EMPLOYMENT RIGHTS BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

FOR THE BILL AS INTRODUCED IN THE HOUSE OF LORDS

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Employment Rights Bill. It has been prepared by the Department for Business and Trade, Department for Education, Cabinet Office, Department for Work and Pensions, the Department for Transport and the Office for Equality and Opportunity.

2. Section 19 of the Human Rights Act 1998 ("HRA 1998") requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). On introduction of the Bill in the House of Lords, Baroness Jones, Parliamentary Under Secretary of State in the Department for Business and Trade made a statement under section 19(1)(a) of the HRA 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights.

3. The purpose of the Bill is to deliver key legislative reforms needed to implement manifesto commitments set out in the Government's Plan to Make Work Pay.

Abbreviations used in this memorandum

A1P1	Article 1 of Protocol 1
CAC	Central Arbitration Committee
CJPOA 1994	Criminal Justice and Public Order Act 1994
Conduct Regulations	Conduct of Employment Agencies and Employment Businesses Regulations 2003
EA 2010	Equality Act 2010
EAA 1973	Employment Agencies Act 1973
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ERA 1996	Employment Rights Act 1996
ET	Employment Tribunal
FWA	Fair Work Agency

HMRC	His Majesty's Revenue and Customs
HRA 1998	Human Rights Act 1998
IA 2016	Immigration Act 2016
LME	Labour Market Enforcement
LMEO	Labour Market Enforcement order
LMEU	Labour Market Enforcement undertaking
NMWA 1998	National Minimum Wage Act 1998
NJC	National Joint Council
PACE	Police and Criminal Evidence Act 1984
SHA	Statutory harbour authority
SSP	Statutory Sick Pay
SSSNB	School Support Staff Negotiating Body
SWA 2023	Seafarers' Wages Act 2023
TULRCA 1992	Trade Union and Labour Relations (Consolidation) Act 1992

Summary of Bill provisions

4. The Bill includes measures to strengthen employment rights and other protections in relation to employment matters, make provision in relation to pay and conditions in particular sectors, update the law relating to trade unions and industrial action and create a new over-arching enforcement function for the Secretary of State to enforce a list of legislation related to the labour market. The measures are intended to support employers and businesses across the country, creating a fair and level playing field and modernising the employment rights framework to suit the economy of today.

5. The employment rights measures introduce new rights to guaranteed hours, reasonable notice of shifts and compensation payments for shift cancellation, movement and curtailment at short notice for those on zero and other specified contracts, which are likely to be of a minimum number of guaranteed hours. Corresponding rights are introduced for agency workers in new Schedule A1 inserted into the Employment Rights Act 1996 ("ERA 1996"). The measures further provide a

right to request flexible working, remove the waiting period and lower earnings limit which apply in relation to statutory sick pay and strengthen protections in relation to tips and gratuities. The Bill also provides a right to parental and paternity leave from day one of employment, a right to bereavement leave, and introduces provisions to require employers to take all reasonable steps to prevent sexual harassment at work and to prevent harassment at work by third parties. Whistleblowing protections are extended to apply to disclosures relating to sexual harassment and in relation to dismissal, the Bill makes provision to remove the qualifying period in relation to unfair dismissal, extend legal protections in relation to dismissal following pregnancy or periods of certain types of statutory family leave and for failing to agree to variation of contract. These implement reforms in relation to providing protection from unfair dismissal from day 1, strengthening protections in relation to pregnancy and maternity and situations involving “fire and rehire”.

6. Regarding other protections in relation to employment, the Bill updates requirements which apply in relation to collective redundancy, and extends the existing requirements concerning collective redundancy notification to apply to ships’ crew. The Bill further updates the legislative framework in relation to the duties of employers relating to equality and the transfer of workers under public contracts.

7. The measures concerning pay and conditions in particular sectors make provision for the reinstatement of the School Support Staff Negotiating Body in England and the establishment of a Negotiating Body covering adult social care in England, and both adult and children social care in Scotland and Wales. Chapter 3 in Part 3 further makes provision regarding seafarers and other maritime employment. It includes powers to provide additional employment protections to seafarers working on services visiting the UK frequently, and provides powers to implement certain international agreements related to maritime employment.

8. The trade union and industrial action provisions update the legislative framework in this area. The Bill removes restrictions on trade unions, giving them greater freedom to organise, represent and negotiate on behalf of their workers, repeals the Strikes (Minimum Service Levels) Act 2023, makes it easier for trade unions to gain recognition. The Bill also makes provision to regulate access to workplaces for trade union members meeting and representing their members, provision for trade union equality representatives, and for facilities to be provided to trade union officials and learning representatives. It further provides for additional powers in relation to the

prohibition on blacklisting, and makes reforms in relation to industrial action ballots, the provision of information to employers regarding industrial action and picketing, protections for taking industrial action and the functions of the certification officer.

9. The Bill also makes provision for the enforcement of labour market legislation by the Secretary of State, to implement the commitment to establish a single enforcement body to be known as the Fair Work Agency. It further increases the time limits which apply to making claims in Employment Tribunals and makes provision regarding the regulation of umbrella businesses.

Convention article analysis

10. The following provides analysis of the interaction of the provisions in the Bill with the various Convention rights engaged.

Article 5 ECHR

11. Article 5 provides that:

> *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in [certain specified] cases and in accordance with a procedure prescribed by law."*

12. The following provisions are considered to engage and/or interfere with the rights guaranteed by Article 5:
    (i) Clause 34: Employment businesses;
    (ii) Clause 54: International Agreements Relating to Maritime Employment;
    (iii) Part 5: Enforcement of labour market legislation by the Secretary of State;

Clause 34: Extension of regulation of employment businesses

13. Clause 34 makes provision to permit the regulation of umbrella businesses ("umbrellas"), a type of intermediary business in the recruitment industry that sits in between individual workers, and employment businesses and end-hirers. Umbrellas typically employ individual workers under an employment contract, and provide other administrative services to the worker, such as dealing with tax deductions, and statutory (and non-statutory) benefits. An employment business then typically supplies the worker to the end-hirer to perform the work (or the worker goes to the hirer direct). Umbrellas pay themselves for their role by taking a margin from the payment received from the employment business (or hirer), before passing on the rest to the worker (being the worker's wages) minus statutory and other deductions.

14. Clause 34 amends the definition of an "employment business" in section 13(3) of the Employment Agencies Act 1973 ("EAA 1973") in order to capture umbrellas. This definition will then permit regulation under the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the "Conduct Regulations") (which will be amended), and will bring umbrellas within scope of the EAA 1973 and the Fair Work Agency enforcement mechanisms under the Bill, in particular an umbrella (and its officers) would then be subject to the offence at clause 136, of breaching a Labour Market Enforcement Order ("LMEO"), which on indictment, could result in imprisonment.

15. As in relation to the other offences set out in Part 5 of the Bill, for the reasons referred to at paragraphs 23 to 24 below the Government considers that while Article 5 is engaged, the provisions are compatible with the rights guaranteed by that Article. Imprisonment is only possible following conviction in a court of law, the provisions in the Bill provide a sufficient degree of legal certainty such that a person may reasonably foresee that imprisonment is a potential consequence of breaching an LMEO, and there are safeguards against arbitrariness.

Clause 54: International agreements relating to maritime employment

16. Clause 54 provides that the Secretary of State may by regulations make such provision as the Secretary of State considers appropriate for the purpose of giving effect to the Maritime Labour Convention, the Work in Fishing Convention, and other unnamed international agreements so far as they relate to maritime employment.

17. The International Maritime Conventions clause provides that regulations may provide for the contravention of any provision of the regulations made under that clause to be a criminal offence. The government considered that to create offences on the face of the Bill would require making any contravention of the regulations an offence. The government considered that such an approach would not be proportionate, and would not reflect policy intention that only select contraventions are serious enough to constitute an offence. Further, the clause will provide for implementation of future amendments to the relevant international maritime conventions, and the government requires discretion as to whether contravention of any new provisions should be an offence.

18. The government considers that Article 5 is engaged because of the potential for imprisonment on conviction for offences made under regulations. However, it is considered that the Bill provisions are compatible with Article 5. Imprisonment is only possible following a conviction in a court of law. This corresponds to Paragraph 1(a) of Article 5, which allows for deprivation of liberty following lawful detention of a person after conviction by a competent court. Further, the Bill provisions largely replicate existing provisions in sections 85 and 86 of the Merchant Shipping Act 1995, which are relied on to implement the relevant international maritime conventions, and are anticipated to be used in tandem with the new clause.

19. The Bill provisions provide a sufficient degree of legal certainty, such that a person may reasonably foresee that imprisonment is a potential consequence of breaching provisions specified in regulations. There are also safeguards against arbitrariness, in that prison sentences are subject to a clear maximum term of two years, thereby preventing deprivation of liberty for an unreasonable length of time.

Clauses 87 to 148: Enforcement of labour market legislation

20. The Government considers that Article 5 is engaged by provisions relating to the Fair Work Agency and the enforcement of labour market legislation (listed in Part 1 of Schedule 5). Specifically, the Bill makes provision for an expanded Labour Market Enforcement ("LME") regime, with the Secretary of State having the power to seek LME undertakings ("LMEUs") and orders ("LMEOs") in relation to certain labour market offences (defined in clause 149). Breach of an LMEO is a separate offence. The offence is triable either way and may result in imprisonment, a fine, or both. For convictions on indictment, imprisonment may be for a term of up to 2 years. For summary convictions, the maximum term of imprisonment depends on whether the conviction is in England & Wales, Scotland or Northern Ireland.

21. The current regime established by the Immigration Act 2016 ("IA 2016") applies only to specified "trigger offences" relating to the national minimum wage, regulation of employment agencies and licensing of gangmasters. The Bill extends the scope of the regime and, consequently, the circumstances in which the offence of breaching an LMEO applies.

22. Part 5 also makes provision for an offence of providing false information or documents and an offence of obstruction. These are summary offences, which may result in imprisonment or a fine. The maximum term of imprisonment depends on whether the conviction is in England & Wales, Scotland or Northern Ireland.

23. The Government considers that Article 5 is engaged because of the potential for imprisonment on conviction for these offences. However, our view is that the Bill provisions are compatible with Article 5. Imprisonment is only possible following a conviction in a court of law. This corresponds to Paragraph 1(a) of Article 5, which allows for deprivation of liberty following lawful detention of a person after conviction

by a competent court. In relation to the offence of breaching an LME Order, the Bill provisions largely replicate existing provisions in the IA 2016.

24. The Bill provisions provide a sufficient degree of legal certainty, such that a person may reasonably foresee that imprisonment is a potential consequence of breaching an LMEO. There are also safeguards against arbitrariness, in that prison sentences are subject to clear maximum terms, thereby preventing deprivation of liberty for an unreasonable length of time.

25. The Bill amends section 114B of the Police and Criminal Evidence Act 1984 ("PACE") regarding the application of PACE to enforcement officers in respect of labour market offences (see Part 2 of Schedule 10).

26. To the extent that PACE powers (including powers of arrest or detention) are to be applied to enforcement officers, the Bill does not amend any of the powers as set out in PACE, including any relevant safeguards. For example, the power of arrest without warrant provided by section 24 PACE is subject to the requirement that the officer has reasonable grounds for suspecting that an offence has been committed and reasonable grounds to believe the arrest is necessary. The powers related to detention under sections 44 and 43 PACE are subject to time limits as well as the requirement for a warrant approved by the court and other limitations. As such the Government considers that these provisions are compatible with Article 5.

Article 6 ECHR

27. Article 6 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."*

28. Broadly, the Government considers the civil rights at issue to be the rights (whether statutory or contractual) of employees and workers, the determination of which may

engage Article 6, and the correlative rights of an undertaking to carry on a business, as it sees fit, without undue state interference. The right to carry on a business involves freedom of contract, the free exercise of property rights and the right to protect confidentiality and trade secrets. Provisions aimed at determining any of these rights would engage Article 6, and therefore need to comply with the substantive and procedural obligations Article 6 requires.

Criminal charges

29. The ECHR concept of a criminal charge is broader than just those charges which are tried in domestic criminal courts. If the measure is not classified as "criminal" under domestic law, this is not decisive. The court will look behind the national classification and examine the substantive reality of the procedure in question. A decision is unlikely to constitute the determination of a criminal charge where the decision cannot lead directly to the imposition of a penalty, but may lead to other obligations being imposed, breach of which may be punished with a penalty.

30. The following provisions are considered to engage and/or interfere with the right to a fair trial under Article 6:

(i) Clause 1: Right to Guaranteed hours;
(ii) Clause 2: Shifts: rights to reasonable notice
(iii) Clause 3: Right to payment for cancelled, moved and curtailed shifts;
(iv) Clause 4: Agency Workers
(v) Clause 9: Right to request flexible working;
(vi) Clause 26: Dismissal for failing to agree to variation of contract, etc.;
(vii) Clause 27: Collective redundancy: extended application of requirements;
(viii) Clause 28: Collective redundancy consultation: protected period
(ix) Clause 33: Duty to keep annual leave records
(x) Clause 34: Employment businesses
(xi) Clause 53: Seafarers' wages and working conditions;
(xii) Clause 54: International agreements relating to maritime employment;
(xiii) Clause 56: Right of trade unions to access workplaces;
(xiv) Clause 61: Facilities provided to trade union officials and learning representatives;
(xv) Clause 62: Facilities for equality representatives;

(xvi) Part 5: Enforcement of labour market legislation by Secretary of State;

(xvii) Clause 149: Increase in time limits for making claims.

31. The Bill establishes (or revises) a number of civil rights which can be enforced in the Employment Tribunal ("ET") (e.g. unfair dismissal rights for dismissals for failing to agree to variation of contract, etc, and amended rights in relation to collective redundancy consultation). The Government considers that the framework provided by the ET, Employment Appeal Tribunal ("EAT") and appellate courts for effective redress in relation to disputes that may arise from the provisions of this Bill meets the relevant procedural safeguards required by Article 6(1). In particular, ET decisions on the rights addressed by the Bill will be directly decisive for the rights in question (*Ulyanov v. Ukraine (dec.)*, no. 16472/04, 2010 and *Alminovich v. Russia (dec.)*, no. 24192/05, 2019, §§ 31-32); the tribunal process is fair and public (*Stanev v. Bulgaria,* no. 36760/06, [GC], 2012, § 231; *Airey v. Ireland*, no. 6289/73, 1979, § 24); independent and impartial (which is indispensable for a fair hearing) (*Grzęda v. Poland,* no. 43572/18 [GC], 2022, § 301), and established by law (*Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 2020, § 211). The ET is itself a public authority and as such is required to act in a manner which is compatible with section 6 of the HRA 1998.

Clauses 1 and 4: Right to guaranteed hours and Agency Workers: guaranteed hours and rights relating to shifts (Provision in Part 1 of Schedule A1)

32. Clause 1 makes provision for guaranteed hours offers to be made by an employer to a qualifying worker at the end of a reference period. This duty on the employer is subject to some exceptions, one of them is where there has been a relevant termination of the contract under which terms the worker last worked before the end of the period in question (see new sections 27BD(1)-(2)). Clause 4, and the provision inserted as Part 1 of Schedule A1 introduces a corresponding right to guaranteed hours offers for qualifying agency workers. The offer is to be made by the person to whom agency workers are supplied to work for (the 'hirer') and is to be an offer to enter into a worker's contract with the hirer. Similar conditions, including similar exceptions, will otherwise apply.

33. The provisions on guaranteed hours (including the related information rights about the right to guaranteed hours) establish new civil rights that can be brought before an ET for determination, in particular under new section 27BG(1) where no guaranteed hours offer has been made by the end of the relevant and required time limit.

Accordingly, those provisions engage the Article 6 rights of both workers and employers. Article 6 rights of agency workers and hirers are also engaged. as well as agencies as the third party to the relationship (see new [27BUA]).

34. Under usual rules in civil cases, the burden of proof would be on the claimant to establish their claim. However, new section 27BD(11)(b) within clause 1 reverses the usual rules on the burden of proof, with a rebuttable presumption that where a qualifying worker worked under more than one contract doing the same work or work of a similar nature as under another of their worker's contract with the same employer, it would be presumed (unless the contrary is shown) that it was not reasonable for that worker's contract to have been entered into as a limited term (if such were the case) - for the purpose of determining that it was not a relevant termination under new section 27BD(4)(c). In such case where the rebuttable presumption applies, the employer would remain under a duty to make a guaranteed hours offer as the termination of a limited term contract would not count as a relevant termination for the purpose of establishing that exception.

35. Employers (as well as workers) will be given sufficient opportunity to state their case before an ET. The presumption regarding the relevant termination of a limited term contract in such circumstances will be rebuttable and therefore it is open to the employer to rebut it where required, where it was in fact reasonable for the worker's contract to be entered into as a limited term, resulting in them being excepted from their duty to offer guaranteed hours.

36. As stated above, the court-based process for enforcement of the rights established under this Bill will be delivered through decisions of the ET system, which is an independent and impartial court for the purposes of Article 6. The Government considers that the enforcement regime for the rights established under this Bill is compliant with Article 6.

<u>Clauses, 2, 3 and 4: Shifts: rights to reasonable notice; and right to payment for cancelled, moved and curtailed shifts) and Agency Workers: guaranteed hours and rights relating to shifts</u>

37. Clauses 2 and 3 (which insert new sections 27BJ to 27BU into the ERA 1996) make provision to require employers to provide reasonable notice of shifts and changes to

shifts to workers on zero-hours contracts and arrangements, and to workers on other specified contracts, and to pay them where they cancel, move or curtail their shifts at short notice (unless an exception applies). Clause 4A also inserts new Schedule A1 into the ERA 1996, Parts 2 and 3 of which provide corresponding rights for agency workers against their work-finding agency and, in relation to Part 2, the hirer.

38. The provisions on notices of shifts establish new civil rights that can be brought before an ET for determination. Accordingly, they engage the Article 6 rights of both workers and employers, as well as agency workers, agencies and hirers.

39. Under usual rules in civil cases, the burden of proof would be on the claimant to establish their claim. However, there will be a rebuttable presumption that notice of a shift given in less than a time to be specified in regulations is presumed to be unreasonable, which reverses the usual burden of proof.

40. Employers, as well as agencies and hirers, will be given sufficient opportunity to state their case and contest any evidence. The presumption of unreasonable notice will be rebuttable and therefore it is open to the employer to rebut this where notice was reasonable. Further, the standard of assessment will still be “on the balance of probabilities” meaning that the employer just needs to establish that it is more likely than not that notice was reasonable.

41. Further, an employer wishes to rely on an exception from the requirement to pay for short notice cancellation, movement or curtailment, they must notify the worker and a work-finding agency must similarly notify an agency worker. The (agency) worker can then bring a claim on the basis that the notice was not provided or was inadequate or untrue.

42. Under Part 3 of new Schedule A1, an exception can apply that means that the work-finding agency does not need to pay the agency worker as a result of a hirer’s circumstances. However, if the agency wants to bring a claim that the notice was not provided or was inadequate or untrue, the agency worker will have to bring the claim against the work-finding agency, even where the exception arises as a result of the hirer’s circumstances, because it is the work-finding agency that has the duty to provide the notice.

43. Recognising though that the hirer is, in some cases, more likely to have information to show whether the notice was untrue or not and may have caused the notice to be inadequate, the agency worker or the work-finding agency may want to add the hirer as a party to a claim. Part 3 provides that, where they apply to do so and the hearing has not commenced, the ET must add the hirer as a party to the claim.

44. Similarly, under Part 2 of Schedule A1, an agency worker is entitled to reasonable notice of shifts from the work-finding agency or the hirer. Where they allege that notice of a shift was unreasonable, an agency worker can bring a claim against the work-finding agency, the hirer or both.

45. Where the claim is only brought against one of the work-finding agency or the hirer, it may become clear that the other one should also be added to the claim, for example, if the work-finding agency and the hirer are jointly responsible for the unreasonable notice. Part 2 therefore provides that, where they apply to add the other entity as a party to the claim and the hearing has not commenced, the ET must grant the application.

46. In both these cases, the ET will not be able to take into account any representations from the hirer/work-finding agency that they should not be added as a party as the ET will have to grant the application. However, this is considered appropriate as any representations as to why they should not be added are likely to go to the issue to be decided in the case and therefore it is appropriate that they are added so that the ET can consider the case with all the relevant facts and relevant parties before it to enable it to reach a determination. Further, the party added will, like the other parties, have an opportunity to have its case heard and therefore this should not result in unfairness for that party.

47. The Government therefore considers these provisions to be compliant with Article 6.

48. The court-based process for enforcement of the rights established under this Bill will be delivered through decisions of the ET system, which is an independent and impartial court for the purposes of Article 6. The Government considers that the enforcement regime for the rights established under this Bill is compliant with Article 6.

