House of Lords
House of Commons

Joint Committee on Human Rights

Legislative Scrutiny: Education Bill; and other Bills

Thirteenth Report of Session 2010–12

Report, together with formal minutes and appendices

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Joint Committee on Human Rights

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Footnotes

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Summary

The Education Bill was introduced into the House of Lords on 12 May, having completed its passage in the House of Commons on 11 May. In this Report we consider four significant human rights issues raised by the Bill.

Free early years' provision

In our Report, we welcome the extension of the entitlement to free early years' provision to all disadvantaged two year olds as a human rights enhancing measure. This will help ensure UK compliance with the UN Convention on the Rights of the Child and responds to the recommendations of the UN Committee on the Rights of the Child to ensure the right of children to a truly inclusive education.

Extended powers to search pupils

The Bill includes measures to improve discipline and behaviour in schools, which we welcome as human rights enhancing measures insofar as they help children exercise their right to education under Article 2 Protocol 1 of the European Convention on Human Rights (ECHR) and Article 28 of the UN Convention of the Rights of the Child. These measures, however, may come into conflict with others rights such as the respect for private life (Article 8 ECHR).

The Bill includes measures to extend the power of staff in schools to search pupils for any item which the school rules identify as an item for which a search can be made. We welcome the Government's intention to issue guidance on the obligations of governing bodies under Article 8 ECHR to respect private life when identifying items in the school rules as items which pupils can be searched for. However, we consider that this open-ended power may fall foul of the requirement that interferences with the right to respect for private life must be "in accordance with the law" unless the power is circumscribed by reference to the purpose for which a search may be made. We recommend that the guidance should make clear that only items capable of being disruptive to teaching or learning, threatening to the safety of pupils and teachers, or which breach criminal law can be identified in school rules as items for which searches of pupils can be made. Guidance should also advise on when the exceptional power to search a pupil of the opposite sex can be exercised, making clear the Government expectation that a secondary school teacher would search a pupil of the opposite sex only "on very rare occasions". We conclude that personal searches (excluding searches of lockers, bags and outer clothing) should only be conducted when there is a risk of serious and imminent harm.

The Bill also provides a power for staff to examine and erase data on pupils' electronic devices. We accept the necessity of a properly circumscribed power to examine and erase data and welcome the Government's intention to give guidance on how it should be exercised. We have concerns, however, about the width of the power as defined in the Bill, given the potentially serious interference with the right to respect for private life. We recommend that the power to examine and erase data "if the person thinks there is a good reason to do so" should be replaced by a power "if the person has reasonable grounds to suspect that the device has been, or is likely to be, used for purposes which are unlawful or

contrary to school rules." In our Report we suggest amendments to the Bill to this effect.

School exclusion appeals

We also consider the change to the process of challenging exclusions from schools in England. This is a particularly important issue given the impact a permanent exclusion can have on the life of the excluded pupil. We are particularly aware that the majority of students excluded from school have Special Educational Needs. The current independent appeal panels will be replaced with "independent review panels" with more limited powers, with the aim of stopping schools from being forced by appeal panels to re-admit excluded pupils. We are not persuaded that the evidence provided by the Government shows the necessity for abolishing independent appeals panels. We conclude that Article 6 ECHR, the right of access to a court or tribunal, applies to the decision permanently to exclude a child from a school. On this basis, we argue that the provisions for review panels without full appellate jurisdiction and without the power to order reinstatement are incompatible with the requirements of the Article. Further consideration should be given to the recommendation of the Administrative Justice and Tribunals Council that all exclusion appeals be referred to a First-Tier Tribunal, which would remove the incompatibility by providing for the right of access for an excluded pupil to a genuinely independent tribunal with the necessary jurisdiction to provide an effective remedy.

Teacher Anonymity

The Bill provides for restrictions on the reporting of allegations made against teachers amounting to charges of a criminal offence, before they have been charged with a criminal offence. While these restrictions represent an interference with freedom of expression, but we are satisfied that the evidence provided by the Government justify that the restrictions are necessary and proportionate in order to protection the reputation and rights of teachers.

Bills drawn to the attention of both Houses

1 Education

Date introduced to first House	26 January 2011
Date introduced to second House	12 May 2011
Current Bill Number	HL Bill 67
Previous Reports	None

Introduction

1.1 The Education Bill was introduced in the House of Lords on 12 May 2011, having completed its passage in the Commons on 11 May.[1] Lord Hill of Oareford has certified that, in his view, the Bill is compatible with Convention rights. The Bill is due to receive its Second Reading in the House of Lords on 14 June.

Information provided by the Department

1.2 The Explanatory Notes to the Bill set out the Government's view of the Bill's compatibility with the ECHR at paras 355–390.[2] Although these Notes identify most of the provisions in the Bill with human rights implications, the explanation of the Government's reasons for its view that those provisions are compatible with the ECHR is for the most part rather cursory and often does not go beyond mere assertion of the Government's view that a particular interference with a Convention right is necessary, serves a legitimate aim and is proportionate.

1.3 Shortly after the Bill's introduction in the Commons, however, the Department for Education also provided the Committee with a detailed Human Rights Memorandum dated 1 February 2011, setting out the Government's views on the principal human rights implications of the Bill.[3] The Memorandum helpfully provides a much more detailed account than the Explanatory Notes of the Government's reasons for concluding either that particular provisions do not interfere with human rights or that any interference is justified. It also considers the provisions of the Bill against the rights enshrined in the UN Convention on the Rights of the Child, as envisaged in the Government's response to the Dunford Review of the Children's Commissioner.[4] The detail and quality of the human rights analysis in the Memorandum shows that serious and careful consideration has been given to the human rights implications of the Bill.

1.4 Following our consideration of the Human Rights Memorandum we wrote to the Secretary of State for Education on 22 March 2011 asking for further information on a number of specific issues raised by the Bill.[5] We received a full and helpful response from

1 HL Bill 67.

2 HL Bill 67–EN.

3 Human Rights Memorandum dated 1 February 2011, Ev 19–53

4 Written Ministerial Statementby Sarah Teather MP (Minister of State for Children and Families), on the Publication of the independent review of the Children's Commissioner, 6 December 2010: "I can therefore make a clear commitment that the Government will give due consideration to the UNCRC Articles when making new policy and legislation."

5 Ev 53–57

the Secretary of State by letter dated 7 April 2011.[6] The Bill team has also made itself available for meetings with the Committee staff.

1.5 **We welcome the Department's pro-active approach to our scrutiny of this Bill for human rights compatibility and we commend it as an example of best practice to be followed by other departments. In particular, the provision of a very full and detailed Human Rights Memorandum shortly after the Bill's introduction enabled us to confine our questions to the Department to a relatively small number of specific issues. In this Report we comment on four significant human rights issues on which our scrutiny of the Bill has focused.**

The significant human rights issues

(1) Free early years' provision

1.6 The Bill enables the extension of the entitlement to free early years provision to all disadvantaged two-year-olds, in order to help narrow the gap between the attainment of children from rich and poor backgrounds.[7]

1.7 We welcome the Bill's extension of free early years provision as a human rights enhancing provision. As the Government's Human Rights Memorandum points out,[8] this enhances the UK's compliance with Articles 2 and 28 of the UN Convention on the Rights of the Child and responds to specific recommendations of the UN Committee on the Rights of the Child in 2008 about investing resources to ensure the right of all children to a truly inclusive education.

(2) Extended powers to search pupils

1.8 One of the Bill's main themes is discipline in schools: it includes a number of measures which are designed to ensure that professionals in schools have the authority and powers to tackle poor behaviour so that all children can learn. **We welcome the inclusion in the Bill of measures to improve discipline and behaviour in schools. As the Government's Human Rights Memorandum correctly points out, such measures are, in principle, human rights enhancing measures, insofar as they enable all children better to exercise their right to education which is guaranteed by Article 2 Protocol 1 ECHR and Article 28 of the UN Convention on the Rights of the Child.9**

1.9 However, although measures to improve discipline and behaviour are themselves human rights enhancing, they may also come into conflict with other rights protected by human rights law, such as the child's right to respect for their private life. We have therefore subjected the relevant provisions in the Bill to careful scrutiny to ensure that we are satisfied that the measures will not interfere unnecessarily or unjustifiably with those rights.

6 Ev 57–60

7 Clause 1.

8 Human Rights Memorandum, Ev 19–53, para 27

9 Human Rights Memorandum, Ev 19–53, para 52

(a) Power to search for items identified in school rules as prohibited items

1.10 Members of staff in schools in England already have the power to search a pupil or his or her possessions where they have reasonable grounds for suspecting that the pupil may have a "prohibited item" with him or her. Prohibited items are listed in the relevant statute and regulations and include weapons, alcohol, illegal drugs and stolen property. The Bill proposes to extend the power to search pupils for "any [...] item which the school rules identify as an item for which a search may be made."[10] The school rules must specifically identify the items for which a search may be made.[11] Force may not be used to conduct such a search.[12]

1.11 The Government's Human Rights Memorandum acknowledges that this extended power to search includes a power to search for items that in themselves may well be innocuous.[13] The Government also accepts that such a search interferes with a pupil's right to respect for their private life under both Article 8 ECHR and Article 16 UNCRC, but considers that such interferences would be justified. It accepts that the power to search for an item that is not intrinsically harmful cannot be supported by the use of force. It considers that the requirement that such interferences be "in accordance with the law" is satisfied because the Bill provides that the item can only be searched for if it is identified as such in the school rules.

1.12 However, the Bill itself does not prescribe the sorts of items which can be so identified by the school rules, nor does it contain any limitation on the sorts of items which can be so identified. The Government indicated in its Human Rights Memorandum that it intends to produce guidance for schools explaining the nature of the obligations on them under Article 8 ECHR.[14] We therefore asked the Government what guidance it intends to give to schools about the sorts of items in respect of which it may be justifiable for the school rules to identify as items for which pupils may be searched.

1.13 The Government replied that it does not intend to issue guidance that gives examples or categories of items because it wants to leave it to schools to identify, in their behaviour policies, items that are causing problems in their school, or have the potential to do so. It says that the purpose of the provision in the Bill is to enable teachers to search for items which, though not intrinsically or potentially harmful, are disruptive to teaching. However, the Government says that it does wish to support schools in understanding their obligations under Article 8 ECHR and it intends to issue guidance on the applicable necessity and legitimate aim obligations under Article 8 ECHR. It envisages that this guidance "would inform the governors' and head teacher's determination of what items might go into the rules as items that can be searched for."

1.14 **We welcome the Government's intention to issue guidance to governing bodies to help them understand their obligations under the right to respect for private life in Article 8 ECHR when deciding what items should be identified in the school rules as items for which pupils can be searched. We are also concerned about ensuring that**

10 New section 550ZA(3)(g) Education Act 1996, as inserted by clause 2(2)(b) of the Bill.

11 New section 89(4A) Education and Inspections Act 2006, as inserted by clause 2(6) of the Bill.

12 Section 550ZB(5) Education Act 1996, as amended by clause 2(3)(a) of the Bill.

13 Human Rights Memorandum, Ev 19–53, para 70

14 Ibid., para 71

there is sufficient certainty about the circumstances in which force may be used in any personal search of a pupil (excluding searches of lockers, bags, and outer clothing). We recommend that such guidance should have the status of statutory guidance and we look forward to the opportunity to scrutinise and comment on a draft of such guidance.

1.15 **We have considered whether such an open-ended power to search pupils for items which may be prohibited by the school rules contains sufficient safeguards against arbitrariness to satisfy the legal requirement that interferences with the right to respect for private life must be "in accordance with the law." There is a risk of the new provision falling foul of that requirement unless the new power to search is circumscribed in some way by reference to the purpose for which such a search may be made. We recommend that the guidance which is proposed by the Government should make clear that only items capable of being disruptive to teaching or learning, or threatening the safety of pupils or teachers, or breaching the criminal law, can be identified in the school rules as items for which searches of pupils may be made.**

(b) Power to search pupils of the opposite sex

1.16 The Bill also relaxes the safeguards that apply when a pupil is searched, by providing that a person carrying out a search of a child need not be of the same sex as the child, or carried out in the presence of another member of staff, if (a) the person reasonably believes that there is a risk that serious harm will be caused to a person if the search is not carried out as a matter of urgency and (b) if in the time available it is not reasonably practicable for the search to be carried out by a person of the same sex as the child.[15]

1.17 The principal justification for the relaxation of these safeguards is that in primary schools there is often a lack of male teachers. As drafted, however, the provision would apply equally to searches of secondary school pupils and students at further education institutions and sixth form colleges. The Human Rights Memorandum acknowledges that the provision would have most impact in primary schools but states that "the Government envisages that in practice it would be on very rare occasions that secondary school teachers would undertake a search of a pupil of the opposite sex."[16] We therefore asked the Government what safeguards it intends to provide to ensure that the power to search a pupil of the opposite sex in secondary schools is only used "on very rare occasions" as it envisages.

1.18 The Government view is that the circumstances in which the searcher can search a child of the opposite sex are sufficiently tightly drawn to make this provision compatible with Article 8.[17] It relies on the two tests which must be satisfied before such a search of a member of the opposite sex can be carried out. It considers that those two tests are the safeguards which will ensure that the power will only ever be used on very rare occasions (in primary schools as well as secondary schools). The Government believes that teachers and college staff can be trusted, as professionals, to act in accordance with the law and to use the flexibility the provisions provide in an appropriate and proportionate way.

15 New section 550ZB(6) and (6A) Education Act 1996, as inserted by clause 2(3) of the Bill.Clause 3(3) of the Bill makes similar provision in relation to further education institutions and sixth form colleges, amending s. 85AB of the Further and Higher Education Act 1992.

16 Human Rights Memorandum, Ev 19–53, para 76

17 Human Rights Memorandum, Ev 19–53, para 77

1.19 We have considered carefully whether the Bill's relaxation of the safeguards surrounding searches of pupils of the opposite sex risk give rise to breaches of the right to respect for private life in particular of older pupils. We are mindful of the fact that, sadly, in some schools there are problems with weapons being brought into school and we therefore accept in principle the necessity of making provision for an urgent power to search even a pupil of the opposite sex if there is a real risk of serious harm to others. Such a power must be very narrowly defined in order to ensure that it is not arbitrarily or inappropriately used.

1.20 We accept that the requirement of reasonable belief that there is a risk of "serious harm" if the search is not carried out urgently is an important restriction on the scope of the power. We do have some concerns, however, about the possible use of the power in relation to older children. The provision is said to be necessary because of practical difficulties which have arisen in primary schools, but it is drafted in a way which is equally applicable to searches of secondary school pupils, who arguably have a greater expectation that they will not be searched by a member of the opposite sex. The importance of the safeguard for privacy increases with the age of the pupil, but there is nothing on the face of the Bill which acknowledges this.

1.21 **We recommend that the guidance which the Government intends to issue to governing bodies to help them understand their obligations under the right to respect for private life in Article 8 ECHR should also provide guidance as to the exceptional circumstances in which the power to search a pupil of the opposite sex can be exercised. The guidance should make clear that such searches should only be conducted in seondary schools by a person of the opposite sex when there is a risk of serious and imminent harm and that the expectation of privacy increases with the age of the pupil. It should also make explicit the Government's clear intention that it would only be "on very rare occasions" that a secondary school teacher would conduct a personal search of a pupil of the opposite sex (as opposed to a search of lockers, bags and outer clothing).**

(c) Power to examine and erase data on electronic devices

1.22 The Bill provides a very wide power to examine and erase any data or files on an electronic device confiscated from a pupil "if the person thinks there is good reason to do so."[18] The person who seized the device from the pupil must have regard to any guidance issued by the Secretary of State in determining whether there is "a good reason" for examining or deleting the data or files.[19]

1.23 The intention behind the provision is to allow the searcher to see whether there are, for example, any images of bullying or threatening messages that show that the device is being used for cyber-bullying.[20] This is clearly a legitimate aim: as the Government acknowledges elsewhere in its Human Rights Memorandum, human rights law imposes on the State a positive obligation to take measures and set up adequate mechanisms to prevent bullying in schools.[21] However, the power is very widely drafted and there is nothing on the

18 New section 550ZC(6E) and (6F) Education Act 1996, as inserted by clause 2(4) of the Bill.

19 New section 550ZC(6G).

20 Human Rights Memorandum, Ev 19–53, para 85

21 Human Rights Memorandum, Ev 19–53, para 51 (referring to the Concluding Observations of the UN Committeee on the Rights of the Child).

face of the Bill to restrict its scope by indicating, for example, the purpose for which the power may be exercised. The Government said in its Human Rights Memorandum that its intention is to prevent possible misuse of the power by issuing guidance. We therefore asked the Government what safeguards it intends to include in guidance to ensure against the arbitrary exercise in practice of the very wide power to examine and erase data on an electronic device seized from a pupil.

1.24 The Government's response is that guidance will make clear that any examination or erasure of data or files must link directly to the teacher's justification for conducting the search in the first place. The Government's view is that a teacher would have a "good reason" for examining the content of a mobile phone or other electronic device if they suspect or are made aware that it has been, or is likely to be, used to circulate inappropriate images or material, for example for the purposes of bullying or harassment. Use of the power for such a purpose would clearly be justified and proportionate, and therefore compatible with human rights law, in the particular case. However, the Government's response does not directly address the concern about the width of the power as defined on the face of the Bill.

1.25 **We accept the necessity for a properly circumscribed power to examine and erase data on a pupil's electronic device and we welcome the Government's intention to give guidance about the exercise of the power. We have concerns, however, about the width of the power as currently defined in the Bill. Given the potentially serious interference with a pupil's right to respect for private life, we recommend that the power to examine and erase "if the person thinks there is a good reason to do so" be replaced by a more tightly defined power which is exercisable "if the person has reasonable grounds to suspect that the device has been, or is likely to be, used for purposes which are unlawful or contrary to the school rules." The following suggested amendments to the Bill are designed to give effect to this recommendation:**

> **Clause 2(4), page 5, line 31, leave out "thinks there is a good reason to do so" and insert "has reasonable grounds to suspect that the device has been, or is likely to be, used for purposes which are unlawful or contrary to the school rules."**
>
> **Clause 2(4), page 5, line 36, leave out "thinks there is a good reason to do so" and insert "has reasonable grounds to suspect that the data or files have been, or are likely to be, used for purposes which are unlawful or contrary to the school rules."**
>
> **Clause 2(4), page 5, line 37, leave out "good reason" and insert "power to examine or erase any data or files on an electronic device".**

(3) School exclusion appeals

1.26 The Bill changes the process for challenging permanent exclusions from schools in England by replacing the current independent appeal panels with "independent review panels" which have more limited powers.[22] The most significant change is that, unlike the independent appeal panels which currently exist, review panels will have no power to

22 Clause 4, inserting new section 51A into the Education Act 2002, and Schedule 1.

direct reinstatement of a pupil. The review panel will have power to uphold the decision of the governing body, to recommend that the governing body reconsiders the matter, or, if it considers that the decision of the governing body was "flawed when considered in the light of the principles applicable on an application for judicial review", to quash the decision of the governing body and direct it to reconsider the matter.[23] The aim of the change is to stop schools from being forced by appeal panels to re-admit excluded pupils. The Government's justification is that "the possible reinstatement of an excluded pupil—however rarely this happens—can undermine the headteacher's authority",[24] demoralise staff, and make pupils feel less safe in their classrooms.[25]

1.27 We approach this issue acutely aware of the impact a permanent exclusion can have on the life of the excluded pupil. We are particularly aware of the fact that the great majority of students excluded from school have Special Educational Needs.

Concerns of the Administrative Justice and Tribunals Council

1.28 The Administrative Justice and Tribunals Council ("the AJTC"), whose statutory remit is to keep under review the administrative justice system and the constitution and working of tribunals, including exclusion appeal panels, wrote us on 10 May 2011 expressing serious concerns about the provisions in the Bill replacing independent appeal panels with review panels.[26] The AJTC's concerns include whether the proposed new arrangements provide for genuinely independent review of exclusion decisions and comply with the right to a fair hearing in Article 6 ECHR and the right to an effective remedy in Article 13.

1.29 In short, while the AJTC fully supports the Government's aim of strengthening discipline in schools to restore the authority of teachers in the classroom, it queries the necessity for changing the current system of exclusion appeals and is concerned that the more limited powers of the review panel proposed fail to provide an effective remedy for the small but important minority of cases in which the review body finds that the allegation in question has not been proven on the facts or the decision to exclude was disproportionate. Pointing out that some 70% of permanent exclusions affect children with Special Educational Needs,[27] it recommends that all appeals against permanent exclusions should be heard by the First-Tier Tribunal (Special Educational Needs and Disability).

1.30 The response to the AJTC on behalf of the Secretary of State rejects these concerns.[28] It refers to several complaints from head teachers and governors concerned about independent appeal panel decisions and says that ministers are clear that headteachers should have the final say over exclusions and not fear that they will be forced to re-admit children who have misbehaved violently. It refers to support for the replacement of independent appeal panels in evidence before the Public Bill Committee on the Bill and, for

23 News s. 51A(4) Education Act 2002.

24 *The Importance of Teaching: The Schools White Paper* 2010, para 3.29

25 Letter dated 7 April 2011 from the Secretary of State, Ev 57–66

26 Letter to the Chair dated 10 May 2011 from Richard Thomas CBE, AJTC Chairman, Ev 66–67. The AJTC expressed similar concerns in a letter to the Secretary of State dated March 2011, published with the evidence to the Public Bill Committee.

27 Lamb Inquiry Report, Special Educational Needs and Parental Confidence (2010).

28 Letter dated 6 April 2011 from the Department for Education to the AJTC, published with the evidence to the Public Bill Committee.

reasons considered in more detail below, disagrees with the argument that the provisions in the Bill are not compatible with Articles 6 and 13 ECHR. While disability-related permanent exclusion cases will automatically be heard by the First-Tier Tribunal (SEND), the Government considered but rejected the option of all SEN-related permanent exclusions being heard by that Tribunal. This was done on the ground that cases going to the Tribunal take 22 weeks to complete a hearing, compared to the 15 school days within which the proposed review panels will be required to meet. In SEN-related cases there will be the additional safeguard that parents will be able to request the attendance of an SEN expert at the review panel if it is relevant to the exclusion. The Government also rejected the suggestion that all appeals against permanent exclusions should go to the First-Tier Tribunal (SEND) on the ground that where there is no element of SEN involved this would be an extension to its jurisdiction.

