

THE SENTENCING BILL 2025
EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

SUMMARY OF THE BILL

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Sentencing Bill 2025 (“the Bill”). It has been prepared by the Ministry of Justice, with input from the Home Office on the provisions relating to foreign criminals and the Ministry of Defence on service justice matters. On introduction of the Bill in the House of Commons, the previous Lord Chancellor and Secretary of State for Justice (the Rt. Hon. Shabana Mahmood MP) made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with Convention rights. On introduction of the Bill in the House of Lords, Lord Timpson intends to make the same statement.
2. Part 1 (sentencing) of the Bill will:
 - a. introduce a presumption against short custodial sentences of 12 months or less unless there are exceptional circumstances, subject to certain exemptions;
 - b. extend the use of suspended sentences by allowing courts to suspend custodial sentences of up to three years, for three years (currently, courts may suspend sentences of up to two years, for two years);
 - c. introduce a new form of ancillary order which allows for a penalty to be imposed linked to an offender’s income and create powers for the Secretary of State to make provision in regulations for various aspects of these orders;
 - d. amend the statutory purposes of sentencing to include an express reference to the protection of victims;
 - e. extend the period for which sentencing may be deferred from six months to twelve months;
 - f. introduce a requirement that courts make an express finding of domestic abuse in relevant cases;

- g. require a special sentence for offenders of particular concern (SOPC) for certain national security offences;
- h. rename the rehabilitation activity requirement that may be imposed as part of a community sentence to a “probation requirement” and remove the requirement that courts set a maximum number of days for which an offender may be required to participate in rehabilitative activities, in order to give greater flexibility to the probation service;
- i. add to the community requirements available to a court when imposing a community order or suspended sentence order, to include a driving prohibition, public event attendance prohibition, hospitality venue entry prohibition, and restriction zone; and
- j. introduce a new statutory requirement for the Sentencing Council to publish a business plan each financial year for approval by the Lord Chancellor and a new requirement that both the Lord Chancellor and Lord Chief Justice approve sentencing guidelines before they are issued as definitive guidelines.

3. Part 2 (management of offenders after sentencing) of the Bill will:

- a. amend the release periods for standard determinate sentences (SDS) under the “Progression Model”;
- b. allow for restrictive licence conditions (including restriction zones, drug testing, drinking establishment entry prohibitions and driving prohibitions) for all determinate sentence offenders;
- c. amend fixed term recall to 56 days and mandate it for SDS prisoners subject to limited exclusions and a backstop to keep some prisoners past that period only where a high threshold is met;
- d. repeal post sentence supervision;
- e. amend provisions allowing removal of an offender from prison for the purposes of immediate deportation so that such removal can happen at any time after sentence;
- f. remove the restriction for unpaid work to be completed within a period of 12 months of the sentence;

- g. introduce an earned reduction of the number of hours offenders can be required to undertake under an unpaid work requirement imposed as part of a community order or suspended sentence order;
- h. insert a provision to publish the name and photographs of offenders where an unpaid work requirement is imposed as part of a community order or suspended sentence order;
- i. provide for termination of community orders and the supervision period of suspended sentence orders on completion of the sentence plan;
- j. repeal section 73(2) of the Victims and Prisoners Act 2024 which allowed for Parole Board Rules to make provision about the number and type of Parole Board members required for cases and about timings for dealing with those cases.
- k. revise the release point for offenders who have received a fixed-term sentence for murder overseas and are repatriated to serve that sentence in England and Wales;
- l. correct an anomaly in the provisions for referrals to the High Court where the Parole Board has directed release unconditionally; and
- m. correct two omissions relating to the operation of release and licence conditions in respect of certain offenders convicted in the service justice system.

4. Part 3 (bail) of the Bill will:

- a. amend the Bail Act 1976 so that fewer exceptions to the right to bail will apply to defendants if there is a real prospect that they will receive a suspended sentence but no real prospect that they will receive an immediate custodial sentence;
- b. amend the Bail Act 1976 so that the more limited exceptions to the right to bail that apply where there is 'no real prospect' of a custodial sentence will continue to apply once a defendant has been convicted;
- c. amend the test for electronic monitoring of bail conditions to be available for defendants for whom there is a real prospect that they will receive a suspended sentence but no real prospect they will receive a sentence of immediate custody; and

- d. insert into the Bail Act 1976 that the fact that a defendant is pregnant, a primary caregiver or a victim of domestic violence should be taken into account where relevant to the decision to grant bail.

5. Part 4 (foreign criminals) of the Bill will:

- a. amend the definition of a “foreign criminal” in section 32 of the UK Borders Act 2007 (“UKBA”) so that the deportation of any foreign criminal who receives a period of imprisonment of 12 months or more (whether the sentence is served in prison or suspended) is automatically deemed to be “conducive to the public good” (section 32(4) UKBA); and
- b. amend section 117D of the Nationality, Immigration and Asylum Act 2002 (“NIAA”) to be consistent with the amended automatic deportation regime (described in paragraph a above) by including persons who are sentenced to suspended sentences of 12 months or more within the definition of a “foreign criminal”.

6. The final provisions of the Bill contain measures relating to consequential provision and powers to state the effect of commencement provisions in the Sentencing Act 2020, as well as the short title of the Bill, commencement, extent and transitional provisions. The Bill will also make equivalent provision for the service justice system, where appropriate and provide a power in respect of territorial extent.

7. The Government considers that clauses or Schedules to the Bill which are not mentioned further in this memorandum do not give rise to any human rights issues.

The Convention rights we have considered in respect of provisions in this Bill are:

- a. the right to liberty and security (Article 5);
- b. the right to a fair trial (Article 6)
- c. no punishment without law (Article 7);
- d. the right to respect for private and family life (Article 8);
- e. prohibition of discrimination (Article 14); and
- f. right to property (Article 1 of Protocol 1).

8. Where Articles are not referenced in relation to certain measures, that it is because we do not consider that the measure engages that Article.

