arbitrariness is prevented by safeguards such as tight controls on which level of officer can apply for search, seizure and disposal and ultimately, the final authorisation for the warrant resting with a Judge. There will be guidance in practice to support the use of these powers providing for a further scrutiny and there will be independent scrutiny of how the powers are used (clause 88 reviews by an independent person). There will also be the ability for individuals to complain to the IOPC (clause 82 provides for a power to make regulations conferring functions on the Director General and Parliamentary Commissioner to investigate matters in relation to PACE powers). Clause 83 provides for a similar function for Scotland. Given the strong public interests in DWP being able to use these powers to target criminality and in particular social security fraud and given the safeguards in place (such as the interference with property is set out on the face of the Bill, the judicial control and the independent oversight), the Government's position is that any interference with A1P1 rights is prescribed by law and is necessary and proportionate to the public interest of preventing and prosecuting social security related crime.

Clause 90 (Recovery and enforcement mechanisms), Clause 91 and Schedule 5 (Recovery from bank accounts etc)

102. The Government recognises that A1P1 rights will be engaged by these provisions. In the context of the liable person's own money being recovered, there will be an obvious and direct interference. In the context of joint accounts, only monies which beneficially belong to the liable person may be deducted. However, it will not always be clear (or agreed between parties) what share of existing or deposited funds belong in law to the liable persons. The Government's position is that the funds are *legally* jointly held by both account holders. Where there is ambiguity or uncertainty over the share of the funds a deduction order could inadvertently lead to the non-labile person's share of the funds being subject to a restriction or deducted.
103. In respect of deduction orders generally, the liable person's right to monies in their bank account will include, now or in the past, possessing or enjoying money which has been transferred to them by DWP improperly. In all the debt recovery cases, that has already been determined by law (by way of an earlier overpayment decision, which the liable person had the ability to challenge and/or appeal). While the liable person has A1P1 rights in respect of money in their account, and DWP may be unable to 'trace' the exact funds into the account to be deducted from, DWP has a pseudo-right as a statutory creditor to the public funds which the liable person has improperly

possessed or does improperly possess. That, in DWP's view, provides a clear application of the State controlling property for the public (general) interest of recovering state funds, and in securing the payment of taxes or other contributions or penalties.

104. The built-in safeguards, including minimum account balances to be left after a lump sum deduction, maximum rates of regular deductions, affordability assessments which must inform any proposed deduction and requirement to issue a Code of Practice, will ensure that the liable person is never placed in a position where their ordinary living expenses cannot be met. These safeguards will ensure less intrusion is caused to the liable person's peaceful enjoyment of property, both as a direct and indirect consequence of the action, than alternative existing debt enforcement options such as charging orders or bailiffs.
105. Therefore, the Government considers that any interference with A1P1 rights would be justified and proportionate and hence considers these provisions are compatible with A1P1.

Clause 92 and Schedule 6 (Disqualification from driving)

106. The Government does not consider that driving licences themselves, either in legal status or the physical document, constitutes a possession for A1P1 ECHR purposes. A licence is provided at the Government's discretion, subject to several conditions. The Government can suspend, revoke or confiscate a licence for a number of reasons. Driving licences cannot be sold or transferred and do not hold a monetary value. Driving licences do not, arguably, resemble a possession to which the liable person has an inherently assertible right.
107. The driving licence and qualification regime undoubtedly affects vehicular ownership, by constraining the driver's use of that vehicle on public highways. However, the Government does not consider that the suspension or revocation of a licence necessarily constitutes direct A1P1 ECHR interference; the purchase of a car does not, under English law, provide any right for the liable person to drive it in public. The removal of a licence also does not affect the person's ability to, *inter alia*, allow others to drive the vehicle for the owner's benefit, nor to sell it or use it on private road and land. The Government considers that the risk of A1P1 ECHR interference by changing the legal status of the licence's validity is low.
108. Within the narrow scope of the application of the power an even narrower set of circumstances are arguably capable of engaging A1P1 ECHR interference through control of use, rather than deprivation, of property. The Government considers this occurs only where invalidating the liable person's lawful qualification to drive would directly prevent the person from earning a living would there be interference. The European Court of Human Rights has previously found that restrictions imposed on, or revocation of, a business licence will cause A1P1 interference where that wholly

deprives the owner of the business or prevents them from fully running the business,⁵ yet future income is only a possession where there is an existing enforceable right to it or it has been “earned”.⁶ Even where licence changes prevented a medical doctor from working, his ability to earn 90% of his usual income meant there had been no interference, and ancillary aspects (such as goodwill) would only become a possession where there were proprietary rights to sell.⁷