Evidence of the need to change the current appeals process

1.31 To ascertain the extent to which this is an actual, practical problem, we asked the Government in how many cases reinstatement of an excluded pupil has been ordered by an independent appeal panel in each of the last three years for which figures are available (i) in total, (ii) as a proportion of the total number of appeals brought and (iii) as a proportion of the total number of exclusions. The Government's response indicates that the number of cases in which reinstatement was directed fell from 100 in 2006–07 to 60 in 2008/09, which is less than 1% of all permanent exclusions.

1.32 The AJTC argues that one of the main flaws in the policy analysis underpinning the Government's proposals is the implication that all exclusions concern children who have been violent against teachers or fellow pupils. This, it says, is "patently not the case". It says that over the past few years there have been one or two high profile cases reported in the media of panels reinstating violent pupils who had allegedly attacked teachers with a weapon, but that these are clearly exceptional cases which do not provide a satisfactory basis for abolishing independent appeal panels. The majority of appeals which succeed, according to the AJTC, do so because, on the basis of the evidence before them, the panel either did not accept that the pupil had done what he or she was alleged to have done or considered that the decision to exclude was not proportionate.

1.33 **We have considered carefully whether the statistics and other evidence demonstrate the necessity for abolishing independent appeal panels which is claimed by the Government. We are not persuaded by the Government's case. We are particularly influenced in reaching this conclusion by the views of the Administrative Justice and Tribunals Council, which has extensive experience of the operation in practice of the tribunal system and has taken a strong interest in the operation of school exclusion appeal panels for some years.**

1.34 The remainder of this section considers whether, if Parliament is persuaded of the need to reform the current exclusion appeals process, the proposed replacement is compatible with the requirements of human rights law: in particular, the right of access to an independent court or tribunal, and the right to an effective remedy.

Whether the right of access to a court or tribunal applies to school exclusions

1.35 In its Human Rights Memorandum the Government relies on the case of *R (on the application of LG) v The Independent Panel for Tom Hood School* [2010] EWCA Civ 142 in support of its view that the right of access to a court in Article 6 ECHR is not engaged because exclusion is not determinative of a civil right.[29] The *Tom Hood* case was decided in February 2010. In March 2010, however, the Grand Chamber of the European Court of Human Rights decided *Orsus v Croatia*, in which it held that Article 6 ECHR applied to an education dispute. We asked the Government whether, in the light of that decision of the European Court of Human Rights, it remains its view that exclusion from school is not determinative of a civil right.

1.36 In its response the Government maintains its view that the right of access to a court or tribunal in Article 6 ECHR does not apply to school exclusions because they are not determinative of a civil right. The Government seeks to distinguish the decision in *Orsus v Croatia* on the basis that the educational dispute to which Article 6 was held to apply in that case was not about exclusion from school but about discriminatory treatment of Roma children in schools by placing them in separate classes. The right being determined in that case was therefore different from what is being determined in a permanent exclusion case. In the Government's view, a decision to permanently exclude a child from a particular school does not determine any civil right, because the right to education in Article 2 Protocol 1 ECHR is not a guarantee of a right to be educated at or by a particular educational institution; also, the domestic legal framework ensures that a permanently excluded pupil continues to receive education following exclusion.

1.37 It is correct to say that the *Orsus v Croatia* case concerned discrimination in the educational context and not exclusion. In our view, however, if Article 6 ECHR applies to such an educational dispute, exclusion from school is an even stronger case. In the operative part of the Court's reasoning in the *Orsus* case (paras 104–107), the Court explicitly referred to the fact that the old Commission decision of *Simpson v UK*, which was previously relied on by the Government as authority for the proposition that Article 6 does not apply to educational disputes, has been abandoned by the Court and is no longer good law. The Court also referred to its case-law establishing that, where a State confers rights which can be enforced by means of a judicial remedy, these can, in principle, be regarded as civil rights within the meaning of Article 6(1) ECHR. The right in question in a permanent exclusion case is not the right to education, but the right to continue to attend the school at which the child is enrolled, a right which is enforceable before the ordinary civil courts by way of judicial review. **In our view it is clear, in light of the Court's reasoning in the Orsus v Croatia judgment, that as a matter of Convention law Article 6 ECHR applies to decisions permanently to exclude a child from school.**

1.38 The Government also refers in its response to the recent decision of the European Court of Human Rights in *Ali v UK*, in which the Court held that an excluded pupil had not been denied the right to education under Article 2 Protocol 1 ECHR. However, as the Government acknowledges in its letter, the Court in that case did not specifically consider the applicability of Article 6 ECHR and it is therefore not relevant to the particular issue being considered here, namely the applicability of Article 6 ECHR to exclusion appeals.

29 Article 6(1) ECHR has been interpeted by the European Court of Human Rights as guaranteeing a right of access to an independent court or tribunal in relation to "the determination of his civil rights and obligations."

1.39 **In our view, whether considered as a matter of Convention law or as a matter of the common law, the right of access to an independent court or tribunal applies to permanent exclusions from school.**

An effective remedy?

1.40 The Government argues that, even if it is wrong about the applicability of Article 6 ECHR to school exclusions, the combination of the review panel and the possibility of judicial review is adequate and sufficient to satisfy the requirements of Article 6. The Human Rights Memorandum, for example, states (para. 90) that the review panel provided for by the Bill "provides for an independent review of the facts" and that this, coupled with the availability of judicial review, is sufficient to satisfy the requirement of Article 6 ECHR. However, the review panel only has the power to quash the decision of the governing body not to reinstate "if it considers that the decision of the responsible body was flawed when considered in the light of the principles applicable on an application for judicial review."[30] This does not provide an opportunity to challenge factual findings.

1.41 When asked to explain how, in the light of that provision, the proposed review panels can be said to provide for an independent review of the facts, the Government maintained its view that the review panel "will provide for an independent review of the facts of an exclusion." It also effectively refused to answer the question whether, assuming Article 6 to apply, the lack of a power to order reinstatement breaches that Article because it fails to provide the means to give practical effect to the judgment of an independent tribunal. The Government response was to re-assert its view that Article 6 does not apply.

1.42 The view of the AJTC is that the provisions in the Bill will not guarantee the genuinely independent review that, as a matter of justice and due process, is needed where decisions to exclude a child from school are challenged. In view of the seriousness of the consequences of exclusion, the AJTC argues, the allegations, their seriousness and the judgments made in each case need to be examined to ensure that the decision can be justified and was correct. The proposals, in the AJTC's view, will therefore inevitably lead to injustice. It maintains its longstanding recommendation that all appeals against permanent exclusions should be heard by the First Tier Tribunal (Special Educational Needs and Disability). It queries the Departments's assertion that SEN appeals typically take 22 weeks, pointing out that the tribunal is currently piloting an 8-week turnaround time for some SEN appeals, and believes that exclusion appeals could be handled even more swiftly. It also points out that, since 70% of exclusion appeals concern SEN, it would be more economic for all exclusion appeals to be heard by the tribunal with the experience and expertise in dealing with such appeals, rather than require each local authority across the country to set up and operate a separate system of review panels to deal with only 30% of the total number of appeals (192 out of 640 in 2008–09).

1.43 **In our view it is clear that, if Article 6 applies, the provisions in the Bill for review panels without full appellate jurisdiction on factual matters and without the power to order reinstatement, are incompatible with the requirements of that Article. We therefore recommend that, if Parliament is persuaded of the necessity to reform the current system, the Bill be amended in order to remove this incompatibility. We**

30 New s. 51A(4)(c) Education Act 2002, inserted by clause 4(2) of the Bill.

recommend that further consideration be given to the recommendation of the Administrative Justice and Tribunals Council, that all exclusion appeals go to the First-Tier Tribunal (Special Educational Needs and Disability), as this, in our view, would remove the incompatibility by providing for a right of access to a genuinely independent tribunal with the necessary jurisdiction to provide an effective remedy.

(4) Teacher anonymity

1.44 The Bill provides for restrictions on the public reporting of allegations made against teachers amounting to charges of a criminal offence, before they have been actually charged with a criminal offence.[31] Breach of the restrictions is a criminal offence.

1.45 The Government acknowledges that the reporting restrictions interfere with the right to freedom of expression in Article 10 ECHR, but is satisfied that any interference is justified as a necessary and proportionate means of achieving the legitimate aim of protecting the reputation and rights of teachers and supporting teachers in their role as the professionals responsible for classroom discipline.[32] The Government considers that the provision answers a "pressing social need" because teachers are particularly vulnerable to false allegations from pupils. The Government cites in support of its view evidence from teachers' unions that the number of allegations against teachers has increased significantly in recent years and "in the overwhelming majority of these cases, the allegations are not substantiated and a significant number are false."

1.46 We asked a number of questions in order to ascertain the full extent of the problem to which this provision is responding and the weight of the justification for creating a new expression-based criminal offence. The Government does not have data showing in how many cases allegations against teachers have been made public before charge, but it provides six examples of such cases. The creation of a new criminal offence for breach of the reporting restrictions is said to be justified in view of the serious detriment suffered by individual teachers when false allegations are published, and the lack of effective remedies available to teachers to prevent such publication.

1.47 When asked what reason there is to believe that teachers are more vulnerable to false allegations from pupils than other professions such as prison officers, police officers, members of the armed forces or staff at secure training centres, the Government says that it has not been provided with any evidence of a problem for other professionals on the scale of that suffered by teachers and teachers are more vulnerable to false allegations because they spend a much higher proportion of their working life with pupils.

1.48 **We recognise that reporting restrictions backed up by criminal sanctions represent a serious interference with freedom of expression. However, we are satisfied that the evidence and justifications relied on by the Government are sufficient to justify the imposition of such reporting restrictions as a necessary and proportionate means of achieving the legitimate aim of protecting the reputation and rights of teachers and supporting teachers in their role as the professionals responsible for classroom discipline.**

31 Clause 13 of the Bill, inserting new sections 141F, 141G and 141H into the Education Act 2002.

32 Human Rights Memorandum, Ev 19–53, para 108

2 Bills not requiring to be brought to the attention of either House: Energy Bill

2.1 We publish, without comment, the Human Rights Memorandum which we have received from the Department for Energy in relation to the Energy Bill.

Conclusions and recommendations

Information provided by the Department

1. We welcome the Department's pro-active approach to our scrutiny of this Bill for human rights compatibility and we commend it as an example of best practice to be followed by other departments. In particular, the provision of a very full and detailed Human Rights Memorandum shortly after the Bill's introduction enabled us to confine our questions to the Department to a relatively small number of specific issues. In this Report we comment on four significant human rights issues on which our scrutiny of the Bill has focused. (Paragraph 1.5)

The significant human rights issues

2. We welcome the inclusion in the Bill of measures to improve discipline and behaviour in schools. As the Government's Human Rights Memorandum correctly points out, such measures are, in principle, human rights enhancing measures, insofar as they enable all children better to exercise their right to education which is guaranteed by Article 2 Protocol 1 ECHR and Article 28 of the UN Convention on the Rights of the Child. (Paragraph 1.8)

3. We welcome the Government's intention to issue guidance to governing bodies to help them understand their obligations under the right to respect for private life in Article 8 ECHR when deciding what items should be identified in the school rules as items for which pupils can be searched. We are also concerned about ensuring that there is sufficient certainty about the circumstances in which force may be used in any personal search of a pupil (excluding searches of lockers, bags, and outer clothing). We recommend that such guidance should have the status of statutory guidance and we look forward to the opportunity to scrutinise and comment on a draft of such guidance. (Paragraph 1.14)

4. We have considered whether such an open-ended power to search pupils for items which may be prohibited by the school rules contains sufficient safeguards against arbitrariness to satisfy the legal requirement that interferences with the right to respect for private life must be "in accordance with the law." There is a risk of the new provision falling foul of that requirement unless the new power to search is circumscribed in some way by reference to the purpose for which such a search may be made. We recommend that the guidance which is proposed by the Government should make clear that only items capable of being disruptive to teaching or learning, or threatening the safety of pupils or teachers, or breaching the criminal law, can be identified in the school rules as items for which searches of pupils may be made. (Paragraph 1.15)

5. We recommend that the guidance which the Government intends to issue to governing bodies to help them understand their obligations under the right to respect for private life in Article 8 ECHR should also provide guidance as to the exceptional circumstances in which the power to search a pupil of the opposite sex can be exercised. The guidance should make clear that such searches should only be

conducted in seondary schools by a person of the opposite sex when there is a risk of serious and imminent harm and that the expectation of privacy increases with the age of the pupil. It should also make explicit the Government's clear intention that it would only be "on very rare occasions" that a secondary school teacher would conduct a personal search of a pupil of the opposite sex (as opposed to a search of lockers, bags and outer clothing). (Paragraph 1.21)

6. We accept the necessity for a properly circumscribed power to examine and erase data on a pupil's electronic device and we welcome the Government's intention to give guidance about the exercise of the power. We have concerns, however, about the width of the power as currently defined in the Bill. Given the potentially serious interference with a pupil's right to respect for private life, we recommend that the power to examine and erase "if the person thinks there is a good reason to do so" be replaced by a more tightly defined power which is exercisable "if the person has reasonable grounds to suspect that the device has been, or is likely to be, used for purposes which are unlawful or contrary to the school rules." The following suggested amendments to the Bill are designed to give effect to this recommendation:

Clause 2(4), page 5, line 31, leave out "thinks there is a good reason to do so" and insert "has reasonable grounds to suspect that the device has been, or is likely to be, used for purposes which are unlawful or contrary to the school rules."

Clause 2(4), page 5, line 36, leave out "thinks there is a good reason to do so" and insert "has reasonable grounds to suspect that the data or files have been, or are likely to be, used for purposes which are unlawful or contrary to the school rules."

Clause 2(4), page 5, line 37, leave out "good reason" and insert "power to examine or erase any data or files on an electronic device". (Paragraph 1.25)

7. We have considered carefully whether the statistics and other evidence demonstrate the necessity for abolishing independent appeal panels which is claimed by the Government. We are not persuaded by the Government's case. We are particularly influenced in reaching this conclusion by the views of the Administrative Justice and Tribunals Council, which has extensive experience of the operation in practice of the tribunal system and has taken a strong interest in the operation of school exclusion appeal panels for some years. (Paragraph 1.33)

8. In our view it is clear, in light of the Court's reasoning in the *Orsus v Croatia* judgment, that as a matter of Convention law Article 6 ECHR applies to decisions permanently to exclude a child from school. (Paragraph 1.37)

9. In our view, whether considered as a matter of Convention law or as a matter of the common law, the right of access to an independent court or tribunal applies to permanent exclusions from school. (Paragraph 1.39)

10. In our view it is clear that, if Article 6 applies, the provisions in the Bill for review panels without full appellate jurisdiction on factual matters and without the power to order reinstatement, are incompatible with the requirements of that Article. We therefore recommend that, if Parliament is persuaded of the necessity to reform the current system, the Bill be amended in order to remove this incompatibility. We

recommend that further consideration be given to the recommendation of the Administrative Justice and Tribunals Council, that all exclusion appeals go to the First-Tier Tribunal (Special Educational Needs and Disability), as this, in our view, would remove the incompatibility by providing for a right of access to a genuinely independent tribunal with the necessary jurisdiction to provide an effective remedy. (Paragraph 1.43)

11. We recognise that reporting restrictions backed up by criminal sanctions represent a serious interference with freedom of expression. However, we are satisfied that the evidence and justifications relied on by the Government are sufficient to justify the imposition of such reporting restrictions as a necessary and proportionate means of achieving the legitimate aim of protecting the reputation and rights of teachers and supporting teachers in their role as the professionals responsible for classroom discipline. (Paragraph 1.48)

Formal Minutes

Tuesday 7 June 2011

Members present:

Dr Hywel Francis, in the Chair

Lord Bowness	Mr Mike Crockart
Baroness Campbell of Surbiton	Mr Dominic Raab
Lord Dubs	Mr Virendra Sharma
Lord Morris of Handsworth	
Baroness Stowell of Beeston	

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Draft Report, *Legislative Scrutiny: Education Bill*, proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 1.32 read and agreed to.

Paragraph 1.33 read,

Question put, That the paragraph stand part of the Report.

The Committee divided.

Content, 7	Not content, 1
Lord Bowness	Mr Dominic Raab
Baroness Campbell of Surbiton	
Mr Mike Crockart	
Lord Dubs	
Dr Hywel Francis	
Lord Morris of Handsworth	
Mr Virendra Sharma	

Paragraph agreed to.

Paragraphs 1.34 to 1.36 read and agreed to.

Paragraph 1.37 read,

Question put, That the paragraph stand part of the Report.

The Committee divided.

Content, 7	Not content, 1
Lord Bowness	Mr Dominic Raab
Baroness Campbell of Surbiton	
Mr Mike Crockart	
Lord Dubs	
Dr Hywel Francis	
Lord Morris of Handsworth	
Mr Virendra Sharma	

Paragraph agreed to.

Paragraph 1.38 read and agreed to.

Paragraph 1.39 read,

Question put, That the paragraph stand part of the Report.

The Committee divided.

Content, 7	Not content, 1
Lord Bowness	Mr Dominic Raab
Baroness Campbell of Surbiton	
Mr Mike Crockart	
Lord Dubs	
Dr Hywel Francis	
Lord Morris of Handsworth	
Mr Virendra Sharma	

Paragraph agreed to.

Paragraphs 1.40 to 1.42 read and agreed to.

Paragraph 1.43 read,

Question put, That the paragraph stand part of the Report.

The Committee divided.

Content, 7	Not content, 1
Lord Bowness	Mr Dominic Raab
Baroness Campbell of Surbiton	
Mr Mike Crockart	
Lord Dubs	
Dr Hywel Francis	
Lord Morris of Handsworth	
Mr Virendra Sharma	

Paragraph agreed to.

Paragraphs 1.44 to 1.48 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Thirteenth Report of the Committee to each House.

Ordered, That the Chair make the Report to the House of Commons and that Lord Dubs make the Report to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence reported and ordered to be published on 8 February, 29 March, 28 April, 12 May and 7 June was ordered to be reported to the House for printing with the Report.

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[Adjourned till Tuesday 14 June at 2.00 pm

Declaration of Lords Interests

No members present declared interests relevant to this Report.

A full list of members' interests can be found in the Register of Lords' Interests:
http://www.publications.parliament.uk/pa/ld/ldreg/reg01.htm

List of Written Evidence

Written evidence

1. Letter to the Committee Chair, from Nick Gibb MP, Minister of State for Schools, Department for Education, 2 February 2011

You will be aware that the Education Bill was introduced in Parliament on 26 January. The Bill takes forward the legislative measures in the Department for Education White Paper *The Importance of Teaching* (CM–7980) as well as measures from the Department for Business, Innovation and Skills on college freedoms and skills entitlements and two elements of the Government's reforms to higher education student finance.

I am pleased to attach a memorandum for your Committee to consider in relation to the Bill. It examines the compatibility of the legislation with the European Convention on Human Rights and considers how the measures promote human rights, in particular rights under the United Nations Convention on the Rights of the Child.

If you have any questions or require further information the please get in touch.

2 February 2011

2. Memorandum submitted by the Department for Education, 1 February 2011

Introduction

1. This Memorandum sets out the Government's views on the principal human rights implications of the Education Bill which was introduced in the House of Commons on 26 January 2011.

2. On introduction of the Bill, the Secretary of State made a statement under section 19(1)(a) of the Human Rights Act 1998 that in his view the provisions of the Education Bill are compatible with the Convention rights, as defined in section 1 of the Human Rights Act 1998; and in the explanatory notes to the Bill the Government has provided an account of its assessment of the impact of the Education Bill on the Convention rights.

3. To assist the Committee in considering the Bill this Memorandum expands upon that account: it sets out those main elements of the Bill that the Government considers create the potential for interference with the Convention rights and in each case describes what the provision does, the potential for interference, and the Government's reasons for concluding either that the provision in question does not interfere with those rights or that any interference is justified.

4. In addition, the Memorandum considers the provisions of the Bill against the rights enshrined in the United Nations Convention on the Rights of the Child.

The content of the Bill

5. There are four key themes to this Bill:

a) Restoring good behaviour: ensuring that professionals in schools and colleges have the authority and powers to tackle poor behaviour so that all children can learn.

b) Freedom: removing unnecessary duties on schools, colleges and local authorities to give them greater freedom and extending the Academies and Free Schools programme.

c) Accountability: increasing schools' accountability for raising educational standards and abolishing five arm's length boaides, with their remaining functions falling to the Secretary of State, accountable through him to Parliament.

d) Using resources fairly: narrowing the gap between the attainment of children from rich and poor backgrounds, with an entitlement to free early years provision for all disadvantaged two-year-olds and enabling a more progressive system for higher education student loans.

6. The Bill consists of ten Parts.

7. **Part 1: Early years provision.** This Part enables the Government to make regulations that will extend the requirement on local authorities to secure free early years provision for specified groups of two-year-olds. The clause also enables local authorities to identify eligible children by accessing information about their family circumstances and applies protections to prevent the unauthorised disclosure of this information.

8. **Part 2: Discipline.** Clauses in this Part make changes to the power of staff at schools and colleges to search pupils and students; reform the process for reviews of permanent exclusions by replacing Independent Appeal Panels for exclusions with Independent Review Panels; and remove the restriction on schools issuing detentions to pupils without providing 24 hours' written notice. The requirement on schools to enter into behaviour and attendance partnerships is also repealed.

9. **Part 3: School workforce.** This Part abolishes a number of arm's length bodies (the General Teaching Council for England, the School Support Staff Negotiating Body and the Training and Development Agency for Schools) and requires some of their functions to be discharged by the Secretary of State; the Secretary of State will be responsible for the funding of teacher training and the regulation of the induction and barring arrangements for teachers. It also makes provision restricting the public reporting of allegations made against teachers.

10. **Part 4: Qualifications and curriculum.** Clauses in this Part amend the structure of Ofqual and require it to compare standards in England with those internationally; abolish the Qualifications and Curriculum Development Agency; amend the law relating to careers guidance; repeal duties in respect of the diploma entitlement; and enable the Secretary of State to require schools, which are sampled, to take part in international surveys.