CONVENTION ARTICLE ANALYSIS

Part 1: Sentencing

Measures relating to short custodial sentences and alternatives to immediate custody

Summary of the measures

9. The Bill includes a package of measures that amend the Sentencing Code to discourage the use of short custodial sentences and give greater flexibility to judges to impose alternatives to immediate custody. These are: a presumption against short sentences of less than twelve months; an increase in the length of custodial sentences that may be suspended, and duration for which they may be suspended, from two years to three years; and an extension in the length of time for which sentencing may be deferred, from six to twelve months. In addition, the Bill includes an express statutory prohibition on suspending extended determinate sentences and sentences for offenders of particular concern.

Article 7

10. These measures apply to those convicted following commencement (including those whose offending predates commencement). None of these measures, however, increases the maximum sentence available for an offence and therefore will not lead to offenders being sentenced to a harsher penalty than could have been imposed at the date of the commission of their offence. Accordingly, the measures are compatible with Article 7.

Article 8

11. Offenders subject to suspended sentences may be subject to supervision, including electronic monitoring. Such supervision engages the right to respect for private and family life. The purpose of supervision falls within one of the recognised justifications for interference set out in Article 8(2): the prevention of disorder or crime. In imposing supervisory conditions as an aspect of a suspended sentence, the court must continue to ensure that the overall terms of a suspended sentence are commensurate with the seriousness of the offence. Additionally, it remains the case that a suspended sentence will only be imposed where an immediate custodial sentence would be imposed if a suspended sentence were not available.

For these reasons any interference is justified as a proportionate means of achieving the legitimate aim of crime prevention in Article 8(2) and the measure is compatible with Article 8.

Article 14

12. There is a possibility of differential treatment for an offender convicted and sentenced after commencement compared with an offender convicted and sentenced before. This does not, however, give rise to “other status” under Article 14 (see *Docherty* [2016] UKSC 62) and in any event any differential treatment would be justified by Parliament’s entitlement to make changes to sentencing law.

13. Although certain exclusions apply to the duty to suspend, the Department is satisfied that these exclusions do not breach Article 14. The exclusions mean that the duty to suspend sentences of less than 12 months will not apply to sentences for offences that constitute, or are closely connected to, the breach of a court order, or in cases where there is a significant risk of harm to an individual. Different treatment based on the category of offence committed is not protected by Article 14. The fact of an exclusion does not mean that an immediate custodial sentence must be imposed, it simply means that the duty to suspend does not apply. However, to the extent that there is any difference in treatment, this can be objectively justified.

14. Accordingly, the clause is compatible with Article 14.

Income reduction orders (IROs)

Summary of the measure

15. This measure will provide for a new form of ancillary order to be available to be issued alongside suspended sentence orders, which will allow the court to order an offender to pay an amount which corresponds to a particular percentage of their monthly income above a threshold. In addition, the measure includes powers for the Secretary of State to make provision for various aspects of the operation of these orders.

Article 8

16. The measure has the potential to engage Article 8 ECHR (the right to respect for private and family life). However, any interference is justified under Article 8(2) as a proportionate means of pursuing the legitimate aim of preventing disorder or crime. The level of the penalty will be set so that it reduces the funds available for luxuries but does not preclude participation in paid social activities, depending on how an offender chooses to manage their budget. Imposition of the order will not be mandatory in any circumstances and the court will need to consider compatibility with an offender's Article 8 rights as part of their overall consideration of the proportionality of the sentence (subject to appeal). The Department therefore considers that Article 8 is not breached by these measures.

Article 1 Protocol 1 ("A1P1")

17. The imposition of a financial penalty may constitute a deprivation for A1P1 purposes (the right to peaceful enjoyment of possessions) and, in certain circumstances, could amount to a disproportionate interference with rights under A1P1.

18. However, any interference caused by IROs is justified in the public interest as a proportionate means of pursuing the legitimate aim of preventing disorder or crime - specifically, by ensuring that offenders subject to suspended sentence orders are appropriately punished where they continue to earn significant income. The legislation sets a floor for monthly income (approximately equivalent to a month of full-time salary at National Living Wage), above which a proportion of income may be required to be paid under an IRO. Regulations may only set the threshold above this statutory floor. The legislation also sets a ceiling for the percentage of excess monthly income which may be payable under an IRO of 20%. This means that regulations may only prescribe the maximum percentage of income above the threshold that can be required under an IRO, within this limit. These statutory parameters serve to limit the extent of any interference with A1P1. Furthermore, imposition of the order will never be mandatory: courts must consider the offender's financial circumstances and assess compatibility with A1P1 rights as part of their overall consideration of the proportionality of the sentence (subject to appeal).

19. The Government is satisfied that any interference with A1P1, as a qualified right, is justified in the public interest in the prevention of disorder or crime, and that it is therefore a control or use of property “in accordance with the general interest” under paragraph 2 of A1P1.

Amendment of the statutory purposes of sentencing to include an express reference to the protection of victims

Summary of the measure

20. The Bill will amend the statutory purposes of sentencing so that the reference to the protection of the public in section 57(2)(d) of the Sentencing Code includes an express reference to victims.

Article 5

21. Article 5 is relevant because an express reference to victims could, over time, alter sentencing practice. Any sentence imposed, however, would fall within the permitted ground under Article 5(1)(a): the lawful detention of a person after conviction by a competent court. The measure is therefore compatible with Article 5.

Article 7

22. The measure applies to all those convicted following commencement (including those whose offending predates commencement). The measure does not however increase the maximum sentence available for an offence and is therefore compatible with Article 7.

Article 14

23. The analysis at paragraph 12 above applies similarly for the measure; the measure is accordingly compatible with Article 14.