Clause 9: Right to request flexible working

49. Clause 7 amends Part 8A of the ERA 1996 to require an employer's refusal of a request for flexible working to be reasonable, and to require the employer to state the ground or grounds for refusing it, and to explain why they consider that it is reasonable to do so.

50. Section 202 of the ERA 1996 makes provision so that where, in the opinion of any Minister of the Crown, the disclosure of any information would be contrary to the interests of national security, nothing in any provision to which that section applies requires any person to disclose the information, and prevents the disclosure of information in any proceedings in any court or tribunal relating to the specified provisions. Section 202(2) sets out the list of provisions to which the section applies.

51. The Bill will insert Part 8A of the ERA 1996 into the list at section 202(2), so that the security services are not required to disclose information if in the opinion of a Minister of the Crown that would be contrary to the interest of national security, when providing reasons for the refusal of a flexible working request.

52. The civil rights at issue are the rights of employees under Part 8A, the determination of which may engage Article 6. While in rare circumstances an employer may not be required to disclose some information related to reasons for the refusal of a flexible working request, the employee would not be prevented from pursuing a complaint about the refusal. The protections before the ET (described at paragraph 31 above) will ensure that employees' Article 6 rights are respected.

Clause 26: Dismissal for failing to agree to variation of contract, etc.

53. Clause 26 introduces a new unfair dismissal right to limit the use of 'fire and rehire' or 'fire and replace' by employers. Unfair dismissal rights engage Article 6 because they are civil rights that can be brought before an ET for determination. The new right will form part of the existing unfair dismissal framework, which the Government considers to meet the relevant procedural safeguards required by Article 6(1).

Clause 27: Collective redundancy: extended application of requirements

54. Clause 27 amends employers' obligations in relation to collective redundancy consultation. The current legislation requires employees to consult with appropriate

representatives when proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. This change means the collective redundancy consultation obligation will also apply where a threshold number of employees are proposed to be made redundant across more than one establishment. The threshold will be specified in secondary legislation, and may be set by reference to a specified number, a percentage of the employer's employees, or some other manner specified in the regulations.

55. A breach of these obligations can currently be enforced by making a claim to the ET for a protective award. The Government considers that the current framework for enforcement of collective redundancy consultation rights meets the relevant procedural safeguards required by Article 6, as set out in paragraph 31 and as explained further below

56. Clause 27 also amends employers' obligations to notify the Secretary of State in relation to proposed redundancies. A breach of these obligations is a criminal offence. The Government considers that the current framework for the prosecution of this offence meets the relevant procedural safeguards required by Article 6(1) to (3).

Clause 28: Collective redundancy consultation: protected period

57. Clause 28 amends Chapter II in Part 4 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA 1992"). This clause will increase the maximum period of the protective award which an ET can make where an employer has failed to consult in a collective redundancy situation. Currently, where an employer breaches their obligations to collectively consult, an ET can make a 'protective award' in relation to each affected employee, which represents pay for such period as it considers 'just and equitable' taking into account the seriousness of the employer's default, up to 90 days' pay. This will be amended so that the ET could make an award for a period of up to 180 days' pay.

58. The Government considers that the increased maximum protective award will amount to a civil penalty for the purposes of Article 6. Whilst protective awards serve a deterrent/punitive purpose, they have several civil and compensatory elements, as they are paid to employees (not the state) and linked to remuneration, and therefore should properly be considered a civil penalty. Even if the protective award were to be considered a criminal penalty for the purposes of Article 6, the Government considers

that the necessary procedural safeguards are already in place. Protective award claims are considered by an ET, an impartial, independent tribunal for Article 6 purposes, and the procedural safeguards in place through that system are sufficient, considering the need to the balance the public interest and the protection of the rights of individual employers. The ET will also be required to consider what level of award is just and equitable in all the circumstances.

Clause 33: Duty to keep records relating to annual leave

59. Clause 33 makes amendments to the Working Time Regulations 1998, inserting a new regulation 16B which establishes a duty on employers to keep records relating to annual leave entitlement and making it an offence under regulation 29 for failure to comply with this duty. The new regulation 16B and the associated offence under regulation 29 are also listed in Part 1 of Schedule 7 to the Bill, so that they are enforceable by the Fair Work Agency, using the powers and provisions set out in Part 5 of the Bill.

60. This proposal will engage Article 6 as it creates a new offence which will be enforceable by the Fair Work Agency. Fair Work Agency officers will be able to enforce the duty under regulation 16B by issuing LME Undertakings or Orders (clauses 90-100), for committing an offence under regulation 29, i.e. where an employer has failed to keep records in relation to annual leave entitlement. If an employer fails to comply with an LME Order in relation to the offence under regulation 29, they could also commit an offence under clause 136 (Offence of failing to comply with an LME Order). The Government considers enforcement of the duty to keep records in relation to annual leave entitlement by the LME Undertakings or Orders regime in the Bill as compatible with Article 6 for reasons as set out in paragraph 101 below.

Clause 34: Extension of regulation of employment businesses

61. Clause 34 is described at paragraph 13 above. It makes provision which would permit the regulation of umbrella businesses. The proposals engage Article 6 given that the new entity (and its officers) will fall within scope of the enforcement provisions in the Bill, and the legal requirements and enforcement provisions set out in the EAA 1973 and the Conduct Regulations.

62. In the EAA 1973, restrictions or bans may be placed on the running of an umbrella as set out in a Prohibition Order in the Act (sections 3A to 3D), where there is misconduct or a person is deemed unsuitable to be running such a business. An umbrella, which would fall within the definition of an employment business, would as a result also be subject to the prohibition on charging a fee for work-finding services in section 6 if it were to do this, and the offence of making fraudulent applications or entries in section 10, where the penalty for breaching such offences is a fine. Umbrellas would also be subject to section 5 of the EAA 1973 which states that breaching regulations made under the Act (namely the Conduct Regulations) is an offence, where the penalty is a fine. Section 11B of the EAA 1973 also allows a court to order a person convicted of an offence under this Act to pay a sum which appears to the court not to exceed the costs of the investigation (which resulted in the conviction).

63. Under the Bill an umbrella may also be subject to an LME Undertaking or LME Order (clauses 116-126), where an offence is potentially being committed, such as breaching the Conduct Regulations, or an offence under the EAA 1973. An umbrella (and its officers) would also be subject to the offence of breaching an LME Order under clause 136 of the Bill, along with the offences of providing false information or documents (clause 137) and the offence of obstruction (clause 139). The assessment demonstrating that these provisions comply with Article 6 is set out above in paragraphs 109 and 110.

64. It is the intention that the Conduct Regulations will be amended as appropriate as umbrellas will become subject to the requirements set out therein, where breach is an offence and within scope of the LME Undertakings and Orders process in the Bill. It is not known at this stage what amendments will be made to the Conduct Regulations. Any amendments to these regulations will first require consultation and the amendments will be subject to scrutiny in both Houses under the affirmative procedure. The Conduct Regulations set out how employment businesses (which will include umbrellas) must conduct their businesses, in particular relating to transparency, fees, protecting workers' pay, and advertising of roles, with the aim of providing greater protections to those using their services, namely workers and end-hirers.

65. These legal obligations are clearly set out in legislation with precise procedural requirements, where proceedings would be before a fair and impartial court. There

are safeguards in place such as time restrictions on the length of a Prohibition Order under the EAA 1973 and LME Undertakings and Orders in the Bill, and there are procedures for revocation, variation, and appeals of these. The penalties for breach of the Conduct Regulations, offences under the Act and under the Bill are clearly set out in legislation and are a proportionate means to achieve greater protections for those using the services of umbrellas, and to achieve fairer practices in the labour market.

66. The Government is satisfied that Article 6 is complied with regarding the amendment to enable regulation of umbrellas.

Clause 53 and Schedule 5: Seafarers wages and working conditions

67. Clause 53 and Schedule 5 provide for amendment to the Seafarers' Wages Act 2023 ("SWA 2023") so that it will become the Seafarers (Wages and Working Conditions) Act 2023. The SWA 2023 as amended by Schedule 4 to the Bill, will empower statutory harbour authorities ("SHAs") to request declarations from operators of certain ship services. It will empower the Secretary of State to make two new sets of regulations regarding the content of such declarations, namely; "remuneration regulations" and "safe working regulations".

68. The SWA 2023 as amended will apply the existing enforcement provisions to the new "remuneration declarations" and "safe working declarations". The enforcement provisions and relevant amendments are contained at sections 5-15 of the SWA 2023 and paragraphs 11-19 of Schedule 5

69. The enforcement provisions empower SHAs to require the operator of a relevant service to pay a surcharge in respect of the use of its harbour, where an operator has not provided a declaration, or has provided one but has operated the service inconsistently with it. An operator who neither provides a declaration nor pays a surcharge in the prescribed circumstances may be denied access to the harbour.

70. The enforcement provisions empower the Secretary of State to give a direction to any one or more SHAs, including directions (a) to impose or not impose a surcharge and (b) as to the amount specified in the direction instead of the amount determined by the SHA's tariff.

71. In the event that an SHA levies a surcharge, operators may raise an objection to the Secretary of State, which provides an important procedural safeguard (see section 10 of the SWA 2023). Any decision of the Secretary of State following such objections will be amenable to judicial review.

72. Additionally, a decision by the Secretary of State to issue guidance or directions will be amenable to judicial review, as would a relevant decision of the harbour authority where it is considered to be carrying out public functions for the purposes of the HRA 1998.

73. Given the above, the Government considers that whilst Article 6 is engaged, the High Court's powers of judicial review will be sufficient to comply with Article 6 in relation to potential challenges to the direction making powers of the Secretary of State. So far as decisions in relation to SHAs relating to the imposition of surcharges and powers of entry are concerned, we consider that the procedural safeguards in section 10 of the SWA 2023 combined with the availability of judicial review are sufficient to comply with Article 6.

Clause 54: International agreements relating to maritime employment

74. Clause 54 is described at paragraph 16 above. The Government considers Article 6 is engaged because the clause provides for enforcement. Specifically, regulations made under the clause may provide for the detention of a ship and for the creation of offences.

75. Clause 54 provides that regulations may provide for the contravention of any provision of the regulations made under that clause to be a criminal offence. Any convictions of such offences shall be made by an independent and impartial court of law. On that basis, whilst the offences provisions engage Article 6, they are not incompatible with its requirements.

Clause 56: Right of trade unions to access workplaces

76. Clause 56 inserts new sections 70ZA to 70ZL into the TULRCA 1992 to make provision for access agreements. These are agreements between employers and trade unions relating to access to a workplace for specified purposes, including for

the trade union officials to meet, represent, recruit or organise workers, and for the facilitation of collective bargaining. Unions will be able to formally request access. Following the formal request, there will be a negotiation period, the length of which is to be set via secondary legislation. In the event that agreement cannot be reached, or there is a dispute covered by the agreement the regulator is the Central Arbitration Committee ("CAC"). The CAC will be able to make determinations as to whether there should be access/terms of access. Accordingly, this clause engages the Article 6 rights of both trade unions and employers. Appeals to CAC determinations on access, on questions of law are to the EAT. The Government considers that the legislative framework for access agreements is compatible with Article 6.

77. Determinations are to be made in accordance with access principles set out in the primary legislation (see new section 70ZF(2)).

78. The Bill makes specific provision that the access agreement is only enforceable under the CAC enforcement framework and not by any other means. Where there is a breach of the CAC order the CAC can issue a penalty. Appeal is to the EAT on any question of law; the penalty or the amount of the penalty can also be appealed to the EAT.

79. The access principles, in accordance with which the CAC must make determinations, are set out in the Bill and are aimed at balancing the rights of the employer with those of the trade union. The CAC is required when considering an application for a determination to be made as to whether access should be given, to as far as reasonably practicable, give any person who it considers has a proper interest in the application an opportunity to be heard. Other safeguards include that a declaration or order of the CAC must be in writing and give reasons. There are clear time limits for steps in the process, some of which are to be provided for in secondary legislation, for example the time for which the employer has to respond to an access request, and the period of time for the negotiations. However, the provisions provide on the face of the Bill that there is a three-month time limit to make a complaint to the CAC from the day on which the matter complained of occurred. The Chair of the CAC decides whether the determination on access can be made by a single person, or a tripartite panel, having regard to the complexity of the case, including whether any terms prescribed in secondary legislation are included – with less complex matters suitable for a single person decision.

80. The CAC is impartial and independent. It is a public sector body so it is constrained by general public law principles to act reasonably and must not act in a way that is incompatible with Convention rights. This includes the decision it will make as to the amount of any penalty, subject to minimum/maximum amounts set by the Secretary of State in regulations. The setting of minimum/maximum penalties by the Secretary of State can be as fixed amounts and/or by reference to prescribed factors/circumstances, such as turnover. Secondary legislation can also set out matters to which the CAC must have regard when considering the amount of any penalty. The clause also makes provision (i) to apply section 264(1) TULRCA 1992, which allows corrections to decisions concerning the right of access if clerical errors are made; and (ii) to allow access agreements to cover virtual access. For example, the access agreement could cover communications between the trade union and workers using technology.

81. If an employer decides not to pay a penalty imposed, that can be enforced as if it were a court order – and at that point failure to pay may lead to contempt proceedings. Given that imprisonment is ultimately a possible sanction in such proceedings, they would be considered criminal for the purposes of Article 6. (*Daltel (Europe) Ltd and others v Makki and another* [2006] EWCA Civ 94).

82. However, any such proceedings will be conducted in accordance with Part 81 Civil Procedure Rules 1998, which make detailed provision for contempt proceedings. In particular, although not formally 'criminal' proceedings, the burden of proof in such cases is to the criminal standard. The Bill does not alter the regular procedures of the court. The court would exercise its powers in a manner that was compatible with Article 6.

83. The provisions are compatible with Article 6, and the Government also considers that the framework meets the procedural safeguards required by Article 6(1) to (3).

Clause 57: Trade union recognition

84. Clause 57 introduces Schedule 6 (Trade union recognition), which amends Schedule A1 to the TULRCA 1992 (collective bargaining: recognition) in order to:
    (i) remove the requirement to show at the application stage that at least 50% of workers in the bargaining unit are likely to support recognition;

(ii) grant the Secretary of State a power to reduce the requirement to show at the application stage that at least 10% of workers in the bargaining unit are members of the union;

(iii) simplify the support required for recognition in the final ballot, so that a simple majority of those voting is sufficient, with no threshold that that majority must represent at least 40% of the workers in the bargaining unit;

(iv) extend the prohibition on unfair practices by employers and unions, extend the time limit for bringing an unfair practice complaint and simplify the test for the CAC to determine if a complaint is well founded;

(v) add a process for the parties to enter into an access agreement and if an agreement cannot be reached, for the CAC to determine an agreement that will give the trade union reasonable access to the workers during the recognition or derecognition process;

(vi) exclude workers recruited after the date of the application from the CAC's considerations when assessing union membership within the bargaining unit and from voting in the ballot; and

(vii) ensure that if a non-independent trade union is recognised after an independent trade union makes a request for recognition to the employer, this does not act as a bar to a subsequent prompt application made by the independent trade union to the CAC.

85. The amendments relating to access during the recognition and derecognition processes and those relating to unfair practice complaints engage the Article 6 rights of employers, workers and trade unions. This is because the amendments relate to the CAC's determinations of complaints regarding these matters and confer a power on the CAC to determine the terms of access agreements. The Government considers that the provision set out within these amendments is compliant with Article 6.

86. Under Schedule A1 to the TULRCA 1992, the CAC currently has the power to determine if an employer has failed to provide the union with reasonable access to enable the trade union to inform the workers of the object of the ballot and seek their support and opinions on the issues involved. The amendments will insert a new process for employers and trade unions to reach access agreements and the parties will then be under a duty to comply with that access agreement. This will provide the parties with greater certainty about what is required of them in this regard. As part of this new process, if the employer and the trade union cannot reach an access

agreement, the CAC will be required to decide the terms on which the union is to have access to the relevant workers or decide that the union is not to have access. Schedule A1 will set out that any terms decided by the CAC must be terms that the CAC regards as allowing such access as is reasonable to enable the union to inform the workers of the object of the application and any related ballot, and seek their support and opinions on the issues involved. This is almost identical to the existing provision requiring the employer to provide, and the CAC to determine a breach of, reasonable access. The CAC will have a period of 10 working days to make this adjudication or such longer period as the CAC may specify to the parties by notice containing reasons for the extension.

87. The CAC will also determine complaints brought by either party that the access agreement (whether agreed by the parties or determined by the CAC) has been breached. Similar to the remedies the CAC can currently award for breaches of the existing access duty, the CAC will be able to make an order specifying steps a party must take to remedy a failure and if an order is not complied with, can ultimately determine the recognition or derecognition application in the other party's favour.

88. The Bill will also amend the test that the CAC must apply when determining an unfair practice complaint. This will mean that in order to find a complaint to be well-founded the CAC still needs to determine whether the party complained against used an unfair practice but it will no longer need to determine whether that use changed or was likely to change how a worker voted or would vote. This will ensure that whilst the use of an unfair practice still needs to be made out, this will be sufficient for the CAC to make a declaration recognising that an unfair practice has been used and to consider an appropriate remedy (the Bill replicates the existing remedies for unfair practice complaints). There are currently very few unfair practice complaints brought and this amendment will remove one of the barriers because the complainant will no longer need to provide evidence from workers who may be reluctant to participate in a complaint. Unfair practices could adversely affect the outcomes of the recognition and derecognition processes and in turn the worker's enjoyment of their Article 11 rights. It is therefore important that the parties can seek appropriate redress when an unfair practice has been used and following these amendments, they will be able to do so with greater confidence.

89. The CAC is independent and impartial. The TULRCA 1992 provides that only persons experienced in industrial relations may be appointed as members and they

must include persons with experience as representatives of employers and persons with experience as representatives of workers. As a public sector body, the CAC is also required to act in accordance with Convention rights and general public law principles. The CAC's declarations under Schedule A1 must be notified to the parties and published. The CAC also has the power to correct clerical mistakes in a decision or declaration and if a question arises as to interpretation of a decision or declaration under Schedule A1, a party may apply to the CAC for a decision on that question, with or without a hearing. The CAC's decisions are also amenable to judicial review.

90. The rights conferred on trade unions, workers and employers during the recognition and derecognition processes are, like those processes, limited and short-term. The Government therefore considers that judicial review is a sufficient remedy for the CAC's determinations under Schedule A1, including these new and amended determinations in relation to access and unfair practices.

91. For the reasons set out above, the Government is content that the provision made by the Bill for the CAC to make determinations in relation to access and unfair practices in the recognition and derecognition processes is compatible with Article 6.

Clauses 61 and 62: Facilities provided to trade union officials and learning representatives; and Facilities for equality representatives

92. Clauses 61 and 62 strengthen the existing rights of employees who are trade union officials or trade union learning representatives to take time off to undertake their duties, and to access facilities. Equivalent provision is made in the Bill for trade union equality representatives.

93. Currently, the amount of time the employer is required to permit the employee to take off is what is reasonable in all the circumstances. The Bill makes provision so that in the event of a complaint made by the employee to the ET that they have not been given a reasonable amount of time off – it is for the employer to show that the amount of time off which the employee proposed to take was not reasonable.

94. Under usual rules in civil cases, the burden of proof would be on the claimant to establish their claim. However, employers will be given sufficient opportunity to state their case and explain why the amount of time off requested was not reasonable. Further, the standard of assessment will still be what is reasonable in all the

circumstances, having due regard to any relevant provisions in an ACAS Code of Practice. The Government considers that the enforcement regime for these rights is compliant with Article 6.

Part 5: Enforcement of labour market legislation by Secretary of State

95. Clauses 87 to 148 make provision for the Secretary of State to become responsible for applying and enforcing a range of employment legislation. The Secretary of State's enforcement functions will be performed by a new body, the Fair Work Agency ("FWA"). As the FWA will be an Executive Agency, enforcement powers will be conferred on the Secretary of State directly and/or on enforcement officers (and so references below to a function or power being within the FWA's remit should be read accordingly), with a power for the Secretary of State to delegate functions to another authority. This application and enforcement of labour market legislation will involve the determination of both civil rights and obligations, such as assuming responsibility for licencing decisions under the Gangmasters (Licensing) Act 2004, and for enforcing criminal offences, depending on the legislation being enforced.

96. The FWA's functions will involve taking over existing functions, in particular enforcement powers, currently exercised by public bodies relating to the national minimum wage, employment agencies, unpaid ET awards, sick pay, gangmaster licensing and offences in Parts 1 and 2 of the Modern Slavery Act 2015, and the FWA will be given the power to investigate the offence of abuse of position in the Fraud Act 2006 (sections 1 and 4) so far as relating to a labour market context. Some of these powers do not require amendment in order to be exercised by the Secretary of State or enforcement officers. However, the Bill does make provision to consolidate and, in some cases, expand provision as follows:

(i) Clauses 93-99: investigatory powers, including powers to require persons to attend the Secretary of State or enforcement officers to provide explanations or additional information;
(ii) Clauses 100 to 112: Notices of Underpayment;
(iii) Clause 113: Power to being proceedings in ET;
(iv) Clause 114: Power to provide legal assistance;
(v) Clauses 116 and 120: Labour Market Enforcement Undertakings and Orders ("LMEU/Os");
(vi) Clause 140: Power to recover costs of enforcement;

(vii) Schedule 10, paragraph 66: Amendment of the Criminal Justice and Public Order Act 1994;

(viii) Clause 33 and Schedule 7, paragraph 21: Duty to keep records relating to annual leave and enforcement by the Fair Work Agency.