11. **Part 5: Educational institutions:** other provisions. This Part removes the duty on schools to produce a profile. The duty on schools and colleges to co-operate with Children's Trusts and for schools to have regard to the area's Children and Young People's Plan is repealed. Local authorities will no longer be required to provide School Improvement Partners. The requirement on local authorities to have admission forums is lifted. Local authorities will also only have to report locally on admission arrangements,

rather than to the Office of the Schools Adjudicator. The remit of the Office of the Schools Adjudicator will be only to consider the complaint received in relation to a school's admission arrangements, rather than other matters in the arrangements. This Part lifts the restriction on charging every pupil the same amount for the same school meal but in future charges will have to be no more than the cost of providing the meal. The procedure for the establishment of new schools is reformed and school governing bodies will be able to determine their composition based on skills rather than representative categories, though the position of parent governors, the head teacher, and the foundation majority is safeguarded. Ofsted routine school inspections will focus on four key areas and Ofsted will not be required to inspect outstanding schools and colleges. Ofsted will be able to charge for an inspection where a school or college voluntarily requests one. The Secretary of State will be able to ask Ofsted to inspect welfare at boarding schools that are under an independent inspectorate and for Ofsted to report annually to him about this. The problem of under-performing schools will be tackled by widening powers to direct the closure of schools and allow local authorities to be directed by the Secretary of State to issue a warning notice to schools where this is warranted. The schools complaints service established at the Local Government Ombudsman, which deals with complaints in relation to 14 LA areas is ended and the Secretary of State will be able to consider these. Nursery schools and schools with nursery classes will be allowed to charge for early years education beyond the current free entitlement, which should provide greater choice for parents and create a level-playing field between schools and voluntary and private providers of nursery education. Bureaucratic requirements on colleges will be removed, including the duties to: secure consent before borrowing; promote the social and economic well-being of the local area; and have regard to guidance on consultation with students and employers. Powers to direct a college to invoke disciplinary procedures and appoint members to governing bodies will be removed.

12. **Part 6: Academies.** Clauses in this Part refine the provisions in the Academies Act 2010 and earlier legislation and enable 16–19 only and alternative provision Academies; they streamline processes for the transfer of land for the use of Academies, with a power for the Secretary of State to direct spare school land be made available to Free Schools. Complaints about Academies' admissions will go to the Office of the Schools Adjudicator in future.

13. **Part 7: Post-16 education and training.** This Part abolishes the Young People's Learning Agency and makes the Secretary of State responsible, through a non-statutory Education Funding Agency, for funding Academies and all 16–19 provision in schools, sixth form colleges and further education colleges. It simplifies the complex performance management arrangements for the 94 sixth form colleges in England, which currently involve both the YPLA and local authorities and gives the Secretary of State the power to tackle entrenched under-performance. It replaces the duty on the Chief Executive of Skills Funding (SF) to provide an Apprenticeship place to all suitably qualified young people with a duty to fund their training as a priority when they have secured an Apprenticeship place for themselves; changes the duties and powers of the Chief Executive of SF; revises the skills entitlement to free training to those up to 24-years-old; stops the automatic commencement of the provisions enforcing the raising of the participation age and keeps under review when they should be brought into force. Raising the participation age will come into force as planned in 2013 and 2015.

14. **Part 8: Student finance.** This Part raises the cap on interest rates on new higher education student loans, to enable more progressive graduate repayment arrangements to be introduced and enables part-time undergraduate course fees to be regulated within the same framework as full-time courses, so that part-time course fees can be capped to the level of the proposed loan for part-time students.

15. **Part 9: Powers of National Assembly for Wales.** Clauses in this Part provide framework powers over teacher and wider workforce registration, qualifications, careers and training and school funding.

The United Nations Convention on the Rights of the Child

16. Article 3 of the United Nations Convention on the Rights of the Child (UNCRC) provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration. By Article 3(2), States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

17. On 6 December, the Minister of State for Children and Families, Sarah Teather MP, made a Written Ministerial Statement1 as part of the Government's response to the review of the role and function of the English Children's Commissioner that was undertaken by Dr John Dunford. In her statement, the Minister affirmed the Government's commitment to the UNCRC. As well as agreeing in principle to the recommendations of the Dunford review to strengthen the role and remit of the Children's Commissioner for England to create a stronger independent advocate for children's rights, the Minister gave a commitment about the place of the UNCRC in the development of Government policy. The Minister said, "I can […] make a clear commitment that the Government will give due consideration to the UNCRC articles when making new policy and legislation. In doing so, the Government will always consider the UN Committee on the Rights of the Child's recommendations but recognise that, like other state signatories, the UK Government and the UN Committee may at times disagree on what compliance with certain articles entails."

18. The Government is a proud signatory of the UNCRC and is committed to its implementation. The Government acknowledges that it is important that the best interests of children continue to be at the heart of policy making and that changes be assessed with that in mind. The Government considers that in the preparation of education policy, and in seeking to give effect to it through the Education Bill, it has honoured that commitment.

19. The Department, led by the Minister for Schools, Nick Gibb MP, held discussions with key groups from the children's rights sector to discuss the themes of the White Paper, *The Importance of Teaching*, which was published by the Department in November 2010 and which sets out the principles and proposals on which the Education Bill is founded.

20. The Bill demonstrates the Government's commitment to children's rights. For example, clause 1 makes it possible to introduce free early years provision for two-year-

1 Hansard, 6 Dec 2010 : Column 5WS

olds from disadvantaged backgrounds which the Government considers will help narrow the gap in levels of achievement between rich and poor; the improvement of discipline and behaviour in schools that the Government believes will result from reforms set out in Part 2 of the Bill will lead to lower levels of bullying and the restoration of good order in the classroom, which in turn will help children access their rights to an education; and the strengthening, in Part 5, of powers to intervene in poorly-performing schools will be of disproportionate benefit to poorer children and to those with special educational needs. The Government is committed to intervening in those schools that continually underperform. Article 28 UNCRC recognises a child's right to education and has been concerned with inequalities with regard to school achievement of children living in hardship.

21. While the Bill removes certain obligations and duties from schools, such as the duty to co-operate with the local authority to improve the well-being of children, or the duties to have regard to the children and young people's plan (see clauses 30 and 31) the Government's view is that the imposition of such duties is not the best way of serving the best interests of children. The Government does not consider that schools need to be told what to do about serving the best interests of children: rather its view is that the reduction of such burdens provides an overall benefit to children, and so secure the best interests of the child. In this way, the Government considers that it is meeting its obligations under Article 3. The duty on a governing body of a maintained school to promote the well-being of pupils in the discharge of their functions relating to the conduct of the school remains.

22. When proposing measures to enhance discipline in schools, such as those in clause 2 (power of members of staff at schools to search pupils) and clause 4 (exclusion of pupils from schools in England: review) Ministers consider the rights of all children. While Ministers do not consider that any of the provisions incompatibly interfere with the rights of the children directly affected by them, they are also concerned to protect the rights of all children that can be affected by the ill discipline of the few.

23. Ministers also acknowledge that within children's rights lies the responsibility to respect the rights of others, and that this should better enable children to act as young citizens and reinforces the proper exercise of authority by parents and other adults such as teachers.

24. Taking all this into account, the Government is confident that the Bill is broadly within the general principles of the UNCRC and seeks to represent the best interests of children in accordance with Article 3 of the UNCRC as well as to ensure that children are afforded the best education by giving every child access to the best possible teaching.

Consideration of relevant clauses

Clause 1: Free of charge early years provision

25. Clause 1(2) amends section 7 of the Childcare Act 2006 which, in its current form, requires English local authorities to secure that certain early years provision is available free of charge for certain young children in their area. "Early years provision" is defined (in section 20 of the Childcare Act 2006) as childcare for young children (broadly speaking, those under the age of five). The Childcare Act 2006 defines "childcare" in broad terms as meaning any form of care for a child, and as including education and other supervised

activities. For young children, legislation requires the childcare to have an educational element through the requirement on all early years providers to ensure their provision meets the requirements of the Early Years Foundation Stage which contains a series of education and development requirements.

26. While the Government's policy is to maintain a universal free entitlement for children aged three and four, the effect of the amendment will be to enable regulations to extend the requirement on local authorities to secure that free early years provision for a targeted group of two-year-olds, such as those who come from poorer families.

UNCRC

27. Article 28 of the UNCRC says that States Parties recognize the right of the child to education. While the Article refers in particular to primary, secondary and higher education the Government considers that the provision of early years education helps address the UN Committee's concerns about inequalities (which relates to Article 2 UNCRC) with regard to the achievement of children living with economic hardship and responds to their recommendation about investing resources to ensure the right of all children to a truly inclusive education (paragraphs 45 and 67 of the Committee's concluding observations, 2008).

28. The aim of this provision is to extend childcare provisions to under-3s from disadvantaged backgrounds. This is also very much within the principles of Article 18 (2) and (3) of the UNCRC which is about assisting parents and legal guardians in the performance of their child-rearing responsibilities, ensuring the development of institutions, facilities and services for the care of children and ensuring that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

ECHR

29, Article 2 of Protocol 1 of the ECHR provides that "no person shall be denied the right to education". The Government considers that to the extent that early years provision is educational in nature, it might be argued that aspects of its provision would engage Article 2 of Protocol 1. However, the Government does not consider that Article 2 of Protocol 1 places a positive obligation on a State to establish or subsidise a particular type or level of education (*Belgian Linguistics Case No. 2*); the primary focus of the right is to guarantee an equal right of access to the educational facilities that exist at any particular time.

30. The Government does not consider that the creation of a duty on local authorities to secure that early years provision is available free of charge for a certain category of two-year-olds (as opposed to *all* two-year-olds) interferes with the right enshrined in Article 2 of Protocol 1: the effect of the policy proposal is not to limit access to childcare facilities to a particular group of two-year-olds as the duty that section 7 of the Childcare Act 2006 imposes on local authorities does not require them to create provision that only eligible two year olds can access. On the contrary, the policy seeks to ensure that two year olds who are currently denied access to early years provision by virtue of their economic circumstances get the same access as their more advantaged peers. Childcare places for young children are already available through a range of private, voluntary, and state providers. Indeed, local authorities are under a duty (in section 6 of the Childcare Act

2006) to secure that there are sufficient childcare places available in the area to meet the needs of working parents (and those in education or training) and will need to use their powers to stimulate the childcare market if there is not sufficient childcare available. In many cases, the child's parents must pay for the provision unless it is in a maintained setting funded by the State (for example, the nursery class of a maintained primary school). Early years providers must operate in accordance with the equality legislation in terms of access.

31. The duty that section 7 of the Childcare Act 2006 (and the regulations made under it) imposes on local authorities is, therefore, not about creating provision that can only be accessed by eligible two-year-olds. Rather, it requires the local authority to fund a prescribed number of hours so that eligible children can access these free of charge. The local authority will do this in most cases by making payments to individual early years providers to cover the costs of them providing free places for eligible children for the prescribed number of hours. Non-eligible children would also be able to access places at those providers, but would not receive any hours free of charge.

32, The Government therefore does not consider that this policy interferes with the right of equal access to educational facilities, which is what Article 2 of Protocol 1 is intended to protect. There is no discrimination in terms of access, albeit that some children will benefit from a subsidised place. In fact, the policy objectives behind this measure are to increase the likelihood that disadvantaged children in the two-year-old age group will be able to access formal childcare for a variety of social policy reasons. There is clear evidence that the gap in development between children from disadvantaged backgrounds and their peers from more advantaged backgrounds starts from an early age. Access to high quality early years education can help to address this gap.

33. The Government has considered whether there is an argument that the fact that only some two year olds will be able to access free early years provision could engage Article 14, read with Article 2 of Protocol 1. The eligibility criteria will be set out in regulations to be made under the new section 7 of the Childcare Act 2006 and they have yet to be settled. The Government is doubtful whether a person's economic status would be considered by the courts to be a status which Article 14 protects but if Article 14 were held to be engaged, the Government considers the Strasbourg case law shows that promoting services to disadvantaged groups through affirmative action is compatible with Article 14 (*Belgian Linguistics Case No. 2*).

34. Article 14 does not prohibit a difference in treatment to correct a factual inequality between one group and another. In this context, the evidence shows that a lower proportion of young children from disadvantaged backgrounds reach a good level of development at age five compared with other groups (in 2010 only 39.5% for pupils known to be eligible for free school meals reached a good level of development at age five compared with 59.2% of other pupils). International research also shows that whilst quality early education is good for all children, it has a more significant impact for those children from disadvantaged backgrounds. The policy to fund a certain number of free hours of early years provision for the most disadvantaged two-year-olds is underpinned by the legitimate aim of encouraging and facilitating access to good quality early years provision for those children otherwise least likely to get access to it or take it up. The benefits of this

would be improving their educational and social development and narrowing the gap between this group and their peers.

35. Accordingly, the Government considers that the approach being taken is a proportionate response to these legitimate aims. The entitlement will be to a part-time free place (equivalent to 15 hours per week) and any additional provision would need to be paid for by the parents, in the same way as parents of non-eligible two-year-olds pay for their provision. Other two year olds will continue to be able to access early years provision purchased by their parents.

36. Clause 1(3) inserts new sections 13A and 13B into the Childcare Act 2006, which relate to the new section 7 of the Childcare Act 2006 that is being inserted by clause 1(2).

37. New section 13A, inserted by clause 1(3) gives the Secretary of State (in practice, the Secretary of State for Work and Pensions) and the Commissioners for Her Majesty's Revenue and Customs the power to supply information that they hold in relation to social security and tax credits functions to the Secretary of State (in practice, the Secretary of State for Education) and to local authorities, to use to determine eligibility for free early years provision (which will be set out in regulations made under section 7). The information supplied pursuant to these powers will be used by local authorities to check a particular child's eligibility. A very similar system already exists for the purposes of checking eligibility for free school meals, and new section 13A is based on section 110 of the Education Act 2005, which enables the same information to be shared for the purposes of determining eligibility for free school meals.

38. New section 13B provides that where a person discloses information received from Her Majesty's Revenue and Customs (HMRC) or the Department for Work and Pensions (DWP) under section 13A, apart from in the circumstances set out in section 13B(2), he or she commits an offence. The circumstances set out in section 13B(2) are where information is being passed on to a local authority in accordance with section 13A(5), in the course of a duty in connection with exercising functions relating to determining eligibility, in accordance with an enactment or a court order, or where consent to the disclosure has been given by or on behalf of the individual.

39. The sharing of information about individuals by DWP or HMRC, or onward supply of information to local authorities, would engage Article 8(1) of the ECHR. The information would be personal details and information relating to the receipt of tax credits and social security benefits. However, an interference with Article 8(1) can be justified in accordance with Article 8(2) and the Government considers that any interference in this case will be necessary in a democratic society for the purposes of the economic well-being of the country, since the purpose behind the sharing of information is to ensure that local authorities are easily able to establish whether a child is eligible for free early years provision, and therefore reduce fraudulent claims or mistakes as to eligibility. The measure is proportionate because section 13A makes clear that the information can only be shared and used for that specific purpose and no other purposes. In addition, there is a safeguard built in because any unauthorised use or disclosure will be deterred, or otherwise dealt with, by the criminal offence created by section 13B. All parties will be data controllers or data processors and therefore also subject to the requirements of the Data Protection Act 1998 which will also help to ensure compliance with Article 8(1).

40. New section 13B, described above, contains a defence for a person who has disclosed information unlawfully, if they can prove (on the balance of probabilities) that they reasonably believed the disclosure to be lawful. This mirrors the provision on disclosure in section 111 of the Education Act 2005 (which relates to free school meals).

41. Reverse legal burdens of proof have been considered in the Strasbourg case law since they can engage Article 6 of the ECHR, in particular the right under Article 6(2) that "everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law". In some cases, the courts have either found legal burdens of proof imposed on the defendant to be incompatible with Article 6(2), or else have been willing to "read down" a provision which purports to place a legal burden of proof on the defendant so that it imposes only an evidential burden on the defendant to adduce evidence which is capable (if believed) of proving the fact or issue in question.

42. However, the courts have in some cases held reverse legal burdens to be compatible with Article 6. In the case of *Sheldrake v DPP*, the House of Lords held that, where the matter that the defendant was required to prove was "a matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities [that the defence applied] than for a prosecutor to prove beyond reasonable doubt [that it did not]", a reverse legal burden was not incompatible with Article 6.

43. The seriousness of the offence and penalty are also relevant to whether a reverse burden of proof is so unfair as to offend against the right set out in Article 6(2). In the case of section 13B, the offence that it creates is of unauthorised disclosure of information. The prosecution have the legal burden of proof in relation to the disclosure having taken place otherwise than in any of the authorised circumstances set out in section 13B(2). The defence available to the defendant is based on his state of mind when disclosing the information and on what he or she believed about the lawfulness of that disclosure. The Government therefore considers that it is more appropriate for the defendant to have to prove, on the balance of probabilities, that she or he reasonably believed the disclosure to be lawful, than for the prosecution to have to prove beyond reasonable doubt that the defendant did not reasonably believe the disclosure to be lawful. This could be very difficult for the prosecution to do, with the result that in many cases it would not be possible to convict the defendant, even in those cases where it was more likely than not that the defendant did not reasonably believe that the disclosure was unlawful. The Government considers that the reverse burden of proof in relation to this defence is proportionate and reasonable in all the circumstances, strikes the right balance between the public interest and the defendant's Article 6 rights, and does not prevent a fair trial from taking place.

Clause 2 Power of members of staff to search pupils

44. Clause 2 amends the power that members of staff in England have to search pupils under section 550ZA of the Education Act 1996. That section already allows authorised staff to search a pupil where they have reasonable grounds for suspecting that the pupil may have a "prohibited item" with him or her or in his or her possessions. Section 550ZA says what the "prohibited items" are.

45. Clause 2(2)(a) amends section 550ZA(3) by adding to the list of prohibited items "an article that the member of staff reasonably suspects has been or is likely to be used to commit an offence or to cause personal injury to, or damage to the property of, any person (including P)". By subsection (4A), inserted by clause 4(2)(c), the term "offence" includes anything that would be an offence but for the operation of any presumption that a person under a particular age is incapable of committing an offence.

46. Clause 2(2)(b) adds to the list of prohibited items "any other item which the school rules identify as an item for which a search may be made". New subsection (4B) inserted by clause 2(2)(c) defines school rules. For maintained and non-maintained special schools (defined in subsection (4C)) they are rules determined and publicised under section 89 of the Education and Inspections Act 2006; for all other schools they are rules determined and publicised in accordance with regulations.

47. Clause 2(3) amends the supplementary provisions in section 550ZB.

48. It amends section 550ZB(5) so that force cannot be used to effect a search for an item under section 550ZA(3)(g). It also provides that a person carrying out a search need not be of the same sex as the pupil being searched if the searcher reasonably believes that there is a risk that serious harm will be caused to a person if the search is not carried out as a matter of urgency and, in the time available, it is not reasonably practicable for the search to be carried out by a person of the same sex as the pupil. It also provides that another member of staff need not be present during the search but only if the same condition is satisfied.

49. Clause 2(4) amends section 550ZC (power to seize items found during search under section 550ZA) to make provision for the disposal of a seized item prohibited under section 550ZA(3)(ea) and (g). In the case of a prohibited item under (g) the item must be returned to its owner, retained or disposed of; in the case of a prohibited item under (ea) the searcher must deliver the item to a police constable as soon as reasonably practicable, return it to the owner, retain it or dispose of it if. In both cases, in determining what to do with the item, the person must have regard to guidance issued by the Secretary of State.

50. Where the seized item is a prohibited item under (ea) and is an electronic device then before retaining it, disposing of it or returning it to its owner the searcher may examine any data or files on the device if she or he has good reason to do so, and may erase the data or files, again only if he or she has good reason to do so. In deciding whether there is a good reason the searcher must have regard to guidance issued by the Secretary of State.

UNCRC

51. Supporting schools to improve behaviour and discipline is a key priority for this Government. Article 28(2) of the UNCRC states that all appropriate measures should be taken to ensure that school discipline is administered in a manner consistent with the child's human dignity. The UN Committee has also been concerned that bullying is a serious problem which may hinder children's attendance at schools and recommends efforts are intensified to tackle bullying and violence in schools. Para 48e of their concluding observations recommends that the State Party takes measures and sets up adequate mechanisms and structures to prevent bullying and other forms of violence in schools and include children in the development and implementation of these strategies, in

light of the Committee's recommendations adopted at its day of general discussion on violence against children within the family and in schools.

52. Improving discipline and behaviour in schools will lead to lower levels of bullying, which affects vulnerable children in particular, and will enable all children to better exercise their right to education under Article 28.1. By repealing the requirement to give 24 hours notice of detention to parents it will enable teachers to act quickly and effectively with pupils who have misbehaved. Early effective discipline can help to avoid exclusion as a disciplinary measure which is considered a last resort by the UN Committee on the Rights of the Child.

53. The Government has also considered Article 16 of the UNCRC, which states that: "(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. (2) The child has the right to the protection of the law against such interference or attacks." The Government considers that the arguments in support of the conclusion that the provisions of clause 2 are compatible with Article 8 ECHR applies equally in terms of Article 16 UNCRC.

54. Children have a right to privacy under Article 16. The UN Committee recommends that the State Party ensures, both in legislation and in practice, that children are protected against unlawful or arbitrary interference with their privacy. Giving teachers a more general power to search for any item they believe can be used to cause injury or aid bullying of other pupils, will enable them to protect the wellbeing of all pupils and best interests of all children.

55. The Government also considers that the steps that it is taking in this clause and elsewhere in the Bill to enable schools to provide for an orderly and safe environment for children meets the obligations in Article 16 to safeguard the rights of all children to the protection of the law against interference with his or her privacy and attacks on his or her honour or reputation.

ECHR

56. The Government considers that the powers to search pupils under section 550ZA of the Education Act 1996 engage, and amount to an interference with, Article 8 but is of the view that the interference created by the addition to the list of prohibited items made by clause 2 is justifiable under Article 8(2).