Requiring a special sentence for offenders of particular concern (SOPC) for certain national security offences

Summary of the measure

24. Special sentences for offenders of particular concern (known as SOPCs) are available for offences listed in Schedule 13 to the Sentencing Code if the court is imposing a sentence of imprisonment but does **not** impose a life sentence or an extended sentence. Unlike standard determinate sentences (SDS), SOPCs must comprise the aggregate of (a) the appropriate custodial term and (b) a further 1 year licence period. The combined length of the appropriate custodial term and 1 year licence period must not exceed the statutory maximum for the offence.
25. This measure expands the list of offences in Schedule 13 to the Sentencing Code to include a category of “national security offences”. These comprise:
- a. a number of offences under the National Security Act 2023;
 - b. the abolished offences under sections 1(1) and 7 of the Official Secrets Acts of 1911 and 1920 respectively (where committed before abolition and corresponding to an equivalent offence post-abolition); and
 - c. other indictable offences (excluding those with a mandatory life sentence) punishable by more than 2 years’ imprisonment, where the court has determined a “foreign power connection” under section 69A of the Sentencing Code.
26. Equivalent provision is made for Scotland and Northern Ireland.

Article 7

27. In England and Wales, SOPCs will apply to offenders aged 18 and over who committed a relevant offence before commencement. This may result in a longer proportion of the sentence being served in custody compared to an SDS. However, the measure does not increase the maximum penalty available at the time of the offending and is therefore compatible with Article 7 of the Convention.
28. For offenders aged under 18, the measure applies only to those who committed the offence after commencement. This approach avoids any risk of infringing

Article 7(1), which prohibits the imposition of a heavier penalty than was applicable at the time the offence was committed. This is particularly relevant given the current 2-year statutory cap on Detention and Training Orders for offenders under 18, unless longer sentences are imposed under current sections 250, 252A or 254 of the Sentencing Code. Applying SOPCs to under-18s retrospectively could result in detention exceeding that cap.

29. In Scotland and Northern Ireland, young offender sentencing regimes are not subject to the same statutory 2 year cap. SOPCs were introduced in those jurisdictions as new custodial sentences replacing SDSs, with the drafting intentionally framed around age at conviction to ensure the provisions apply to the intended cohort. As SOPCs cannot exceed the maximum sentence for the offence and remain within the available sentencing range, no issue of retrospective penalty arises. Accordingly, the measure is compatible with Article 7 across all three jurisdictions.

Article 14

30. The analysis at paragraph 12 above applies similarly for the measure; the measure is accordingly compatible with Article 14.

Removal of requirement for the court to specify a maximum number of days in a rehabilitation activity requirement

Summary of the measure

31. This clause removes the requirement (currently in paragraph 4(2) of Schedule 9 to the Sentencing Act 2020) for the court to specify a maximum number of days on which an offender who is sentenced to a rehabilitation activity requirement (RAR) – to be renamed a ‘probation requirement’ under a related provision – can be instructed by a probation officer to participate in activities. The result is that probation staff will be free to determine the amount of rehabilitative activity an offender must undertake, without reference to the court.

Article 7

32. The measure will apply to all those dealt with by a court following commencement. In theory, the removal of the court-imposed restriction could enable a probation officer to require an offender to undertake more rehabilitative activities that would otherwise have been the case. There is no effect, however, on the maximum penalty available for offences and accordingly the measure is compatible with Article 7.

Article 8

33. A requirement to undertake rehabilitative activities engages Article 8. However, any interference is justified as a proportionate means of achieving the legitimate aim of crime reduction specified in Article 8(2); we consider that probation staff may well be better placed than a court to determine what amounts of supervision will be effective for rehabilitative benefit to the offender, and that more effective assessment of such benefit has a knock-on wider benefit to the community. The measure is therefore compatible with Article 8.

Article 14

34. The analysis at paragraph 12 above applies similarly for the measure; the measure is accordingly compatible with Article 14.

New community requirements for community and suspended sentence orders

Summary of the measure

35. This measure will add new requirements to the available 'menu' of community requirements that may be imposed as part of a community or suspended sentence order (see Schedule 9 to the Sentencing Code). The new requirements will be a driving prohibition requirement, public event attendance prohibition requirement, drinking establishment entry prohibition requirement, and a restriction zone requirement (requiring an offender to remain within a defined geographical area). The intention is that the court should be able to be imposed for punitive reasons, to facilitate tough community punishment.

Article 8

36. The new community requirements have the potential to engage Article 8 ECHR (right to respect for family and private life). However, any interference is justified under Article 8(2) as a proportionate means of pursuing the legitimate aim of the prevention of disorder or crime and/or the protection of the rights and freedoms of others. Furthermore, any new requirement will be imposed by a court, and the court will be required to ensure the sentence is proportionate to the offending and to take into account the offender's Article 8 rights (and subject to appeal). An offender will also only be subject to punishment for breach of a requirement where they have no reasonable excuse (see Sentencing Code, Schedule 10, paragraphs 10 and 11; Schedule 16, paragraphs 10 and 12). For these reasons, the measure is compatible with Article 8.

Other sentencing measures

37. The other sentencing measures in the Bill (a requirement to make an express finding of domestic abuse and Sentencing Council reform) do not engage, or raise any meaningful issues in relation to, the ECHR.

Part 2: Management of Offenders After Sentencing

Release

Summary of the measure

38. The Bill will amend the provisions of Chapter 6 of the 2003 Act which govern the release of SDS offenders from the custodial portion of their sentence. The Secretary of State has a duty to release SDS offenders at the end of the custodial part of their sentence, rather than having their case considered by the Parole Board. For the majority SDS offenders who are released under section 244 of the 2003 Act, they must now be released at the one-third point of their sentence, unless added days are awarded (see below). Under current legislation the duty to release arises at the 40% point (or halfway depending on offence and sentence type). Those serving sentences for certain violent and sexual offences, who are released under section 244ZA of the 2003 Act (known as SDS+) must be released at the halfway point, rather than two-thirds as currently (again subject to any added days). Those offenders who due to the nature of their serious offending would have

received an SDS+ sentence had they been sentenced after this sentence was introduced in April 2022 (under the Police, Crime, Sentencing and Courts Act 2022), are excluded from the changes to release provisions and will continue to be released at 50%.