109. The Government considers, therefore, that the relevant possession here is likely to be tangential to the driving qualification (or licence); it may include professional drivers or those who must drive for a living, where the contractual right to remuneration would be impeded. In contrast, a police officer who may usually drive as part of their occupation, but who can continue the majority of their duties without driving without financial loss, is unlikely to be caused A1P1 interference.
110. The fact that disqualification must always be suspended, and even where activated must only do so for fixed periods of time, significantly reduces the risk of such interference occurring. Should A1P1 ECHR interference occur, a reasonable relationship of proportionality between the means and the objective sought must be established⁸. DWP considers that in the case of either A1P1 interference, the interference to economic interest or property as a result of temporary disqualification would be justified and proportionate.
111. In reaching that view, DWP notes that the disqualification order is directly linked to the person’s means, and the recovery of the money they owe. A *de minimis* level of £1000 is set on the face of the Bill, to ensure that the value of the debt can never be trivial or too small such that the interference would be disproportionate to the amount to be recovered.
112. DWP has considered the use of fines or financial penalties, which are often an effective sanction for, *inter alia*, avoiding tax evasion or preventing benefit fraud. However, the fact that the person already owes DWP money (potentially due to fraud) and refuses to pay makes the threat of a fine unlikely to alter their behaviour. Increasing the size of the person’s debt (through the imposition of fines) also makes it harder for the person to eventually pay, undermines the public interest in preventing indebtedness, and is likely to cause DWP to incur greater costs as recovery will take longer to achieve. The Government considers, therefore, that any actual A1P1 ECHR interference is likely to arise only very rarely. While disqualification, even temporary, would be a significant and serious consequence, we consider that is proportionate to the seriousness of the repeated refusals to make payments within the person’s

⁵ *Bimer S.A. v. Moldova*, no. 15084/03, § 49, 10 July 2007; *Megadat.com SRL v. Moldova*, no. 21151/04, §§ 62-63, 8 April 2008.

⁶ *Ian Edgar [Liverpool] Ltd. v. the United Kingdom* (dec.), no. 37683/97, 25 January 2000; *Denimark Limited and 11 Others v. the United Kingdom* (dec.), no. 37660/97, 26 September 2000.

⁷ *Malik v. The United Kingdom*, no. 23780/08 §§108-110, 13 March 2012.

⁸ *Phillips v. the United Kingdom*, §§ 51-52; *Balsamo v. San Marino*, § 81).

means. The Government's position therefore is that these provisions are compatible with A1P1.

Clause 89 (Enforcement of non-benefit payments), Clause 97 (Offences: non-benefit payments), Clause 98 (Penalty as alternative to prosecution: extension to non-benefit payments)

113. Clause 89 allows the Secretary of State to recover an overpayment of a non-benefit payment by the same methods which apply to the recovery of benefit payments.
114. Clause 97 amends the offence of dishonest representation under section 111A(1) of the SSAA to include any non-benefit payment. Clause 97(3) amends the offence of false representation for obtaining a benefit to include a non-benefit payment. Clause 98 extends the type of payment where an Administrative Penalty may be an alternative to prosecution.
115. The mechanism for determining whether a non-benefit overpayment can be recovered will be the same as the process currently in place for a benefit-related overpayment decision. The expansion of the definition of an overpayment to include payments outside of the welfare system might engage A1P1 rights of those who are seeking to receive grants.
116. However, the Government considers that any interference with A1P1 rights by these measures is justified and proportionate. These provisions serve a legitimate social and economic aim of deterring behaviour that would be detrimental to the public purse if allowed to continue or for that behaviour to have no consequence. The measures are connected to that aim and are limited to expanding the types of payment that can fall within the existing recovery of benefit overpayment regime (set out in sections 71ZB following SSAA). There are safeguards in place that allow for a review of the overpayment decision and an appeal to the First Tier Tribunal. Furthermore, as a public body, when exercising its functions the Department will be required to behave compatibly with the Convention rights, ensuring that any exercise of its review function is undertaken in a way that is compatible with those rights.