57. Article 8(1) ECHR provides that everyone has the right to respect for his private and family life, his home and his correspondence. Article 8(2) provides that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

58. In *Niemietz v Germany (1992)*, the European Court of Human Rights held that the concept of private life was not susceptible to "exhaustive definition". The severity of the adverse effects for the individual's moral or physical integrity will determine whether the

treatment is sufficiently serious as to fall within the scope of Article 8. The Government considers that the level of physical intrusion envisaged by these search powers may be at the lower end of the scale of "physical searches" compared to, for example, being required to remove more than just outer clothing, being required to strip down to underwear, and intimate body searches. (See *Wainwright v UK (2006)* where visitors to a prison were required to undergo a strip search and intimate body search, which was found to be a breach of Article 8.) Nonetheless this type of physical search without consent is more intrusive than searching conducted by use of a "screening device" and may still involve a degree of humiliation and embarrassment, as the search may be conducted in front of peers, and could result in personal items (for example, diaries or photographs) being examined by teachers.

59. The European Court of Human Rights has acknowledged that the measures taken in the field of education may, in certain circumstances, affect the right to respect for private life (*Belgian Linguistics Case No. 2(1968)*). However, in *Costello-Roberts v UK (1993)*, which concerned corporal punishment in school of a seven-year-old child, the Court said that not every act or measure which may be said to adversely affect the physical or moral integrity of the person necessarily gives rise to an interference and that the sending of a child to school necessarily involves some degree of interference with his or her private life. The Court said (at paragraph 36) that it "*does not exclude the possibility that there might be circumstances in which Article 8 (art. 8) could be regarded as affording in relation to disciplinary measures a protection which goes beyond that given by Article 3 (art. 3). Having regard, however, to the purpose and aim of the Convention taken as a whole, and bearing in mind that the sending of a child to school necessarily involves some degree of interference with his or her private life, the Court considers that the treatment complained of by the applicant did not entail adverse effects for his physical or moral integrity sufficient to bring it within the scope of the prohibition contained in Article 8. While not wishing to be taken to approve in any way the retention of corporal punishment as part of the disciplinary regime of a school, the Court therefore concludes that in the circumstances of this case there has also been no violation of that Article).*"

60. This case was determined some years ago, and the Government considers that it must be arguable that the Court considering such a case today would decide it differently. The case of *Gillan v UK (2010)* before the European Court of Human Rights concerned searches conducted under the police powers set out in sections 44–47 of the Terrorism Act 2000. In its judgment of January 2010, the European Court of Human Rights noted that "*there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'*". It also set out its view that "*a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive, factor.*". The Court concluded (at paragraph 63): "*Irrespective of whether in any particular case correspondence or diaries or other private documents are discovered and read or other intimate items are revealed in the search, the Court considers that the use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life. Although the search is undertaken in a public place, this does not mean that Article 8 is inapplicable. Indeed, in the Court's view, the public nature of the search may, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment. Items such as bags, wallets, notebooks and*

diaries may, moreover, contain personal information which the owner may feel uncomfortable about having exposed to the view of his companions or the wider public."

61. In light of this judgment in particular, the Government is of the view that searching pupils without consent is sufficiently serious so as to amount to an interference with their rights under Article 8.

62. As a search under these powers would constitute an interference with a pupil's right to respect for private life under Article 8, then the interference is justified by the terms of paragraph 2 of Article 8 only if it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" in order to achieve the aim or aims.

63. The Government considers that in the case of the added prohibited item under section 550ZA(3)(ea) the wording is sufficiently clear and precise to meet the test of being in accordance with the law set by the Strasbourg Court. The Government also considers that the power serves a legitimate aim under Article 8(2) that is to say for the prevention of disorder or crime or for the protection of health or morals.

64. In determining whether the power to search is necessary in a democratic society a court will weigh the reasons presented against the nature and degree of the interference with the individual's rights. It will also consider the existence of procedural safeguards when assessing whether a measure is "necessary in a democratic society." The new power to search is limited to items that have been used to commit a crime or are thought likely to be used to commit a crime. The power is to be subject to the safeguards which are provided for in section 550ZB: the search can only be carried out by the head teacher or someone authorised by him or her to search; the search can only take place on school premises or if elsewhere only when the member of staff has lawful control or charge of the pupil concerned; the teacher can only search if he or she has a reasonable suspicion that the pupil is in possession of a "banned" item; the pupil cannot be required to remove any clothing other than outer clothing; and there must ordinarily be someone else present and the searcher must ordinarily be of the same sex.

65. Accordingly, the Government considers that the extended power to search in clause 2 amounts to a justifiable interference with a pupil's Article 8 rights.

66. The second addition to the list of prohibited items, in section 550ZA(3)(g) is any other item which the school rules identify as an item for which a search may be made.

67. The Government considers that the provisions in the Bill that give effect to this satisfy the requirement that the interference which it amounts to be in accordance with the law: the item can only be searched for if it is identified in the school rules as an item that can be searched for. In the case of a maintained school, those rules must be determined and publicised by the head teacher in accordance with section 89 of the Education and Inspections Act 2006 (EIA 2006) which imposes requirements on the head teacher to make the rules (or measures as they are called in that Act) generally known within the school and to parents of children at the school, and in particular at least once in every school year to take steps to bring them to the attention of all pupils and parents. In determining measures the head teacher must act in accordance with the statement of general principles prepared by the governing body; and must have regard to any notification or guidance received from

the governing body. The governing body when making or revising the statement of general principles is required to consult the head teacher, parents and pupils and have regard to guidance from the Secretary of State.

68. It is intended that the regulations made under section 550ZA(4B)(b) should mirror the requirements in section 89 of EIA 2006.

69. The Government considers that where the ban is under a power in EIA 2006 and has been publicised under section 89 of EIA 2006 there will be a proper legal basis for it, and there will be sufficient accessibility and foreseeability for it to be considered "in accordance with the law". The Government considers that guidance on the use of such powers will assist; the requirement to have regard to guidance is already in section 88 EIA 2006 and it is intended to make similar provision under the regulations.

70. The power to search under section 550ZA(3)(g) will be for items that in themselves may well be innocuous. The Government considers that a legitimate aim upon which it can rely to justify this is the protection of the rights of others. In particular, the Government relies on Article 8 which protects a right to personal development, and the right to establish and develop relationships with the outside world. Where the disruptive school environment is such that those aspects of the Article 8 right are threatened the Government would argue that the rights of others are engaged so steps to protect that right, in this case by searching the pupil, meet a legitimate aim.

71. The Government considers that the power taken under section 550ZA(3)(g) is necessary and proportionate. The power is subject to the existing safeguards in sections 550ZA and 550ZB referred to above. Furthermore, the power to use force has been specifically excluded from the power to search under section 550ZA(3)(g). This power to use force is found in section 550ZB(5) and applies to searches for other items; but where, as here, the search is for an item that is not intrinsically harmful then to be proportionate the Government accepts that the power cannot be supported by the use of force.

72. The Government intends to produce guidance under section 88(4) of the 2006 Act, and under regulations, that will explain the nature of the obligations under Article 8(2) of necessity and legitimate aim that are applicable.

73. Section 550ZB(6) of the Education Act 1996 currently requires that the person conducting the search under section 550ZA must be of the same sex as the pupil being searched and that the search take place in the presence of another member of the school staff who is also of the same sex as the pupil if that is reasonably practicable, this latter modification being made to address concerns that have been raised about the practical difficulties of ensuring that the witness to the search is the same sex as the pupil for searches conducted in primary schools (where there are few male staff) and on school trips.

74. Clause 2(3) amends section 550ZB by inserting a new subsection (6A) which provides that a person carrying out a search of a child under section 550ZA need not be of the same sex as the child if the person reasonably believes that there is a risk that serious harm will be caused to a person if the search is not carried out as a matter of urgency and in the time available it is not reasonably practicable for the search to be carried out by a person of the same sex as the child.

75. Similar provision is made to relax the requirement to have another member of staff present.

76. The provision would have most impact in primary schools where, as discussed above, there is often a lack of male teachers. The Government envisages that in practice it would be on very rare occasions that secondary school teachers would undertake a search of a pupil of the opposite sex.

77. The Government considers that there would be circumstances in which it will not be practicable for a member of staff of the same sex to be found if there is an element of urgency based on risk of harm. The Government's view is that the circumstances in which the searcher can search a child of the opposite sex are sufficiently tightly drawn to make this provision compatible with Article 8: the searcher has reasonably to believe that there is a risk that serious harm will be caused to a person (not property) if the search is not carried out urgently; and in the time available it is not reasonably practicable for the search to be carried out by a person of the same sex.

78. Clause 2(4) amends section 550ZC (power to seize items found during search under section 550ZA) by inserting provisions regarding the disposal of items found in exercise of a search under new section 550ZA(3)(ea). The Government considers that where an item is handed to the police, retained or disposed of this may amount to a deprivation of property for the purposes of Article 1 of Protocol 1 (A1P1).

79. A1P1 says: "(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."

80. While the seizure of a prohibited item from a pupil amounts to a deprivation of property and potentially interferes with Article 1 of Protocol 1, the Government would argue that in relation to an item used or to be used to commit a crime there are arguments that any interference is justified and proportionate. Deprivation will prevent the commission, or continued commission, of a criminal offence; and may prevent harm being caused to pupils. Because of the risks to the safety of pupils and others and of the disorder that could result from allowing pupils to have on them such items, seizure of these items is a proportionate response.

81. For items handed over to the police, the Police (Property) Act 1897 (disposal of property in the possession of the police) will apply to property which has come into the possession of a police constable under these provisions. This allows a Magistrates Court to make an order that property in police possession be delivered to the person appearing to be the rightful owner.

82. It is not envisaged that compensation will be paid where prohibited items are seized. Although Article 1 Protocol 1 does not expressly require the payment of compensation to a person deprived of property, compensation is generally required in all but the most exceptional circumstances (see *Lithgow v United Kingdom* (1986) 8 EHRR 329), and the taking of property without payment will normally constitute a disproportionate

interference. However, legitimate objectives of public interest, such as measures to achieve social justice, may call for less than reimbursement of the full market value (*James v United Kingdom* (1986) 8 EHRR 123 ECtHR). Provided the state can properly take the view that the benefit to the community outweighs the detriment to the individual, a fair balance will be struck without any requirement to compensate the individual (*R (Trailer & Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2005] 1 WLR 1267).

83. In some circumstances the item seized will be such as not to warrant such a drastic response—in the case of electronic devices such as mobile phones and mp3 players, for example, it may be more proportionate to confiscate the item and return it at the end of the day. In that case, Article 1 of Protocol 1 rights may not be not engaged at all. If they are then the Government considers that such circumstances would be likely to amount to an interference with enjoyment under Article 1 Protocol 1 rather than a control of use because the items would only be taken temporarily for the duration of the school day. The Government considers however that such interference would be proportionate and justified given the very limited duration and the aim of preventing crime and harm to others.

84. Clause 2 provides that in the case of an electronic device searched for under section 550ZA(3)(f) the searcher may examine any data or files on the device if he or she thinks there is good reason to do so; the person may also erase the data or files if he thinks there is good reason to do so. In deciding whether there is good reason to do so the person must have regard to guidance from the Secretary of State.

85. The intention behind this provision is to allow the searcher to see whether there are, for example, any images of bullying or threatening messages that show that the device is being used for cyber-bullying. The power to examine and erase data engages Article 8 and is justifiable to meet the legitimate aim of preventing and detecting crime and the protection of the rights of others. The Secretary of State will issue guidance in connection with the exercise of this power to meet concerns about the possible misuse of the power.

Clause 3: Power of members of staff at further education institutions to search students

86. Clause 3 makes similar provision in relation to further education and sixth form colleges as are made by clause 2 in relation to schools. The power to search is not extended to search for items banned under the college's rules. The arguments in support of compatibility with this clause are the same as the arguments set out above in relation to clause 2.

Clause 4: Exclusion of pupils from schools in England: review

87. Clause 4 makes new arrangements for England only in relation to the exclusion of pupils from maintained schools and pupil referral units. Subsections (1) and (2) of new 51A Education Act 2002 will give head teachers of maintained schools power to exclude any pupil from the school on disciplinary grounds and gives the same power to teachers in charge of pupil referral units. This is the same as current arrangements. The remainder of the new section provides for the procedures that relate to the exclusion of pupils, including arrangements for reviewing exclusion decisions within a school (which will reflect current arrangements) and providing for an independent review of any decision not to reinstate

the pupil in question. The independent review is new and replaces the independent appeal that exists currently. The new review panel will be constituted very similarly but its powers will change. The most significant change will be that the review panel will have no power to direct reinstatement of a pupil as an appeal panel has currently. The review panel will have power to: uphold a decision of a governing body; direct a governing body to look again at its decision not to reinstate where it considers that the decision was flawed in the light of the principles applicable on an application for judicial review; order an adjustment of the school's budget in particular circumstances; and ask a governing body to look again at its decision where it has concerns. There is a power to make regulations in relation to supplementary powers for the panel and it is intended to use this to provide that a panel may add to a pupil's record that the panel considers that the decision of the governing body to exclude was flawed.

88. Article 2 Protocol 1 ECHR provides that, "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions." The duty under section 19 Education Act 1996 provides that every local authority must make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them. Under section 19(3A) of the Education Act 1996 this duty is to provide full time education for permanently excluded children from a day specified in regulations (currently the sixth day of exclusion—see SI 2007/1870). Therefore, a permanently excluded child will not be denied the right to education.

89. Further, Article 2 Protocol 1 ECHR does not provide a general right to education of any particular quality or at any particular school. Case law suggests that education authorities have considerable latitude when exercising disciplinary functions before they will be held liable for breaching the right of access to education. The Government therefore considers that Article 2 of Protocol 1 is not engaged.

90. The Government also considers that Article 6 ECHR is not engaged because exclusion is not determinative of a civil right (see for example *R (on the application of B) v Head Teacher of Alperton Community School* [2001] EWHC 229 (Admin)). In the case of *R (on the application of LG) v The Independent Panel for Tom Hood School and Another* [2010] EWCA Civ 142, the Court of Appeal concluded that Independent Appeal Panels do not determine civil rights or criminal charges: a decision on permanent exclusion would only decide where a child will attend school or receive education otherwise than at school. If Article 6 were engaged, the Government's view is that the review board (independent from both school and the local authority and which provides for an independent review of the facts) coupled with judicial review is adequate and sufficient to satisfy the courts following case law in this area (see *Tsfayo v UK* [2007] LGR 1).

91. In *R (B) v Head Teacher of Alperton Community School* [2001] EWHC 229, the Claimant also sought to argue that a refusal to reinstate following exclusion breached the Claimant's right under Article 8 to a fair or good reputation. The argument was that the decision by an Independent Appeal Panel not to reinstate a pupil who had been excluded for bullying constituted an interference in that individual's private life and that, in

particular, it affected his reputation for the rest of his career such that he had to be able to challenge it before an Article 6 tribunal. The Court rejected that argument on the basis that exclusion proceedings are not directly decisive of reputation and the potential to cause damage had been recognised by the procedure. The Court is required to look at the overall matter being determined: here it is where and how education will be received.

Clause 5: Repeal of requirement to give notice of detention to parent

92. Clause 5 removes the requirement at section 92(3)(d) of the Education and Inspections Act 2006 (EIA 2006) that a parent of a pupil in England must be given 24 hours' written notice that their child is required to attend a detention outside school sessions. Provisions at section 90 EIA 2006 set out what is meant by a "disciplinary penalty" in the context of schools (defined by section 4 Education Act 1996) and section 91 sets out what schools must do to ensure that those disciplinary penalties are lawful. There are additional conditions required where the penalty is to be a detention outside normal school sessions.

93. Article 8 ECHR is likely to be engaged in relation to any pupil punishment which means that the pupil is detained at school after the normal school hours. The European Court has accepted that attendance at school may engage Article 8 but that it can be justified on various grounds such as protecting the economic well-being of the country and for the protection of health or morals. The Government would argue that a system of detention outside of school hours is simply an extension of, and therefore part of, the necessary interference of the school day. Detention is an inherent part of a school's disciplinary system and therefore does not require separate justification. While schooling engages Article 8, it is necessary and justified for the reason identified above. The imposition of detention without notice is just one aspect of the disciplinary system, which extends the Article 8 infringement, but can be justified for the same reasons as a system of schooling.

94. In addition, the statutory framework (at sections 91 and 92 without the requirement at section 92(3)(d) that is being repealed here) provides for clear and transparent rules with a view to ensuring that any disciplinary penalty is necessary to ensure good discipline and therefore an effective system of schooling. In particular, schools are required to ensure that the penalty is reasonable in all the circumstances (section 91(3)(b)) taking into account whether the penalty is proportionate (section 91(6)(a)) and any special circumstances which are known or ought to have been known including the pupil's age, any special educational needs, any disability and any religious requirements which affect him/her (section 91(6)(b)). The school is also required to ensure that parents know that detention outside school hours may be used (section 92(3)(b)) and to take into account particular travel issues where relevant (section 92(5)). The policy intention behind this clause is to ensure that schools have the freedom to punish pupils where appropriate by detaining them outside school hours on the same day as the decision was taken to punish them. The delay in being able to impose the punishment is seen to water down its impact considerably. Further, the Government does not consider that the requirement to provide 24 hours' written notice actually adds any particular safeguard in ECHR terms.

Clause 8: Functions of Secretary of State in relation to teachers

95. Clauses 7 to 12 concern the abolition of the GTCE and the establishment of the new system for teacher regulation to replace it.

96. Clause 10 inserts new section 141B into the Education Act 2002. Section 141B gives the Secretary of State the power to investigate cases where it appears to him that a teacher at a school, sixth form college, relevant youth accommodation (youth custody) or a children's home in England may be guilty of unacceptable professional conduct or to have been convicted of a relevant offence. The Secretary of State may investigate such disciplinary cases under new Schedule 11A to the Education Act 2002, inserted by section 141B(3). If he finds that there is a case to answer, he must decide whether to make a prohibition order in respect of the person. The effect of such an order will be to prohibit the person from being employed to carry out teaching work in the institutions mentioned above. The person's name will be entered on the prohibited teachers list, to be kept by the Secretary of State under clause 141C. Under regulations to be made under Schedule 11A he will be able to apply for his name to be removed from the list.

97. None of these provisions is new. Schedule 11A is based heavily on Schedule 2 to the Teaching and Higher Education Act 1998.

98. The potential for a teacher to be prohibited from teaching unsupervised in the institutions mentioned above potentially engages Convention rights. The Government has considered the application of Article 6 to decisions of the Secretary of State to place a teacher on the prohibited list. Paragraph 4 of new Schedule 11A to the Education Act 2002 will require the Secretary of State, when making regulations about the determination of disciplinary cases, to make provision conferring on a person to whom a prohibition order relates a right of appeal against the order to the High Court. This is the same as the arrangements which currently exist in respect of appeals against decisions of the GTCE under Schedule 2 to the Teaching and Higher Education Act 1998. Such appeal regulations could provide that the existing right to practice would not be affected until any appeal had been dealt with or the relevant time limit had expired, other than in extreme cases requiring the protection of children.

99. The Government considers the fact that the Secretary of State is required to confer a right of appeal is sufficient for the purposes of Article 6. Clearly, as the Secretary of State regulates the appeal system he will have to ensure that regulations are Article 6 compliant and that appropriate safeguards are put in place to ensure a fair appeals process. When designing the appeal system the Secretary of State will keep in mind the decision of the Court of Appeal in *Kulkarni v Milton Keynes Hospital NHS Foundation Trust and Secretary of State of Health* [2009] EWCA Civ 789, and in particular the observations of Smith LJ that it would have been contrary to Article 6 to deny the doctor in that case legal representation in his disciplinary appeal as the allegations were quasi-criminal and the effect of the finding would be that he would be unable to practice his profession.

100. Decisions of the Secretary of State or any person to whom he delegates functions under the regulations are also subject to judicial review, providing a further route of redress. Additionally, a teacher who is placed on the prohibited list will, as at present, be able to apply for their name to be removed after a specified period of time.

101. The Government has also considered the application of Article 1 Protocol 1 in relation to whether being permitted to teach in the institutions mentioned above might be a possession. The Government has concluded that it would not, as it would affect anticipated future income rather than any present legal entitlement or professional goodwill. No economic rights attach to it other than the ability to hold certain types of employment in the future. Again, there is no change here from the present position in that teachers can be barred from teaching currently. Even if it were considered to be a possession, regulation of this nature would come within the right of the State to enforce laws to control the use of property in accordance with the general interest and thus be justified under the second paragraph. In any event, the Government does not consider that this raises any separate issues to Article 6.

102. The clauses also include several provisions which concern the sharing of information concerning teachers.

103. The restricted list under clause 141C is to be available for inspection by members of the public. Although the equivalent list is not currently available for inspection, GTCE decisions are readily available on their website, so the same information can be easily obtained.

104. Under clauses 141D and E, where an employer or an agency has ceased to employ a teacher on grounds of serious misconduct, or might have done so had the teacher not resigned, the employer is required to consider whether it would be appropriate to provide relevant information to the Secretary of State. These provisions are less stringent than those presently in place are, when referrals must be made in the case of dismissal for misconduct, professional incompetence, or conviction of a relevant offence. The Government considers that they potentially raise issues under Article 8 but that, particularly given that they are restricted to cases of a serious nature, they are justified.

Clause 11: Abolition of the GTCE: consequential amendments

105. Clause 11 makes consequential amendments. Under paragraph 1 of Schedule 1, the Safeguarding Vulnerable Groups Act 2006 is amended so that the Secretary of State will be under a duty to provide prescribed information about teachers to the Independent Safeguarding Authority (ISA) if there is a risk of harm to children. He will also be under a duty to provide information about teachers to ISA on request. Finally, the ISA must provide relevant information to the Secretary of State. This mirrors the present position regarding the exchange of information between GTCE and the ISA.

106. The Government considers that the information sharing provisions and the availability of the prohibited list for inspection potentially engages Article 8. However, any interference with private life would be justified as necessary and proportionate, within the provisions of Article 8(2), in pursuit of the legitimate aim of ensuring that a narrow category of information concerning teachers is available to those with a justifiable interest in it and is shared appropriately between the various agencies who may have access to it. Again, they simply re-enact (and in some cases narrow) existing provisions, in respect of which there has been no judicial criticism to date on this basis.