97. The Government considers that these provisions are compatible with Article 6 for the following reasons.

General

98. The Government recognises that neither the Secretary of State nor enforcement officers, in exercising their powers, would constitute an independent and impartial tribunal for the purposes of Article 6 but considers that the appeal and review mechanisms referred to below are sufficient to render the relevant enforcement processes compliant with Article 6.

99. With regard to existing functions being brought within the FWA's remit, several pieces of legislation with the FWA's remit already make provision for specific appeal mechanisms to ensure the compatibility of that legislation with Article 6. For example, provision regarding appeals against licensing decisions has been made by way of regulations under section 10 of the Gangmasters (Licensing) Act 2004. Similarly, the Labour Market Enforcement order regime in clauses 120 to 126 largely replicates the existing regime in the IA 2016 and requires LMEOs to be imposed by an appropriate court (defined in clause 120(4)), either on application by the Secretary of State or on the court's own initiative, with provision for appeals to the Crown Court (in England & Wales), the Sheriff Appeal Court (in Scotland) or a county court (in Northern Ireland). All these courts are independent and impartial tribunals for Article 6 purposes.

100. With regard to new enforcement functions, the Bill makes express provision for appeals where appropriate. For instance, notices of underpayment may be appealed to an ET – please see paragraph 109 below. Regulations providing for the recovery of enforcement costs may also include provision about the resolution of disputes, including provision for the making of appeals to a court or tribunal – please see paragraph 119 below.

101. Also, in carrying out their functions, the Secretary of State and enforcement officers will be required to act in a way that is compatible with Convention rights, including

Article 6 (see section 6(1) of the HRA 1998) and, in the Government's view, the provisions in the Bill do not require otherwise (see section 6(2) HRA 1998). Further, actions and decisions of public bodies are subject to judicial review in the absence of alternative remedies such as statutory appeal rights (as mentioned above and discussed further below). For instance, in relation to the Labour Market Enforcement regime, decisions taken by the Secretary of State on whether to accept, vary or release LMEUs could be said to determine a person's civil rights, and compliance with the right to a fair trial will be subject to the courts' supervisory jurisdiction of judicial review. (As opposed to decisions taken by the courts in relating to LMEOs, which may be subject to a statutory appeal (see clause 126).) The standard of review applied by a court exercising its judicial review jurisdiction is flexible and will be influenced by the nature and subject matter of the administrative decision (*R (Mott) v Environment Agency* [2016] EWCA Civ 564, paras 68-77). The court will modulate the intensity of its review in line with those factors, in a manner that enables the requirements of Article 6 to be met.

102. Criminal offences in the relevant labour market legislation are to be dealt with in accordance with the criminal law. Convictions would be made by competent courts, all of which are independent and impartial tribunals for the purposes of Article 6.

103. In relation to specific elements regarding the provisions made by the Bill in Part 5:

Investigatory powers

104. Powers to require persons to provide information engage the principle of privilege against self-incrimination. Although this principle is not specifically mentioned in Article 6, it is generally recognised as lying at the heart of the idea of a fair procedure (alongside the right to remain silent). Intentionally obstructing enforcement officers is an offence, as is failure to comply without reasonable excuse with requirements imposed by enforcement officers (clause 139). However, clause 139(5) provides that nothing in this section requires a person to answer any question or give any information if to do so might incriminate that person. Further, clause 130 makes specific provision for privilege against self-incrimination where a person provides information in response to a requirement under clause 94 ("power to obtain documents or information"). An additional safeguard is in clause 129, which makes provision about items subject to legal privilege.

Clauses 100 to 112: Notices of Underpayment

105. Clauses 100 to 112 make provision for the issue of notices of underpayment, to include a penalty element, in relation to "statutory pay provisions", and a state enforcement mechanism to recover arrears owed to workers in respect of statutory pay rights. Statutory pay provisions are those provisions listed in Part 1 of Schedule 7 to the Bill which confer a right of entitlement to the payment of any wages (e.g. national minimum wage, statutory sick pay or holiday pay), or which prohibit or restrict the withholding of the payment of any wages (e.g. restriction under Regulation 12 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003).

106. The provisions in clauses 100 to 112 are modelled on the notice of underpayment regime set out in the National Minimum Wage Act 1998 ("NMWA 1998"). This provides for a mechanism which involves a notice of underpayment to be issued to the employer. This regime will apply in relation to underpayments that took place from the date of Royal Assent.

107. Where a Notice of Underpayment is issued, clauses 104 and 105 also requires a penalty to be imposed on the employer, set at a rate of 200% of the underpayment due for each worker, subject to a minimum charge of £100 per notice and a maximum charge of £20,000 per worker. There is no discretion on the FWA officer not to issue a penalty, however as set out in clause 105(1), the Secretary of State has the power to issue directions specifying circumstances in which a Notice of Underpayment is not to impose a requirement to pay a penalty.

108. The penalty element of the Notice of Underpayment regime may engage the criminal limb of Article 6, despite its designation as 'civil' in domestic law. This is because the penalty is intended to have a punitive and deterrent effect. By contrast, the arrears element of the regime would engage the civil limb of Article 6.

109. The Government considers that regime contains appropriate safeguards sufficient to maintain compatibility with Article 6. In particular:

(i) The power to impose the penalty will be set out in law, in Part 5 of the Bill.

(ii) As set out in clause 107, an employer served with a Notice of Underpayment may appeal to the ET within 28 days, which is an independent and impartial

tribunal able to undertake a review of the decision. Appeals may be made against the decision to serve the Notice of Underpayment, any requirement imposed by the Notice of Underpayment to pay a sum to the worker and any requirement to pay a penalty, on a full merits basis.

110. In relation to the other requirements of Article 6(2):

(i) To be informed promptly, in a language which the person understands and in detail, of the nature and cause of the accusation against them: The detail of the underpayment and penalty will be set out in the NOU.

(ii) To have adequate time and facilities for the preparation of their defence: The 28 day period to appeal is considered to provide adequate time, in circumstances where the employer should already have all the information in their own control regarding payments made to workers, the Notice of Underpayment is required to set out the details of the infringement committed.

(iii) To defend himself in person or through legal assistance of his own choosing, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice require: Legal aid will not be available for the purposes of any enforcement action by the FWA, nor any appeal from it, but the Government considers that the interests of justice do not require it in this context.

(iv) To examine (himself or through his legal representative) witnesses and to obtain the attendance and examination of witnesses on his behalf: As a public body, the FWA is bound to comply with this requirement through the exercise of its powers. On appeals, the ET will be able to receive new evidence, that was not before the FWA at the time when it took the appealable decision, and will be able to hear oral evidence.

(v) To have the free assistance of an interpreter if the person cannot speak the language of the court: there is general provision for free interpreters in the civil courts where, broadly, the person cannot afford an interpreter, doesn't qualify for legal aid and doesn't have a friend or family member who the judge says can act as their interpreter.

Clause 113: Power to bring proceedings in employment tribunal

111. Clause 113 makes provision for the Secretary of State (expected to be exercised through the FWA) to have power to bring proceedings in an ET. Where it appears to the Secretary of State that a worker is not going to present a complaint to an ET, the

Secretary of State would be able to present a complaint in place of the worker in relation to any matter that the worker could present a complaint. Any complaint presented by the Secretary of State would be subject to the same ET procedure as a complaint presented by an individual, including the requirement for ACAS conciliation, and would be compliant with Article 6(1). In considering a complaint presented by the Secretary of State, the ET would be able to make an order in favour of any individual as if the individual had themself presented the complaint.

Clause 114: Power to provide legal assistance

112. Clause 114 makes provision for the Secretary of State to have a power to provide advice and assistance to any person (i.e. not limited to workers) who is or may become a party to any civil proceedings relating to employment law, trade union law or industrial relations law. This would not involve the Secretary of State becoming a party to the proceedings (although the Secretary of State would separately retain the ability to intervene in any proceedings) or have any impact on the procedure that applies to the relevant proceedings. As this power would relate to proceedings before an independent court or tribunal, its exercise would not give rise to any incompatibility with Article 6(1).

Clauses 116-126: LMEU/Os

113. The Bill follows the approach of the IA 2016. The key change is to expand the scope of the existing LME regime to apply to a wider set of "labour market offences" which are defined in clause 148.

114. LMEUs are undertakings given voluntarily by a person to the Secretary of State, where the Secretary of State believes that the person has committed, or is committing, a labour market offence (clause 116). LMEUs are undertakings to comply with prohibitions, restrictions or requirements ("measures") aimed at preventing or reducing non-compliance with relevant legislation (clauses 116 and 117).

115. If a person refuses or fails to provide an undertaking, or fails to comply with an undertaking they have provided, the Secretary of State may apply to an appropriate court for an LMEO (clause 121). The appropriate court is a magistrates' court (in England and Wales), the sheriff or a summary sheriff (in Scotland) or a court of

summary jurisdiction (in Northern Ireland) – all constitute independent and impartial tribunals for the purposes of Article 6. LMEOs either prohibit or restrict a person from doing anything set out in the order or require the person to do anything in the order. Similar to LMEUs, measures in LMEOs are aimed at preventing or reducing non-compliance with relevant legislation (clause 123). The court may make a LMEO where it: (i) is satisfied, on the balance of probabilities, that the person has committed, or is committing, a labour market offence, and (ii) considers that it is just and reasonable to make the order (clause 120). The balance of probabilities test is considered appropriate as the decision of the court to impose an LMEO does not result directly in a criminal conviction or criminal liability.

116. A court may also make a LMEO when it deals with a person in respect of a conviction for a labour market offence and the court considers it is just and reasonable to do so (clause 122). The maximum duration of LMEOs is two years, and the court may vary or discharge LMEOs on application (clauses 124 and 125). Further, there is a right of appeal in relation to LMEOs, with appeals lying to the Crown Court (in England and Wales), the Sheriff Appeal Court (in Scotland) or a county court (in Northern Ireland) (clause 126).

117.. The Government is satisfied that the provisions are compatible with Article 6.

Clauses 136, 137 and 139, 140: Offences of failing to comply with an LMEO, providing false information or documents, and obstruction

118. Clause 136 provides for an offence of failing to comply with an LMEO. A person in relation to whom an LMEO is made commits an offence if they, without reasonable excuse, fail to comply with the Order. Clause 137 provides for an offence of providing false information or documents and clause 139 provides for an offence of obstruction. Persons must be convicted of the above offences by a competent court of law. Such courts are independent and impartial for the purposes of Article 6 and follow usual criminal law procedure. The Government therefore considers the framework for this offence meets the relevant procedural safeguards required by Article 6.

Clause 140: Power to recover costs of enforcement

119. Clause 140 makes provision for a power, by regulations, to require relevant persons to pay a charge as a means of recovering any costs incurred in connection with the exercise of an enforcement function of the Secretary of State in relation to the person. The regulations may only require the payment of a charge by persons who have failed to comply with any relevant labour market legislation. The regulations may set out how the amount of a charge is to be determined, which could be a fixed amount, an amount calculated by reference to an hourly rate or an amount determined in accordance with a scheme made and published by the Secretary of State. The power enables provision to be made in the regulations about the resolution of disputes relating to the payment of such a charge, including provision for the making of appeals to a court or tribunal.

Schedule 10, paragraph 66: amendment of the Criminal Justice and Public Order Act 1994, Inferences from failure to provide explanation on arrest

120. Schedule 10 amends the Criminal Justice and Public Order Act 1994 ("CJPOA 1994") so as to apply sections 36 and 37 of that Act to investigations of labour market offences carried out by FWA enforcement officers. This is the ability for a court or jury to draw inferences from a suspect's failure to provide an explanation for an object, substance or mark (section 36), or their whereabouts (section 37), when asked about this on being arrested.

121. This engages Article 6 – which includes a right to remain silent and to not incriminate oneself (*O'Halloran and Francis v. the United Kingdom* [2007] no. 15809/02 and no. 25624/02, § 45*; Funke v. France* [1993] no. 10828/84, § 44). However, the right to remain silent is not absolute (*John Murray v. the United Kingdom* [1996] no. 18731/91, § 47).

122. Whilst a conviction must not solely be based on a suspect's refusal to answer questions, where the situation clearly calls for an explanation from the suspect then it is not necessarily a breach of Article 6 for there to be adverse consequences for the suspect if they refuse to provide an explanation (*John Murray v. the United Kingdom*, § 47).

123. In determining whether Article 6 has been breached, the Court would have regard to any safeguards in place (*Jalloh v. Germany* [2006], no. 54810/00, § 101). Existing safeguards include:

(i) Section 38(3) of the CJPOA 1994 – this prevents a defendant being convicted solely on the basis of an adverse inference being drawn from a refusal to answer, meaning there must be a prima facie case against the defendant (*John Murray v. the United Kingdom*, § 47);

(ii) Sections 36 (4) and 37(3) of the CJPOA 1994 – an officer must warn the suspect of the consequences of refusing to provide an explanation, otherwise a court or jury may not draw inferences from the refusal.

(iii) Sections 36(4A) and 37(3A) of the CJPOA 1994 – if the suspect is arrested at a police station, then a court or jury may not draw inferences from the refusal, unless the suspect had been given the opportunity to get a solicitor at the time.

124. Clause 139 of the Bill provides that it is an offence to obstruct an enforcement officer who is carrying out their enforcement functions, or to refuse to comply with a request from an enforcement officer without reasonable excuse. Clause 139(5) provides that nothing in clause 139 requires a person to answer any question or give any information if to do so might incriminate that person. However, in the case where someone is arrested on suspicion of committing a labour market offence, the application of sections 36 and 37 of the CJPOA 1994 will mean that a court or jury may draw inferences, as appropriate, from a suspect's failure to provide an explanation for an object, substance or mark (section 36), or their whereabouts (section 37), when asked about this on arrest, provided the requisite warning about this consequence has been given to the suspect (sections 36(4) and 37(3)). Sections 36 and 37 of the CJPOA 1994 will only apply where a person has been arrested, as opposed to during other investigations undertaken by the FWA.

Clause 149: Increase in time limits for making claims

125. Clause 149 introduces Schedule 12, which extends the period of time in which an employee or worker can lodge a claim with an ET from 3 months to 6 months for the majority of employment rights disputes. Article 6 is engaged because the disputes heard by an ET concern the determination of civil rights and obligations. Case law from the European Court of Human Rights ("ECtHR ") has confirmed that Article 6 applies to employment disputes including proceedings relating to an employee's dismissal (*Buchholz v. Germany* , no. 7759/77, [1981] ECHR) and, in most cases, to

employment disputes of those working in public service (such as civil servants; *Vilho Eskelinen v. Finland,* no. 63235/00, [2007] ECHR 314).

126. Article 6 requires that there is a "practical and effective" right of access to the court (*Bellet v. France,* no. 23805/94, [1995] ECHR). Limitation periods are not in general contrary to Article 6 (*Stubbings v. UK* (1996) 23 EHRR 213), as they serve the legitimate aims of ensuring legal certainty and the proper administration of justice. States are allowed a certain margin of appreciation when imposing limitations on the right of access (*Luordo v. Italy,* no. 32190/96, [2003] ECHR). As the measure increases the time available to an employee or worker to bring proceedings, our view is that this measure is compatible with Article 6. The measure enhances employees' and workers' right of access to a court, while still achieving the legitimate aim of ensuring legal certainty and the proper administration of justice.

Article 7 ECHR

127. Article 7(1) 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."*

128. Article 7(2) further provides that:

> *"This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."*

129. 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.

130. The provisions considered to engage Article 7 are:
    (i) Clause 54: International agreements relating to maritime employment;
    (ii) Clauses 100 to 112: Notices of Underpayment.
    (iii) Clauses 136 to 139: Offences.

Clause 54: International agreements relating to maritime employment

131. The provision at clause 54 concerning international agreements relating to maritime employment are described above at paragraphs 74 and 75.

132. As referred to there, the clause provides that regulations made under the power may provide for the contravention of any provision of the regulations made under that clause to be a criminal offence.

133. The Government considers that Article 7 is engaged because of the potential for conviction for offences made under regulations. While any offences established under the regulations would be required to comply with Article 7, the Government considers that the power does not give rise to any incompatibility issues.

134. The potential and maximum penalties are set out clearly in the clause, which enhances legal certainty. There is a maximum sentence of two year's imprisonment for conviction on indictment, which limits judicial discretion and prevents arbitrariness in sentencing.

135. The clause also states that regulations may provide, in specified cases, that specified persons each commit an offence created by regulations. In practice, this will allow regulations to provide that a shipowner and master are guilty of an offence should certain provisions be breached. That this is provided on the face of the clause increases foreseeability for shipowners and masters that they may be held liable for offences relating to employment conditions on their ships.

Clauses 101 to 112: Notices of Underpayment

136. To the extent that the penalty element of a Notice of Underpayment may be argued to be of criminal character for Article 6 purposes, the same arguments may be made in relation to Article 7. The penalty element will be potentially high, and are punitive and deterrent in nature, and parties could argue that their Article 7 rights are engaged.

137. As referred to in paragraphs 105 to 110 above, the creation of the new penalty powers will be accessible and provided for in law, and foreseeable as they will apply only in relation to breaches committed after Royal Assent in relation to statutory pay rights. The safeguards detailed in the Article 6 section are also applicable here, and

for these reasons, the Government considers the provisions to be compatible with Article 7.

Clauses 136 to 139: Offences

138. Clauses 136 to 139 are described above at paragraph 118. The Government considers that the Labour Market Enforcement powers conferred on the Secretary of State are compatible with Article 7. The provisions expand the scope of the existing powers in the IA 2016, with the result that the criminal offence of breaching an LMEO could apply in a wider set of circumstances. The Bill also provides for an offence of providing false information or documents and an offence of obstruction.

139. The Government considers that the Bill provisions are compatible with Article 7, as they provide a sufficient degree of legal certainty and foreseeability. The Bill clearly sets out, in relation to each offence, the circumstances in which an offence is committed. Persons must be convicted by a competent court of law, and the potential consequences of conviction are clear.

Article 8 ECHR

140. Article 8 provides that:

> *"Everyone has the right to respect for his private and family life, his home and his correspondence."*

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

(i) Clauses 2 and 4: Shifts: rights to reasonable notice and Agency Workers;
(ii) Clause 3: Right to payment for cancelled, moved and curtailed shifts;
(iii) Clause 15: Parental leave: removal of qualifying period of employment;
(iv) Clause 16: Paternity leave: removal of qualifying period of employment;
(v) Clause 19: Employers to take all reasonable steps to prevent sexual harassment;
(vi) Clause 20: Harassment by third parties;

(vii) Clause 24: Dismissal during pregnancy;
(viii) Clause 25: Dismissal following period of statutory family leave;
(ix) Clause 33: Duty to keep records relating to annual leave
(x) Clause 57: Right of trade unions to access workplaces;
(xi) Clause 62: Facilities provided to trade union officials and learning representatives;
(xii) Clause 63: Facilities for equality representatives
(xiii) Clause 65: Blacklists: additional powers;
(xiv) Clause 58: Trade union recognition;
(xv) Part 5: Enforcement of labour market legislation by Secretary of State.

Clauses 2, 3 and 4: Shifts: rights to reasonable notice; Right to payment for cancelled, moved and curtailed shifts; and Agency Workers: guaranteed hours and rights relating to shifts

142. Clauses 2 and 3 and Parts 2 and 3 of new Schedule A1 to be inserted into the ERA 1996 by clause 4 are described above at paragraph 37.

143. Regulations will set out exceptions to the requirement on employers to pay workers on zero-hours contracts and arrangements or other specified contracts where they cancel, move or curtail their shifts at short notice. Regulations will set out exceptions to a corresponding requirement on a work-finding agency to pay agency workers.

144. Where they wish to rely on an exception, employers and work-finding agencies must notify the worker of the exception relied on and provide further information to explain why the exception applies. The requirement to provide this notification does require employers and work-finding agencies to disclose relevant personal data, provided that data is not disclosed in contravention of data protection legislation.

145. There is a small risk that the explanations given by employers or work-finding agencies could reveal personal information about other individuals. The disclosure of such information could constitute an interference with Article 8.

146. To the extent that such an interference would be permitted, it would have to be in line with other law on confidentiality, including the UK General Data Protection Regulation.