39. In both cases, offenders may have additional days added to the custodial part of their sentence if awarded by an independent adjudicator following an offence against discipline in prison. This process is already in operation and is governed by the Prison Rules 1999 and does not form part of the Bill.
40. This measure will also repeal a discretionary release power for those subject to the progression model under section 246 (home detention curfew), which allows for release on electronically monitored curfew prior to the release date.
41. The Bill will preserve existing release arrangements for offenders under 18 at the time of conviction on indictment, who are sentenced under section 250 of the Sentencing Act 2020 (or its predecessor, section 91 of the Powers of Criminal Courts (Sentencing) Act 2000). These offenders are not captured by the measures amending the release arrangements for adult SDS offenders. Under the measure in the Bill, offenders sentenced under section 250 will be released upon serving 50% of their sentence, unless their offending is captured by section 244ZA which requires them to be released after serving two-thirds of their sentence.

Article 7

42. As the provisions are to apply to existing prisoners, Article 7 has been considered. The domestic courts and the ECtHR have consistently drawn a distinction between a measure that constitutes a 'penalty' and a measure that concerns the 'execution' or 'enforcement' of a penalty: release arrangements are part of the execution of the penalty, not the penalty itself. There is an established body of case-law to the effect that release provisions (including the imposition of licence conditions) are the administration of the sentence and do not form part of the penalty for the purposes of Article 7 (*Uttley v UK (Application No. 3694/03)*). In any event, these measures will result in the majority of SDS/SDS+ prisoners being released earlier. This analysis applies equally to the youth offender provisions included in the Bill,

outlined at paragraph 30 above. The Department therefore consider that Article 7 is not breached by these measures.

Article 14

43. Although certain cohorts of determinate sentences are not included in this measure, the Department is satisfied that Article 14 is not breached. The excluded sentences have been handed down either because of the type of offence that has been committed (for example, terrorism) or because the court considers the offender to be dangerous. Release in relation to the sentences not included in the measure is not automatic but is subject to the direction of the Parole Board.

44. The exclusions are to particular types of sentence given due to the nature of the offence, as opposed to identifiable characteristics of the offender, and these are not considered a relevant status. The court held in *R(Khan) v Secretary of State for Justice* [2020] EWHC 2084 (Admin) that prisoners treated differently due to the category of offence they have committed are not protected by Article 14. In any event, any difference in treatment can be objectively justified on the grounds of public protection.

45. Article 14, with Article 5, is engaged by the retention of the current legislative framework for section 250 offenders on the grounds of age, as there are different release arrangements for comparable cohorts. However, as the youth sentencing framework is discrete and different, offenders sentenced under section 250 are not the same as adult SDS offenders and are therefore not in an analogous position; even if the court were to consider them analogous, per *R(SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, a measure would need to be manifestly without reasonable foundation to breach Article 14. Any differential treatment can be objectively justified on the grounds that children and young people who have committed the most grave offences should have more time to engage with rehabilitative services, which a longer custodial sentence allows for. The Department therefore does not consider that Article 14 is not breached by the youth offender release measures in this Bill.

Post-custody supervision – licence conditions

Summary of the measures

46. The measures provide the power for a number of new, restrictive licence conditions to be imposed by the Secretary of State on all determinate sentence offenders following their release from the custodial part of their sentence, regardless of risk. These include: driving prohibition, restriction zones (which confine an offender to a particular geographical location), a ban on attending sporting/ public events and a prohibition on entering public houses, bars and nightclubs. The measures also amend section 62 of the Criminal Justice and Courts Services Act 2000 to allow a drug testing condition to be imposed on all offenders, rather than just those with an issue with substance misuse which contributed to their offending. The measure will apply to existing prisoners and to those recalled and released after commencement.

47. As with current standard licence conditions, the additional conditions themselves will be set by secondary legislation. Although the power to insert such conditions into a licence is included in the Bill, it cannot be exercised until secondary legislation is passed to allow for this. Such secondary legislation must be ECHR compatible.

Article 7

48. As the measure applies to existing prisoners, Article 7 has been considered. Although restrictive, licence conditions remain part of the administration of a custodial sentence where the prisoner is still serving that sentence of imprisonment in the community and do not constitute a new penalty for Article 7 purposes. The analysis of the release provisions above applies in the same way to licence conditions – they are part of the administration of the sentence, regardless of whether someone is already released or not or subject to the new release changes.

Article 8

49. The imposition by the court of a sentence of imprisonment necessarily involves an interference with an individual's Article 8 rights. This interference is authorised by the court-imposed sentence and is necessary as punishment for the offence found

to have been committed. The court considers proportionality within sentencing guidelines when handing down the sentence, and directs its duration accordingly.

50. The new licence conditions in these measures can be imposed on all determinate sentence offenders, regardless of risk, and by their nature are considered more intrusive on an offender's Article 8 rights than most existing standard conditions. However, the changes in release provisions set out above will lead to a new way of administering sentences, with many offenders spending a greater proportion of their sentence in the community rather than in custody. This means that in the future licence conditions will not just be imposed to manage an offender's risk, but as part of the administration of the sentence of imprisonment imposed by the court. It is considered necessary for such conditions to be able to be imposed as part of the administration of justice, and to protect the rights and freedoms of others such that the law-abiding population can be confident that justice is done where a court had considered that an offence justifies a sentence of imprisonment.

51. Any interference with Article 8 rights because of these measures will be a result of the administration of a sentence of imprisonment imposed by an independent court, and so the inference under Article 8(2) is authorised by the court-imposed sentence, and is necessary as part of the administration of that sentence. As noted above, the conditions themselves will be set out in secondary legislation, and in each case will be subject to the application to individual circumstances by the supervising officer. This means that the Probation Service can ensure that the conditions are applied proportionately, taking into account an offender's particular circumstances. Therefore, the Department does not consider that Article 8 is breached by these measures.

Article 14

52. Unlike the rest of the measures which apply only to SDS or SDS+ offenders, the power to impose restrictive licence conditions will apply to all determinate sentence offenders. By convention, the Parole Board also impose the same standard conditions as those imposed by the Secretary of State on automatic release, and so those offenders whose release is directed by the Board may also have these

conditions added. Therefore, there is no difference in treatment for Article 14 purposes.