Clause 13: Restrictions on reporting alleged offences by teachers

107. Clause 13 inserts new sections 141F, 141G and 141H into part 8 of the Education Act 2002. New section 141F applies where a person who is employed or engaged as a teacher at a school is the subject of an allegation, made by or on behalf of a registered pupil at the school that the person is guilty of a relevant criminal offence (defined in section 141F(10)). By section 141F(2) no matter relating to the person is to be included in any publication if it is likely to lead members of the public to identify the person as the teacher who is the subject of the allegation. Section 141G makes it an offence to breach such reporting restrictions. Section 141H sets out defences.

108. Article 10 is engaged, and Article 10 rights will be interfered with, by the provision imposing reporting restrictions that would prevent publication of any information capable of identifying a teacher. The restriction will apply if allegations have been made that a relevant criminal offence has been committed—a relevant offence being one where the alleged victim is a pupil—and will last until criminal proceedings are instituted. The provision will create a criminal offence of breach of the reporting restrictions. However, the Government is satisfied that any interference is justified under Article 10(2) as a necessary and proportionate means of achieving the legitimate aim of protecting the reputation and rights of teachers and supporting teachers in their role as the professionals responsible for classroom discipline.

109. The European Court of Human Rights has found that interference with qualified rights may be "necessary in a democratic society" where there is a "pressing social need" but the interference must "be proportionate to the legitimate aim pursued" (*Handyside v UK 7 December 1976 and Silver v. UK 25 March 1983*). The Government is satisfied that this provision does answer a "pressing social need" and is "proportionate to the legitimate aim pursued". Teachers are responsible for the discipline of pupils in their classrooms and in their schools and this includes on occasion needing to restrain violent or potentially violent pupils. Given this particular role, teachers are particularly vulnerable to false allegations from pupils.

110. The Government has evidence from teachers' trades unions (in particular NASUWT[2] and ATL[3]) that the number of allegations against teachers has significantly increased in recent years and in the overwhelming majority of these cases, the allegations are not substantiated and a significant number are false, and made by pupils in an attempt to avoid disciplinary sanctions for poor behaviour. Teachers who are the subject of false allegations have suffered significant negative impact on their lives and careers in cases where the allegation has been publicised at an early stage, breaching their Article 8 rights. The Government is satisfied that this provision is necessary to protect the rights and reputation of teachers and is therefore justified under Article 10(2).

111. The protection of the Article 8 rights of teachers raises potential arguments under Article 14 that the protection afforded to teachers is discriminatory on the grounds of "other status" (namely profession) against other professions who may argue that they are equally vulnerable to false allegations and the impact of reports of such allegations in the Press. However, the Government is satisfied that the arguments set out above as to the

2 NASUWT (2009), NASUWT evidence to Inquiry into the Allegations Against School Staff, House of Commons, Children, Schools and Families Select Committee.

3 ATL (2009b), ATL primary school behaviour surveylast retrieved 27 October 2010 from: http://www.atl.org.uk/Images/ATL per cent20primary per cent20school per cent20behaviour per cent20survey.pdfand http://www.atl.org.uk/media-office/media-archive/primary-behaviour-survery.asp

particular vulnerabilities of teachers and the importance of their role with responsibility for classroom discipline support an argument that the different treatment of teachers in this provision can be objectively justified and pursues a legitimate aim of maintaining classroom discipline. The Government notes that the European Court will generally respect the legislature's policy choices in this regard unless they are "manifestly without reasonable foundation" (*Stec and Others v. the United Kingdom ECHR 2006*).

112. There are no effective remedies to protect the rights and reputations of teachers subject to false allegations. Protections in place to regulate the reporting of unsubstantiated allegations, such as civil proceedings for defamation, complaints to the Press Complaints Commission ("PCC") for breaches of the Editors' Code of Practice,[4] proceedings for breach of confidence, in which Convention rights would need to be considered by the Court, are not adequate safeguards given the position of teachers and the number and nature of the allegations they face. Defamation is in essence a reactive remedy and therefore cannot protect teachers from the damage done by the reporting of false allegations. Further, the media will have a defence in defamation proceedings that the report is true and defamation proceedings therefore offer no protection where a report states that an allegation has been made and does not assert that the allegation is true, even though the damage to the teacher's career may be done simply by the allegation becoming public knowledge, particularly when it has yet to be substantiated. The Government is also satisfied that the cost and complexity of defamation proceedings means that this is not an avenue open to most teachers who are the subject of false allegations. Similar arguments apply in relation to breach of confidence in that a teacher would have difficulty establishing the tort and also that there is a broad defence of public interest and the cost and complexity of the case will prevent most teachers from pursuing such a cause of action. The Government is also satisfied that complaints to the PCC for alleged breaches of the Editor's Code of Practice are also ineffective because, again, this is in essence a reactive remedy and the Editor's Code is not sufficiently robust or clear to prevent publication in many cases or to found a successful complaint to the Press Complaints Commission. The lack of complaints relating to press reports about teachers made to the PCC indicates that teachers do not perceive this to be an effective remedy, or even one, which is open to them in cases where the reporting of an allegation may be factually correct, even if the allegation itself is false. Defamation proceedings, complaints to the PCC and proceedings for breach of confidence do not take account of the particular vulnerability of teachers to false allegations made by pupils. They therefore do not provide adequate deterrents to the reporting of similar cases in the future or adequate safeguards to protect teachers from damage to their reputation and from the distress caused by false allegations. Once allegations have been reported, the damage to the teacher's professional reputation can be irreparable and therefore the mere threat (explicit or implied) by a pupil that such an allegation will be made can in some circumstances succeed in undermining classroom discipline.

113. The Government is clear that any restrictions on the right to freedom of expression in Article 10 must be proportionate and limited to what is necessary to meet the pressing social need identified above. Any offence needs to be clearly framed so that there can be no doubts about the circumstances in which reporting restrictions apply and therefore when a criminal offence will be committed. For these reasons, reporting restrictions are very narrowly drafted.

4 http://www.pcc.org.uk/assets/111/Code_A4_version_2009.pdf

114. Reporting restrictions under these provisions will cease when proceedings are instituted in a court (i.e. once an independent assessment has been made by the Crown Prosecution Service that there is evidence to support the allegation and the teacher has been charged with an offence). In the examples that the Government has of allegations against teachers being published before charge, the Government is satisfied that in the majority of cases there was no overriding public interest in allegations being reported by the Press before there was sufficient evidence to charge the teacher with an offence. In those exceptional cases where there is an overriding public interest in publicising allegations at an early stage, for example where a teacher, who may pose a risk of harm to children, has fled and the Police need the help of the public to locate him, the Government has made provision for anyone to apply to the Court for reporting restrictions to be lifted where it is in the interests of justice to do so.

115. The Government is satisfied that these measures ensure that this is a proportionate response to the problem in that it balances the public interest in genuine cases of misconduct by teachers being reported by the media against the need to support teachers' authority in the classroom and protect their reputations and rights under Article 8 by preventing unfounded, false or malicious allegations being publicised, where there are no other effective protections for teachers who are falsely accused of harming a pupil.

116. Article 6 may also be engaged by the fact that new section 141H(1) imposes a legal burden of proof on the defendant to establish the defences to an offence under new section 141G. The issues surrounding reverse legal burdens have been considered above (at paragraph 41). The Government is satisfied that in the case of section 141H, it is appropriate to impose a legal burden and it is compatible with Article 6(2) to do so. Given the nature of the defences in new section 141H(2)(a) and (b) particularly, which relate to the knowledge of the defendant at the time that the identifying information was published, the Government is satisfied that these fall within the type of defence described by their Lordships in *Sheldrake v. DPP*; the defence in new section 141H(2)(c) requires evidence that written consent has been obtained. As this will impose a largely evidential burden, rather than a legal burden on the defendant, the Government is satisfied that it is compliant with Article 6 to extend the legal burden to this section also.

117. The Government has also considered Article 13 of the United Nations Convention on the Rights of the Child (UNCRC). This guarantees the child's right to freedom of expression and the Government relies on the same arguments, as those set out above in respect of Article 10 ECHR, in concluding that the restrictions to be imposed are necessary and proportionate under Article 13(2) UNCRC. The Government is satisfied that this provision will not discourage children from reporting genuine cases of abuse by teachers and mechanisms for facilitating reporting through the appropriate channels will be entirely unaffected by this provision. The reporting restrictions will simply limit the possibility of the case being widely publicised until it is established that there is good evidence that the allegations may be well-founded.

Clause 26 Education and training support services

118. Clause 26 amends Part 2 of the Education and Skills Act 2008 ("ESA 2008") which is concerned with education and support services in England. The only part of clause 26 that

raises any human rights issues is subsection (5) which amends section 76A of the ESA 2008.

119. Section 76A of ESA 2008 relates to personal information of 13–19-year-olds obtained in respect of the "Connexions services", which are for example services provided under section 68 or 70(1)(b) of ESA 2008 in relation to the education and training of young people and relevant young adults. The providers of Connexions services are either local authorities or persons providing these services on their behalf. Section 76A(5) prohibits the disclosure of some of this information in certain circumstances in a way that the identity of an individual to whom it relates is revealed. Clause 26(5) removes this prohibition. For the reasons more fully explained below, the Government is of the opinion that this clause engages Article 8 of the ECHR and Article 16 of the Convention on the Rights of the Child. However, the Government considers that in the case of Article 8 any interference is justified; and that rights under Article 16 are not breached.

120. Section 76A of ESA 2008 operates in the following way: Section 76A(1) allows the Secretary of State to arrange with another person for that person to hold and supply information in connection with or for the purposes of the provision of Connexions services. In reality, this person is the contractor who operates the National Client Caseload Information System ("NCCIS") database—a database containing information about individuals who use the Connexions services. Hereafter the contractor is referred to as "the NCCIS contractor".

121. Section 76A(3) allows anyone holding "relevant information" as defined in the section to supply this information to: (a) the Secretary of State, or (b) the NCCIS contractor. Relevant information is information about a person to whom Connexions services are provided or obtained in connection with providing the Connexions services, referred to hereafter as "Connexions services information".

122. If information is supplied under section 76A(3) to the Secretary of State or the NCCIS contractor, section 76A(4) allows them to pass it on to anyone involved in the provision of Connexions services, for the purposes of Connexions services. This would include Connexions services providers themselves, but also others involved in any way in the provision of the services.

123. Section 76A(5) contains provision about what can be done with Connexions information once it has been passed to Secretary of State or the NCCIS contractor under section 76A(3). Its effect is that the Secretary of State or the NCCIS contractor is not allowed to pass this information on to each other in such a way that the identity of the individual to which it relates is revealed. This is subject to subsection (4)— so section 76A(4) does permit disclosure by the Secretary of State or NCCIS contractor to a Connexions service provider (or other person involved in the provision of the services) in such a way that reveals an individual's identity.

124. The effect of this clause in the Bill will be to repeal section 76A(5) so that the restriction on the onward disclosure of information received under section 76A(3) by the Secretary of State or the NCCIS contractor to each other in a way that identifies individuals is removed. For the sake of clarification, the existing provisions of section 76A(3) already allow anyone holding Connexions information to pass this to the Secretary of State or the

NCCIS contractor without any prohibition on this identifying individuals. It is therefore technically lawful for the NCCIS contractor or Secretary of State to pass such information to each other in a way that identifies individuals under section 76A(3), it is only where such information has already been passed to the Secretary of State or the NCCIS contractor by another person under section 76A(3) (for example by a Connexions services provider) that there is currently a prohibition on the onward disclosure (to the NCCIS contractor or the Secretary of State) in a way that identifies individuals.

125. The Government believes that this clause engages and potentially interferes with Article 8(1) of the ECHR as it potentially allows the sharing of individuals' personal information without their consent. However, such interference is justified under Article 8(2) as it is necessary in a democratic society in the interests of the economic well-being of the country.

126. The reason this clause in the Bill is required is to make it easier for the NCCIS contractor and the Secretary of State to share information about individuals who use the Connexions services. It is necessary for the shared information to identify individuals so that the Connexions information can be "matched" to other information held by the Secretary of State in relation to the individuals. This will enable the Secretary of State to form a "joined-up" view of individuals' progression through education and in particular to assess the performance of educational and training institutions by ascertaining what happens to individuals after they have left school or college, particularly their success or otherwise in gaining employment as information about their "employment destinations" is contained within the Connexions information. The Government consider this to be in the interests of the economic well-being of the country.

127. The Government is also of the view that any interference in Article 8(1) rights is proportionate in view of the legitimate interests being pursued. The information that is intended to be shared will not include any "sensitive" information but just details of the individuals' current "activity" (e.g. whether in education, training, employment, NEET, etc) as well as information identifying them consisting of: date of birth, Unique Pupil Number, Unique Learner Number, name and address.

128. The Secretary of State could obtain such information from individual Connexions services providers under the existing provisions of section 76A(3), but it is felt that this would be extremely burdensome on the providers (who are either local authorities or other persons providing such services on their behalf) as well as being very costly. Obtaining such information from the NCCIS contractor is the least costly and least burdensome method of doing this.

129. It is also necessary to allow such information to be passed from the Secretary of State to the NCCIS contractor in case there is a need for Secretary of State to populate the NCCIS database with education and training data that it holds, so as to ensure that the database is as accurate and up to date as possible.

130. The only change made by this clause is where such information has already been passed to the Secretary of State or the NCCIS contractor by another person under section 76A(3) (e.g. by a Connexions services provider) the current prohibition on the onward disclosure to the NCCIS contractor or the Secretary of State in a way that identifies

individuals will be removed. It will be seen therefore that the clause only makes a very small change to the status quo.

131. In addition, the clause will only permit Connexions information being shared between the NCCIS contractor and the Secretary of State in a way that identifies individuals—the existing restrictions preventing such information being shared more widely will remain. Section 76(A)(6) also provides that nothing in that section authorises the disclosure of any information in contravention of any provision of, or made under, ESA 2008 or any other Act which prevents disclosure of the information. This makes it clear that, for example, the protection to "personal data" under the Data Protection Act 1998 will apply to section 76A.

132. The Government considers that Article 16 of the UNCRC is engaged. However, for the same reasons as to why Article 8(2) of the ECHR justifies any interference with individuals' rights under Article 8(1), the Government does not believe that there would be any arbitrary or unlawful interference with individuals' privacy under Article 16, and therefore is of the opinion that that the UNCRC would not be breached in this regard.

Clause 56 Transfer of property, rights and liabilities to Academies

133. This clause amends the existing provision regarding the Secretary of State's power to make schemes for transfer of property, rights, and liabilities so that it expressly includes staff rights and liabilities. The Government has considered A1P1, but as the Government think this just applies to maintained schools (including voluntary and foundation) the Government does not think a private legal entity is affected, so the Government does not consider that this clause raises any human rights issues.

134. There is also a power for the Secretary of State to direct transfer of property, rights, and liabilities in paragraph 13 of new Schedule 1 to the Academies Act 2010, inserted by Schedule 13 to this Bill but the same arguments apply.

Clause 59 Academies: land and Schedule 13

135. Clause 59 and Schedule 13 make provision about land in relation to Academies. They re-enact and amend existing provisions in Schedule 35A to the Education Act 1996, incorporating them into a replacement Schedule 1 to the Academies Act 2010, which incorporates and amends provisions from the existing Schedule 1. They also amend provisions in Schedule 22 to the School Standards and Framework Act 1998, which concerns the disposal of publicly funded land at foundation and voluntary schools.

Paragraph 1 of Schedule 13

136. Paragraph 1 of the Schedule replaces Schedule 1 to the Academies Act 2010 with a revised version ("the new Schedule 1") that also incorporates and extends the provisions of Schedule 35A to the Education Act 1996 by enabling the Secretary of State to object to the disposal or appropriation of land held by a local authority that was used for any maintained school or Academy within the last eight years. Provisions enabling the Secretary of State to compulsorily purchase any school land that is disposed of to a third party in breach of the duty on local authorities to seek the Secretary of State's consent are re-enacted from Schedule 35A.

137. The new Schedule 1 continues to provide a power for the Secretary of State to make a scheme to transfer former maintained school land from local authorities to Academies (but extends this to include land used for a former Academy), and a power to direct the transfer of publicly funded land from governing bodies, trustees and foundation bodies on a maintained school's conversion to an Academy.

138. The amendments to existing provisions contained in the new Schedule 1 extend the protection of publicly funded land held for Academies by providing additional powers for the Secretary of State to direct the transfer of publicly funded land held for existing or former Academies.

139. "Publicly funded land" is defined for the purposes of the Schedule as including land within the definitions in Part A1 (paragraphs A1(1), A7(1) and A13(1), (2) and (3)) of Schedule 22 to the School Standards and Framework Act 1998, which defines publicly funded land held for foundation and voluntary schools, but is also extended to include public investment in private land held for an Academy, provided the Secretary of State or local authority serves a notice within six months of the date of any public investment. This replicates the existing position in legislation for voluntary schools (contained in Part A1 of Schedule 22 to the School Standards and Framework Act) that receive capital investment from the Secretary of State.

140. There is a new provision to prevent Academies from disposing of publicly funded land without notifying the Secretary of State, who has new powers to direct the transfer of such land, subject to payment of compensation where appropriate. These powers are intended to put Academies in a similar position to foundation and voluntary schools, which may also own publicly funded land and cannot dispose of that land without following a statutory procedure, including a new requirement to notify the Secretary of State in addition to the existing procedure involving the local authority and schools adjudicator.

Paragraphs 2 to 17 of Schedule 13

141. Paragraphs 2 to 12 of Schedule 13 amend Schedule 22 to the School Standards and Framework Act 1998 to ensure that surplus publicly funded land (within the meaning of paragraphs A1(1),A7(1) and A13(1), (2) or (3) of Schedule 22) held by the governing body of a foundation, voluntary or foundation special school, or a foundation body, may be made available for Academies.

142. Publicly funded land is defined for the purposes of Schedule 22 in paragraphs A1(7), A7(1) and A13(1)(2) and (3) of that Schedule and includes land that has been acquired or enhanced with public money in the ways listed in those paragraphs.

143. Paragraphs A1 to A19 of Schedule 22 provide a procedure for governing bodies, foundation bodies and trustees of voluntary and foundation schools to dispose of publicly funded land, which involves notifying the local authority, with the local authority being given the chance to object in various ways, and to claim a share of the proceeds, with the option of an appeal to the schools adjudicator for a final decision.

144. Paragraphs 2 to 12 of Schedule 13 provide that where the governing body, foundation body or trustees of a foundation or voluntary school wish to dispose of publicly funded land they must first notify the Secretary of State, and must not take any further steps to

dispose of the land via the local authority/adjudicator procedure without his consent. The Secretary of State then has the option of directing that the land be transferred to an Academy, subject to the payment of appropriate compensation.

145. Similarly, paragraph 13 provides that where a local authority wishes to apply to the adjudicator for the transfer to them of publicly funded land they think is no longer needed by a foundation or voluntary school under existing statutory powers, they must first notify the Secretary of State of their intention and take no further action until they have received a response. The Secretary of State may then decide to direct that the land be transferred to an Academy. If the Secretary of State decides that the land is not needed for an Academy, the existing procedure for the schools adjudicator to make a decision may be followed. Publicly funded land is defined specifically for the purposes of these provisions and only includes land that has been wholly acquired or funded by public means.

146. If the Secretary of State decides to direct that the land is transferred to an Academy, he may make a direction under paragraph 12 of the new Schedule 1 to transfer the land to an Academy, but if land includes any privately owned portion, he must compensate the private owner. This is similar to existing provisions in paragraph 5 Schedule 22, which allow the Secretary of State to make a direction on closure of a foundation or voluntary school for the land to be transferred to a local authority, subject to a direction for payment of compensation by the local authority to the private owner for loss of the private portion of the land, such amount to be determined by the Secretary of State.

147. Paragraph 14 of the Schedule provides direction powers for the Secretary of State to direct the transfer of publicly funded land at a foundation or voluntary school that is closing under paragraph 11 of the new Schedule 1, subject to the payment of compensation for any privately owned element of the land, thereby extending the provisions in paragraph 5 of Schedule 22.

148. Paragraph 15 enables land held by governing bodies of foundation or voluntary schools to be automatically transferred to an Academy, rather than to the local authority, on the closure of such a school, if the Secretary of State so directs.

149. Paragraph 17 of Schedule 13 also provides that the Secretary of State may direct the transfer of maintained school playing field land to an Academy if it is no longer needed for playing field purposes.

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150. In some circumstances, taking property from a person by operation of statute may constitute a breach of Article 1 of Protocol 1 to the Convention (peaceful enjoyment of property rights).The question arises as to whether any of the additional powers in this Schedule for the Secretary of State can engage the Convention rights of any of the landowners involved.

151. In relation to wholly privately owned land, where there has been no public enhancement at all, these fall outside the remit of the Schedule and would not fall to be subject to any transfer direction.

152. No issue of Convention rights arises in relation to transfers from, or to, the local authority since these public bodies do not have Convention rights. In relation to wholly public land (i.e. land that may technically not be held by a core public authority but which was formerly local authority land or purchased with public funds) there will likewise be no question of any breach of Convention rights since the transfer to a separate entity (usually a 'trust' school foundation) will have been on the basis that the purpose of the transfer was to conduct a maintained school and that purpose will now have ceased. The body holding the land will have received it, in any event, without having paid for it or its upkeep. No issue arises therefore if the Secretary of State simply transfers the land between such bodies, or from such bodies to an Academy company by operation of statute or a scheme.

153. In relation to land that falls within the statutory definition of "publicly funded land" on the basis that it is land enhanced through relevant public investment but held by educational foundations, charitable trusts or churches who provided some or all of the land from out of their own funds, taking the land from such bodies would engage their Convention rights to hold property without interference. If the land were to be taken without adequate compensation for the loss, this would also be likely to constitute a breach of those rights. The same principle would apply to any land that is compulsorily purchased by the Secretary of State from a third party, provided it is a body to which Convention rights apply. However, the clause and Schedule provide that in relation to such land held by private entities, or in which the private entity may have an interest, the non-public body would be compensated for any deprivation of property or interest, by compensation from the Secretary of State.

154. Compensation is to be determined by the Secretary of State on the basis of what he considers to be appropriate. This replicates the existing position in legislation for determinations of compensation where a foundation or voluntary school that holds publicly funded land closes (paragraph 5 of Schedule 22 to the School Standards and Framework Act 1998).