147. The legitimate aim served by any interference with Article 8 would be the protection of rights of others. The information provided would enable a worker to know if they are entitled to payment for short notice cancellation/curtailment/movement and to enforce their rights if they are.

148. Any interference with Article 8 would be minimal and would strike a fair balance with competing interests and ensures that the purpose of the Bill is not undermined.

149. The provisions on notice of shifts and changes to shifts may also come within the scope of Article 8 because they necessarily affect the way that family life is organised. The proposed measures will ensure that workers may better predict when they are required to work. As a result, improved stability around when they will be paid will allow better planning of their home lives, and the measures will have a positive impact on family life.

Clauses 15 and 16: Parental leave: removal of qualifying period of employment; and Paternity leave: removal of qualifying period of employment

150. Clauses 15 and 16 dispense with the existing requirement for employees to meet conditions as to the duration of their employment before they become entitled to take paternity leave or parental leave. Forms of leave for parents and related allowances come within the scope of Article 8 because they necessarily affect the way that family life is organised. They will enhance existing entitlements to leave and, therefore, will have a positive impact on family life.

Clause 19: Employers to take all reasonable steps to prevent sexual harassment

151. Clause 19 strengthens the duty on employers to take reasonable steps to prevent sexual harassment under section 40A Equality Act 2010 (“EA 2010”), which came into force on 26 October 2024.

152. This clause engages rights under Article 8, which imposes positive obligations on the state to adopt policies which are designed to secure the right to a private and family life. These positive obligations may require the state to take action to stop interferences caused by the actions of other private individuals, including the actions of a private employer (*Bărbulescu v. Romania,* no. 61496/08, [GC], 2017, §§ 108-111).

153. This clause further enhances protections for employees by strengthening the positive duty on employers. Therefore, the Government does not consider that there is any interference with Article 8 rights and in fact it should enhance the rights of employees by strengthening protection from sexual harassment.

Clause 20: Harassment by third parties

154. Clause 20 amends section 40 of the EA 2010 to strengthen employees' protection from harassment by providing that employers must not permit third parties to harass their employees.

155. The Government considers that this engages Article 8 for the same reasons as stated in the section above on prevention of sexual harassment, and, as with that clause, should lead to an enhancement of employees' rights. The Government therefore considers that there is no interference with Article 8.

Clauses 24 and 25: Dismissal during pregnancy; and Dismissal following period of statutory family leave

156. The purpose of clauses 24 and 25 is to enhance the protection from dismissal for employees who are pregnant or on maternity leave. They provide powers to extend the existing protection, for employees when on maternity leave and on their return to work, to also cover the period when they are pregnant and a period after their return to work from maternity leave. The powers will also enable protection to be extended to employees who have taken adoption or shared parental leave, for a period after their return to work. The powers will also apply to those exercising rights which are not yet in force: to neonatal care leave and the extended form of paternity leave to be made available to bereaved parents.

157. The notion of family life under Article 8 incorporates the right to respect for decisions to become a parent and dismissal of a person from employment for reasons related to exercising a family-based entitlement to leave would engage Article 8. Extending the existing protection in relation to redundancy for pregnant employees and parents returning from certain types of family-related, in order to encompass dismissal for non-redundancy reasons would have a positive impact on family life.

Clause 33: Duty to keep records relating to annual leave

158. Clause 33 is described above at paragraph 59. The requirement to maintain records will involve the collection and storage of personal data, engaging Article 8. Any interference will be in accordance with the law, set out in the regulations as amended by the bill. The obligation to create and maintain the record will need to be fulfilled in compliance with other law on confidentiality, including the GDPR.

159. The interference is intended to support the legitimate aim of ensuring the effective enforcement of entitlement to leave and pay. The information collected will allow enforcement officials to review compliance and take enforcement action where necessary.

160. Any interference is considered proportionate to the aim of ensuring that workers and enforcement officials are able to access information to ensure compliance.

Clause 56: Right of trade unions to access workplaces

161. Clause 56 is described above at paragraph 76.

162. Access to workplaces may involve interference with the Article 8 rights of employers, or those on the premises, depending on the type of workplace. Article 8 guarantees the right to a "private social life", and under certain circumstances this can include professional activities (*Fernández Martínez v. Spain, no. 56030/07,* [GC], 2014, § 110; *Bărbulescu v. Romania* [GC], 2017, § 71; *Antović and Mirković v. Montenegro*, no. 70838/13, 2017, § 42).

163. The legitimate aim served by any interference with Article 8 rights is the protection of rights of others. It is important for trade union officials to be able to meet workers face to face, and also important for workers that trade union officials are able to do so. The access framework seeks to ensure that the Article 11 (freedom of association) rights of workers are strengthened. There are various safeguards (see paragraph 79 above) which are also relevant in relation to any interference with Article 8.

164. The safeguards include that the CAC must make determinations in accordance with the access principles, which are set out in the Bill, and are aimed at balancing the rights of the employer with those of the trade union, so that a proportionate outcome

in terms of access is arrived at. The access principles that are included in the Bill specifically refer to not unreasonably interfering with the employer's business; and refusing access where it is reasonable in all the circumstances to do so.

165. The right of access is also to be restricted so that only unions which are listed and have a certificate of independence may apply for access.

166. The right of access applies to workplaces, and does not include entry into a dwelling. This helps to ensure that any interference with Article 8 rights is limited.

167. In addition to physical access to premises, access agreements may in addition, or in the alternative, provide for 'virtual' access, for example for trade union officials to meet with workers online. This may involve the processing of personal data, such as work email addresses, however the Bill contains an explicit provision that nothing in the clause permits or authorises a disclosure of information that would contravene data protection legislation. In addition, nothing in the access provisions can require or authorise the disclosure of personal data without the consent of the data subject. Any interference with Article 8 rights would therefore be limited and proportionate.

168. Secondary legislation will set out the circumstances where the CAC must not grant access, and circumstances where it is reasonable for the CAC to refuse access. This enables regulations to make provision for workplaces that are to be exempt from the scope of access agreements. A non-exhaustive list of matters which those circumstances can be prescribed by reference to include the description of the workplace, the number of workers employed by the employer, the ability of the employer to facilitate access to the workplace, avoiding prejudice to the prevention or detection of offences and national security.

169. The exercise of the powers by the Secretary of State to make provision in secondary legislation for exemptions will need to be done in a manner that is compatible with Convention rights. Those regulations are subject to the affirmative procedure so will be subject to further Parliamentary scrutiny.

170. The CAC is a public body and constrained by public law principles. In addition, there will be further restrictions placed in secondary legislation. Ultimately, the court is involved in the event of disagreement if a party chooses to appeal a determination or order of the CAC to the EAT.

171. Overall, the Government considers that any interference with Article 8 rights is justified and proportionate.

Clause 57: Trade union recognition

172. Clause 57 and Schedule 6 (Trade union recognition) that it introduces are described at paragraph 84.

173. The existing provisions of the TULRCA 1992 impose duties on the employer relating to the ballot process: in particular to cooperate with the union and the "qualified independent person"; to provide the names and addresses of its workers; and to provide reasonable access to its workers. Such duties, information and access could be considered to interfere with the rights of the employer under Article 8. The amendments made by the Bill makes it more likely that the recognition process will be commenced and will enable trade unions to receive access to the workers in the bargaining unit on clearer terms and from an earlier stage in the recognition and derecognition processes.

174. Article 8 is a qualified right. Any interference will be in accordance with the law, clearly set out in the TULRCA 1992, as amended by the Bill.

175. Granting trade unions access to workers in the bargaining unit may involve interference with the Article 8 rights of employers and others in the workplace. Article 8 guarantees the right to a "private social life", and under certain circumstances this can include professional activities (*Fernández Martínez v. Spain* [GC], 2014, § 110; *Bărbulescu v. Romania* [GC], 2017, § 71; *Antović and Mirković v. Montenegro*, 2017, § 42).

176. Each of the amendments made by the schedule has a legitimate aim, being the protection of the rights and freedoms of trade unions and their members and other workers in a bargaining unit. This is also in the general interest. Collective bargaining is in the Government's view likely to improve the terms and conditions of employment of workers, and lead to a better balance between the interests of employers and workers, in the long-term interests of the economy.

177. In relation to access agreements in particular, the new provision sets out a clearer process for trade unions to gain access to the workers in the bargaining unit. This access will (as is the case under the legislation as it stands) be for the purposes of informing the workers of the object of the application and seeking their support and opinions on the issues involved. This is important for ensuring that trade unions can effectively communicate with the relevant workers throughout the application process and in turn, enables the workers to make an informed decision when casting their votes in any resulting ballot. Employers will naturally also be able to communicate with the relevant workers for similar purposes, as is currently the case.

178. The aims are pursued in a proportionate way. It will remain the case that statutory recognition of a trade union will only be obtained where there is clear majority support for recognition among those workers in the bargaining unit who exercise their right to vote on the matter.

179. In relation to access, the new provision will encourage employers and trade unions to agree the terms on which the union is to have access. If the employer and trade union cannot agree, the CAC will determine the terms, if any, on which the union is to have access. Schedule A1, as amended, will require the CAC to impose the terms that it regards as allowing the trade union such access as is reasonable to fulfil the purposes referred to above.

180. There are several safeguards and limitations in relation to these access agreements that ensure any interference with Article 8 rights is limited and proportionate. An access agreement cannot require personal data relating to the workers to be disclosed to any person other than a person appointed by the CAC under existing provisions in Schedule A1. The agreement will also be conclusively presumed not to have been intended by the parties to be a legally enforceable contract and the parties will only be under a duty to comply with the access agreement for the period that the relevant application is in progress. In the event of an alleged breach, a party may bring a claim to the CAC and if the claim is well-founded, the CAC may order the party to take such steps as the CAC considers reasonable to remedy the breach. If the party fails to comply with the order, the CAC may issue a declaration to decide the application in the other party's favour. The CAC will not be able to impose financial penalties.

181. The CAC is independent and as a public sector body it is constrained by general public law principles to act reasonably and in a way that is compatible with Convention rights. Its decisions in relation to imposing access agreements and determining if an agreement has been breached, will be amenable to judicial review.

182. Overall, the Government considers that any interference with Article 8 rights is justified and proportionate.

Clauses 61 and 62: Facilities provided to trade union officials and learning representatives; and Facilities for equality representatives.

183. Clauses 62 and 63 strengthen the existing rights of trade union officials and learning representatives to take reasonable time off for carrying out their duties so that in the event of a complaint made by the employee that they have not been given a reasonable amount of time off – it is for the employer to show that the amount of time off which the employee proposed to take was not a reasonable amount of time off. The clauses also make provision for access to accommodation and other facilities requires employers to provide an employee who is also a trade union official with such accommodation and other facilities for carrying out their duties or undergoing training as is reasonable in all the circumstances.

184. These clauses arguably engage and interfere with the Article 8 rights of the employer. However, the obligations on the employer to permit time off and provide access to facilities is conditional on what is reasonable in all the circumstances, having regard to any relevant provisions of a Code of Practice. The Code of Practice will provide more detailed guidance as to what may be reasonable. It is a legitimate aim to ensure that rights to freedom of association under Article 11 are fully realised, and it is important that trade union officials are able to fulfil their duties, and they may need reasonable access to facilities such as meeting rooms in order to do that. This approach is proportionate and is confined to what is reasonable in all the circumstances. Any interference with Article 8 would be minimal and would strike a fair balance between employers and employees who are trade union officials. The Government considers the provisions to be compatible with Article 8.

Clause 64: Blacklists: additional powers

185. Clause 64 is intended to strengthen the Article 8 right, as it will widen the scope of blacklisting protection, preventing the misuse of trade union membership data.

Part 5: Enforcement of labour market legislation

186. Clauses 87 to 148 are described above at paragraph 20.

Clause 93: Power to obtain documents or information

187. The Government considers that the provisions of the Bill in relation to investigatory powers engage Article 8.

188. The Bill provides for a new, consolidated suite of investigatory powers to be exercised by the Secretary of State or by enforcement officers. The powers are framed broadly to allow the Secretary of State to require "a person" to provide specified documents or information, as well as attending at a specified time and place to answer questions (clause 93).

189. Given the nature of the rights and obligations being enforced, it is highly likely that persons may be required to produce personal data and confidential material. Such information in professional or commercial activities of persons, including legal persons, is subject to protection as an element of private life under Article 8.

190. Any interference with the Article 8 right can be said to be sufficiently justified by the objective of enhancing effective investigations into potential breaches of labour market legislation. Ensuring compliance with such legislation contributes to the economic well-being of the country and protects the rights and freedoms of employees, workers and law-abiding businesses. Further, where breach of labour market legislation is an offence, any interference with Article 8 is necessary to prevent crime.

191. The powers in clause 93 are subject to certain safeguards. For instance, the powers may only be exercised by notice (subsection (1)) and a notice may only be given if certain conditions are met. Specifically, if requiring a person to attend to answer questions, the Secretary of State must have a reasonable belief that that person is

able to provide information which is necessary for any enforcement purpose. If requiring a person to produce specified information or documents, the Secretary of State must have a reasonable belief that it is necessary to obtain information or documents for any enforcement purpose and that the person is able to provide the information or documents. As such, the circumstances in which questions may be asked, or information requested, and the purposes for which they may be asked or requested are limited and clearly connected to what is relevant for the investigation, thus guarding against arbitrary use of the investigation powers.

192. Personal data will also be subject to the data protection regime. This is reflected in clause 134(2)(a), which provides that disclosures of information under clause 132 are not authorised if they would contravene the data protection legislation. Additionally, the Secretary of State and delegate authorities (e.g. His Majesty's Revenue and Customs ("HMRC")) are under a general duty to carry out their investigations and make decisions in a procedurally fair manner, according to the standards of administrative law, and in a manner which is compatible with the HRA 1998.

Clause 94: Power to enter premises in order to obtain documents, etc

193. Clause 94 provides a power of entry for an enforcement officer, for any enforcement purpose (as defined in clause 93), to enter any premises, subject to the requirement that the power may only be exercised to enter a dwelling where it has been authorised by a warrant. An enforcement officer may inspect or examine any documents on the premises, require any person on the premises to produce any document which the officer has reasonable grounds to believe are on the premises and within the person's possession or control, and to have access to, and check the operation of, any computer of other equipment (including software) used in connection with the processing or storage of any information or documents.

194. Any document so produced, inspected or examined may be seized. Clause 93 defines enforcement purpose as the purpose of enabling the Secretary of State to determine whether to exercise any enforcement function, determining whether there has been non-compliance with any relevant labour market legislation, and to ascertain whether the documents produced may be required as evidence in proceedings for non-compliance. Failing to comply with any requirement imposed by

a person who is acting in the exercise of an enforcement function, without reasonable excuse, is an offence under clause 139.

195. The Government considers that the provisions on powers of entry to premises in order to obtain documents, etc, engage Article 8. However, any interference is considered to be justified under Article 8(2) in accordance with the law and necessary and proportionate in pursuit of a legitimate aim.

196. The scope of the power is clearly set out on the face of the legislation. The power serves the legitimate purpose of supporting effective enforcement of labour market legislation which protects workers, law-abiding businesses, as well as the effective functioning of the labour market and economic well-being of the country. Further, where powers of entry are used as part of an investigation into possible breaches of labour market legislation which constitute an offence, any interference with Article 8 is necessary to prevent crime.

197. Where powers relate to the entry into dwellings, they are subject to safeguards and are justified. Businesses are increasingly operated from premises which may also be the proprietor's home, or where persons are residing. Effective enforcement of employment rights requires that enforcement officers have access to such premises. The clause makes provision for various safeguards. A warrant will be required to enter dwellings and will only be issued where a justice is satisfied that certain conditions are met (see clause 95(2)). In addition, the new Schedule 6 applies to clause 95, setting out a robust procedure for the application for warrants and execution of warrants. Enforcement officers will further be required to ensure that the powers are exercised in a manner which is proportionate. It is therefore considered that the powers are justified in relation to Article 8.

198. The power is limited in relation to the retention of documents, etc, by clause 94(2). Further, an officer may only exercise the power to enter premises at a reasonable time, unless it appears to the officer that there are grounds for suspecting that the purpose of entering the premises may be frustrated (clause 94(3)).

199. In relation to personal data and confidential material becoming available, an enforcement officer acting under this section will only be able to access documents for enforcement purposes. The disclosure of information will be subject to the limitations set out in clause 133. Information obtained may only be used by an

enforcing authority in connection with the exercise of any other enforcement function, or by the Secretary of State in connection with a function of the Secretary of State under Part 5 of the Bill. Disclosure will be restricted to the circumstances set out in subsections (4) and (5).

200. In addition, nothing in clause 132 authorises the making of a disclosure which (a) would contravene the relevant data protection legislation or (b) would be prohibited by any of Parts 1 to 7 or Chapter 1 of Part 9 of the Investigatory Powers Act 2016 (see clause 107(2)).

201. As such the Government considers that these provisions are compatible with Article 8.

Information sharing

202. The Government considers the provisions on disclosure of information set out in clauses 132 to 135 and Schedule 9 to be in accordance with the law, necessary in pursuit of a legitimate interest and proportionate, and therefore any potential interference with Article 8 will be justified.

203. Any interference can be said to be justified by the objective of enhancing effective investigations into potential breaches of labour market legislation. Ensuring compliance with such legislation contributes to the economic well-being of the country and protects the rights and freedoms of employees, workers and law-abiding businesses. Further, where information is being shared as part of an investigation into possible breaches of labour market legislation which constitute an offence, any interference with Article 8 is necessary to prevent crime. Where data is being shared with other bodies in connection with the functions of those bodies, for example to assist with investigations of those bodies into breaches of other employment law, health and safety law, discrimination issues, modern slavery offences, immigration issues etc, any interference with Article 8 is also likely to be necessary for one or more reasons related to national security, the prevention of crime, protection of public safety, health or morals or the protection of the rights of individuals.

204. The data sharing clauses are considered to be proportionate on the basis that data may only be shared with others to the extent that the sharing is for a purpose connected to the exercise of the enforcement functions of the Secretary of State. The provisions only go as far as is necessary to facilitate data being shared for the purposes of the performance of legitimate functions of either the Secretary of State or the specified bodies, in pursuance of legitimate aims. Further, any sharing of personal data must be compliant with the data protection legislation as set out in clause 133, as well as comply with restrictions on disclosure of HMRC information (clause 134) and on disclosure of intelligence service information (clause 135).

205. The list of specified persons with whom such data can be shared is set out in Schedule 9 to the Bill, so data sharing for those purposes is limited to that extent. There is a power to add to the list of specified persons, and where the Secretary of State wishes to do so, regulations must be made in Parliament. Those regulations will be subject to the affirmative procedure, which is considered to be an appropriate level of scrutiny.

Availability of powers under the Police and Criminal Evidence Act 1984 for the investigation of labour market offences

206. Paragraph 67 in Schedule 10 to the Bill amends section 114B of PACE to make powers under that Act available to enforcement officers (that is a person appointed by the Secretary of State to exercise enforcement functions under Part 5 of the Bill) for the purposes of labour market offences. Clause 148 defines a labour market offence as an offence under any provision of relevant labour market legislation as set out in Schedule 7 Part 1.

207. Currently, section 114B of PACE, as inserted by section 12 of the IA 2016, allows the Secretary of State to apply, by regulations, any provision of PACE which relates to investigation of offences by police officers to investigations of labour market offences by labour abuse prevention officers. “Labour market offences” are currently defined in section 3(3) of the IA 2016 and include offences under the EAA 1973, the NMWA 1998, the Gangmasters (Licensing) Act 2004 and sections 1 and 2 of the Modern Slavery Act 2015. The current regulations are The Police and Criminal Evidence Act 1984 (Application to Labour Abuse Prevention Officers) Regulations 2017.

208. The amended power in section 114B PACE applies to a wider range of offences than is currently the case, such as any other offences which could be brought into scope in future by virtue of the exercise of the power at paragraph 27 of Schedule 7 to the Bill.

209. The exercise of the expanded power in this way engages Article 8.

210. The use of police-style powers under PACE, including powers of search, seizure of evidence and entry, constitutes an interference with Article 8. Where the power under section 114B PACE is exercised to confer PACE powers on FWA officers investigating labour market offences, the interference would be in accordance with the law and any such regulations would be subject to the negative resolution procedure. This ensures parliamentary scrutiny of the application of PACE powers to investigations of labour market offences. The conferral of PACE powers will need to be capable of justification as necessary and proportionate in pursuit of the legitimate aim of prevention of crime and enforcement of labour market legislation. The need for the specific powers to be granted will have to be considered on a case-by-case basis in relation to each offence the powers are to be applied to, at the time such regulations were made.