Recall

Summary of the measures

53. The Bill will amend the provisions of Chapter 6 of the 2003 Act which govern the revocation of licence of determinate sentence offenders and their recall to custody, and their re-release on licence following recall.

54. Under current legislation, following recall if an SDS offender meets the statutory criteria to be considered suitable for automatic release, they will be re-released into the community on licence after a fixed period of 28 days (14 days for those serving a sentence under 12 months) – this is known as “fixed term recall”. If they are not suitable, they may be detained until the end of their sentence unless re-released earlier by the Secretary of State or Parole Board, known as “standard recall”. These measures change the fixed term period to 56 days in custody and apply it to all SDS offenders (including those serving a sentence as at commencement, whether in prison or on licence, except for those serving a fixed term recall under the current scheme). Certain cohorts of offenders are excluded from the 56 day fixed term recall and must be given a standard recall. These groups include extended sentence prisoners, terrorist and terrorist-connected prisoners and those who pose a terrorist risk, those serving SOPCs those serving offences relating to national security, offenders at risk of involvement in foreign power threat activity, those managed under MAPPA at levels 2 and 3 and those recalled in connection with a charge for a further offence.

55. In certain, limited circumstances (where the Secretary of State considers the offender poses a significant risk to members of the public of serious harm occasioned by the commission of murder or offences, specified within the meaning of section 306 of the Sentencing Code) it may be necessary to continue to detain an offender past the 56-day fixed term period. Offenders may also be detained past 56 days if further information is received that they will fall into one of the cohorts excluded from fixed term recall. In either circumstance, they can be detained until

the end of their sentence on a standard recall (subject to earlier release by the SoS or Parole Board).

56. The Bill will also preserve the existing framework for recall in Chapter 6 of the 2003 Act for offenders who are under 18 at the time of conviction on indictment and who are sentenced under section 250 of the Sentencing Act 2020. These offenders are not captured by the measures which amend the provisions of Chapter 6 to change the recall provisions for adult SDS offenders.

Article 5

57. Whilst Article 5 is engaged as there is a detention the Department does not consider that Article 5 is breached as the continued detention from a sentence lawfully imposed by a court which is covered by Article 5(1)(a) (*R (Whiston) v Secretary of State for Justice* [2015] AC 176).

Article 7

58. The analysis of the release provisions above applies in the same way to recall.

Article 14

59. Although certain cohorts of determinate sentence offender are not included in this measure, the Department does not consider that Article 14 is breached by them for the same reasons as those set out in the analysis of the release measures above. Exclusion from fixed term recall is based on offence and sentence type and the nature or risk posed by these offenders, and in any event is justified on public protections grounds, as the option to detain them to the end of their sentence is necessary for their management in the community.

60. Article 14, with Article 5, is engaged by the retention of the current legislative framework for section 250 offenders on the grounds of age, as there are different release arrangements for comparable cohorts. However, as the youth sentencing framework is discrete and different, offenders sentenced under section 250 are not the same as adult SDS offenders and are therefore not in an analogous position; even if the court were to consider them analogous, the differential treatment can be objectively justified on the following grounds. There is a high likelihood that, since they are the most serious youth offenders receiving a fixed-term sentence,

section 250 offenders would fall into one of the exceptions to FTR under new section 255A(5A) and receive a standard recall. HMPPS should have as much flexibility as possible to handle recall of youth offenders who have committed the gravest offences, which the current framework provides, and, due to the gravity of the offences involved, it is also important for the Parole Board to consider cases sentenced under section 250 to ensure offender risk is adequately managed. Further, the Secretary of State retains discretion to automatically re-release section 250 offenders on a standard recall under section 255C if it is not necessary for the protection of the public that they should remain in detention. We therefore consider that Article 14 is not breached by the youth offender recall measures in this Bill.

Early Removal Scheme

Summary of the measure

61. The Early Removal Scheme (ERS) allows for determinate sentenced prisoners liable to removal from the UK to be removed from prison before the end of the custodial part of the sentence for the purpose of immediate deportation. Terrorist offenders are excluded from removal under ERS. Once removed, they are not subject to further imprisonment, but they cannot legally return to the UK. If they do, they will be liable to serve the rest of their sentence from the point they were deported.

62. This measure removes the requirement that an offender serve a minimum pre-removal custodial period, and provides that there be no maximum removal period before an eligible offender can be removed. This means that a foreign national offender to whom this section applies can be removed for the purposes of immediate deportation any time after sentence.

Article 7

63. In respect of Article 7, whilst the changes will be commenced in respect of offenders who have already been sentenced and serving their sentence at the point of commencement, the changes are in line with the case law as set out above, holding that release provisions are the administrative arrangements of a sentence rather than the imposition of a penalty in Article 7 terms.

Article 14

64. Article 14 prohibits discrimination in the enjoyment of the Convention rights, on the basis of a status within the meaning of Article 14, between those in an analogous position. The High Court has previously found that Article 14 did not apply as the different treatment for those removed under ERS was based on liability to removal and not nationality (*Brooke v Secretary of State for Justice* [2009] EWHC 1396 (admin)). Further case-law has endorsed that difference in treatment based on liability to removal (and not nationality or immigration status) does not engage Article 14.

Unpaid work requirement: publication of names and photographs

Summary of the measure

65. This measure makes provision for the power to publish the name and photographs of offenders where an unpaid work requirement is imposed as part of a community order or suspended sentence order. It will amend Part 1 of Schedule 9 to the Sentencing Code to enable responsible officers to publish the name and photographs of offenders unless an offender's case falls within exemptions prescribed in regulations made by the Secretary of State.