155. On the basis that the powers in this Schedule replicate the position in existing legislation for the determination of compensation, and that any determination of compensation by the Secretary of State would be subject to legal challenge by way of judicial review if the determination was considered to be unreasonable, the Government considers that to the extent that any rights of such landowners are engaged, there will be no breach of Article 1 of Protocol 1 to the Convention.

1 February 2011

3. Letter from the Committee Chair, to Rt Hon Michael Gove MP, Secretary of State for Education, 22 March 2011

The Joint Committee on Human Rights is currently scrutinising the Education Bill for compatibility with the UK's human rights obligations. It is grateful for the very full Human Rights Memorandum which your Department has provided and to your officials for making themselves available to meet with the Committee's staff, both of which have greatly assisted the Committee in its scrutiny task. I would be grateful for your answers to the following questions.

Extended powers to search pupils

The Bill proposes to extend the power to search pupils for items which the school rules identify as an item for which a search may be made.[1] Force may not be used to conduct such a search. The Government's Human Rights Memorandum acknowledges that this extended power to search includes a power to search for items that in themselves may be innocuous.[2] The Government also accepts that such a search interferes with a pupil's right to respect for their private life under both Article 8 ECHR and Article 16 UNCRC, but considers that such interferences would be justified. It considers that the requirement that such interferences be in "accordance with the law" is satisfied because the Bill provides that the item can only be searched for if it is identified as such in the school rules. However, the Bill itself does not prescribe the sorts of items which can be so identified by the school rules, nor does it contain any limitation on the sort of items which can be so identified. The Government intends to produce guidance for schools explaining the nature of the obligations on them under Article 8 ECHR.

Q1. What guidance does the Government intend to give to schools about the sorts of items in respect of which it may be justifiable for the school rules to identify as items for which pupils may be searched?

The Bill also relaxes the safeguards that apply when a pupil is searched, by providing that a person carrying out a search of a child need not be of the same sex as the child if the person reasonably believes that there is a risk that serious harm will be caused to a person if the search is not carried out as a matter of urgency and in the time available it is not reasonably practicable for the search to be carried out by a person of the same sex as the child.[3] The principal justification for the relaxation of the safeguard is that in primary schools there is often a lack of male teachers. As drafted, however, the provision would apply equally to searches of secondary school pupils. The Human Rights Memorandum acknowledges this but states that "the Government envisages that in practice it would be on very rare occasions that secondary school teachers would undertake a search of a pupil of the opposite sex." The importance of the safeguard for privacy arguably increases with the age of the pupil, but there is nothing on the face of the Bill which acknowledges this. The Government view is that the circumstances in which the searcher can search a child of the opposite sex are sufficiently tightly drawn to make this provision compatible with Article 8.[4]

Q2. What safeguards does the Government intend to provide to ensure that the power to search a pupil of the opposite sex in secondary schools is only used "on very rare occasions" as it envisages?

The Bill also provides a very wide power to examine and erase date or files on an electronic device confiscated from a pupil "if the person thinks there is good reason to do so."[5] The person must have regard to any guidance issued by the Secretary of State in determining whether there is a good reason for examining or deleting the data or files. The intention

1 New section 550ZA(3)(g) Education Act 1996, as inserted by clause 2(2) of the Bill.

2 Human Rights Memorandum, para 70.

3 New section 550ZB(6) and (6A) Education Act 1996, as inserted by clause 2(3) of the Bill.

4 Human Rights Memorandum, para 77.

5 New section 550ZC(6E) and (6F), as inserted by clause 2(4) of the Bill.

behind the provision is to allow the searcher to see whether there are, for example, any images of bullying or threatening messages that show that the device is being used for cyber-bullying,[6] but the power is very widely drafted and there is nothing on the face of the Bill to restrict its scope. The intention is to prevent possible misuse of the power by issuing guidance.

Q3. What safeguards does the Government intend to include in guidance to ensure against the arbitrary exercise of the very wide power to examine and erase data on an electronic device seized from a pupil?

Review of school exclusions

One of the Government's justifications for its proposed reforms of the exclusions appeals process is that "possible reinstatement of an excluded pupil—however rarely this happens—can undermine the headteacher's authority."[7] The Committee is interested in ascertaining the extent to which this is an actual, practical problem.

Q4. In how many cases has the reinstatement of an excluded pupil been ordered by an independent appeal panel in each of the last three years for which figures are available

i. In total

ii. As a proportion of the total number of appeals brought

iii. **As a proportion of the total number of exclusions?**

In its Human Rights Memorandum, the Government relies on the case of *R (on the application of LG) v The Independent Panel for Tom Hood School* [2010] EWCA Civ 142 in support of its view that Article 6 ECHR is not engaged because exclusion is not determinative of a civil right. The *Tom Hood* case was decided in February 2010. In March 2010 the Grand Chamber of the European Court of Human Rights decided *Orsus v Croatia*, in which it held that Article 6 ECHR applied to an education dispute.

Q5. After the decision of the European Court of Human Rights in *Orsus v Croatia*, is it still the Government's view that exclusion from school is not determinative of a civil right, and, if so, why?

The Human Rights Memorandum states (para. 90) that the review panel provided for by the Bill "provides for an independent review of the facts) and that this, coupled with the availability of judicial review, is sufficient to satisfy the requirement of Article 6 ECHR. However, the review panel only has the power to quash the decision of the governing body not to reinstate "if it considers that the decision of the responsible body was flawed when considered in the light of the principles applicable on an application for judicial review."[8]

Q6. What are the reasons for the Government's view that the review panel provides for an independent review of the facts when the Bill provides that the review panel may only quash the decision of the governing body if it considers it to be "flawed when

6 Human Rights memorandum, para 85.

7 The Importance of Teaching: The Schools White Paper 2010, para 3.29.

8 New s. 51A(4)(c) Education Act 2002, inserted by clause 4(2) of the Bill.

considered in the light of the principles applicable on an application for judicial review"?

Q7. Assuming that Article 6 ECHR applies, is the lack of a power to order reinstatement in certain cases at risk of breaching the Article because it fails to provide the means to give practical effect to the judgment of an independent tribunal?

Q8. What estimate have you made of the effect of the proposed change to the exclusion appeals process on the number of judicial reviews that will be brought?

Q9. Have you sought the view of the Administrative Justice and Tribunals Council on the proposed reforms, and if so what was its view?

Q10. Will draft Regulations proposed to be made under new s. 51A(3) Education Act 2002 be made available during the passage of the Bill?

Q11 If not:

a) **in what case is it envisaged that the responsible body should not order reinstatement?**

b) **what is the proposed constitution of the review panel?**

c) **how, if at all, will the proposed procedure at review panel hearings (including the standards of proof) be different from the current procedure before independent appeal panels?**

Teacher anonymity

The Bill provides for restrictions on the public reporting of allegations made against teachers amounting to charges of a criminal offence, before they have been actually charged with a criminal offence.[9] Breach of the restrictions is a criminal offence. The Government acknowledges that the reporting restrictions interfere with the right to freedom of expression in Article 10 ECHR, but is satisfied that any interference is justified as a necessary and proportionate means of achieving the legitimate aim of protecting the reputation and rights of teachers and supporting teachers in their role as the professionals responsible for classroom discipline.[10] The Government considers that the provision answers a "pressing social need" because teachers are particularly vulnerable to false allegations from pupils. The Government cites in support of its view evidence from teachers' unions that the number of allegations against teachers has increased significantly in recent years and "in the overwhelming majority of these cases, the allegations are not substantiated and a significant number are false." The Committee is interested in ascertaining the full extent of the problem to which this provision is responding.

Q12. Please provide more detailed statistics to demonstrate that the overwhelming majority of allegations against teachers are not substantiated and a significant number are false.

9 Clause 13 of the Bill, inserting new sections 141F, 141G, 141H into the Education Act 2002.

10 Human Rights Memorandum, para 108.

Q13. In each of the last three years, how many examples is the Government aware of in which allegations against teachers have been made public before charge?

Q14. Please provide details of the specific examples that the Government has of allegations against teachers being published before charge referred to in para. 114 of the Human Rights Memorandum.

Q15. Please provide in full the Government's justification for the creation of a new criminal offence of breach of reporting restrictions, in terms of the Government's own gateway requirement for the creation of new offences.

Q16. What evidence does the Government rely on to demonstrate that teachers are more vulnerable to false allegations from pupils than other professions such as prison officers, police officers, members of the armed forces, or staff at secure training centres?

It would be helpful if we could receive your reply by 6 April 2011. I would also be grateful if your officials could provide the Committee secretariat with a copy of your response in Word format, to aid publication.

22 March 2011

4. Letter to the Committee Chair, from Rt Hon Michael Gove MP, Secretary of State for Education, 7 April 2011

Thank you for your letter regarding scrutiny of the Education Bill by the Joint Committee on Human Rights. I have set out answers to your questions below, which I hope you will find helpful.

Q1. What guidance does the Government intend to give to schools about the sorts of items in respect of which it may be justifiable for the school rules to identify as items for which pupils may be searched?

The purpose of the provisions in clause 2 of this Bill is to enable teachers to search for items which, although not intrinsically or potentially harmful, are disruptive to teaching. We want to leave it to schools to identify, in their behaviour policies, items that are causing problems in their school or have the potential to do so. We do not intend to issue guidance that gives examples or categories of items.

We do wish to support schools in understanding their obligations, covering for example the legitimate aims of protecting the rights of others by reference to Convention rights under Article 8 and Article 2 of Protocol 1. This would inform the governors' and head teacher's determination of what items might go into the rules as items that can be searched for.

Q2. What safeguards does the Government intend to provide to ensure that the power to search a pupil of the opposite sex in secondary schools is only used "on very rare occasions" as it envisages?

The new provisions will only permit opposite sex searches if two important tests are satisfied. The first test is that the person carrying out the search must reasonably believe that there is a risk that serious harm will be cause to a person if the search is not carried out as a matter of urgency. The second test is that in the time available it is not reasonably practicable for the search to be carried out by a person of the same sex as the student, or in the presence of another member of staff.

It is these safeguards that we consider will ensure that the power will only ever be used on very rare occasions. We believe that teachers and college staff can be trusted, as professionals, to act in accordance with the law and to use the flexibility these particular provisions provide in an appropriate and proportionate way.

Q3. What safeguards does the Government intend to include in guidance to ensure against the arbitrary exercise of the very wide power to examine and erase data on an electronic device seized from a pupil?

Clauses 2 and 3 ensure that a head teacher, college principal or an authorised member of school or college staff will only be permitted to examine or delete data or files on a student's mobile phone or other electronic device if there is a good reason to do so. In determining whether there is a good reason, the member of staff must have regard to guidance issued by the Secretary of State.

We will describe in guidance the process of a search and will make clear that any examination or erasure of data or files must link directly to the teacher's justification for conducting the search in the first place. Our view is that a teacher would have a good reason for examining the content of a mobile phone, or any other electronic device, if they suspect or are made aware that it has been, or is likely to be, used to circulate inappropriate images or material, for example for the purposes of bullying or harassment.

Q4. In how many cases has the reinstatement of an excluded pupil been ordered by an independent appeal panel in each of the last three years for which figures are available

i. In total

ii. As a proportion of the total number of appeals brought

iii. As a proportion of the total number of exclusions?

The table below shows figures for the last three academic years for which figures are available.

	2006–07	2007–08	2008–09
Number of cases where reinstatement was directed	100	60	60
Reinstatements directed as % of appeals lodged	9.5	7.7	9.3
Reinstatements directed as a % of all permanent exclusions	1.2	0.8	0.9

Q5. After the decision of the European Court of Human Rights in *Orsus v Croatia*, is it still the Government's view that exclusion from school is not determinative of a civil right, and, if so, why?

Thank you for referring us to the case of *Orsus v Croatia*. It is still our view that exclusion from school is not determinative of a civil right and therefore that Article 6 does not apply.

Orsus v Croatia is a case which, in our view, is primarily about discrimination in the educational context rather than being about denial of the right to education or about exclusion. The applicability of Article 6 must be seen in this particular context. We refer to paragraph 143 of the judgment.

> "*The applicants in the present case made complaints under Article 2 of Protocol No 1 taken alone and in conjunctions with Article 14 of the Convention, claiming that the fact that they had been allocated to Roma-only classes during their primary education violated their right to receive and education and their right not to be discriminated against. However the Grand Chamber sees this case as raising primarily a discrimination issue.*"

You will no doubt be familiar with the fact of the case. Consideration was given to the issue of Roma children being placed in separate classes because of their difficulties with the Croatian language, whether adequate steps were taken by the schools to ensure that these children acquired Croatian language skills quickly enough, whether the curriculum in this context was adequate and whether their transfer back into mixed classes was speedy and effective.

The Court found that the "*alleged inequality of treatment in the enjoyment of the right to education is a fundamental aspect of the present case and the issues pertinent to this case are to be analysed from the standpoint of Article 14 of the Convention read in conjunction with Article 2 of Protocol No 1"* (paragraph 145).

The Court found that there was a violation of Article 14 of the Convention, taken together with Article 2 of Protocol 1, and in view of this conclusion did not find it necessary to examine the complaint under Article 2 of Protocol 1 separately (paragraphs 185 and 186). The "educational dispute" to which Article 6 was considered applicable was therefore not actually about the denial of the right to education or exclusion.

We refer to paragraphs 106 and 107 of the judgment.

> *"The proceedings before the domestic courts concerned the applicants' allegations of infringement of their right not to be discriminated against in the sphere of education, their right to education and their right not to be subjected to inhuman and degrading treatment. The applicants raised their complaints before the regular civil courts and in the Constitutional Court and their complaints were examined on the merits.*
>
> *Furthermore the applicants right not to be discriminated against on the basis of race was clearly guaranteed under Article 14 of the Constitution and, as such, enforceable before the regular civil courts in the national legal system."*

This is not what is being determined in relation to an exclusion. We are clear that, in the context of the existing statutory framework around educational provision for children who are excluded, a decision to exclude either on a fixed term basis or permanently is not determinative of a civil right. The right to education is not a Convention guarantee of

education at or by a particular institution. The legislative framework provides for continuing education following exclusion.

We would also like to refer you to the case of *Ali v UK* (Application no 40385/06) which was decided recently and not covered in our Human Rights Memorandum. Whilst the Court did not specifically consider the applicability of Article 6, the judgment (in particular paragraphs 51–54) is relevant to the issues you raised and supports our position in relation to Article 2 of Protocol 1 and exclusion

Q6. What are the reasons for the Government's view that the review panel provides for an independent review of the facts when the Bill provides that the review panel may only quash the decision of the governing body if it considers it to be "flawed when considered in the light of the principles applicable on an application for judicial review"?

Our view is that it is right that a school's decision to exclude can be quashed by a panel if it is considered to be flawed in the context of a judicial review, but not that a panel should be able to simply replace a school's decision with its own.

The review panel will provide for an independent review of the facts of an exclusion in making a decision regarding that exclusion in the light of the principles of judicial review. This will involve consideration of the facts in the context of:

- legality—the body must act within the scope of its powers and for a proper purpose;
- procedural fairness—for example, giving the individual a right to be heard;
- reasonableness and rationality—taking into account, relevant but not irrelevant factors, not making a decision that no reasonable person could have made;
- compatibility with European Convention on Human Rights (ECHR) and European Union (EU) law.

We intend the constitution of the panel to be broadly the same as the constitution of an appeal panel, so it will remain independent from the school.

Q7. Assuming that Article 6 ECHR applies, is the lack of a power to order reinstatement in certain cases at risk of breaching the Article because it fails to provide the means to give practical effect to the judgment of an independent tribunal?

It is our firm view that Article 6 does not apply in relation to an exclusion decision. We have formulated policy in this area on the basis of this view.

Q8. What estimate have you made of the effect of the proposed change to the exclusion appeals process on the number of judicial reviews that will be brought?

Our view is that parental behaviour will not substantially change. There will still be an independent review of the permanent exclusion available and parents will be able to request than an SEN expert attends the review where relevant to the case. Disability discrimination related permanent exclusion cases will automatically be able to be brought to First Tier Tribunal (SEND), which will have the power to reinstate a pupil.

We consider it likely that most governing bodies will offer to reinstate pupils if directed to reconsider by a panel and therefore there will be no need for parents to seek judicial review. There may be a small number of cases where governing bodies reconsider but decide not to reinstate and parents may consider judicial review. However, we consider it more likely that parents would ask for investigation by the Secretary of State under s 496 of the Education Act 1996, who would have the power under this section to reinstate a pupil.

Importantly, there is clear evidence over the last three years that in approximately 60% of successful appeal cases parents do not opt for their child to be reinstated. The imposition of a financial penalty on a school which decides not to reinstate when a review panel quashes the original decision will be a disincentive to schools making unreasonable exclusions decisions. The fact that the outcome of a panel's decision can be noted on a pupil's records and that a quashed exclusion would not count towards the rule that after two exclusions a parent loses the right to choose another mainstream school (amendment to section 87 SSFA 1998), will be additional redress for parents.

Q9. Have you sought the view of the Administrative Justice and Tribunals Council on the proposed reforms, and if so what was its view?

Officials have discussed this issue with the AJTC. AJTC have also submitted written evidence to the Commons Public Bill Committee.

The AJTC have expressed concerns about whether the new system is necessary and, in particular, about the removal of the power of reinstatement from the panel and whether there is compliance with ECHR, article 6. As I have explained in the Human Rights Memorandum and this letter, I do believe it is necessary and I am content it is compliant with the ECHR.

AJTC have asked us to consider if all SEN related permanent exclusion cases should be heard by First Tier Tribunal (SEND). We did consider this in developing our approach. However, Tribunals typically take up to 22 weeks to complete a hearing whereas the review panel will have to meet to consider a case no later than 15 school days after the day on which the parent logs the request for review. We believe it to be in the interest of all concerned to deal with exclusion matters quickly.

We are continuing discussions with AJTC on their areas of concern.

Q10. Will draft Regulations proposed to be made under new s. 51A(3) Education Act 2002 be made available during the passage of the Bill?

A policy statement on the new regulations was made available to the Commons Public Bill Committee on 7 March, 2011. A copy is attached at Annex A for your reference. Regulations will provide for the constitution of the new review panels, how they will operate and the procedure that they will follow. This will be broadly the same as for existing appeal panels. The right to request a review will also follow the current position in relation to an appeal. We will consult on the details of the regulations prior to them being laid before Parliament.

Q11 If not:

a) **in what case is it envisaged that the responsible body should not order reinstatement?**

b) **what is the proposed constitution of the review panel?**

c) **how, if at all, will the proposed procedure at review panel hearings (including the standards of proof) be different from the current procedure before independent appeal panels?**

Under the new system the final decision on reinstatement will be made by the school. We consider it likely that most governing bodies will offer to reinstate pupils if directed to reconsider by a panel. However, there may be local circumstances where the school considers that the detrimental effect on the wider school community of a pupil being reinstated mean that they decide not to reinstate the pupil. The school is best placed to make that decision.

We intend that the review panel constitution will mirror that for independent appeal panels as set out in SI 2002 No 3178, The Education (Pupil Exclusions and Appeals) (Maintained Schools) (England) Regulations 2002. We expect that the procedures also will broadly mirror those for appeal panels. We will consult on the issue of the standard of proof during the consultation on regulations. Under the new system parents can ask for an SEN expert to attend the panel if relevant to the exclusion. The SEN expert will be there to offer advice but will not have the power to vote on the panel. The regulations will be the subject of consultation.

Q12. Please provide more detailed statistics to demonstrate that the overwhelming majority of allegations against teachers are not substantiated and a significant number are false.

Over a significant number of years teacher unions have been highlighting devastating individual cases and have drawn attention to the fact that only a small percentage of allegations each year result in criminal convictions.

The Association of Teachers and Lecturers (ATL) carried out a survey in 2009 in which 50 per cent of members questions (from a sample of over 1,000 participants) reported that they or a colleague had had a false allegation made against them.

In response to the Children, Schools and Families Select Committee investigation into allegations against school staff, carried out in 2009, the National Association of Schoolmasters and Union of Women Teachers (NASUWT) provided evidence showing that since 1991 the majority of allegations made against teachers were false. The figures in the table below indicate that in a considerable number of cases there was no further action. Of those that went to court only a small number resulted in a caution or conviction.

Please note that the figures for 2009 do not reflect a full year.

Year	Allegations	NFA	To Court	Court NFA	Cautioned or Convicted	Total Concluded	Total Still outstanding
1991	44	33	11	5	6	44	0
1992	91	78	10	4	6	88	3
1993	153	130	22	12	10	152	1
1994	134	108	25	14	11	133	1

1995	103	93	10	3	7	103	0
1996	108	81	27	13	12	106	2
1997	118	96	21	14	7	117	1
1998	163	130	30	17	13	160	3
1999	190	169	21	17	4	190	0
2000	173	154	19	10	9	173	0
2001	183	164	18	15	2	181	2
2002	161	143	14	6	6	155	6
2003	191	171	20	12	6	189	2
2004	193	167	23	9	10	186	7
2005	170	154	16	8	8	170	0
2006	185	171	14	5	8	184	1
2007	192	173	11	3	7	183	9
2008	148	116	2	2	2	120	28
2009	41	16	0	0	2	18	23
	2741	2347	314	169	136	2652	89

In addition, the National Union of Teachers (NUT) also provided evidence to the Select Committee stating that the number of NUT members subject to an allegation of criminal misconduct has remained relatively steady at approximately 200 cases per annum. Of these about 5% resulted in a conviction or finding of misconduct. They do not hold statistics on allegations of improper conduct made against NUT members, which do not lead to police involvement.

Q13. In each of the last three years, how many examples is the Government aware of in which allegations against teachers have been made public before charge?

The Department does not routinely collect this data. However, a routine search does return a number of cases where a teacher was named prior to charge. Details of these are set out below. Some of these cases were referred to by the Minister of State for Schools at the Public Bill Committee on 22 March.

Q14. Please provide details of the specific examples that the Government has of allegations against teachers being published before charge referred to in para. 114 of the Human Rights Memorandum.

Below is a brief summary of the articles referred to in our Human Rights Memorandum. The original articles identified the teachers and schools by name. For the purpose of this response teacher, pupil, school and place names are replaced with an X. I can provide copies of the articles if you wish.