211. The Government considers that there are sufficient safeguards in place to ensure that the power is exercised in an ECHR compatible manner, and section 6(1) HRA 1998 will require it to be exercised in such a way; in the Government's view, the provisions in the Bill do not require otherwise (see section 6(2) HRA 1998). Further, under section 6 HRA 1998, an enforcement officer would be required to act in a manner that was compatible with Article 8 and other ECHR rights, including when exercising the powers available to them. The use of PACE powers by FWA enforcement officers will also be subject to oversight by the Independent Office for Police Conduct pursuant to regulations made under new section 26CA of the Police Reform Act 2002 (to be inserted under Paragraph 74(3) in Schedule 10 to the Bill, and which replaces section 26D of the Police Reform Act 2002).

Article 10 ECHR

212. Article 10 provides that:

> *"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."*

Clause 20: Harassment by third parties

213. Clause 20 provides that an employer ("A") must not permit a third party to harass one of A's employees in the course of their employment; A is liable if they fail to take all reasonable steps to prevent the third party from doing so. This clause applies to the three forms of harassment defined in section 26 of the EA 2010, including sexual harassment and harassment on the basis of certain protected characteristics. The third party in question could potentially argue that their Article 10 right to freedom of expression is engaged, particularly in areas of legitimate debate which are carried out in a contentious manner. It is considered that Article 10 is much less likely to be engaged where the conduct is reprehensible and unacceptable in principle, such as sexual harassment or unwanted sexual conduct.

214. The Government considers that any interference with Article 10 is necessary for the protection of the rights of others (in this case, the employee) and is proportionate. By definition the clause is only applicable where the third party's conduct amounts to harassment within the meaning of section 26 of the EA 2010, which the Government considers is a high threshold: all three forms of harassment require that the conduct has the purpose or effect of violating the recipient's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the recipient. The clause will have no effect on legitimate debate which is uncomfortable or contentious but falls short of harassment. It is considered that this strikes a proportionate balance between the employee's Article 8 rights and the third party's potential Article 10 rights.

Clause 22: Protection of disclosures relating to sexual harassment

215. Clause 22 adds to the whistleblowing framework which is already a function of the ERA 1996 in order to expressly confirm the position that sexual harassment can be

the subject of a protected whistleblowing disclosure. The provision slightly broadens the definition of qualifying disclosure at section 43B(1) of the ERA 1996 to include specific reference to sexual harassment and the policy intention is that this will make it easier for workers to speak up about sexual harassment that they experience or are aware of.

216. A disclosure about sexual harassment may already have formed the subject matter of a protected disclosure as the sexual harassment could have been a criminal offence, a breach of a legal obligation or an endangerment of health and safety. This provision is aimed at making it explicit that disclosures about sexual harassment can form the basis of a protected disclosure and ensuring that any disclosure about sexual harassment which would not qualify for protection under the existing list of relevant failures in section 43B(1) will now be covered. The Government expects that this measure will strengthen the position for workers in respect of Article 10.

Article 11 ECHR

217. Article 11 provides that:

> "*Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*"

218. The following provisions are considered to engage the right to freedom of peaceful assembly and freedom of association with others under Article 11:

(i) Clauses 1 to 8: Zero hours workers etc.;
(ii) Clause 27: Collective redundancy: extended application of requirements;
(iii) Clause 28: Collective redundancy consultation: protected period;
(iv) Clause 35: Pay and conditions of school support staff in England;
(v) Clause 36: Power to establish Social Care Negotiating Body;
(vi) Clause 56: Right to statement of trade union rights;
(vii) Clause 57: Right of trade unions to access workplaces;
(viii) Clause 58: Trade union recognition;
(ix) Clause 59: Political funds: requirements to pass political resolution
(x) Clause 62: Facilities provided to trade union officials and learning representatives;

(xi) Clause 63: Facilities for equality representatives;
(xii) Clause 65: Blacklists: additional powers;
(xiii) Clause 66: Industrial action ballots: turnout and support thresholds;
(xiv) Clause 75: Protection against dismissal for taking industrial action.

Rights for zero hours workers etc (Clauses 1 to 6)

219. Clauses 1 to 3 and Schedule 1 create rights for workers on zero hours contracts and similar workers to receive guaranteed hours, reasonable notice of shifts and payment where shifts are cancelled, moved or curtailed at short notice ("the zero hours rights"). Clause 5 permits collective bargaining agreements between independent trade unions and employers (including agencies) to exclude (agency) workers from the scope of the zero hours rights where certain conditions are met. Those conditions include that the collective bargaining agreement must identify which rights are being granted in exchange for the statutory rights and that those rights have to be incorporated into a worker's contract.

220. Implicit in Article 11 is a negative right of association i.e. a right not to join or a right to withdraw from an association, (*Sigurður A. Sigurjónsson v. Iceland,* no. 16130/90, 1993, § 35; *Vörður Ólafsson v. Iceland*, no. 20161/06, 2021, § 45). Workers on zero hours contracts and similar workers may not wish to join a trade union but feel that they nevertheless have to in order to ensure that their views are represented as part of any collective bargaining process seeking to exclude them from the zero hours rights, including if they want to keep their statutory rights.

221. However, the UK's legislative framework for collective bargaining already allows a recognised trade union to negotiate on behalf of the entire workforce rather than just its members alone. Therefore, workers do not have to join a union in order to be represented in the collective bargaining process and unions should still be undertaking collective bargaining for the benefit of the entire workforce, rather than only its members.

222. A number of safeguards are also created to protect workers from losing their statutory rights for no benefit, including that the union has to be independent, that the collective bargaining agreement must identify which rights are being granted in exchange for the statutory rights and that those rights have to be incorporated into a worker's contract. Further, the requirement for the rights to have to be incorporated

into a worker's contract means that whether the statutory rights apply to a worker or not will ultimately depend on what the worker has agreed with their employer and therefore a worker, to some extent, has control over whether they keep their statutory rights.

223. The Government believes that there are strong public interest arguments to justify the policy of allowing collective bargaining agreements to exclude workers from the zero hours rights. There are cases where unions and employers working together may want to agree more tailored conditions than the provisions allow, and which would benefit both the workers and the employer, given the unique context of that particular sector. The Government believes that the safeguards ensure that the approach taken is proportionate.

224. On the other hand, the conditions imposed could be seen as an interference with Article 11 in that they may appear to restrict what unions can agree and in turn ultimately restrict the right to freedom of association. However, these conditions do not in fact prevent unions and employers from agreeing other terms; they only prevent unions and employers from excluding workers from the zero hours rights where those conditions are not met. Where the conditions are not met, unions and employers are free to agree any other terms that do not circumvent the statutory rights, as is usual in employment law.

225. In any event, as above, the Government believes that these conditions are a proportionate way of ensuring that worker's rights are protected, whilst providing flexibility to employers, unions and ultimately workers to agree terms that are more suitable for them.

Clause 27: Collective redundancy: extended application of requirements

226. Clause 27 amends employers' obligations in relation to collective redundancy consultation. The current legislation requires employees to consult with appropriate representatives when proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. This change would mean the collective redundancy consultation obligation would also apply where a threshold number of employees are proposed to be made redundant across more than one establishment. The threshold number will be specified in secondary legislation,

227. This change is likely to enhance employees' rights under Article 11, because it will expand employers' obligations to consult a recognised trade union, or if there is not one, employee representatives, on proposed redundancies, where the proposed redundancies are spread across multiple establishments.

Clause 28: Collective redundancy consultation: protected period

228. Clause 28 increases the maximum period of the protective award which an ET can make where an employer has failed to consult their employees in a collective redundancy situation. Currently, where an employer breaches their obligations to collectively consult, an ET can make a 'protective award' in relation to each affected employee, which represents pay for such period as it considers 'just and equitable' taking into account the seriousness of the employer's default, up to 90 days' pay. This will be amended so that the ET could make an award for a period of up to 180 days' pay.

229. The increased penalty for non-compliance with collective consultation obligations aims to increase employer compliance with these obligations, which is likely to enhance employees' rights under Article 11.

Clause 35: Pay and conditions of school support staff in England

230. Clause 35 of the Bill provides for the establishment of the School Support Staff Negotiating Body ("SSSNB") and provides a statutory framework for the negotiation of school support staff terms and conditions by that body. The Secretary of State must prescribe school support staff organisation and school support staff employer organisation members of the SSSNB through secondary legislation.

231. Article 11 rights include a negative right of association, i.e. a right not to join an association (*Sigurður A. Sigurjónsson v. Iceland,* 1993, § 35; *Vörður Ólafsson v. Iceland*, 2021, § 45). School support staff may not wish to join a trade union but feel that they nevertheless have to in order to be represented on the SSSNB.

232. There are established collective bargaining arrangements in relation to school support staff and the contracts of most school support staff already incorporate terms that have been agreed through that process (either as a result of the collective bargaining process or through the adoption of those terms by employers as a matter

of policy). The introduction of mandatory national arrangements will ensure consistency across the education workforce, professionalising these roles and driving improvements in education standards.

233. This clause allows the Secretary of State to prescribe employer and employee representative membership of the SSSNB and so could engage Article 11 and be seen as interfering with a trade union's activities (*Ecodefence and Others v. Russia*, no. 9988/13, 2022, §§ 81 and 87). States may place restrictions on trade unions, provided this is a proportionate means of achieving a legitimate aim (*Sidiropoulos and Others v. Greece*, no. 26695/95, 1998, § 40). The Government considers that the impact of any exclusion from the SSSNB would be limited, and is proportionate. Employee representative members of the SSSNB will comprise of all those trade unions who are currently recognised as part of national collective bargaining arrangements. They represent the vast majority of school support staff. Limiting the membership of the SSSNB as above will ensure the body can function effectively to protect the rights and freedoms of school support staff.

Clauses 36-38, 40 and 41: Power to establish the Social Care Negotiating Body

234. Clauses 36 - 38, 40 and 41 contain powers for the relevant Minister to create a Social Care Negotiating Body, and to make provision in regulations about (amongst other things) membership of the negotiating body and terms of appointment, as well as set out its remit, the matters it may consider, and how it may consider them. The intention is that membership of the body will include officials of trade unions representing the interests of relevant social care workers as well as employer representatives. Clause 39 defines "social care worker".

235. Implicit in Article 11 is a negative right of association i.e. a right not to join or a right to withdraw from an association, (*Sigurður A. Sigurjónsson v. Iceland,* 1993, § 35; *Vörður Ólafsson v. Iceland*, 2021, § 45). Workers in the social care sector may not wish to join a trade union but feel that they nevertheless have to in order to be represented on the Social Care Negotiating Body.

236. However, the UK's legislative framework for collective bargaining already allows a recognised trade union to negotiate on behalf of the entire workforce rather than just its members alone.

237. The Government believes there are strong public interest arguments to justify the introduction of mandatory arrangements. In particular, the voluntary bargaining framework has not been able to address the imbalance in bargaining power between employers and social care workers and many social care workers receive pay at or only slightly above the national minimum wage. This in turn has led to an unsustainable recruitment and retention crisis in the social care sector. These clauses aim to address this crisis by establishing a mechanism for relevant Minister to implement improved terms and conditions for social care workers that have been agreed by representatives of the sector.

Overview of Part 4 – Trade Unions and Industrial Action etc

238. The measures in Part 4 engage and enhance the rights within the scope of Article 11, as they enhance the rights of trade unions, trade union representatives and workers. Therefore, the Government does not consider that there is any interference with Article 11 rights.

239. As set out in *Demir and Baykara v. Turkey,* no. 34503/97, [2008] ECHR 1345 the substance of the right of association enshrined in Article 11 "*affords members of a trade union a right, in order to protect their interests, that the trade union should be heard, but has left each State a free choice of the means to be used towards this end. What the Convention requires, in the Court's view, is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests"* (paragraph 141).

240. The package of measures contained in Part 4 goes beyond what is required in order for a statement of compatibility to be made in relation to Article 11, as summarised below.

(i) The repeal of legislation (the Trade Union Act 2016 and the Strikes (Minimum Service Levels) Act 2023) that, whilst compatible with Article 11, was criticised for being restrictive for trade unions and their members, particularly in relation to industrial action. For example, the Parliamentary Joint Committee on Human Rights criticised the Strikes (Minimum Service Levels) Bill 2023, in terms of Article 11 risks (10th report Session 2022-23).

(ii) Building on the existing framework of the TULRCA 1992, the Bill contains a range of measures to enhance rights of trade unions and trade union members. For example, rights for trade unions to access workplaces through

access agreements, to be regulated by the Central Arbitration Committee; new rights for trade union representatives to facilities; and new rights for equality representatives.

(iii) The Bill provides rights in relation to workers – both trade union members and non-members. Critically, the Bill enables protection from detriment for those taking industrial action – which will mean the TULRCA 1992 will no longer be incompatible with Article 11. The Supreme Court in the case of *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12 issued a declaration under section 4 of the HRA 1998 that section 146 of TULRCA 1992 is incompatible with Article 11. The Bill makes provision to change that position, in part via subsequent secondary legislation, to ensure that the legislative framework providing employment protections for those taking part in industrial action is fully compliant with Article 11.

241. Further details on these measures are considered below.

Clause 55: Right to statement of trade union rights

242. This clause imposes a duty on employers to inform workers of their right to join a trade union alongside the existing written statement provided to workers when they start work containing the main conditions of employment. The right to join a trade union is a key element of Article 11. Also implicit in Article 11 is the right not to join a trade union. The Government considers that requiring employers to inform workers of their right to join a trade union does not interfere with the rights of those who do not wish to join a trade union, as the duty is limited to informing and reminding workers of their existing right to join a trade union. Those who do not wish to join a trade union are free to do so.

Clause 56: Right of trade unions to access workplaces

243. This clause makes provision for access agreements, to enable trade unions to access workplaces for specified purposes, to meet, represent, recruit or organise workers (including non-union members); and to facilitate collective bargaining – this is likely to lead to an enhancement of Article 11 rights.

Clause 57: Trade union recognition

244. Clause 57 and Schedule 6 (Trade union recognition) it introduces is described above at paragraph 84.

245. This clause simplifies the process of union recognition and the law around statutory recognition thresholds. This is also in compliance with case law: refusal and restrictions on granting legal-entity status to trade unions amounts to an interference with Article 11 (*Sidiropoulos and Others v. Greece*, 1998, § 31; *Koretskyy and Others v. Ukraine*, no. 40269/02, 2008, § 39; and delays to the registration procedure similarly amount to such interference (*Ramazanova and Others v. Azerbaijan*, no. 44363/02, 2007, § 60; *Aliyev and Others v. Azerbaijan*, nos. 68762/14 and 71200/14, 2008, § 33).This clause would enable trade unions to gain statutory recognition more easily. The human rights of trade unions and their members, in particular under Article 11, are somewhat improved by the proposals.

246. The Clause makes provision so that workers recruited after the date of the application to the CAC for statutory recognition for collective bargaining are not to be taken into account in assessing union membership within the proposed bargaining unit or entitled to vote in a recognition ballot. In this way, the clause denies a say in the recognition process for workers recruited after the date of the application, notwithstanding their being affected by its outcome. The employer is also denied the expectation that a recognition decision should take into account the views of the bargaining unit to the fullest possible extent. Collective bargaining is generally understood to be an essential element of Article 11. Rights can in principle be negative (for example, not to be a union member or not to be represented in collective bargaining) as well as positive.

247. There is currently some risk of manipulation of the bargaining unit by an employer, in order to head off recognition. Schedule A1 does not currently include protection addressed at that risk. This provision fills that gap and also has the legitimate aim of strengthening the overall system of statutory collective bargaining, in line with the objectives of Article 11. The proposal does not prevent the employer recruiting after the date of the application. In any event, the numbers and identities of workers in a bargaining unit will naturally change over time, both before and after any ballot; in which sense the position of a worker recruited just before the ballot is not much different from that of a worker recruited just after the ballot. There are existing

provisions of Schedule A1 which allow for such changes by allowing applications to the CAC where there has been a material change in the bargaining unit, and ultimately by providing for derecognition.

248. However, Article 11 is a qualified right, and the Government considers that the restriction is in pursuit of the legitimate aim of preventing employers from seeking to manipulate the bargaining unit in order to prevent unions obtaining statutory recognition. The policy intention is to support the same Article 11 right concerned, which is a legitimate aim. It is considered that the approach proposed is proportionate to the aims pursued.

Clause 58: Political funds: requirement to pass political resolution

249. Clause 58 makes provision in relation to trade union finances, including removing the 10-year ballot requirement. Currently, a trade union can't spend any part of its funds in the furtherance of political objects unless it maintains a separate political fund, and those objects have first been approved by a resolution passed on a ballot of its members. After approval of the initial political resolution, the resolution must be put to the trade union's members every 10 years via a ballot, in order for the political fund to continue. The removal of the requirement to reballot every 10 years means that such political funds can continue indefinitely (unless the resolution is rescinded or otherwise ceases to have effect). Within eight weeks of the 10-year anniversary of the political fund being passed and each successive period of ten years thereafter, the union must send an 'opt-out information notice' to its members. This is to ensure members are adequately reminded of their right to opt-out of political fund contributions.

250. Overall, this change is likely to enhance the ability of trade unions to exercise their rights by meaningfully engaging in political discourse and campaigning on issues on behalf of its members.

251. Implicit in Article 11 is a right not to contribute to a trade union's political fund. We consider that this right is adequately safeguarded since members will be able to opt-out of contributing (noting that the opt-out will take effect on 1 January of the following year) and the opt-out information notice will be sent to union members every ten years, reminding them of their right to opt out of contributing.

Clauses 61 and 62: Facilities provided to trade union officials and learning representatives; and Facilities for equality representatives

252. These clauses are described above at paragraph 92. These rights enhance the rights of trade union representatives. A new right for trade union equality representatives to take time off for specified purposes, and to have access to accommodation and other facilities, enhances Article 11 rights.

Clause 64: Blacklists: additional powers

253. Clause 64 is intended to strengthen the Article 11 right, as it will widen the scope of blacklisting protection, protecting individuals from detriment as a result of trade union membership or activities.

Clause 65: Industrial action ballots: turnout and support thresholds

254. Clause 65 removes the requirement that in all ballots for industrial action, at least 50% of the trade union members entitled to vote must do so in order for the ballot to be valid. It also repeals the minimum threshold of support that must be satisfied in ballots for industrial action in defined important public services. Currently in order for a ballot in these important public services to lead to industrial action, a trade union must obtain the support of at least 40% of all union members entitled to vote in the ballot. Removing these restrictions will arguably enhance the ability of trade unions and their members to exercise Article 11 rights.

Clause 74: Protection against dismissal for taking industrial action

255. The Supreme Court made a declaration of incompatibility in *Mercer* [2024] UKSC 12 and held that section 146 of the TULRCA 1992 was incompatible with Article 11. Employees who are dismissed for taking part in lawful strike action have some statutory remedies for unfair dismissal; however, there is currently no express statutory (or other) protection in domestic law against action taken by an employer short of dismissal for participation in lawful strike action. This clause enables the Secretary of State to make provision in secondary legislation that will provide workers with the right not to be subject to detriment of a prescribed description to prevent, deter or penalise the worker for taking industrial action. The Government plans to

consult on what forms of detriment should be prohibited, in order to strike a fair balance between the competing interests of employers and workers.

Article 14 ECHR

256. Article 14 provides that:

> *"The enjoyment of the rights and freedoms set forth in this 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."*

257. 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.

258. The following provisions are considered to engage Article 14:

(i) Clause 1: Right to guaranteed hours;
(ii) Clause 2: Shifts: right to reasonable notice;
(iii) Clause 3: Right to payment for cancelled, moved and curtailed shifts;
(iv) Clauses 10 and 12: Statutory sick pay: lower earnings limit etc;
(v) Clauses 11 and 13: Statutory Sick Pay: removal of waiting period;
(vi) Clause 15: Parental leave: removal of qualifying period of employment;
(vii) Clause 16: Paternity leave: removal of qualifying period of employment;
(viii) Clause 18: Bereavement leave;
(ix) Clause 22: Protection of disclosures relating to sexual harassment;
(x) Clause 24: Dismissal during pregnancy;
(xi) Clause 25: Dismissal following period of statutory family leave;
(xii) Clause 26: Dismissal for failing to agree to variation of contract, etc.;
(xiii) Clause 30: Public sector outsourcing: protection of workers;
(xiv) Clause 35: Pay and conditions of school support staff in England;
(xv) Clause 376: Power to establish Social Care Negotiating Body;
(xvi) Part 5: Enforcement of labour market legislation by Secretary of State.

Clauses 1 and 4 Right to guaranteed hours and Agency Workers

259. Clauses 1 and 4 provide that an employer must offer a guaranteed hours offer to a qualifying worker, reflecting the hours worked (to be defined in regulations, stating

how it is to be determined that the hours offered reflect the reference period hours) during the reference period (to also be set out in regulations, but anticipated to be 12 weeks). This offer if accepted could lead to a variation to an existing contract, if there is only one single contract in place throughout the reference period, or to a new worker's contract. The term of this new or amended worker's contract shall be permanent unless it is reasonable for the worker's contract to be entered for a limited term, to carry out a specific task, or in relation to the occurrence of an event or where there will be temporary need (a definition to be supplemented in regulations), and the contract provides for termination once that task, event or specific needs have been met or carried out.