Article 8

66. The publication of offenders' names and photographs engages Article 8 right to a private and family life. However, any interference with Article 8 is a proportionate means of achieving the legitimate aim of crime reduction specified in Article 8(2); the Department considers it necessary and proportionate for managing a sentence being served by offenders because community orders and suspended sentence orders have the legitimate aim of crime prevention and is a justified interference. Furthermore, the measure will have built in exclusions applied by secondary legislation and operates by way of a discretion which will allow for proportionate application to ensure compliance with Article 8. For these reasons, any interference is justified and proportionate and the measure is compatible with Article 8.

Termination of community orders and the supervision period of suspended sentence orders on completion of the sentence plan

Summary of the measure

67. This measure makes provision for the termination of a community order and the supervision period of a suspended sentence order. It will amend Part 3 of Schedule 10 and 16 to the Sentencing Code to enable an offender's order to be terminated once the court-ordered requirements imposed in the order have been complied with and the objectives in the sentence plan have been met.

Article 8

68. The supervision of an offender pursuant to a community order or a suspended sentence order engages the right to respect for private and family life, as guaranteed by Article 8 ECHR because an offender will be subject to supervision by probation practitioners when the order is in force. However, any such imposition is justified because community orders and the supervision period of suspended sentence orders are imposed as a sentence of the court for offences committed and have the legitimate aim of crime prevention, as specified in Article 8(2) of the Convention. This measure will terminate an offender's community order or the supervision period of a suspended sentence order sooner where they have completed the court-ordered requirements and objectives in the sentencing plan, thereby lessening any interference in respect of family life. For these reasons, any interference is justified and proportionate and the measure is compatible with Article 8.

Repatriated offenders serving fixed-term sentences for murder

Summary of the measures

69. In the UK, murder carries a mandatory sentence of life imprisonment, but not all jurisdictions impose a life sentence for murder. Prisoners can be repatriated to and from any country where there is an international arrangement in place to do so. Whilst the enforcement provisions of the State to which the prisoner is transferred apply, even if they are different from those in the sentencing State, the sentence

cannot be aggravated on transfer, so a fixed term sentence cannot be changed to a life sentence.

70. Currently the automatic release provisions of section 243A and 244 of the Criminal Justice Act 2003 will apply to repatriated prisoners convicted and sentenced overseas to a fixed term sentence for murder, meaning that after transfer they currently have a fifty percent release point. The Bill will effectively exclude these offenders from the progression model and change their statutory release point to two thirds in line with extended sentence prisoners. These offenders will remain on licence until the end of their sentence and if recalled while on licence, they will only be eligible for a standard recall where they can only be released by the Parole Board or Secretary of State.

71. This provision will not apply to any repatriated offenders serving a life sentence for murder who are subject to the release and recall arrangements set out in Part 2 of the Crime (Sentences) Act 1997.

Article 7

72. In respect of Article 7, whilst the changes will be commenced in respect of offenders who have already been sentenced and serving their sentence at the point of commencement, the changes are in line with the caselaw set out above that it is a change to the administration of the sentence and not to the sentence itself as imposed by the court in a foreign jurisdiction. Nothing in these measures changes the nature of the sentence or type of detention imposed on the prisoner. The change to the release point does not constitute an additional penalty so it is considered that Article 7 is not breached by these measures.

Article 14

73. These measures will apply to all offenders repatriated to England and Wales to serve a fixed-term sentence for murder. Applying the principles in *Khan v Secretary of State for Justice* [2020] 1 WLR 3939, as set out above, measures which provide for different treatment of offenders based on gravity of offence are not an 'other status' on which an Article 14 claim can be based. In any event, the Department

considers the measures are justified based on the legitimate aim of protection of the public given the seriousness of the offending.

Parole Referral Power

Summary of the measure

74. Section 32ZAA of the Crime (Sentences) Act 1997 (not yet in force) enables the Secretary of State to direct the Board to refer a case to the High Court to retake the release decision where the Parole Board has directed release of a life sentence prisoner who has committed a top tier offence. While the High Court can make an order requiring the Secretary of State to give effect to the direction to release a prisoner on licence or quash the Parole Board's direction to release the prisoner on licence, there is no clear power for the High Court to make these orders in respect of offenders serving a sentence of imprisonment or detention for public protection who have been released unconditionally (without a licence) by the Parole Board. This measure ensures it is clear that they can.

Articles 5 and 6

75. The Department does not consider Article 6 engaged as this is not a determination of a criminal charge but a parole review in accordance with Article 5. Whilst Article 5 is engaged as there is a detention the Department does not consider that Article 5 is breached as the continued detention from a sentence lawfully imposed by a court which is covered by Article 5(1)(a).

Article 7

76. In respect of Article 7, whilst the changes will be commenced in respect of offenders who have already been sentenced and serving their sentence at the point of commencement, the changes are in line with the case law set out above. Nothing in this measure changes the nature of the sentence or type of detention imposed on the prisoner.

Article 14

77. These measures will apply to all parole eligible offenders serving a sentence of imprisonment for public protection who have committed the most serious top-tier

offences. As set out above, measures which provide for different treatment of offenders based on gravity of offence are not an 'other status' on which an Article 14 claim can be based. In any event, the Department considers the measures are justified based on the legitimate aim of protection of the public given the seriousness of the offending.

Part 3: Bail

Fewer exceptions to the right to bail where no real prospect the defendant or offender will receive an immediate custodial sentence and changes to eligibility for electronic monitoring

Summary of the measures

78. The Bill includes a number of measures aimed at broadening eligibility for bail and reducing the number of defendants or offenders remanded in custody. The first of these is a clause which will amend the Bail Act 1976 so that the limited exceptions to bail which currently apply where there is no prospect of any custodial sentence will instead apply where there is no real prospect of a sentence of immediate custody, even where there is a real prospect of a suspended sentence ("the no real prospect amendment"). This amendment will work in conjunction with the duty to suspend short sentences of less than twelve months.

79. The second measure will amend the no real prospect test so that more limited exceptions to the right to bail will apply to a defendant who has been convicted; currently, the full range of exceptions to bail apply to a convicted defendant. Remand in custody should therefore not be widely available in respect of a defendant who is unlikely to go to prison as a part of their sentence.