1. The Telegraph and Argus (15 May 2009) printed "A music teacher with nearly 50 years of experience has been told to stay away from a X primary school after being accused of assaulting a pupil. XX, who was working part time at X School in X, has vehemently denied the claim against her."

2. The Mail online (no date) printed "A head teacher and her deputy were under suspension today over claims they taped shut a 10-year-old boy's mouth on a school trip. XX, head of X School in X, Essex, and assistant head teacher XX are accused of dishing out punishment to X."

3. The Telegraph (15 January 2009) printed "XX was arrested and bailed on suspicion of breaching a position of trust with boys from her school."

4. The Lancaster Guardian (12 March 2009) printed "A senior teacher at a leading X church school has been suspended amid claims he verbally abused pupils. XX, head of music at XX school, has been suspended on full pay since last Friday."

5. The Guardian (9th July 2009) printed "Teacher held on suspicion of attempted murder of 14-year-old pupil. XX was arrested by Nottinghamshire police yesterday after the incidence at X school in Mansfield that left a 14-year-old boy with serious head injuries."

6. Liverpool Local News (27 Feb 2010) printed "Teacher suspended over allegation of sexual relationship with female pupil at X School. X, an assistant head teacher at the top performing school, has been asked to stay off work while the X school and council probe the allegation."

Q15. Please provide in full the Government's justification for the creation of a new criminal offence of breach of reporting restrictions, in terms of the Government's own gateway requirement for the creation of new offences.

The Coalition Agreement contained a commitment to "give anonymity to teachers accused by pupils and take other measures to protect against false accusations". Our particular concern is to remove, or significantly reduce, the risk of teachers having been named publicly when allegations are later found to be malicious or unfounded. The Bill will impose reporting restrictions preventing the publication of information that would identify a teacher in connection with an allegation unless or until they are charged with a criminal offence. This will change attitudes in the classroom, making teachers feel more valued and less vulnerable to false allegations.

At present there is no provision in legislation preventing the media from publishing information identifying teachers against whom allegations have been made. The press are signed up to the Editor's Code of Practice, which is ratified and enforced by the Press Complaints Commission. However, the existing Editor's Code (self-regulation) does not take account of the particular position of teachers, their vulnerability to false allegations and the public interest in protecting their status in schools. As I have set out, the Code has not prevented a number of cases of details of allegations being published at a time when no charges had been brought against the teacher.

Teachers may have a legal remedy in certain circumstances under the law of defamation or under the Human Rights Act, but these provisions are unlikely to prevent publication in most cases. Where these remedies are available, they are more likely to be a reaction to publication, rather than prevent publication taking place.

In all the circumstances, and given the serious detriment suffered by individual teachers as a result of publication of false allegations, were are satisfied that a legislative solution is needed, with the force of a criminal offence for a breach.

There is a need for a penalty where the restrictions are ignored. We believe that only by including a criminal offence for a breach of restrictions could we make it clear that the public interest lies in protecting teachers from damage done by malicious allegations. A civil penalty would not be appropriate because there is no regulatory body to enforce and prosecute it. We are satisfied that we have got the balance right by creating a summary

offence and the threat of prosecution will act as a deterrent, even to those for whom the level of fine may not be significant, such as national newspapers.

In proposing this new offence, the Department carried out a justice impact assessment in line with the Ministry of Justice guidelines and received approval through the Ministry of Justice Criminal Offence Gateway. This considered what impact the new offence would have on the justice system in terms of: whether there would be an increase in demand for legal aid; whether more cases would be hard in the courts and tribunals; and whether there would be additional pressure on the prison and probation services.

The nature of the offence and the level of sentence are in line with legal precedents for similar provisions relating to reporting restrictions, such as section 44 of the Youth Justice and Criminal Evidence Act 1999 (in relation to people under-18 involved in criminal investigations and proceedings), and section 1 of the Sexual Offences (Amendment) Act 1992 (in relation to individuals making allegations of specified sexual offences).

Q16. What evidence does the Government rely on to demonstrate that teachers are more vulnerable to false allegations from pupils than other professions such as prison officers, police officers, members of the armed forces, or staff at secure training centres?

I have set out earlier in this letter the evidence that the Department has gathered of a problem for teachers that needs to be addressed. Given the careful balance of competing rights that this clause requires, we have drawn clause 13 narrowly. We have resisted a number of attempts to widen the scope of the provision at this stage in the absence of robust evidence that there is a systemic problem for other professions on the same scale as that experienced by teachers.

Clear evidence that other groups in the education sector are in the same position as teachers in terms of their role and their vulnerability to false allegations is not yet available. We will be continuing our discussions with representatives of support staff and the further education sector on this issue. We are committed to considering any evidence that is made available. However, I am sure you will appreciate that we need to proceed with caution and consider the impact of this provision before making a decision to extend it further.

We have not been provided with any evidence of a problem for other professionals on the scale of that suffered by teachers. The Government would consider such evidence carefully if it were brought forward. It is of course apparent that teachers spend a much higher proportion of their working life with pupils than any of the other groups cited, and so it follows that they are vulnerable to false allegations from pupils.

I hope this response is helpful in your consideration of the Education Bill. If you require any further information please do not hesitate to contact me.

7 April 2011

5. Letter to the Committee Chair, from Richard Thomas, Chair of the Administrative Justice and Tribunals Council (AJTC), 10 May 2011

I am writing as Chairman of the Administrative Justice and Tribunals Council (AJTC) in connection with the provision in the Education Bill regarding school exclusion appeal panels. The AJTC has seen a recent exchange of correspondence between the Committee and the Secretary of State, which raised many of the same issues that AJTC has also raised with the Minister in connection with the Bill's provisions.

As you may be aware the AJTC's role is to keep under review the administrative justice system and the operation of tribunals falling under its oversight, including exclusion appeal panels. Of all the tribunals under the oversight of the AJTC (and its predecessor body the Council on Tribunals) the operation of admission and exclusion appeal panels have continued to give cause for concern, largely because of the widely held perception that they are not sufficiently independent. This was highlighted in a Special Report produced by the Council on Tribunals in 2003[11] and by Sir Andrew Leggatt in his 2001 Review of Tribunals.[12] Despite a number of positive developments in recent years in the operation of the panels, for example the introduction of mandatory training for panel members and greater clarity in the chairing of panels, fundamental concerns remain with regard to their independence, both actual and perceived.

The AJTC's primary focus is on the users of tribunals, in this case the parents of excluded children and the children themselves. One of the main flaws from the AJTC's perspective of the policy analysis in respect of the government's proposals is the implication that all exclusions concern children who have been violent against teachers or fellow pupils, which is patently not the case. AJTC members have observed appeal hearings for children who have been excluded for far less serious incidents and it is this type of case that will suffer particular injustice under the new arrangements. Indeed, the small percentage of permanent exclusions that go to appeal (around 9%) are more likely to be cases where the parents of the excluded child feel a real sense of injustice. The Department's response to my earlier letter to the Secretary of State highlighted support for the government's proposals from head teachers and unions, which is of course to be expected. There was little by way of acknowledgement in the response of the likely impact on excluded children, and no recognition that some children may be excluded for far less serious misdemeanours.

It is however uncontroversial that—as a matter of justice and due process—genuinely independent review is needed where decisions to exclude a child from a school are challenged. The consequences of any exclusion can be life-changing. The allegations, their seriousness and the judgments made in each case need to be examined to ensure that the decision can be justified and was correct.

Appeals to the First-tier Tribunal (SEND)

11 School Admission and Exclusion Appeal Panels (2003) Cm 5788.

12 Tribunals for Users: One System, One Service (2001) pp 178–182

Because of the clear link between exclusion and the children involved having special educational needs (SEN) the AJTC (and former Council on Tribunals) has long held the view that exclusion appeals should be heard by the First-tier Tribunal (Special Educational Needs and Disability)—FTT(SEND).

On the question of appeals being heard by the FTT(SEND) it is not entirely accurate for the Department to state that SEN appeals typically take 22 weeks. In a recent meeting with Judge John Aitken, the Deputy Chamber President with lead responsibility for FTT(SEND), the AJTC was advised that the tribunal is currently piloting an 8-week turnaround time for some SEN appeals. Given the less onerous evidential requirements for exclusion appeals, that time could easily be reduced further. In any event, the AJTC has always held the view that exclusion appeals could be handled on a separate track to SEN appeals and dealt with more speedily.

Given that around 70% of exclusion appeals concern children with some degree of SEN, under the new arrangements the majority of these appeals could theoretically be brought on grounds of disability discrimination, meaning that they would be heard by the FTT(SEND), with the other 30% being heard by the new review panels. In terms of numbers (based on statistics for 2008–09), of the 640 appeals lodged, 448 would therefore go to the FTT(SEND) and 192 to the new review panels. It seems illogical to require each local authority across England to operate a separate appeals system to deal with such a small number of appeals, incurring associated costs of recruiting, training and reimbursing panel members. It must be more economic for all exclusion appeals to be head by the FTT(SEND), which already has trained judiciary with wide experience of dealing with such appeals.

Consultation with the AJTC

Finally, I have seen the Secretary of State's letter to you of 7 April. The Committee asked whether the department had sought the views of the AJTC on the proposed reforms, the response to which was that officials had discussed the issue with us. In fact, the department did not seek the AJTC's views on the proposed reforms, certainly not before the publication of the White Paper. Rather, one of our senior policy advisors contacted the department after publication of the White Paper to seek a meeting to discuss the proposals, by which time, of course, it was too late to be able to exert any influence. It is a matter of some considerable regret that the Department should fail so lamentably to consult an expert body like the AJTC, which has statutory responsibility for these matters, before bringing forward these proposals, which in the AJTC's view will lead to injustice.

10 May 2011

6. Memorandum submitted by the Department of Energy and Climate Change on Human Rights Compatibility for the Energy Bill 2011

Introduction

1. This note analyses the ECHR considerations arising from the Energy Bill. Our conclusion is that, , there is no incompatibility. Where no specific reference is made to a provision, we consider that that provision does not raise any ECHR issues or engage any of the Articles of the ECHR. We have also considered the applicability of other human rights obligations of the United Kingdom, inter alia, the UN Convention on the Rights of the Child and the UN International Covenant on Civil and Political Rights, but we have concluded that these obligations are not engaged by this Bill.

Summary of the Energy Bill 2011

2. The Bill has five parts:

- Part 1, energy efficiency, contains chapters dealing with the Green Deal, private rented sector, reducing carbon emissions and home-heating costs and information about energy consumption, efficiency and tariffs;
- Part 2, security of energy supplies, contains chapters dealing with electricity supply, gas supply, upstream petroleum infrastructure, special administration and the continental shelf;
- Part 3, low carbon generation, contains chapters dealing with offshore electricity and decommissioning nuclear sites;
- Part 4, Coal Authority, deals with powers of Coal Authority; and
- Part 5, miscellaneous and general, deals with matters such as the repeal of the Home Energy Conservation Act 1995.

Part 1: Energy Efficiency

Chapter 1: green deal

3. Clauses [17 to 22] give the Secretary of State powers to modify energy licences for various purposes in connection with the green deal. These powers enable the Secretary of State to modify (i) conditions of a particular licences, (ii) the standard conditions of licences, (iii) documents maintained in accordance with those licences, and (iv) agreements giving effect to documents so maintained.

4. Clause [17] enables the Secretary of State to modify gas transporter, shipper and supply licences, and electricity distribution and supply licences. Modifications can be made for the purpose of enabling a holder of these licences to make specified arrangements for facilitating the collection of green deal payments, and enabling the holder of a supply licence to take specified action in connection with green deal payments.

5. Clause [18] enables the Secretary of State to modify gas and electricity supply licences for the purpose of providing for the steps to be taken by a licence holder following a bill payer's default in making green deal payments. The purpose of making these amendments will be to enable licence holders to take exactly the same steps in relation to default on payment of green deal payments as the licence already entitles or requires them to take in relation to default on payment for supply of gas or electricity.

6. Clause [19] enables the Secretary of State to modify gas and electricity supply licences for the purposes of requiring licence holders to provide bill payers with specified information in connection with their green deal plans. For example, it is intended that licence holders will be required to show any amount being charged in respect of the green deal plan as a separate item in an energy bill, so that it is easily identifiable. In addition, licence holders are likely to be required to provide bill payers with other information periodically regarding their green deal plan— such as the number of green deal instalments that remain to be paid, and the period over which they will be collected.

7. Clause [20] enables the Secretary of State to modify gas and electricity supply licences for the purposes of making provision which corresponds to provisions of the Consumer Credit Act 1974 which are being disapplied by virtue of [clause 24] of the Bill. [Clause 24] provides that energy suppliers will not need a consumer credit licence issued by the Office of Fair Trading in respect of their role in relation to the collection of green deal payments from their customers. We have agreed with the Department for Business Innovation and Skills that an Office of Fair Trading licence should not be required for energy suppliers which simply collect green deal payments for green deal providers, given that energy suppliers are already licensed by the Gas and Electricity Markets Authority and that those licences will make provision at to the collection of energy supply charges and green deal payments from customers. This power will be used to ensure that provision is made in suppliers' licences to give consumers protection which corresponds to that provided for under the Consumer Credit Act 1974.

8. As set out in paragraphs below in relation to the smart metering provisions which also contain licence modification powers, Article 6 and the right to a fair trial may be engaged by these powers for the Secretary of State to make licence modifications. However, to the extent that the modifications may constitute a determination of a licensee's civil rights and obligations, the Secretary of State must consult licensees under [clause 21] prior to making any modification and the terms of the modification will be subject to judicial review. We consider that these safeguards are sufficient to satisfy the requirements of Article 6, and the decision in Tsfayo v UK (2206) is distinguishable since the content of any licence modifications will be an exercise of administrative discretion, based on policy considerations and expert knowledge of electricity supply and distribution and gas supply, shipper and transportation issues.

9. As set out in below in relation to the smart metering provisions, article 6(1) is engaged in relation to the enforcement of any new licence conditions. However, licensees are able to apply to court under sections 30 and 30E Gas Act 1986 and sections 27 and 27E Electricity Act 1989 to challenge any order made or penalty imposed by Ofgem. Ofgem is also bound by section 6 of the Human Rights Act as a public authority, and therefore must act compatibly with the ECHR.

10. The modification of licence conditions could engage Article 1 of Protocol 1 and the right to property, as it may interfere with energy companies' licences. Paragraph 63 explains that the right to property is qualified, and a fair balance must be struck between the general interest and the rights of the individual.

11. We consider that the powers in clauses [17 to 22] do strike a fair balance between the general interest and the rights of individual licensees.

12. The exercise of the power in [clause 17] will enable an essential feature of the green deal, that is the collection of payments via energy bills, to be implemented, which will enable customers to pay for energy efficiency improvements (i) only for as long as they are liable for energy bills at the property, and (ii) in a way which should enable them to make a clear link between the cost of the energy efficiency improvements and the amount of their energy bills.

13. The exercise of the power in [clause 18] will enable important provisions to be included regarding steps to be taken when a customer defaults on green deal payments. Provision made under this power will help to protect energy suppliers and green deal providers from the risk of customers defaulting on payments, but will also be used to ensure that steps taken by suppliers are reasonable and fair to customers–particularly domestic customers, where licences already contain provision as to the treatment of customers who default in respect of charges for supply of energy.

14. The exercise of the power in [clause 19] will benefit customers, as it will ensure that they receive information on their green deal plans.

15. The exercise of the power in [clause 20] will benefit consumers, as it will be used to ensure that equivalent provisions are included in supply licences to those contained in the Consumer Credit Act 1974 regarding the activities of debt-adjusting, debt-counselling, debt-collecting or debt administration.

16. We therefore consider that provision made under these powers will be in the general interest.

17. The rights of individual licensees are, however, protected as these powers to make licence modifications are limited in scope (see subsection (2) of clauses [17, 18, 19 and 20]). The Secretary of State is required to consult on any modifications which he proposes to make (clause [21]), and must also publish details of modifications as soon as reasonably practicable after they are made. For these reasons we believe that a fair balance is struck between the rights of licensees and the general interest.

18. Clauses [3], [6] and [16] enable the Secretary of State to make provision in regulations for sanctions to be imposed and/or redress to be available where:

a) a green deal participant does not comply with obligations imposed on him under the regulatory framework envisaged by the green deal scheme;

b) a person does not obtain the necessary consents at the time the green deal plan is entered into; and

c) a person fails to comply with his obligations to make others aware of the green deal when a property is sold or let out.

19. Each of these clauses enable the Secretary of State to make provisions requiring a green deal provider to cancel or suspend a bill payer's liability to make green deal payments in appropriate circumstances and also for compensation to be payable by various parties to those who are affected in circumstances where the relevant obligations have not been complied with.

20. In addition, clause [3] enables the Secretary of State to make provision requiring a bill payer's liability to pay for a qualifying assessment to be cancelled and also to enable a green deal participant's authorisation to be withdrawn in certain circumstances. It also enables the Secretary of State to make provision requiring a green deal participant to rectify a qualifying energy improvement or its installation or to pay compensation or a financial penalty.

21. Clauses [6] and [16] also enable the Secretary of State to make provision requiring a green deal provider to refund payments made under a green deal plan where a bill payer's liability to make payments has been suspended or cancelled.

22. Clause [16] enables the Secretary of State to require a civil penalty to be payable where a person has not complied with his obligations to make others aware of the green deal when a green deal property is sold or let out.

23. The examples of the types of sanction and redress that the Secretary of State is able to provide for in regulations are not exhaustive and the Secretary of State is able to make provision for other types of sanction in redress where appropriate.

24. These clauses enable regulations to make provision to determine the civil rights and obligations of green deal participants and others connected to green deal properties. Therefore, the clauses engage Article 6(1). We consider that the clauses provide for these powers to be exercised in a manner which is capable of being compatible with Article 6. In particular, clause [33] requires the Secretary of State to make provision in regulations for an appeal to a tribunal against any sanction imposed or redress awarded under clauses [3], [6] or [16]. In addition, sanctions and rulings under all these clauses will be issued by public authorities, which are bound by section 6 of the HRA.

Chapter 2: private rented sector

25. [Clauses 38–50[1]] make provision enabling the Secretary of State to regulate the domestic and non-domestic private rented sectors with a view to improving their overall energy efficiency. In summary, these clauses enable the Secretary of State to make provision specifying the circumstances in which a landlord must carry out energy efficiency improvements to his or her property.

26. The power to make provision specifying the circumstances in which a landlord must make energy efficiency improvements to his or her property is subject to the requirement in clause 39 for the Secretary of State to undertake a review with a view to determining

1 Clauses [51–63] contain similar provisions dealing with this policy but which apply to Scotland only. Nevertheless, the discussion which follows here, although based on provisions which extend to England and Wales should be read as applying to the similar Scottish provisions.

whether regulatory intervention will improve the overall energy efficiency of the private rented sector, see further paragraphs 48 and 49.

27. If after a review the Secretary of State considers that regulatory intervention will improve the energy efficiency of private rented properties and will not decrease the number of properties available for rent, clause [40] enables the Secretary of State to make provision requiring local authorities to impose a duty on landlords of particularly energy inefficient properties to take up such energy efficiency measures as are available to the landlord at no upfront cost (defined in clause 40(6) as "relevant energy efficiency improvements").

28. Similarly, clause [43] enables the Secretary of State to make provision enabling tenants of private sector accommodation to make arrangements for "relevant energy efficiency improvements" to be made to a property in which they are resident. The power in clause [43] is likely to be exercised so as to require a landlord to whom a request is made by a tenant to consent to the installation of energy efficiency improvements which will entail no upfront costs to the landlord.

29. Therefore, provision may be made under clauses [40 and 43] which restrict the circumstances in which a landlord can refuse to have relevant energy efficiency improvements installed at or in his/her property.

30. The Department recognises that the exercise of the power contained within both of these clauses[2] will engage Article 1 of Protocol 1 (A1P1) of the European Convention on Human Rights (ECHR). The Department is satisfied that the clauses themselves are compatible with the ECHR and that the powers contained within them are capable of being exercised in a way which is compatible with the ECHR.

31. So, whilst clause [40] will enable provision to be made requiring a landlord to install to his or her property relevant energy efficiency improvements, clause [43] enables provision to be made requiring a landlord to consent to relevant energy efficiency improvements being made to his or her property. In both cases, a landlord might reasonably argue that A1P1 is engaged as the State is interfering with his or her property.

32. In light of such an argument, the questions which arise for further consideration are:

a) is the interference in pursuit of the general interest?[3];

b) if (a) is answered in the affirmative, is the interference proportionate in the way that it seeks to achieve the matter falling within the general interest?

33. The Department believes that both of these questions can be answered in the affirmative and therefore is satisfied that the powers available in [clauses 38-50] are compatible with the ECHR.

2 Clause 46 contains similar powers enabling the Secretary of State to make provision in relation to the non-domestic private rented sector. Under clause 46 the Secretary of State can impose a duty on a landlord to install relevant energy efficiency improvements and therefore the discussion which follows is equally applicable to this clause.

3 The Department notes the views expressed by the authors of Human Rights Practice updated with Release 19 (March 2010) in paragraph 18.045 that member states have been afforded a wide margin of appreciation in determining the general interest. The Department believes that matters such as environmental protection, improved public health and security of energy supply are all grounds falling within the "general interest".

34. The following paragraphs of this section describe the intended effect of both clauses and the general basis upon which a subsequent exercise of these powers will be regarded as an interference which is justified (as in accordance with the law) and proportionate to the aims reflected in furthering the general interest. The Secretary of State will need to perform an assessment of whether a particular interference is proportionate in due course. For present purposes the Department is satisfied that the powers in clauses [38–49 (40, 44 and 46 in particular)] are capable of being exercised in a way which are compatible with the ECHR. In summary:

a) any interference with a landlord's property rights will be an interference in pursuit of the general interest in the form of environmental benefits resulting from a reduction in carbon emissions, improvements to local air quality and therefore to public health and also improvements to the security of our energy supplies. Facilitating energy efficiency improvements will enable a resident of a rented property to benefit from lower energy bills and also help to reduce the property's carbon emissions and thus help to further the general interest.

b) facilitating energy efficiency improvements by restricting the circumstances in which the owner of a property may refuse to have energy efficiency improvements made to his/her property is a proportionate method by which to achieve the general interest. Significant exemptions from a requirement to install relevant energy efficiency improvements are likely to be available to the landlord which the Department considers will demonstrate that the interference is likely to be proportionate.