260. One possible ground of challenge is that the regulation making powers provide for potential discrimination against those zero-hours workers and workers who fall outside the scope of the provisions, if their hours do not meet the conditions as to "regularity, number or otherwise", or if they fall above the threshold of the number of hours specified in regulation in respect of contracts which guarantee a minimum number of hours, or if they are for instance excluded under regulations via the power at section 27BA(10) so that those excluded workers have no right to guaranteed hours.

261. Regulations will set both the conditions as to "regularity, number or otherwise" of the worker's hours, for them to meet in order to be a qualifying worker, the threshold of the number of hours of contracts guaranteeing a minimum number of hours, which are included within the scope of the provisions.

262. It is arguable that Article 14 (in conjunction with Article 1 of Protocol 1 ("A1P1") as noted at paragraph 331), will be engaged as a result of making the regulations on both the "regularity" and "specified threshold " as both sets of regulations will contribute to applying the provisions only to those whose hours meet the condition as to regularity, and similarly for contract guaranteeing a minimum number falling below the specified threshold and could exclude some workers.

263. It is unlikely that from among zero-hours workers or among those on contracts with a minimum guarantee of hours, workers who fall within the scope and those fall outside the scope due to a difference of hours worked would be able to show a difference of treatment on grounds of "other status". This is in line with *Peterka v. the Czech*

Republic (21990/08, 4 May 2010), which found that the nature and length of an employment contract did not amount to an 'other status'.

264. In the unlikely situation in which those workers may be in a comparable situation, the Government is confident that it could objectively justify this difference in treatment by reference to the need to target the policy towards those who most need it. The Government is seeking to address exploitative contracts where workers work "regularly" but are guaranteed no hours, or a minimum of hours that they regularly exceed. The Government is not looking to ban situations where workers are content to work odd hours offered to them to supplement their income.

265. There is a risk that, as a result of the clauses, employers may choose to move away from offering zero hours contracts or contracts with a minimum guarantee of hours which falls within the specified threshold contracts. There is a risk that this could limit employment opportunities for certain workers who need flexible hours and in turn lead to higher unemployment for them. If the workers who need flexible work are disproportionately more likely to have certain recognised statuses (e.g., if women need flexible work more than men), this could lead to differential treatment of those workers compared to the rest of the workforce.

266. Nonetheless, the application of the policy to those on zero hours contracts and with minimum number of guaranteed hours and therefore any difference in treatment between comparable/analogous groups of workers is considered to be objective and reasonable. As such, the Government considers that any indirect discrimination would be justified.

267. The Government considers that this policy is within the realm of economic and social policy decision-making for which the 'manifestly without reasonable foundation' test would be the most suitable.

268. In addition, section 6 of the HRA 1998 will apply to the power to make regulations, and powers must be exercised in a manner compatible with Convention Rights. The Government believes that the provisions on guaranteed hours for qualifying workers containing regulation making powers are capable of being exercised in a manner which is compatible with the Convention. Compatibility will be further assessed when laying secondary legislation.

269. A corresponding right for agency workers to guaranteed hours offers from hirers, resulting in a permanent worker's contract (unless reasonable for the worker's contract to be entered for a limited term) is set out in Part 1 of Schedule A1. As agency workers do not work for hirers under a worker's contract the contract would be a new permanent or limited term contract.

270. Similar issues could arise for agency workers as set out in paragraphs 260-268. In line with *Peterka v. the Czech Republic* (21990/08, 4 May 2010), which found that the nature and length of an employment contract did not amount to an 'other status', we do not consider a high risk of agency workers successfully claiming direct discrimination in relation to A1P1 rights based on "other status". Agency workers, as is the case with workers on zero hours contracts and arrangements, may be composed of individuals who can claim protected status, such as ethnic minorities or women. As with the core provisions on zero hours contracts, we anticipate that disadvantages to such groups, if substantiated, could be considered justified, and, as stated above, when exercising regulation-making powers under the provisions on agency workers, Ministers will assess compatibility of regulations with convention rights, including Article 14 in conjunction with protected rights.

Clauses 2, 3 and 4: Shifts: rights to reasonable notice; and Right to payment for cancelled, moved and curtailed shifts)

271. Clauses 2, 3 and 4 and Parts 2 and 3 of new Schedule A1 to be inserted into the ERA 1996 are described above at paragraph 37.

272. As discussed elsewhere in this memorandum, the policy on notice of shifts is considered to be within the ambit of Articles 6 (see paragraph 37), 8 (see paragraph 142) and A1P1 (see paragraph 340).

273. The policy is aimed at providing predictability to those who do not otherwise have this so only workers on zero-hours contracts and arrangements and other contracts to be specified in regulations, which can be by reference to a maximum number of hours or pay, will be in scope. Similarly, agency workers will be in scope except where regulations are made to exclude certain shifts.

274. The workers on zero hours contracts/arrangements, including some agency workers, are more likely to be young, female or from a minority ethnic background. Age, sex and race should all be considered to be 'statuses' for the purpose of Article 14. Being

on a zero hours contract or arrangement or another specified contract (or not) should not however in itself be an 'other status' for the purpose of Article 14 in line with *Peterka v. the Czech Republic* (21990/08, 4 May 2010), which found that the nature and length of an employment contract did not amount to an 'other status'.

275. The majority of older workers, males and those not from a minority ethnic background who do not benefit from the policy would also not be in an analogous position to those workers who are young, female or from a minority ethnic background in scope of the policy. This is because they would not be on a zero hours contract or arrangement and would not suffer from the same unpredictability that the policy is aimed at preventing.

276. Additionally, there is a risk that, as a result of the clauses, employers may choose to move away from offering zero hours contracts or other contracts in scope of the policy. Agency workers could also be affected if the measures, taken as a whole, lead to more workers being directly engaged. There is a risk that this could limit employment opportunities for certain workers who need flexible hours and in turn lead to higher unemployment for them. If the workers who need flexible work are disproportionately more likely to have certain recognised statuses (e.g., if women need flexible work more than men), this could lead to differential treatment of those workers compared to the rest of the workforce.

277. Nonetheless, the application of the policy to those in scope and therefore any difference in treatment between comparable/analogous groups of workers is considered to be objective and reasonable. As such, the Government considers that any indirect discrimination would be justified.

278. The Government considers it to be a legitimate aim to ensure that workers have more predictability of when they are required to work and therefore when they will be paid so that they can in turn better plan their home lives and finances and ultimately reduce stress, anxiety and income precarity.

279. The Government is legislating on a matter of social policy and should generally be permitted to legislate unless it is manifestly without reasonable foundation for the purpose of Article 14.

280. It is considered appropriate and proportionate to target the policy at those on zero hours contracts and arrangements, as well as agency workers, rather than all

workers as those are the workers that face the greatest level of unpredictability of when they will need to work and what income they will receive. Those on other contracts to be specified in regulations would also be included because it would be considered that they face a high level of unpredictability.

281. Further, the Government has designed the policy and intends to exercise the powers in the Bill in such a way as to retain flexibility where it is genuinely two-sided and does not place undue burdens on employers, so the risk of higher unemployment is expected to be small. In particular, in order to avoid employing workers who are in scope of the rights to reasonable notice and payments for short notice cancellation, curtailment and movement, employers would have to guarantee hours to workers in their contracts and in turn could end up having to give reasonable notice and pay for cancellations etc. anyway so as not to breach such contracts. Additionally, the measures in the Bill on flexible working at clause 7 should support those who do need flexibility. For example, even if a worker accepts employment on a guaranteed hours basis but they would rather have a zero hours arrangement, employers should accept an application from a worker to move to such an arrangement unless it is reasonable to refuse that request on one of the grounds set out in clause 7.

282. Section 6 of the HRA 1998 will apply to Ministers when exercising regulation-making powers and prevent them from making regulations that breach Article 14. Accordingly, the Government will at that point ensure that any regulations are compatible with Article 14.

Clauses 10 to 13: Statutory Sick Pay: removal of waiting period; and Statutory sick pay: lower earnings limit etc

283. Clauses 10 to 13:

(i) remove the prohibition on employees earning below the Lower Earnings Limit being entitled to Statutory Sick Pay ("SSP");

(ii) create a new lower rate of SSP. The new rate of SSP means that employees will be paid the lower of (a) a defined percentage of their normal weekly earnings; and (b) a flat weekly rate (currently £116.75 per week), and;

(iii) remove the waiting period for SSP and make it available from day 1 of a sickness absence.

284. These measures require employers to pay SSP to eligible workers in circumstances where they are not currently required to do so and this obligation applies to

employers in England, Wales, Scotland and Northern Ireland. These circumstances are where: (a) the period for which the employee is incapable of work lasts for three or fewer days; (b) for the first three qualifying days (days on which an employee would otherwise be required to work); and (c) where the employee earns less than the Lower Earnings Limit.

285. Imposing burdens on employers to pay sick pay falls within the ambit of A1P1.

286. Potential differential treatment may arise where employers argue that imposing additional costs upon them, despite their different sizes or natures, would be unlawfully discriminatory. Size of employer, and particular types of employer, are likely to be "other" statuses for the purposes of Article 14.

287. Imposing obligations on all employers to pay SSP under the amended rules, and amending the rate of SSP, are considered to be objectively justified and proportionate.

288. The Courts are likely to afford a wide margin of discretion in relation to this matter of social and economic policy, and are likely to accept the judgement of the legislature unless it is manifestly unreasonable.

289. The Government considers that a regime of minimum pay in relation to sickness can only properly and fairly function where the relevant rules apply to all eligible employees equally. As such, having decided that it is correct to extend SSP to the low paid and to remove the waiting period, it is clearly justified for these changes to apply to all employers, without distinction. The additional costs on employers, even small enterprises, are not sufficient to undermine this justification.

Clauses 15 and 16: Parental leave: removal of qualifying period of employment; and Paternity leave: removal of qualifying period of employment

290. Clauses 15 and 16 are described above at paragraph 150.

291. Paternity leave and parental leave support respect for family life and so fall within the ambit of Article 8. In the case of *Weller v. Hungary,* no. 44399/05, 2009, the European Court of Human Rights recognised parental status as an "other status" for the purposes of Article 14.

292. The purpose of paternity leave is to care for the child newly born or adopted or to support the mother or the person with whom the child is placed for adoption. Making the right to paternity leave a day one right, makes it consistent with maternity leave which is already a day one right. As the majority of persons who take maternity leave are women and the majority of persons who take paternity leave are men, this will bring the entitlement to these two types of leave more in line with each other. In the case of parental leave, this is equally available to all parents, regardless of their sex. Therefore, there is no obvious disadvantage to any person in creating a day one right to paternity leave and to parental leave and the proposed measures will enhance existing entitlements to leave.

Clause 18: Bereavement leave

293. Clause 18 provides powers for a new form of bereavement leave for employees, alongside the existing entitlement to bereavement leave for employees whose child under the age of 18 has died. In clause 18 the enhanced entitlement for employees to take bereavement leave will apply to all employees and, therefore, there is no obvious disadvantage to any person in providing for a new entitlement for employees to take bereavement leave on the death of a family member. The relationships with the deceased that will give rise to the entitlement, the extent of the entitlement and the amount of leave that an employee can take, will be set out in secondary legislation. The powers to make this secondary legislation are not framed in a way which would require them to be exercised incompatibly with the ECHR. The policy intention is to apply the new entitlement equally across all protected characteristics under the EA 2010. In addition, since section 6 of the HRA 1998 will apply to the power to make regulations, that power must be exercised in a manner compatible with the ECHR.

Clause 22: Protection of disclosures relating to sexual harassment

294. Clause 22 is described above at paragraph 215.

295. Whistleblowing is within the ambit of Article 10. Clause 22 does not change the application of the whistleblowing framework. This means that those individuals who do not fall within the extended definition of “worker” in section 43K (and section 230) of the ERA 1996 are not in scope of the Bill measure regarding disclosures about

sexual harassment. Those who do not fall within the definition of worker may constitute an 'other status' for the purposes of Article 14, for example, charitable trustees, volunteers or contractors. Where these individuals are part of an organisation, they may be in an analogous position to workers of the same company (*Gilham v Ministry of Justice* [2019] 1 W.L.R. 5905).

296. Those who work within an organisation in a potentially analogous position but who do not fall within the extended definition of a worker may argue their right to speak up about sexual harassment is infringed because this could not amount to a protected disclosure. As the Bill measure does not change the scope of those protected by the whistleblowing framework, this is an existing point of interference which is also applicable to our addition of sexual harassment to the legislation.

297. The policy objective behind the whistleblowing framework seeks to protect the public at large by giving workers who are aware of wrongdoing in the workplace a route to make disclosures about this to their employers and provide accompanying protection from retaliatory detriment or dismissal. Workers within an organisation are most likely to be those with 'insider information' of the type which could constitute the subject of a disclosure and are also those most likely to be discouraged from raising concerns internally because of their subordinate status in the workplace and their reliance on their employer for their livelihood. Additionally, workers may owe duties to their employer, such as those of confidentiality and so need the protection of the framework when making a disclosure which might otherwise breach these. This puts workers in a different situation to, for example, volunteers who are not risking the loss of their livelihood and would not owe contractual duties to an employer. For these reasons the Government considers that it is justified for protections to be focused on workers as the group most in need of this type of protection.

298. The Government is legislating in an area of social policy, and in line with *R(SC) v Secretary of State for Work and Pensions* [2022] AC 223 should be accorded a wide margin to legislate in this area unless it is manifestly without reasonable foundation to do so.

Clauses 24 and 25: Dismissal during pregnancy; and Dismissal following period of statutory family leave

299. Clauses 24 and 25 are described above at paragraph 156.

300. Article 14, read with Article 8, is almost certain to be engaged. If the creation of tailored, and more favourable, dismissal protections is limited to pregnant women / new mothers, this may constitute more favourable treatment on the grounds of sex under the ECHR. The ECHR recognises the legitimacy of more favourable treatment which is a response to the biological realities of pregnancy and new motherhood (*Petrovic v. Austria* [1998] 33 EHRR 307 (ECHR); *Konstantin Markin v. Russia,* no. 20078/06, 22 March 2012)). The extension of protection into a period after a return from maternity leave may require more robust justification, but there is substantial and consistent evidence of the particular and overwhelming risk that this cohort of employees bears in relation to their job security. The Government believes that the enhanced protection is justified as a proportionate response to that risk, and as part of the advancement of important social policy aims.

301. However, as power to provide protection is also being extended to include employees returning from periods of those types of family-related leave which are potentially of significant length, the Government does not believe that there is a prima facie infringement of the Convention which would require justification, as there is no less favourable treatment of persons in an analogous position. Even if there were a prima facie infringement, the Government believes that any such infringement would be proportionate in light of the policy aims being pursued.

Clause 26: Dismissal for failing to agree to variation of contract, etc.

302. Clause 26 makes it automatically unfair to dismiss an employee where they have refused to agree to a variation in contractual terms or to dismiss an employee with a view to replacing or re-engaging them on varied contractual terms. The exception to this is where the employer can show the variation would eliminate or prevent financial difficulties, and the employer could not have avoided the variation. If an employer can demonstrate this, then the ET would consider whether the dismissal was fair in all of the circumstances, having regard to factors specified in the Bill, which include whether the employer has consulted on the variation in contractual terms or offered the employee anything in return for agreeing to a variation. This is a change from current legislation in which variation in contractual terms would not be automatically unfair and could be justified as being ‘some other substantial reason’ for the dismissal.

303. It is arguable that Article 14 (in conjunction with A1P1 as noted at paragraph 369), could be engaged as a result of the clause applying only to employees who are

employed for the purposes of a business and therefore not to employees employed by private individuals for non-business reasons.

304. The ECtHR has found that status in relation to employment can be regarded as an "other status" for the purposes of Article 14. It is likely that employees employed in a non-business setting (as compared to those employed by a business) could be regarded as having an "other status" for the purpose of Article 14. However, the required justification for a difference in treatment based on this status will be lesser, as is it an acquired characteristic rather than an innate one (*R (oao RJM) v SSWP* [2008] UKHL 63). This provision is more likely to exclude domestic workers, who are generally more likely to be women. However, the exclusion is not being applied 'on the basis' of sex.

305. A person who is employed by a private individual may not be considered to be in an analogous position to a person employed by a business. For example, a person employed by a private individual is likely to be aware that their employment status is not based solely (or even primarily) on the financial position of their employer, but also their employer's personal needs and reasons for employing the employee, which may change over time.

306. The aim of the clause is to improve security of work by reducing instances where an employer can dismiss an employee for refusing to agree to a variation in their contractual terms and conditions. The Bill allows for an exception to this clause when a business is in financial difficulty and the change to terms and conditions are unavoidable.

307. The impact on those who are employed by a private individual is expected to be low because often services in non-business settings are provided by self-employed individuals, rather than employees.

308. The policy is not aimed at employees who are employed in a private setting, as the Government is not seeking to interfere with private individuals who employ people outside of a business setting. The Government considers it would be disproportionate if a private individual had to be in financial difficulty before they were able to change the contractual terms of those they employ in a non-business setting.

309. Employees who are not employed by a business will still be able to bring ordinary unfair dismissal claims if they wish to challenge a dismissal for a refusal to agree revised contract terms.

310. The Government believes that any interference with Article 14 rights that may be produced by this clause is justified.

Clause 30: Public sector outsourcing: protection of workers

311. Clause 30 contains a power to make regulations and imposes a duty to publish a code of practice in relation to relevant outsourcing contracts (under which functions previously performed by a public authority's workers are to be performed by a subcontractor).

312. The Government considers that these measures are within the ambit of A1P1. Whilst the right to participate in procurement is not protected by A1P1, it is a modality of the exercise of A1P1; that is to say, suppliers participate in procurement with a view to obtaining a contract which would, as an asset, be protected by A1P1.

313. The Government considers that Article 14 is engaged to the extent that the procurement measure set out in the Bill has the potential to discriminate against suppliers on the basis that the supplier themselves or their services are based in or provided from another country. This would particularly be the case where a supplier is based in a country with lower employment standards, and is consequently able to price their services lower than competitors from countries with more developed employment standards.

314. Whilst the Government recognises that the exercise of the power to make regulations and to publish a code of practice could have the effect of making it less attractive to bid for UK contracts for suppliers connected to certain countries, there is no obstacle to them doing so. A supplier who has lost their competitive edge due to increased costs as a result of regulations or a code of practice could arguably make a case that there is indirect discrimination on the basis of nationality (as prohibited by Article 14). Where an applicant establishes a rebuttable presumption of indirect discrimination in the application of a measure, the burden of making that rebuttal lies with the state.

315. To the extent that this could amount to an infringement of Article 14 read alongside A1P1, the Government considers these measures to be firmly in the public interest.

These measures are intended to ensure fairness between groups of employees working on the same contract, which in turn promotes the provision of good quality public services.

316. The UK is subject to a number of international obligations in relation to non-discrimination in procurement, and care will be taken to ensure that any measures required by regulations or set out in a code of practice are designed in such a way that their application cannot lead to unlawful indirect discrimination against suppliers or, where that is not possible, will be subject to appropriate exemptions, as permitted by this clause.

Clause 35: Pay and conditions of school support staff in England

317. Clause 35 is described above at paragraph 230.

318. As set out above and below, these measures are considered to be within the ambit of Article 11 (paragraph 230) and A1P1 (paragraph 396). The ECtHR has found in a number of cases that status in relation to employment can be regarded as "other status" for the purposes of Article 14. Local authorities employ school support staff and other staff, who may have been evaluated as carrying out work of equal value to school support staff for the purposes of domestic equal pay claims. Improved terms for school support staff could give rise to equal pay claims from other local authority employees, framed as breaches of Article 14 (when read with Article 11 or A1P1).

319. These provisions ensure all schools employ school support staff on consistent terms that are appropriate to their roles in schools. The SSSNB also has a remit to advise on training and career progression for these staff. Together, these measures will support the professionalisation of this workforce and improve educational standards in schools.

320. The Government considers that the powers in the Bill can be exercised compatibly with Article 14 and guidance can be issued to employers to assist them in implementing changes to terms and conditions. Further, Part 8 of the Education Act 2002 contains a separate pay and terms and conditions statutory framework for school teachers. There is, therefore, precedent for establishing different frameworks for more specialist negotiation of pay and conditions of local government employees in the education sector. Other local government employees will continue to benefit

from existing collective bargaining processes, allowing for their representation by trade unions.

Clauses 36 - 38, 40, 43 and 45: Power to establish Social Care Negotiating Body

321. Clauses 36 - 38 and 40 are described above at paragraph 234. Clause 43 gives the relevant Minister the power to ratify an agreement reached by their respective Negotiating Body and the effect of the ratification will be to impose terms and conditions, including in relation to pay, into the employment contracts of the relevant social care workers. The same result would be achieved in circumstances where the Negotiating Body has been unable to reach an agreement (and any other specified circumstances are met) and the relevant Minister decides to exercise their power to make regulations under clause 45. The expectation is that these imposed terms will result in a pay rise for many social care workers. The aim of the clauses is to improve the pay, and other terms and conditions of employment for social care workers.