Article 14 ECHR

Article 14 provides that:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

117. Article 14 does not provide a free-standing right to non-discrimination; rather, it provides a right to non-discrimination in the enjoyment of other Convention rights. While it is necessary for the issue to fall within the remit of one of the other rights, it is not necessary to show a violation of that right for Article 14 to be engaged (*Carson*

v UK (42185/05)). To fall within scope of Article 14 a claimant must be within one of the groups listed or have “other status”. They must also show difference in treatment between themselves and a comparator, in other words “persons in an analogous or relevantly similar situation” (*Molla Sali v Greece (20452/14)*).

118. Difference in treatment will not be discriminatory, and thus not contravene Article 14, where the measure in question has a legitimate aim, there is a link between the measure and the aim, and the measure is proportionate- in other words, strikes a fair balance between the aim pursued and the rights and freedoms of those impacted. The debt recovery measures (Clause 91 and Schedule 5) and the disqualification from driving (Clause 92 and Schedule 6) as set out elsewhere in this memorandum are considered to be within the ambit of Articles 6, 8 and A1P1 ECHR. Schedule 3 (Eligibility Verification) is considered to be within the ambit of Article 8.
119. The Government considers that none of the measures in the Bill constitute direct discrimination as no particular group is treated less favourably due to holding a protected characteristic as the measures in the Bill apply equally to all groups irrespective of protected characteristics. However, the Government accepts that in respect of certain measures within the Bill, these may potentially impact upon certain groups with protected characteristics in different ways because people with these characteristics may be more prevalent in the likely affected population. For example, a higher proportion of people with disabilities may be in the cohort of people who receive benefits and hence may be more likely to be impacted by the EVM powers. Another example is in respect of the debt recovery powers, the analysis carried out suggests that there is a greater proportion of male liable persons who are no longer in receipt of benefit and against whom the existing power to deduct from benefits cannot be used. Potentially, more men may therefore be impacted by the new power to deduct from bank accounts than women as historically recovery may not have been possible from them. In this way, the measures could potentially be said to have a disproportionate impact on persons holding protected characteristics such as sex, race or other status.
120. The Government considers that many of the amendments in the Bill have the effect of drawing distinctions between groups that are not sufficiently analogous to serve as comparators under Article 14. Further, the Government considers that any differential treatment of sufficiently comparable cohorts is justified as a proportionate measure to achieve the legitimate aim of furthering the economic well-being and interests of the country by reducing fraud and error in the benefit system and where fraud and error has occurred, by strengthening the Government’s ability to recover debt owed to it. Moreover, the Government considers that in many situations, the impact on individuals may also be beneficial, by highlighting errors that have previously not been discovered and allowing people not to get any further into debt with the Government. The Government considers there are sufficient safeguards within the powers to ensure that the impact of the measures is proportionate. For example, Deductions from accounts (Clause 91 and Schedule 5) have the potential to cause hardship in

meeting essential living costs. The Government recognises that some liable persons may have additional living costs, such as for childcare or due to disability, which may give rise to Article 14 ECHR considerations. The Government is confident that robust hardship safeguards on the face of the Bill, supported by Regulations and a Code of Practice which determine the levels of deductions in any particular person's case, will ensure such considerations are always taken into account.

121. As mentioned above, the disqualification from driving power (Clause 92 and Schedule 6) gives rise to Article 8 considerations to the extent a car may sometimes be necessary for a person to access essential economic, cultural and social activities. This may also engage Article 14, such as where a person's disability or age gives rise to a greater need to drive to access such activities. The Bill requires a court to assess whether the person has an essential need to hold a driving licence and cannot make a disqualification order where an essential need exists. The Government therefore considers it is unlikely that any Article 14 ECHR interference would arise in respect of these groups and if there is interference, it is proportionate to the legitimate aim of recovery debt owed to the taxpayer. In relation to EVM, the Government's position is that any interference with Article 14 and Article 8 would be proportionate and objectively justified as furthering the legitimate aim of safeguarding the economic well-being of the country, which applies to the objective of making savings through the reduction of incorrect benefit payments. Together with the anticipated impact of the measure in terms of savings and proposals to limit the scope and use of the power and a range of operational safeguards in place, should justify any adverse impacts on particular protected groups. For these reasons, the Government's position is that these provisions are compliant with Article 14 ECHR.