80. Thirdly, the Bill will amend the test for eligibility for electronic monitoring for the cohort of defendants for whom there is a real prospect of a suspended sentence, but no real prospect of an immediate custodial sentence. The effect of the amendment will be that defendants in this cohort who are currently eligible for electronic monitoring only to prevent remand into custody will all be eligible for electronic monitoring.

Article 8

81. Electronic monitoring of an individual engages the Article 8 right to respect for family and private life. The amendment to the test for electronic monitoring pursues the legitimate aim under Article 8.2 of preventing disorder or crime, by promoting compliance with bail conditions and facilitating enforcement action for breach of bail conditions for defendants who are particularly likely to abscond, offend, or interfere with witnesses if released on bail. Additionally, the cohort eligible for electronic monitoring under this amendment will either be remanded to custody or subject to electronic monitoring under the current law, meaning that this change in the law will either maintain current levels of interference, or reduce them. For these reasons, any interference is justified and proportionate and the measure is compatible with Article 8.

Amendment to the Bail Act 1976 so that where a defendant is pregnant, a primary caregiver or a victim of domestic violence this should be considered by the court where relevant to bail

Summary of the measure

82. This measure will make express provision in statute that the court should, when deciding bail, take into account the fact that the defendant is pregnant, a primary caregiver, or has been a victim of domestic abuse, but only where those factors appear to the court to be relevant to the decision as to whether to grant bail.

Article 14

83. Article 14 provides for protection from discrimination. This measure does not change the position that the court should consider any relevant factor when deciding whether to grant bail; it simply adds to the list of statutory factors of potential relevance to the decision. Nor does it require the court to take these factors into account unless they are relevant. This amendment would not result in different treatment between defendants who possess and do not possess the listed characteristics and therefore does not breach Article 14.

Part 4: Foreign Criminals

Deportation etc of foreign criminals

Summary of the measure

84. The measure amends the definition of a “foreign criminal” in section 32 UK Borders Act 2007 (“UKBA”) so that the deportation of any foreign criminal who receives a period of imprisonment of 12 months or more (whether the sentence is served in prison or suspended) is automatically deemed to be “conducive to the public good” (section 32(4) UKBA). This has the effect of extending the current threshold for automatic deportation to include suspended sentences of 12 months or more.
85. The measure also amends section 117D of the Nationality, Immigration and Asylum Act 2002 (“NIAA”) to be consistent with the amended automatic deportation regime (described in paragraph 1 above) by including persons who are sentenced to suspended sentences of 12 months or more within the definition of a “foreign criminal.” Section 117D applies when a court or tribunal is required to determine whether any deportation decision breaches a person's right to respect for private and family life under Article 8, and as a result would be unlawful under section 6 of the Human Rights Act 1998 (“HRA”). Currently, Part 5A applies to both automatic deportation decisions and conducive decisions taken on the basis of the offence having caused serious harm, or where the foreign criminal is a persistent offender. Amending the definition to include suspended sentences of 12 months or more therefore ensures that Part 5A applies to all foreign criminals within the automatic deportation regime.

Deportation of foreign criminals

86. Section 32 of the UKBA 2007 places an obligation on the Secretary of State to make a deportation order in respect of a “foreign criminal” where the foreign national is convicted in the UK of an offence and sentenced to at least 12 months' imprisonment (section 32(1) UKBA), subject to the exceptions listed in section 33 UKBA. Deportation orders are made under section 5(1) of the Immigration Act 1971. The Bill will extend the period of imprisonment to include suspended sentences and will extend the definition in Part 5A NIAA so that the Article 8 public interest considerations continue to apply to all foreign criminals within the

automatic deportation regime. The policy aim is to address other measures taken in the Bill which reflect a shift to more suspended sentences, and which might otherwise, as such, result in fewer deportations under the automatic regime, and to recognise that offences where a sentence of 12 months or more have been imposed are sufficiently serious so as to justify automatic deportation.

Article 8

87. It is well-established that decisions to deport foreign nationals due to their criminality engage Article 8 of the European Convention on Human Rights. The Home Office routinely relies on the following legitimate aims in Article 8(2) to justify deportation: national security, public safety, the prevention of disorder or crime, and the protection of rights and freedoms of others. There is an abundance of case law, at domestic and ECtHR level, that deals with the factors that must be considered when deciding whether to order the deportation of a foreign national. (see, for example: *Üner v. the Netherlands* (2006); *Unuane v. the United Kingdom* (2020); *HA (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60). Each case is fact specific, and the weight of the public interest will vary according to the offence. but there must be a balancing exercise conducted which weighs the state's interest in deportation and seriousness of offending (in this context, due to criminality) against the foreign national's family and private life considerations in order to strike a fair balance

88. The Bill will not remove the requirement for that balancing exercise (see below for the decision-making and appellant process), rather it extends the bar set by Parliament for the automatic consideration of deportation from any sentence of immediate custody, so as to include suspended sentences.

89. Extending the automatic deportation threshold to included suspended sentences, and consequently including those persons as foreign criminals for the purpose of Part 5A NIAA, is a statement by Parliament of where the public interest in deportation lies. A wide margin of appreciation is afforded to ECHR member states when determining policy relating to the expulsion of foreign nationals. There are existing powers to deport foreign nationals under the discretionary powers in section 3(5)(a) of the Immigration Act 1971 where the Secretary of State decides deportation is conducive to the public good, for example where the foreign national

is a persistent offender or whose offending has caused serious harm, or even where the foreign national has not been convicted of any offence where deportation is in the interests of national security or they are a suspected war criminal.