322. Local authorities employ social care workers and other staff, who may have been evaluated as carrying out work of equal value to those social care workers for the purposes of domestic equal pay claims. Improved terms for social care workers could give rise to equal pay claims from other local authority employees, framed as breaches of Article 14 (when read with Article 11 or A1P1). Unjustified differences in pay between the two groups would breach the principle of non-discrimination in Article 14.

323. The Government considers that the powers in the clauses can be exercised compatibly with Article 14. If ratification of an agreement under clause 45 will lead to a pay rise for certain social care workers, guidance on equal pay can be provided to help employers ensure they remain compliant with Article 14 when they implement the change.

Part 5: Enforcement of labour market legislation.

324. Clauses 100 to 112 make provision for a notice of underpayment regime (see paragraph 105 above). Lower paid workers are more likely to have one or more protected characteristics. These groups are expected to benefit from the creation and operation of the regime, as they are most likely to be able to receive support in enforcing their statutory pay rights.

325. The majority of workers who do not share these characteristics and who may not benefit from FWA's enforcement would not be in an analogous position to those workers who are in the scope of the policy. This is because they are likely to have higher-value claims and, presumably, resources to bring claims individually in the ET or other forums.

326. The Government considers that the regime can be operated compatibly with Article 14. Any difference in treatment between comparable/analogous groups is considered to be objective and reasonable, thereby justifying any indirect discrimination.

327. The legitimate aim is to protect low-paid vulnerable workers. It is considered appropriate and proportionate to target the policy at these workers, since they are in the most financially precarious position. Further, this is a matter of social and economic policy, and the legislation would generally be permissible from an ECHR perspective unless it is manifestly without reasonable foundation.

Article 1 of Protocol 1 ECHR

328. 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.".*

329. The following provisions are considered to engage A1P1:

(i) Clause 1: Right to guaranteed hours;
(ii) Clause 2: Shifts: rights to reasonable notice;
(iii) Clause 3: Right to payment for cancelled, moved and curtailed shifts;
(iv) Clause 4: Agency Workers;
(v) Clauses 10 and 12: Statutory sick pay: removal of the lower earnings limit;
(vi) Clauses 11 and 13: Statutory sick pay: removal of the waiting period;
(vii) Clause 14: Policy about allocating tips etc: review and consultation;

(viii) Clause 26: Dismissal for failing to agree to variation of contract, etc.;
(ix) Clause 27: Collective redundancy: extended application of requirements;
(x) Clause 28: Collective redundancy consultation: protected period;
(xi) Clause 30: Public sector outsourcing: protection of workers;
(xii) Clause 34: Regulation of umbrella businesses;
(xiii) Clause 35: Pay and conditions of school support staff in England;
(xiv) Clause 36: Power to establish Social Care Negotiating Body;
(xv) Clause 53: Seafarers' wages and working conditions;
(xvi) Clause 54: International agreements relating to maritime employment;
(xvii) Clause 56: Rights of trade unions to access workplaces;
(xviii) Clause 61: Facilities provided to trade union officials and learning representatives;
(xix) Clause 62: Facilities for equality representatives;
(xx) Clause 58: Trade union recognition;
(xxi) Part 5: Enforcement of labour market legislation by Secretary of State.

Clauses 1 and 4: Right to guaranteed hours and Agency Workers

330. Clause 1, and the corresponding new provision in relation to agency workers in clause 4 and schedule A1, are described above at paragraph 259.

331. The Government believes that A1P1 may be engaged by the provision relating to guaranteed hours under clause 1, which requires that an offer of guaranteed hours to be made, which would, if accepted, lead to binding contract be made between the employer and the qualifying worker. Such contract would require therefore that the employer pays those workers' wages for the set number of hours guaranteed in the contract as a result of the offer, until a worker's contract is lawfully terminated. Employers' income can only be considered to be a possession for A1P1 purposes if it has already been earned, or where an enforceable claim to it exists (*Ian Edgar (Liverpool) Ltd v. the United Kingdom* (dec.), no. 37683/97, 2000, *Denisov v. Ukraine,* no. 76639/11, [GC], 2018, § 137, *Gyulumyan and Others v. Armenia* (dec.), no. 25240/20, 2023, § 101).

332. The Government believes that to the extent that there is any interference with the employers' or businesses' rights under A1P1 in respect of their monies, their right to manage their assets and conduct their business, it is necessary to determine whether

this interference amounts to a deprivation of property in accordance with the second rule of A1P1, or to a control of the use of property, in accordance with the third rule.

333. The Government would contend that if there is any interference with the employers' and businesses' possessions, that they are not deprived of their possession as reflected in some of the cases on expropriation and as explained in the ECtHR's own "Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights". The Government would instead contend that the interference amounts to a control of use, in that the employer is directed in the spending of its funds in the form of wages payable for guaranteed hours of work.

334. If it is considered that there is an interference in the meaning of A1P1 with the employers' or businesses' possessions including their right to conduct their operations, then the Government would contend that it is justified as it pursues a legitimate aim and is proportionate. Interference in A1P1 rights may be justified if it serves a legitimate public or general interest (*Béláné Nagy v. Hungary* [GC], 2016, § 113; (*Lekić v. Slovenia,* no. 36480/07, [GC], 2018, § 105).

335. The legitimate aim is to give workers guaranteed hours of work which reflect the hours they work during the reference period, seeking to end "exploitative practices" where workers have no certainty they would be provided with work (or only for a low number of hours for some), but in reality they work for the employer on a regular basis or in excess of the hours they are contractually guaranteed.

336. The Government's assessment is that the measure is proportionate since the guaranteed hours to be offered to a qualifying worker would reflect the hours regularly worked by that worker. There would therefore be no significant material change caused by the interference in terms of the wages that the employers will be bound to pay compared to the wages they currently pay under the zero-hours contracts, zero hours arrangements or worker's contracts with a minimum number of hours.

337. Part 1 of Schedule A1 introduces a corresponding right to guaranteed hours for agency workers. A hirer (to whom an agency supplies agency workers to work for and under the direction of) must make a guaranteed hours offer to a qualifying agency worker. The offer must reflect the hours worked regularly (to be defined in regulations) during the reference period (to be defined in regulations) and be a

permanent worker's contract, unless it is reasonable to enter into a limited term contract.

338. The Government acknowledges that a guaranteed hours offer, if accepted, would result in the agency worker changing status from an agency worker to a directly engaged worker. The Government believes that placing the obligation on the hirer to take on agency workers as directly employed workers (with associated cost) engages A1P1, as A1P1 protects businesses' right to conduct their operation and manage their assets. The so-called temp-to-perm fee that agencies are allowed to charge a hirer in certain circumstance (and within 14 weeks from an initial assignment) forms part of the analysis as it could be argued that a duty to take on a worker, combined with a contractual obligation to pay a fee to the agency supplying the worker which could apply e.g. if the offer had to be made within the 14 weeks, interferes with A1P1 rights and results in additional costs beyond what is the case for other zero hours contract measures (compare the assessment of proportionality in paragraph 336). Similar considerations would apply if the obligation were to be placed on the agency or another person (under exercise of a power in paragraph 11 of Part 1 of Schedule A1). If the agency were under an obligation to offer a guaranteed hours offer this legislation would similarly engage their A1P1 rights of peaceful enjoyment of possessions, as they would be required to guarantee a certain number of hours of work under a permanent or temporary contract, regardless of business need as the work demand comes from a third party and is out of their control.

339. The Government has considered a number of options for extending the protection against exploitative zero hours contracts to agency workers. The Government considers that, to the extent that A1P1 rights were found to be interfered with by the measures, as an interference with hirers' control and use of their resources and business interest, they can be considered to be in accordance with the law and justified as a proportionate means of achieving legitimate public interest. The measures pursue the aim of regulating the labour market and create security of work for categories of workers who lack security and predictability. The Government considers that the measures strike a fair balance between the public interest and individual rights, taking into account the wide margin of appreciation allowed when regulating economic and social issues. Depending on how a reference period will be set in secondary legislation, hirers or alternatively agencies (in some circumstances) will be required to offer members of their workforce, who regularly work a set number of hours for them, guaranteed hours reflecting that work. The way the scope of the

rights will be drawn by specifying who is a “qualifying agency worker” will mitigate the impact on the hirer and will provide that only those with such relationship with the hirer in terms of work and reference period, be directly engaged by the hirer. We also note, as set out above, that the legislation will allow for the obligation to offer guaranteed hours to be placed on agencies or other intermediaries in certain scenarios. This power may be used in scenarios where it is considered more appropriate to place the obligation on the agency, and this will ensure that any interference with hirers’ control and use of resources does not go further than necessary to achieve the legitimate aim. The Government is also of the view, both in respect of the obligation to offer guaranteed hours to agency workers reflecting their work for the hirer during the reference period; and in relation to temp-to-perm fees, that Ministers’ exercise of powers engages section 6 of the HRA 1998. ECHR rights, including A1P1 rights will therefore be further considered when regulations are enacted. In case of temp-to-perm fees, one mitigating factor will be how the Government will determine the length of the reference period in regulations.

Clauses 2, 3 and 4, Shifts: rights to reasonable notice; and right to payment for cancelled, moved or curtailed shifts; and corresponding provision in relation to Agency Workers

340. Clauses 2 and 3 and Parts 2 and 3 of Schedule A1 to be inserted into the ERA 1996 by clause 4, are described above at paragraph 37.

341. Part 3 of Schedule A1 also provides a right to work-finding agencies to recover the cost of short-notice payments from hirers to the extent that the hirer is responsible for the short-notice (“the recovery mechanism”).

342. The Government believes that A1P1 may be engaged by these provisions as they require an employer or a work-finding agency to pay a worker money, i.e., transfer their assets to the (agency) worker. However, as set out at paragraph 331 above, there are limits to when future income can be considered to be a possession for A1P1 purposes. A1P1 may also be engaged because contractual rights contained in agreements between hirers and agencies may therefore amount to possessions under A1P1 and the recovery mechanism would interfere with those contractual arrangements.

343. To the extent that A1P1 is engaged, it is necessary to determine whether this interference amounts to a deprivation of property, in accordance with the second rule of A1P1, or a control of the use of property, in accordance with the third rule.

344. It is only in situations where the applicant's ownership is actually or effectively extinguished that a case will amount to a deprivation of property. By way of contrast, there are many cases in which an applicant loses their property which do not amount to a deprivation of property for the purposes of A1P1.

345. The provisions on notice of shifts in this Bill contain provisions to regulate the payment of workers and therefore regulate the transfer of ownership of money as between the employer and the workers. The Bill does not extinguish the employer's (or the work-finding agency's or hirer's) right to their money, but instead creates provisions meaning that the employer must, in certain situations, ultimately transfer the ownership of the money to the workers. The Government's assessment is that the Bill would involve a control of the use of the money rather than a deprivation in the sense of an expropriation.

346. This is particularly so given that employers, agencies and hirers can generally avoid having to pay a worker (or, for hirers, having to pay the work-finding agency) and therefore retain their assets by ensuring that workers are provided with reasonable notice of their shifts and changes to these or, in the case of work-finding agencies and hirers, that they ensure that they do what they can to provide reasonable notice of shifts and changes to these. Further, there are likely to be exceptions from the duty to make payment for certain circumstances outside of the employer, work-finding agency's and hirer's control.

347. Further, the recovery mechanism should not terminate contracts and deprive the parties of the benefit of their contractual terms and would instead amount to regulating these.

348. To the extent that it is considered that these provisions constitute an interference in the meaning of A1P1 with the employer's possessions (and the possessions of agencies or hirers in case of agency workers), then the Government would contend that it is in accordance with the law and justified as a proportionate means of achieving a legitimate aim.

349. As above, the provisions on notice of shifts are aimed at ensuring that workers have more predictability of when they are required to work and therefore when they will be paid so that they can in turn better plan their home lives and finances and ultimately reduce stress, anxiety and income precarity. The Government considers this to be a legitimate aim for the purposes of A1P1.

350. Many employers rarely cancel shifts and already pay workers for cancelled shifts. Additionally, the policies will only apply to employers employing workers on zero-hours contracts and arrangements and contracts of a type to be specified in regulations by reference to a maximum amount of hours or renumeration as well as work-finding agencies and hirers so they should only affect a proportion of employers (as most workers are not on such contracts).

351. Where employers are subject to the provisions, the sums involved are likely to be relatively small. In particular, the maximum amount that employers and work-finding agencies would need to pay in compensation ordered by an ET for short notice cancellation/curtailment will not exceed what the worker would have earned from working the relevant hours (and is likely to be lower than this). Further, payment should usually only be required where an employer, work-finding agency and hirer has acted unreasonably. To the extent that an employer, work-finding agency or hirer may have to pay for circumstances outside of their control, this is considered proportionate to ensure that workers do not bear the risks associated with short notice shift changes given that employers, work-finding agencies and hirers are more capable of doing so.

352. Further, the Government considers that the recovery mechanism also achieves the aim of ensuring that agency workers have predictability by encouraging hirers to give more notice of changes to shifts. The Government also considers the recovery mechanism to be proportionate to achieve that aim. In particular, the mechanism ensures fairness for agencies in existing contracts by ensuring that they can recover costs that they are not responsible for but it also gives agencies and hirers the ability to opt out of it from Royal Assent, agencies and hirers should aware that the duty to make short notice payments will apply to agencies and can negotiate accordingly.

353. Finally, it is anticipated that the provisions will lead to significant benefits for workers, as set out above. The interference with employers' property is therefore considered to be proportionate.

Clauses 10 and 12: Statutory Sick Pay: removal of waiting period

354. Clauses 10 and 12 are described above at paragraph 283.

355. The Government believes that this measure may amount to an interference with the employer's rights under A1P1 in respect of their monies, which would be required to be spent on SSP.

356. The Government would contend that any interference amounts to a control of use which is justified as it has a legitimate aim and is proportionate. The Courts afford a wide margin of appreciation to states in determining what is in the general or public interest (*Béláné Nagy v. Hungary* [GC], 2016, § 113), (*James v. UK* [1986] 8 EHRR 123; para 46*, Jacobson v. Sweden* [1990] 12 EHRR 56), § 55).

357. The legitimate aim associated with this measure is ensuring that employees receive sick pay from the first day of their absence. This will provide important support to employees whilst also discouraging presenteeism, which in turn benefits the wider economy.

358. The Government's assessment is that the measure is proportionate. It is unlikely to impose substantial additional costs on employers but the positive effect on employees, and on the wider economy, is likely to be significant.

Clauses 11 and 13: Statutory sick pay: lower earnings limit etc.

359. Clauses 11 and 13 are described above at paragraph 283.

360. The Government believes that A1P1 is engaged by the extension of SSP to employees who earn below the Lower Earnings Limit (and are currently excluded from eligibility to SSP). This measure has the effect of requiring that the employer pay wages to particular employees at a specified rate in circumstances where the employer would not currently be required to use their property to pay the employee a wage. The Government believes that this may amount to an interference with the employer's rights under A1P1 in respect of their monies, which would be required to be spent on SSP.

361. The Government would contend that if there is any interference with the employers' possessions, that they are not deprived of their possession. These provisions do not extinguish the employer's right to their money, but instead specify new circumstances in which the employer must transfer the ownership of the money to particular employees. The Government would contend that the interference amounts to a control of use, in that the employer is directed in the spending of its funds in the form of wages payable as SSP.

362. The legitimate aim associated with this measure is ensuring that all employees, including the lowest paid, receive sick pay when they are incapable of work due to ill health. This provides low paid employees with financial protection during any period of ill health, avoiding employees incurring a financial penalty when taking leave as a result of ill health. This in turn discourages presenteeism, ensuring that employees are discouraged from attending work when they have short term, contagious illnesses. The effect of these measures will, therefore, both provide support to low paid employees during periods of ill health and produce overall benefits to the economy by reducing the financial costs associated with presenteeism.

363. The Government's assessment is that the Lower Earning Limit measure is proportionate. Extending SSP to the low paid, at a comparatively low rate, is likely to impose limited additional costs on employers but the positive effect on employees, and on the wider economy, is likely to be significant. As such, the Government considers that any interference in the rights of employers is proportionate to the overall benefit both to low paid employees and to the wider economy.

Clause 14: Policy about allocating tips etc: review and consultation

364. Clause 14 requires relevant employers consult with workers on the distribution and allocation of tips when developing or updating their written tipping policy. The current legislation requires employers to pass all tips, service charges and gratuities on to workers without deductions. It also mandates that employers have a written policy on tip allocation where these tips are paid on more than an occasional and exceptional basis. However, the legislation does not currently require employers to consult with workers when developing these policies. The statutory Code of Practice only encourages employers to consult with workers to seek broad agreement that the allocation system is fair, reasonable, and clear.

365. The Government believes that the requirement to consult workers when developing polices for distributing and allocating tips, service charges and gratuities may interfere with employers' right to peaceful enjoyment of possessions under A1P1. This represents an external imposition on employers' ability to independently make decisions regarding the administration and allocation of these funds while taking into account the statutory Code of Practice. It is arguable that although tips, service charges, and gratuities are ultimately intended for workers, they are still part of employers' overall business revenue and financial management.

366. The primary aim of the provisions is to protect workers' rights. Current legislation already mandates that these payments must be passed to the workers. The amendment is rooted in the public interest by promoting fairness and transparency in the workplace. The provisions introduce a procedural obligation (consultation) and do not deprive employers of their property. Employers retain the power to distribute and allocate the tips while having regard to the Code of Practice.

367. The Government considers that the amendment strikes a balance between protecting workers' financial interests and respecting the employers' right to control their business operations. To the extent that the provisions constitute some interference with the A1P1, the Government is satisfied that such interference is justified.

Clause 26: Dismissal for failing to agree to variation of contract, etc.

368. Clause 26 is described above at paragraph 53.

369. In current legislation, dismissals in order to effect a variation in contractual employment terms would not be automatically unfair and such dismissals could be justified as being for 'some other substantial reason'. The Government believes that the change being made by clause 26 could amount to an interference with A1P1. Rights protected under A1P1 include businesses' right to conduct their operations and manage their assets.

370. The amendment could interfere with these rights by reducing the range of scenarios in which an employer can fairly dismiss or replace an employee to achieve a variation in contractual terms, affecting the employer's assets and economic interests.

371. To the extent that the provisions constitute some interference with the A1P1, the Government is satisfied that such interference is justified, as follows.

372. The Government considers that the amendment serves the public interest, as it creates more security in work, potentially preserving jobs, or reducing reductions in employees' contractual terms unless truly necessary.

373. In the Government's assessment, making such dismissals automatically unfair will deter employers from using dismissal and re-engagement or replace tactics to reduce an employee's terms and conditions unless it is truly necessary due to the employer being in financial difficulty.

374. The exceptions in the clause mean that a dismissal to effect a variation in contractual employment terms is still available to employers where necessary, striking the right balance between:

(i) reducing instances of employers unfairly varying an employee's contractual terms, and increasing the security of employee's employment, and;

(ii) the employers' right to conduct their operations and manage their assets.

375. While this may have a financial impact on a businesses' ability to manage their assets, it is balanced against the substantial benefit to workers. Any interference with the right to the peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (*Sporrong and Lönnroth v. Sweden*, no. 7151/75, 1982, § 6, *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], 2007, § 52, 53).

376. If employers truly need to use dismissal to vary contractual terms, they have the exemption available to them, under which the ET could find such a dismissal fair having regard to all the circumstances. The Government therefore considers any interference with employers' property rights is proportionate.

Clauses 27 and 28: Collective redundancy: extended application of requirements and Collective redundancy consultation: protected period

377. Clause 27 is described above at paragraph 54. Clause 28, which will increase the maximum period of the protective award which an ET may make, is described at paragraph 57.

378. The Government believes that clause 27, which extends the scope of collective redundancy obligations, could amount to an interference with A1P1, which for businesses includes the right to conduct their operations and manage their assets. The Government recognises that clause 28, which increases the maximum period of the protective award, increases employers' potential financial liability, affecting their assets and economic interests, and so may amount to an interference with A1P1.

379. These provisions pursue several legitimate aims in the general interest including an enhanced protection of the rights of workers so that more employees benefit from collective consultation during the redundancy process, and increased protection for employees if an employer fails to collective consult. Collective redundancy processes can help to reduce the amount of redundancies being made, or mitigate the impact of redundancies, leading to increased protections for employees.

380. Although the Bill expands the obligations to collectively consult, employers will only have to consult on (and notify of) redundancies happening across more than one establishment where a threshold number of employees are proposed to be made redundant across more than one establishment. This threshold number will be set in secondary legislation. The government is satisfied that the power to set the threshold number in secondary legislation can be exercised in a way which is proportionate and compatible with A1P1. The government intends to consult before using the power, to ensure that the threshold number is set at a level which is proportionate.

381. The Government is also satisfied that any interference with A1P1 rights through the increase to the protected award is justified, as follows.

382. In the Government's assessment, the possibility of a protective award will encourage employers to comply with the redundancy consultation process, making actual awards less likely. The Government believes that the increased scope of the collective consultation requirements, the consequent increase in the potential for protective awards to be made, and the increase in the maximum protective award period to 180 days, is necessary to compel employers to take consultation seriously across their entire operation.

383. The potential financial impact on businesses is balanced against the substantial benefit to workers. Employers can avoid financial liability by following the proper procedure and consultation requirements. Where the collective redundancy

requirements are breached, ETs must make awards for such period as they consider just and equitable in all the circumstances, up to a maximum of 180 days. Tribunals therefore have discretion in setting the award amount, which allows them to make lower awards for more minor breaches, and take mitigating circumstances into account, to ensure the amount awarded is proportionate.

384. The Government therefore considers that the increase in the maximum protective award is compatible with A1P1 and is mitigated by the discretion of tribunals to make awards which are proportionate. ETs will continue to apply established principles when determining award amounts.

385. The interference with employers' property rights is therefore considered to be proportionate.

Clause 30: Public sector outsourcing: protection of workers

386. Clause 30 is described above at paragraph 311.

387. A right to participate in procurement exercises and to be awarded public contracts do not amount to "possessions" protected by A1P1. In these cases, there is no enforceable claim, or legitimate expectation, to bid for or to be awarded a contract.

388. Loss of goodwill as a result of the removal of such rights may, in limited circumstances, also engage A1P1. However, the powers taken in this Bill, and their eventual application, are not capable of removing rights to participate in a procurement.

389. The Government recognises that the number and breadth of outsourced services contracts means that it is possible that there exist suppliers (in very small number) whose business depends upon successfully bidding for outsourced services contracts with UK public authorities, and whose success is founded on local staffing costs allowing them to put forward the most competitive bid.

390. To the extent that there is any residual interference, and in the limited circumstances where there is loss of goodwill, the Government is content that the interference serves the public interest, complies with conditions provided for by law and passes the fair balance test.

391. The powers are delimited by the purposes expressed on the face of the Bill and, importantly, contain sufficient flexibility to allow their requirements to be tailored to specific types of contracts or contexts, including, where appropriate, by the inclusion of exemptions. These provisions are accessible, precise and foreseeable and therefore compatible with the rule of law.

Clause 34: Extension of regulation of employment businesses

392. Clause 34 is described at paragraph 14 above. It makes provision which would permit the regulation of umbrella businesses. The proposals engage A1P1 by the extension of enforcement powers to umbrellas, for example to seize documents (clauses 93-97 of the Bill), which would be deemed "possessions" within the meaning of A1P1.

393. Increased regulation of umbrellas could result in the business of an umbrella having to be carried out in a certain way to comply with new requirements. As such the A1P1 rights of an umbrella or person running an umbrella may be engaged. For example, restrictions or bans may be placed on the running of an umbrella as set out in a Prohibition Order in the EAA 1973 (sections 3A to 3D), where there is misconduct or a person is deemed unsuitable to be running such a business, or as set out in LME Undertakings or LME Orders in the Bill (clauses 116-126), where there is potential non-compliant conduct. These processes are clearly set out in legislation with precise procedural requirements. There are safeguards in place such as time restrictions on the length of a Prohibition Order and LME Undertaking/Order, and procedures for revocation, variation, and appeals.

394. The Government considers that any interference with the A1P1 rights of an umbrella (or person running an umbrella) will be justified, proportionate, in the public interest and consistent with the existing regime that applies to employment agencies and employment businesses.

395. Pursuant to section 6 of the HRA 1998, the making of regulations to amend the Conduct Regulations that will apply to umbrellas will need to be ECHR compliant, relevant stakeholders will also be consulted prior to the amendments to the Conduct Regulations being made, and the amending regulations will be subject to the higher level of scrutiny under the affirmative procedure.

Clause 35: Pay and conditions of school support staff in England

396. Clause 35 is described above at paragraph 123.

397. The Government considers that A1P1 may be engaged in two ways by these measures, through interference with:

(i) the individual employment rights of members of school support staff, and

(ii) the contractual rights of academy trusts arising from funding agreements between the trust and SoS.

Individual school support staff employment contracts:

398. The Government considers that the impact on individuals and therefore any interference with A1P1 rights will be limited.

399. Most school support staff are employed in accordance with the National Joint Council ("NJC") for Local Government Services National Agreement for pay and conditions which covers all local authority employees (and is therefore not specific to school support staff). The Government will gather more detailed information about the terms on which support staff are employed and consider the extent to which any protection of existing terms and conditions is necessary to ensure that changes to support staff contracts made through secondary legislation are fair. The Bill provisions also prevent the imposition of less beneficial terms than those a member of school support staff is currently working under in respect of a period prior to the secondary legislation being made.

400. The Government therefore considers that these provisions are capable of being exercised in a manner that is ECHR compliant.

Academy trust funding agreements:

401. Academy trusts are independent charitable companies that have entered into a funding agreement with the Secretary of State for the provision of state funded education. Whilst it has not been determined by the Courts, the Government considers that they are highly likely to be considered hybrid public authorities for the purposes of section 6 of the HRA 1998. The Government considers it unlikely that an academy trust would be considered a victim for the purposes of the ECHR and the HRA 1998.

402. In any event, the impact of these provisions on academy trusts and therefore any infringement of their A1P1 rights is likely to be limited. The majority of academies already employ support staff on NJC terms and these measures are unlikely to result in significant changes to the terms they currently use. Further, there is precedent for imposing statutory requirements on academy trusts.

403. Overall, these provisions ensure greater consistency across all schools in both the maintained and academy sector. Agreements reached by the SSSNB will be the product of meaningful engagement by employee and employer representatives (including those representing academy trusts). To the extent that A1P1 is engaged, the Government considers that any interference can be justified on the grounds that the public interest in providing tailored employment terms and conditions for school support staff and improving recruitment to and retention in these roles with the aim of improving educational standards in schools outweighs any limited interference with property rights. These provisions can therefore be exercised in an ECHR compliant manner.

Clauses 36 - 38, 40, 43 and 45: Power to establish Social Care Negotiating Body

404. Clauses 36 - 38, 40, 43 and 45 are described above at paragraphs 234 and 321.

405. Caselaw on A1P1 relates to either deprivation of property or control of its use. A ratified agreement reached by the Negotiating Body might set a uniform standard or a minimum floor of pay and other terms and conditions for social care workers. The Government considers that this would be considered a form of ‘control of use’, and not deprivation.

406. Any interference with A1P1 must strike a “fair balance” between public interest demands and the requirement to protect an individual’s fundamental rights. Unlike other pay-setting legislation such as the NMWA 1998 which prescribes a minimum wage floor, an agreement reached by the Negotiating Body will be the product of meaningful negotiation between parties representing impacted employers and workers. As such, the parties will have the opportunity to reach an agreement that strikes a fair balance between their respective interests.

407. Further, the margin of appreciation afforded to states in A1P1 matters is particularly wide where the national legislation aims to implement social and economic policies in

the public interest. There is a clear public interest in improving the working conditions of social care workers in order to address the recruitment and retention crisis in the sector and ultimately improve the quality of care received by social care users.

408. The Government considers that these clauses are a proportionate way to address the crisis in social care, and that any associated interference with A1P1 rights is justified.

Clause 53 and Schedule 5: Seafarers' wages and working conditions

409. Clause 53 and Schedule 5 are described above at paragraphs 67-70. The enforcement provisions of the SWA 2023 as amended by Schedule 5 will extend to the new "remuneration regulations" and "safe working regulations". This will expand the power for the Secretary of State to request evidence that operators comply with declaration requirements (see section 12 SWA 2023 and paragraph 17 of Schedule 5), and the power to impose a surcharge on an operator or refuse access to the port (see sections 6-11 SWA 2023 and paragraphs 13-16 of Schedule 4). These enforcement provisions may engage the protections conferred by A1P1 in that such powers may interfere with operators' existing contractual or commercial rights. Additionally, the requirement to pay a surcharge may deprive operators of their property (funds). Any interference can be justified as being (i) provided for by law, (ii) in the public or general interest, and (iii) proportionate.

410. The measures will be based on a clear and predictable legal basis as set out on the face of the enforcement provisions as amended and in secondary legislation, namely, in "remuneration regulations" and "safe working regulations" specifying the requirements for the content of declarations subject to the enforcement provisions.

411. The purpose of Clause 47 and Schedule 4 is to ensure that seafarers working on ships that regularly use UK ports are adequately remunerated, well trained and are not too fatigued, which is in the public/general interest. Balancing this public interest and the rights of individuals against the commercial rights of in-scope ship operators, it is considered that the measures are proportionate, and the provisions are compatible with A1P1.

Clause 54: International agreements relating to maritime employment

412. Clause 54 is described at paragraph 16 above. Regulations made under the clause may provide for the detention of a ship in respect of which a contravention of the regulations is suspected to have occurred. Detention of vessel is considered to engage the protections conferred by A1P1 as detention may interfere with a ship operator's existing contractual or commercial rights.

413. Any interference can be justified as being (i) provided for by law, (ii) in the public/general interest, and (iii) proportionate.

414. The detention power will be set out in secondary legislation. The government considered that to include the detention power on the face of the Bill would render liable for detention any ship suspected to be in contravention of the regulations. The government considered that such an approach would not be proportionate, and would not reflect policy intention that only select contraventions are serious enough to render a ship liable to be detained.

415. The purpose of Clause 54 is to ensure that the terms and conditions and working conditions of masters and seamen employed or engaged on ships are compliant with international requirements, which is in the public/general interest. Regulations made under this clause will afford masters and seamen the employment rights to which they are titled.

416. The Government has considered the balance between that public/general interest and maintaining the rights of individual seafarers, and the rights of those who may have their ship detained under regulations made under this clause. Detentions are not intended to be permanent, but rather last until the grounds of detention cease to apply (see, for example, the existing detention provisions in respect of Maritime Labour Convention contraventions in S.I. 2014/1613, regulation 56). In that regard, the detention of a vessel under this power will constitute a control of use, rather than a deprivation of property. Detention may be avoided (or ended) by the vessel's compliance with the relevant requirements and so provision of compensation is not considered necessary. It is, therefore, considered that the measures are proportionate, and the provisions are compatible with A1P1.

Clause 56: Rights of trade unions to access workplaces

417. Clause 56 is described above at paragraph 76.

418. The access framework provides access to workplace premises and facilities such as a meeting room. As such, the Government considers that A1P1 is engaged by the provisions relating to the access framework. This would be a control of use of property, rather than deprivation of property. Provision will also be made for 'virtual' access.

419. An A1P1 interference must strike a "fair balance" between public interest demands and the requirement to protect an individual's fundamental rights. The margin of appreciation afforded to states in A1P1 matters is particularly wide where the national legislation aims to implement social and economic policies in the public interest.

420. If it is considered that there is an interference in the meaning of A1P1 with the employers' or businesses' possessions, then the Government would contend that it is justified as it pursues a legitimate aim and is proportionate.

421. The margin of appreciation afforded to states in A1P1 matters is particularly wide where the national legislation aims to implement social and economic policies in the public interest. There is a clear public interest in allowing trade union officials to be able to meet workers face to face, and it is also important for workers that trade union officials are able to do so.

422. There are various safeguards that apply to the access agreement framework. These include that the CAC must make determinations in accordance with the access principles – these contain safeguards on the face of the primary legislation, for example by referencing that access should be in a manner that does not unreasonably interfere with the employer's business.

423. Additionally, the Secretary of State can prescribe in regulations when it is to be regarded as reasonable for the CAC to refuse access, and also where the CAC must refuse access. This is a right to request an access agreement, and in the event of a dispute, an access agreement can be imposed by the CAC including the terms and conditions of entry – these can provide for date/time/length of access/location/names etc, which can limit the interference as to what is needed and what is proportionate. Provision can also be made in secondary legislation as to the terms that the CAC must consider would not unreasonably interfere with an employer's business; would constitute reasonable steps and employer should take to facilitate access; and it would be reasonable for a union to comply with.

424. The employer who does not comply can ultimately face a penalty, the intention is to consult on the approach to penalties, and the clauses provide that the Secretary of State can set the maximum penalty level in regulations. Exercise of that power will need to be in accordance with Convention rights under section 6 HRA 1998. The Bill will contain further detail as to the power of the Secretary of State to set minimum/maximum penalty amounts.

425. The Government considers that these clauses are a proportionate way to ensure the fundamental rights in Article 11 are respected, and that any associated interference with A1P1 rights is justified.

Clauses 61 and 62: Facilities provided to trade union officials and learning representatives; and Facilities for equality representatives

426. Clauses 61 and 62 are described above at paragraph 92.

427. These clauses arguably engage and interfere with the "control of use" of the employer's property under A1P1. This is framed as an obligation on the employer to permit, rather than a right for the employee, and in any event the 'right' is conditional on what is reasonable in all the circumstances, having regard to any relevant provisions of a code of practice. The code of practice will provide more detailed guidance as to what may be reasonable. It is a legitimate aim to ensure that rights to freedom of association under Article 11 are fully realised, and it is important that trade union officials are able to fulfil their duties, and may need reasonable access to facilities such as meeting rooms in order to do that. This approach is proportionate and is confined to what is reasonable in all the circumstances, and so the Government considers the provisions to be compatible with A1P1.

Clause 57: Trade union recognition

428. Clause 57 and Schedule 6 (Trade union recognition) it introduces is described above at paragraph 84.

429. These provisions simplify the process of union recognition and the law around statutory recognition thresholds. This enables trade unions to gain statutory recognition more easily. The human rights of trade unions and their members, in particular under Article 11, are somewhat improved by the proposals.

430. The Government believes that A1P1 rights for employers are engaged and, arguably, interfered with by the proposals, albeit any interference is very indirect and contingent

431. The provisions make it somewhat more likely that trade unions will obtain statutory recognition for, in particular, collective bargaining in relation to pay, hours and holidays of the workers in the bargaining unit. In turn, such collective bargaining could potentially disadvantage the employer and, arguably, make the employer's existing contracts of employment less valuable as a result of the additional costs which they might carry for the employer. However, our proposals do not affect the outcome of recognition of a trade union. It also remains within the control of the employer to decide on its approach to negotiation in collective bargaining and any ultimate agreement of terms. Our proposals do not enable the imposition of terms of employment on employers or workers.

432. A1P1 is a qualified right. Any interference will be in accordance with the law, clearly set out in the Act, as amended by our Bill.

433. Each of the three proposals has a legitimate aim, being the protection of the rights and freedoms of trade unions and their members and other workers in a bargaining unit. This is also in the general interest.

434. The proposals are pursued in a proportionate way. It will remain the case that statutory recognition of the trade union will only be obtained where there is clear majority support for recognition among those workers in the bargaining unit who exercise their right to vote on the matter.

Part 5: Enforcement of labour market legislation by Secretary of State

435. Clauses 87 to 148 are described above at paragraph 95.

436. The Government considers that the following aspects of the FWA provisions engage A1P1:

Investigatory powers

437. Clause 94 provides a power for the Secretary of State to seize documents following entry into premises (see subsection (4)). Clause 97 provides for the retention of

documents provided in response to a requirement under clause 93 or seized under clause 94. Documents are possessions within the meaning of A1P1. The power is to retain documents for "so long as is necessary in all the circumstances". The Government considers that these powers to seize and retain documents could be said to interfere with the right to peaceful enjoyment of possessions, as they prevent persons from dealing with documents belonging to them as they see fit (which could include disposal of those documents).

438. The Government considers that the enforcement of labour market legislation is in the public interest. It falls within the socio-economic sphere, in relation to which a wide margin of appreciation is usually afforded to states (see the case of *James v. UK* cited at paragraph 356). The ECtHR will respect the legislature's judgement on such matters unless it is manifestly without reasonable foundation (see the case of *Béláné Nagy v. Hungary* cited above at paragraph 356). It is important for enforcement authorities to be able to investigate suspected breaches of employment law in order to protect employees and workers and secure their rights. Ensuring compliance with labour market requirements also benefits law-abiding businesses and ensures a level playing field for competition between businesses.

439. The investigatory powers are set out on the face of the Bill and are, therefore, provided by law. Further, they comply with the rule of law because the provisions are sufficiently precise, accessible and foreseeable. The powers are subject to safeguards to prevent them being used in an arbitrary way, as follows.

440. The power to retain documents applies for so long as is necessary in all the circumstances (clause 97(2)), thereby building a proportionality test into the power itself. Further, under subsection (3), the power is not available where it would be sufficient to take a photo or a copy of a document. Generally, the Secretary of State and other delegate authorities (e.g. HMRC) are public bodies and therefore bound to act in accordance with public law principles, including ECHR rights (section 6 HRA 1998).

Notices of Underpayment

441. The Bill makes provision for a notice of underpayment regime (see paragraph 105 above). The FWA will not be subject to the same time limits that apply to individuals when bringing a claim to recover arrears. In addition, the two-year backstop contained in section 23(4A) ERA 1996 will also not apply where FWA is recovering

underpayments that took place in the previous six years. The application of the regime would engage A1P1. This is because a requirement to either pay arrears and / or pay an additional penalty would interfere with an employer's existing possessions or assets.

442. As noted above, the regime would be used to enforce underpayments occurring in the period post-Royal Assent. In order to be compatible with A1P1, the interference must comply with the principle of lawfulness and pursue a legitimate aim using reasonably proportionate means.

443. The Government considers that the regime can be operated compatibly with A1P1. The principle of lawfulness requires that the provisions of domestic law are sufficiently accessible, precise and foreseeable in their application. The regime will be set out on the face of the Bill and follow to some degree the wording of the equivalent provisions in the NMWA which are already familiar to employers; and there will be a maximum six-year 'look-back' period which means that a notice can be issued in respect of underpayments occurring no further back than in the previous six years. As such there is certainty regarding the maximum period of time for which an employer remains liable for underpayments.

444. The legitimate aim in this case is to protect vulnerable workers, encourage increased compliance with employment law obligations, and 'level up' the balance of power in favour of workers by having a state enforcement process.

445. Further, it is arguable that since employers are required to comply with the relevant pay right in the first place, it is reasonable that those in breach are required to pay back arrears. In order to achieve the legitimate aim of deterring employers from breaching employment rights, it is reasonable that penalties are applied as well.

Expanded regime for LMEUs and LMEOs

446. The Bill provides that both LMEUs and LMEOs may contain prohibitions, restrictions or requirements ("measures") that fall within subsections (2) or (3) of clauses 117 and 123. Under subsection (2) of each clause, a measure may be for the purpose of: (a) preventing or reducing the risk of the respondent not complying with relevant legal requirements, or (b) bringing information about the undertaking or order to the attention of interested persons. In practice, measures could require respondents to

deal with their property in a certain way; e.g. by requiring employers to comply with record-keeping requirements (e.g. the duty in section 9 of the NMWA 1998) or, potentially, requiring them to dispose of documents that could give rise to breaches (e.g. employee blacklists). The Government therefore considers that the LME regime engages A1P1 and potentially interferes with it (depending on the precise measures adopted in an LMEU or LMEO).

447. As set out above in relation to investigatory powers, the Government considers that the enforcement of labour market legislation is in the public interest. It is important for enforcement authorities to be able to take action against serious breaches of employment law in order to protect employees and workers and secure their rights. Ensuring compliance with labour market requirements also benefits law-abiding businesses and ensures a level playing field for competition between businesses.

448. The powers relating to LMEUs and LMEOs are set out on the face of the Bill and will, therefore, be provided by law. They comply with the rule of law because the provisions are sufficiently precise, accessible and foreseeable. The powers are subject to safeguards to prevent them being used in an arbitrary way.

449. The powers relating to LMEUs and LMEOs are subject to detailed requirements and a clear procedure, thereby striking a balance between the rights between persons whose rights are affected and the general community. What constitutes a valid "measure" for an LMEU or LMEO is set out in the legislation (either primary or secondary). The Secretary of State must give a notice to a person that it invites to give an LMEU and there are provisions regarding the maximum length of an LMEU and release from an LMEU. To obtain an LMEO, the Secretary of State must apply to court and the court may only make an LMEO if certain conditions are satisfied. There are provisions regarding the maximum length of an LMEO and the variation and discharge of LMEOs. Finally, a respondent may appeal against the making of an LMEO or the making of (or refusal to make) a variation or discharge order.

450. Generally, the Secretary of State and other delegated authorities (e.g. HMRC) are public bodies and therefore bound to act in accordance with public law principles, including ECHR rights (section 6 HRA 1998).

13 March 2025