90. The obligation to make a deportation order against a foreign criminal in section 32 UKBA is subject to the exceptions listed in section 33 of the same Act. Section 33(2)(a) is clear that the duty to make a deportation order does not arise where deportation would breach “*a person’s Convention rights*”. “Convention rights” has the same meaning in section 1 HRA 1998. This provides a robust safeguard against making a deportation order, or carrying out deportation, where to do so would breach the ECHR. Further, the foreign criminal may make a human rights claim (defined in section 113 NIAA) that to deport them would be unlawful under section 6 of the HRA. If that claim is refused, then the foreign national is entitled to appeal the refusal of the human rights claim to the First-tier Tribunal (Immigration and Asylum Chamber) or the Special Immigration Appeals Commission (where sensitive material is relied on) under section 82 of the NIAA on the grounds that removal from the United Kingdom would be unlawful under section 6 of the HRA (section 84 NIAA). If the Tribunal or Special Immigration Appeals Commission allow the appeal, then the foreign criminal cannot be deported, absent an onward successful appeal by the Secretary of State to the Upper Tribunal, Court of Appeal or Supreme Court or material change of circumstances.

91. Where Article 8 is raised as a human rights claim, the question of how justification should be approached is governed by Part 5A (sections 117A-117D) of the NIAA (inserted by the Immigration Act 2014) which, together with Part 13 of the Immigration Rules, aimed to provide a structured framework for application of and compliance with Article 8 in deportation cases and to mark Parliament’s view of the

public interest in the deportation of foreign criminals. Part 5A provides a framework in which to conduct the proportionality assessment.

92. While an appeal is pending the person cannot be deported, ss.78 – 79 NIAA).

93. Therefore, three substantial safeguards are built into the automatic deportation regime:

- a. A deportation order will not be made, or the person deported, if the Secretary of State considers that deportation would breach their (or another's) ECHR rights,
- b. Where the Home Office considers deportation would not breach ECHR rights, the foreign criminal is entitled to appeal the refusal of their claim to an independent tribunal, and
- c. While an appeal is pending the foreign national cannot be deported (absent a limited number of cases where the Home Secretary certifies that deportation prior to appeal would not be unlawful, s.94B NIAA or the claim is clearly unfounded s.94 NIAA).

94. The clause does not alter or undermine these safeguards.

Articles 2, 3, 5 and 6

95. In addition to Article 8, a foreign national can rely on the other articles in the ECHR to resist deportation. It is well-established that a foreign national cannot be deported where there are substantial grounds to believe that the individual, if deported, would face a real risk of treatment contrary to Article 2 or 3 in the receiving country (*Soering v UK*; *Ullah*). For Articles 5 and 6, the test is whether the individual has suffered or risks suffering a flagrant denial of the components of Article 5, or a flagrant denial of justice, in the receiving state.

96. The exception to automatic deportation in section 33(2)(a) UKBA 2007 applies to Articles 2, 3, 5 and 6. The safeguards in relation to the decision-making process

and appeals described in paragraph 93 above apply in relation to claims based on Articles 2, 3, 5 and 6 as they do to Article 8.

Article 14

97. Article 14 enshrines the right not to be discriminated against in relation to the enjoyment of the rights and freedoms set out in the Convention. Article 14 is not a free-standing right to equality but rather protects equal treatment in the enjoyment of ECHR rights. Article 14 is engaged because the various Articles listed above, and predominantly Article 8, are within the ambit of the legislative change to the UK's automatic deportation regime.

Protected and other status

98. A foreign criminal could seek to argue that their place of residence is a "protected status" and that their residence places them at greater risk of deportation for the purpose of Article 14 ECHR. There is varying case law on what constitutes "other status". The court held in *R (Khan) v Secretary of State for Justice* [2020] EWHC 2084 (Admin) that prisoners treated differently due to the category of offence they have committed are not protected by Article 14, and if a category of offence is chosen due to the gravity of offence, this cannot be an "other status" (see also *Gerger v Turkey* (24919/94)). Elsewhere, the domestic courts have applied a generous interpretation of the meaning of "status" (*R (Stott) v SSJ* [2018] UKSC 59) and have also held that different cohorts of prisoner can have a relevant "status" (*Clift v the United Kingdom* [2010] 7 WLUK 387). To confer "other status" on a group there must still be an identifiable characteristic distinguishing them from another, and that status must be independent of the treatment complained of, otherwise the ambit of Article 14 becomes so broad as to become meaningless.

99. The ECtHR has found that "other status" can include place of residence (*Carson v United Kingdom* (42184/05)), but it has also recognised that differences in treatment can be based on geographic location where there are differing legislative regimes across regions, and that this is not a personal characteristic or status (*Magee v United Kingdom* (28135/95)). It is the government's position that FNOs across the UK do not have a protected or other status based on their residence,

but given there is varying case law, the Home Office shall answer the remaining questions to be considered when approaching an Article 14 analysis.

Difference in treatment

100. If a court found that a foreign criminal can accrue “other status” by virtue of residence, it would then go on to consider whether this cohort has been treated differently to persons in analogous situations. An applicant would need to successfully argue that they would have avoided automatic deportation had they been sentenced in a different UK country to the one in which they are residing, such as by arguing that they would have been given a non-custodial sentence in Scotland, in circumstances where they were given a suspended sentence of more than 12 months in England and Wales (and thus fall within the automatic regime). This is a difficult argument to make given there is discretion to give a custodial or suspended sentence in both jurisdictions.

101. In any event, the government would still have the power to consider that individual for deportation elsewhere in the UK on conducive grounds under the 1971 Act. Therefore, FNOs across the UK would be treated similarly with the same safeguards, as identified above, applying in all scenarios.

Objective justification

102. The legitimate aim of the proposed amendment to the automatic deportation threshold is to reinforce the integrity of the UK’s immigration system and to deter offending by foreign nationals. The policy intention is to ensure that any foreign national who receives a custodial sentence, regardless of length, is liable for automatic deportation, thereby signalling a clear and consistent approach to public protection and immigration control. This policy reflects a broader shift in the Government’s approach to foreign national offending, underpinned by the view that the public interest is strongly served by the removal of individuals who have committed criminal offences. The measure is considered proportionate in that it targets only those who have been sentenced to immediate custody and remains subject to the statutory exceptions under section 33 of the UK Borders Act 2007.

Ministry of Justice

30 October 2025