35. The low level of take up of energy efficiency measures in the private rented sector is believed to be caused by a wider set of barriers than those that constrain the rest of the UK housing stock. In particular incentives, information failures, and inertia seem to be more prominent in the private rented sector than in other sectors.[4]

36. Properties in the private rented sector make up 17% of the UK's housing stock and contain a disproportionate number of the most energy inefficient properties.[5] To date, the uptake of energy efficiency measures in the private rented sector has been poor. A reason for this may be that a landlord has no real incentive to pay for energy efficiency improvements from which he or she will not directly benefit. For example, a landlord who decides to install loft insulation will not necessarily benefit from the reduction in energy bills where the energy bill is paid by the tenant as is usually the case. The usual type of incentive which may encourage an owner-occupier to invest in energy efficiency measures as a means of lowering energy bills and improving the thermal comfort of the property does not seem to apply to landlords. Therefore, a different approach is required to ensure that those owning the most energy inefficient properties in the private rented sector are encouraged to take up offers to improve the energy efficiency of their property.

37. So, it is important to note that the powers in these clauses will be restricted to that sector of properties where there seems to be a barrier to the greater uptake of energy efficiency measures. The powers are thus constrained in scope; the powers apply only to properties for which there is evidence of some inertia in the uptake of energy efficiency

4 See 'Private Landlords Research' Harris Interactive (February 2009) for EST and EEPH; EST research.

5 For example, 42% of private rented properties with lofts have less than 100mm of loft insulation installed. This is compared to only 25% in the owner-occupier sector.

improvements. The powers are constrained further by being restricted to those types of tenancy agreements where this inertia can be identified.[6]

38. It is also important to note the wider context in which the powers provided by these clauses (40 and 43 in particular) will be exercised. These are powers which will operate within the context of the Green Deal. Part 1 of the Bill introduces the Green Deal, whose aim is to enable the entire cost of an energy efficiency measure (and its installation) to be met by way of instalments - where the amount of the instalment represents the potential cost saving that the measure's installation will have on that property's energy bills. So, an energy efficiency measure which costs £5,000 and is likely to lead to energy bill savings of £10 per month might be installed with no upfront cost to the landlord and should result in a Green Deal repayment of £10 (or less) per month for the bill payer (probably the tenant). The Green Deal repayment will always be paid by the bill payer— who in the present context is the tenant and not the landlord— until such time as the agreed Green Deal finance amount has been repaid.[7]

Clause [40]—Domestic energy efficiency regulations

39. Clauses [40 and 41] enable provision to be made placing an obligation on landlords to take up relevant energy efficiency improvements. Clauses [40and 41] complement clauses [43 and 44] in that they deal with the case where tenants might not initiate a request for energy efficiency improvements to be made to the property. The Department envisages that there will be circumstances where a tenant may be reluctant to be seen to be demanding energy efficiency improvements to the property. Local authorities are under a duty to ensure that landlords comply with some health and safety legislation. For example, they are required to ensure that a valid gas/electricity certificate exists for a rented property and also to ensure that the property is kept free from particular types of hazards.[8] These existing functions, whilst different, do have some similarities to what is intended under this policy where local authorities will be required to ensure that residential landlords improve the energy efficiency of their property wherever this is practicable.

40. Clause [40] will enable the Secretary of State to place a duty on local authorities to identify particularly energy inefficient properties in the residential private rented sector and issue notices to landlords requiring them to take up relevant energy efficiency measures. As with the power in clause [43] to require landlords to consent to the installation of relevant energy efficiency measures, see further below, the Government recognises that this type of provision will engage A1P1 of the ECHR. However, for the reasons summarised above, and discussed in greater detail in paragraphs below the Department believes that an interference will be in the general interest and proportionate to the aims of reducing carbon emissions, and thereby improving public health benefits which will result from improvements to the energy efficiency of the property, and also

6 In the domestic sector, in England and Wales for example, assured tenancies under the Housing Act 1988 and regulated tenancies under the Rent Act 1977 will be caught by these powers. However, a tenancy let by a registered provider of social housing under, for example, sections 79 and 80 of the Housing and Regeneration Act 2008 will not be caught. In the non-domestic sector only those with the lowest energy efficiency ratings will be caught.

7 The Green Deal will also be available to owner-occupiers. See also paragraph 47 which explains how the Department may deal with any periods where there is no tenant in the property and therefore where the Green Deal repayments may fall to the landlord.

8 Under Part 1 of the Housing Act 2004 local authorities are under a duty to serve notices on landlords in respect of health and safety hazards which they have identified at a landlord's property.

improving the security of the UK's energy supply occasioned by the more efficient use of energy.

41. By issuing a landlord with a notice requiring him or her to take up relevant energy efficiency measures, the Department recognises that a landlord's property rights are likely to be interfered with. However, as explained in paragraphs below we envisage that in practice a landlord will only be required to take up those measures for which finance is available; in this context finance will mean finance which imposes no upfront costs on the landlord. So, for example, Green Deal finance which will spread the cost of the measure over the lifetime of the energy savings which will result or perhaps a 100% subsidy provided by an energy company under the new Energy Company Obligation.[9] Where finance is not available or where one of the circumstances described below apply, a landlord will not need to comply with the notice served upon him. Put another way, a landlord will be given an exemption from the requirement to install relevant energy efficiency measures. So, essentially, the interference will only bite in circumstances where there is no upfront cost to the landlord and where his/her property's value will not be adversely affected. Instead, the value of the property can reasonably be expected to increase as a result of its improved energy efficiency thus leading to a positive gain for the landlord caused as a result of the interference.

Clause [43]—tenant request for energy efficiency improvement

42. In the context of clause [43] it is not uncommon for leasehold agreements to contain provisions preventing a tenant from making structural or other types of alterations to the property which forms the subject matter of the leasehold agreement. Thus, a tenant who was minded to take up a Green Deal package for an energy efficiency measure will often, in accordance with the terms of his or her lease, need to seek his or her landlord's consent for the installation of the energy efficiency measure.

43. The exercise of power in clause [43] will restrict the circumstances in which a landlord faced with a request from a tenant to proceed with energy efficiency improvements can refuse permission to do so.[10] However, a landlord will be able to withhold consent where he or she is being asked to fund the cost and installation of the energy efficiency measures, i.e. no Green Deal finance package is available and/or where there is no subsidy provided by other programmes such as the Energy Company Obligation[11] for such circumstances are

9 Under the new energy company obligation,energy companies will be required to promote energy efficiency measures. It is possible that some energy companies may subsidise the entire cost of an energy efficiency measure as part of fulfilling their obligation. This will not necessarily always be the case but it is not unreasonable to expect energy companies to subsidise the entire cost for those more vulnerable members of society in much the same way as they do under the Electricity and Gas (Carbon Emissions Reduction) Order 2008 (S.I. 2008/188), as amended, and the Electricity and Gas (Community Energy Saving Programme) Order 2009 (S.I. 2009/1905).

10 The discussion which follows is equally applicable to a landlord who receives a notice from a local authority to install relevant energy efficiency improvements.

11 Currently, under the Electricity and Gas (Carbon Emissions Reduction Target) Order 2008 (S.I. 2008/188), as amended, defined energy companies are under an obligation to promote energy efficiency measures. Energy companies can fulfil their obligation in different ways. One way is to encourage a domestic customer to purchase an energy efficiency measure by subsiding its cost. A similar type of energy company obligation is likely to exist for when the obligation period in the 2008 Order ends in December 2018. Therefore, in the present content, it is possible that a tenant could have promoted to them an energy efficiency measure under the new energy company obligation; promoted on the basis of the measure being subsidised to a level where the landlord is comfortable paying for the rest. The Department envisages that Green Deal finance packages to work in tandem with subsidies for energy companies under a future energy obligation so that the entire cost of the measure is divided between the two. It is only where there is no upfront cost to the landlord that he/she will be required to consent. Where he/she has to contribute to the cost of the measure consent will not be mandatory.

likely to fall outside the meaning of "relevant energy efficiency improvements"[12] that can be requested by a tenant.

44. The Department envisages that there will be other circumstances, circumstances not related to whether the landlord will incur any upfront cost to install the measures, which will justify a landlord refusing to consent to energy efficiency measures being installed at his or her property. The power in clause 44(1)(c) enables the Secretary of State to make provision exempting landlords from having to comply with a notice from a local authority to make relevant energy efficiency improvements or from having to consent to a request made by a tenant to install relevant energy efficiency improvements. The Department expects that the power of exemption will be exercised so as to exempt landlords from having to take up relevant energy efficiency improvements or consent to such improvements where:

a) it can be demonstrated that the value of the property will be adversely affected (reduced in value) as a result of the proposed energy efficiency measures being installed. (In the vast majority of cases it is reasonable to expect the required energy efficiency improvements to lead to an increase in the value of the landlord's property);

b) the property is of a specified type;[13]

c) a landlord can show that he/she is unable to obtain the consent of others for the works.[14]

d) where the landlord believes and can demonstrate that it would be unreasonable to impose a requirement to consent to the proposed works.[15]

45. The types of cases falling with the previous paragraph reflect the circumstances in which the Department accepts that it may not be appropriate to interfere with the way in which a person may wish to control or use their property. However, outside of the circumstances described in the previous paragraph, it would seem reasonable for a landlord to have to consent to energy efficiency improvements being made to their property. Outside of these types of exemption, a landlord will be required to consent only where there is no upfront cost to the landlord; the cost of the energy efficiency improvements will be spread in their entirety over a period of several years and met by the bill payer and therefore will not impose any upfront costs to the landlord. When a rental property is vacant the Department expects to make provision enabling a landlord to apply

12 See [clause 40(5)] for the definition of "relevant energy efficiency improvements".

13 The Department recognises that there are likely to be properties caught by these powers for which the interference caused may not be justified or proportionate. For illustrative purposes only, a property which is a listed building may make it extremely difficult and/or expensive to obtain the relevant planning permission for the relevant energy efficiency measure. Such factors may make the interference disproportionate and therefore properties which are identified as creating a risk that the interference will be disproportionate will be excluded from within scope of the obligation.

14 It may not be possible for a landlord to obtain the necessary consents of others for the works. A landlord may not always be the freeholder and therefore may need to obtain the consent of the freeholder to allow alterations to be made to the property. Alternatively, a sitting tenant, as the bill payer, may refuse to agree to take on the Green Deal repayments.

15 The Department envisages that there will be circumstances falling outside the more specific type of cases listed in a.-d. where the requirement to consent might apply in a way which could be argued to be disproportionate. There may be circumstances where although the energy efficiency measures can be installed with no upfront cost to the landlord they in turn cause further works or redecoration to be undertaken at the property, the cost of which is not covered by, for example, the Green Deal finance package. These costs may make it unreasonable to expect the landlord to have to consent to the energy efficiency improvements as they would create a disproportionate interference with a landlord's property rights.

for an exemption from having to make any Green Deal repayments. In the vast majority of cases it is reasonable to expect the required energy efficiency improvements to lead to an increase in the value of the landlord's property.

Substantive and procedural constraints on powers

46. Exercise of the powers in these clauses will be subject to both substantive and procedural constraints. Substantively, before exercising the power which will limit the circumstances in which a landlord can refuse to consent to energy improvement measures being installed, the Secretary of State will be expressly required to be satisfied that regulatory intervention will improve the energy efficiency of the domestic or non-domestic private rented sector and will not decrease the number of properties available for rent in either part of the sector. Before exercising the power made available by either of these clauses, the Secretary of State must review the uptake of energy efficiency measures and the associated level of improvement by, for example, looking at the following:

a) the estimated energy efficiency standards of properties in the private rented sector in England and Wales relative to other tenures;

b) the general availability of finance packages for landlords and tenants;

c) whether there appears to be a need for regulatory intervention and if so to identify what negative impacts may arise from such intervention and how those negative impacts may be mitigated.

47. The express need for the Secretary of State to undertake a review to establish whether it is appropriate to exercise the powers which these clauses will provide will act as the means of identifying whether the general interest can be furthered by regulatory intervention in the private rented sector. The Secretary of State decision to proceed with regulatory intervention will be open to judicial review if stakeholders thought that the evidence underpinning the review did not support regulatory intervention.

48. Procedurally, the exercise of the powers in these clauses will be subject to a requirement to for Parliament to approve any Regulations made by the Secretary of State. This will enable Parliament to consider whether the Secretary of State's decision to exercise the power is appropriate both in terms of actually deciding to exercise the power(s) and also in how the exercise of power balances the interference against a person's property rights and the general interest.

49. Clauses [42], [45] and [48] enable the Secretary of State to make provision in regulations for the imposition of sanctions on landlords who do not comply with the obligations imposed on them.

50. Clause [42] enables regulations to make provision to secure that landlords comply with obligations imposed under domestic energy efficiency regulations (clauses[40 and 41]). In particular it states that regulations can provide for the imposition of a civil penalty on a landlord who does not comply with a notice issued by a local authority, or who provides false information in connection with obligations imposed by domestic energy efficiency regulations. The amount of the penalty must not exceed £5,000. Subsections (4) and (5) of

clause [42] require provision to be made in regulations for an appeal to a court or tribunal against the imposition of any penalty.

51. Clause [45] enables regulations to make provision to secure that landlords comply with requirements imposed under tenants' domestic energy efficiency improvements regulations (clauses [43 and 44). In particular, it states that regulations can provide for tenants to apply to a court or tribunal for a ruling that a landlord has not complied with its obligations – in other words, that the landlord has unreasonably refused a request to consent to relevant energy efficiency requirements. Subsections (4) and (5) of clause [45] require provision to be made in regulations for an appeal to a court or tribunal against any decision made by a court or tribunal.

52. Clause [48] enables regulations to make provision to secure that landlords comply with requirements imposed under non-domestic energy efficiency regulations. In particular, it states that a local weights and measures authority can enforce the regulations, and can impose a civil penalty on a landlord for non-compliance. Subsections (3) and (4) of clause [48] require provision to be made in regulations for an appeal to a court or tribunal against the imposition of any penalty.

53. These clauses enable regulations to make provision to determine a landlords' civil rights and obligations. In addition, clause [45] enables regulations to make provision for the determination of a tenants' right to request consent to energy efficiency improvements. The clauses therefore engage Article 6(1). We consider that these clauses provide for the powers to be exercised in a manner which is capable of being compatible with Article 6. In particular, the clauses require the Secretary of State to make provision in regulations for an appeal to a court or tribunal against any sanction imposed under clauses [42] or [48] and against any ruling of a court or tribunal under clause [45]. In addition, rulings and sanctions under all these clauses will be issued by public authorities, which are in any case bound to comply with the HRA.

Chapter 4: smart meters

[Clause 71]—Smart meters

54. [Clause 71] make minor amendments to the Secretary of State's powers in sections 88-90 of the Energy Act 2008, sections 41HA-HB of the Gas Act 1986, and sections 56FA–FB of the Electricity Act 1989 to rollout smart meters in Great Britain. The Energy Act 2008 gives the Secretary of State power to make licence and code modifications to require electricity and gas licensees to rollout smart meters to all gas and electricity customers. The powers in the Gas and Electricity Acts enable the Secretary of State to create and grant new licenses in respect of smart metering activities.

55. In light of further work undertaken by DECC [clause 71] makes various amendments to the Secretary of State's smart meter powers to:

- give the Secretary of State power to modify the conditions of electricity transmission licences and any industry codes or agreements made under such licences for the purposes of the smart meter roll out;

- make clear that the power to make licence and code modifications under section 88(1) includes power to require licensees to provide Ofgem or the Secretary of State with information to review the efficiency and effectiveness of the roll out;
- make clear that the roll out powers can be exercised to make different provision in different areas to cover any area-based requirements; and
- extend the time within which the Secretary of State can make any licence or code changes, or create any new licensable activities from November 2019 to November 2018, to cover any additional requirements arising during the roll out period.

We consider that this clause is compatible with the ECHR.

ECHR implications

56. Article 6 and the right to a fair trial may be engaged by the exercise of the power by the Secretary of State to make licence and code modifications. To the extent the modifications may constitute a determination of a licensee's civil rights and obligations, pursuant to section 89 of the Energy Act, the Secretary of State must consult licensees before making any modification and the terms of the modification will be susceptible to judicial review. We consider that these safeguards are sufficient to satisfy the requirements of Article 6, and the decision in *Tsfayo v UK* (2006) is distinguishable since the content of any licence and code modifications will be an exercise of discretion based on complex policy considerations, expert knowledge of electricity and gas distribution and supply, and specialist technical knowledge of smart metering and communications.

57. Article 6(1) is engaged in relation to the enforcement of any new licence conditions. Once any licence modifications have been made, Ofgem will enforce them under the existing regime in the Electricity and Gas Acts, which includes power to impose orders to secure compliance and financial penalties.[16] In terms of Article 6, the Electricity and Gas Acts give licensees the opportunity to apply to court to challenge any order made or penalty imposed by Ofgem.[17] Moreover as a public authority, Ofgem is bound by section 6 of the Human Rights Act to act compatibly with the ECHR.

58. The roll out of smart meters may engage Article 8 and the right to respect for family and private life, home and correspondence, because smart meters are capable of collecting greater information about a consumer's energy use in his property and the roll out will involve installers entering a customer's property. We consider that any interference meets the legitimate aims set out in Article 8(2), in particular the interests of the economic wellbeing of the country and the protection of the rights and freedoms of others. With appropriate privacy controls under the Data Protection Act 1998 and modifications made under section 88 of the Energy Act 2008, the roll out of smart meters will provide more visible information about energy consumption, encouraging energy and carbon saving by consumers, as well as enabling improved network management and security of supply.

16 Sections 28 and 30A Gas Act, sections 25 and 27A Electricity Act.

17 Sections 30 and 30E Gas Act, sections 27 and 27E Electricity Act.

59. Changes to licence conditions may also engage Article 1 of Protocol 1 and the right to property. The right to property is qualified and by virtue of the second paragraph of Article 1, it does not prevent a state enforcing such laws as it deems necessary to control the use of property in the general interest. A fair balance must be struck between the general interest and the rights of the individual.

60.We consider that both the power to amend electricity transmission licences and codes, and the overall extension of the licence and code modification powers until 2018 strike a fair balance between the general interest and the rights of the individual licensees.

61. It may be necessary to modify electricity transmission licences to ensure the effective introduction and operation of smart meters. It might, for example, be necessary for Elexon, the industry code body established under an amendment to National Grid's transmission licence, and responsible for electricity balancing and settlement, to play a role in implementation. This could take various forms, including a transitional role to enable a staged roll-out of smart meters or to support the establishment of a central communications body that will support all smart meters.

62. In terms of the general exercise of the powers, the extension to 2018 is necessary because we may need to make further licence or code modifications after 2013, for example if there is a delay in the programme or new requirements concerning the use of communications networks, safety or technical issues emerge which require further regulatory action. Overall, smart meters will bring significant benefits in terms of energy saving, carbon reduction and security of supply. Customers will receive better information about their energy use to help them become more energy efficient and save money. Suppliers will benefit from improved billing information and no longer needing to carry out remote meter reading. Distributors will benefit from having more accurate information to improve grid management and security of supply.

63. We therefore consider that these amendments strike a fair balance between the general interest and the rights of individual licensees.

64. The powers also ensure that any interference with property is proportionate by limiting the purpose for which the powers may be exercised (section 88(2) Energy Act 2008, section 56FA(3) Electricity Act 1989, section 41HA(3) Gas Act 1986) and limiting the duration of the powers to the period of the smart meter roll [(clause 69 (5), (7) and (8))].

Customer information on cheaper tariffs

65. Clauses [74 and 75] give the Secretary of State power to modify the standard conditions of supply licences to require electricity or gas suppliers to give their domestic customers information about their cheapest tariffs. Clause [76] requires the Secretary of State to exercise these powers in a manner that is compatible with the principal objective and general duties set out in Part 1 of the Electricity Act 1989 and the Gas Act 1986. We consider that these provisions are compatible with the ECHR.

ECHR implications

66. Article 6 and the right to a fair trial may be engaged by the exercise of the power by the Secretary of State to make licence modifications. To the extent the modifications may

constitute a determination of a licensee's civil rights and obligations, pursuant to [clause 71] the Secretary of State must consult licensees before making any modification and the terms of the modification will be susceptible to judicial review. We consider that these safeguards are sufficient to satisfy the requirements of Article 6, and the decision in Tsfayo v UK (2006) is distinguishable since the content of any licence modifications will be an exercise of administrative discretion, based on policy considerations and expert knowledge of electricity and gas supply and billing arrangements.

67. As set out above, Article 6(1) is engaged in relation to the enforcement of any new licence conditions. In terms of Article 6, the Electricity and Gas Acts give licensees the opportunity to apply to court to challenge any order made or penalty imposed by Ofgem18. Moreover as a public authority, Ofgem is bound by section 6 of the Human Rights Act to act compatibly with the ECHR.

68. Also, as set out above, changes to licence conditions may also engage Article 1 of Protocol 1 and the right to property. However, the right to property is a qualified one and by virtue of the second paragraph of Article 1, it does not prevent a state enforcing such laws as it deems necessary to control the use of property in the general interest. In terms of Article 1, a fair balance must be struck between the general interest and the rights of the individual.

69. We consider that the power to require suppliers to provide customers with information about cheaper tariffs on offer strikes a fair balance between the general interest and the rights of the individual licensees. The exercise of this power will ensure that customers receive information on cheaper tariffs and how to switch to them, promoting switching, price competition and a better deal for consumers.

70. The clauses further ensure that the control on the use of property is proportionate by including detailed provision limiting the purposes for which the power may be exercised (clause [74(2)]) and by the inclusion of a sunset clause (clause [74(7)]) which limits the duration of the powers to 2018. This coincides with the period of the smart meter roll out, during which time there may be changes in customer contracts and billing as a result of the introduction of smart metering.

Chapter 5: energy performance certificates

71. Clause [72] permits the Secretary of State to make amendments to the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 (the 2007 Regulations) which will enable changes to be made in respect of the disclosure of documents and information held on the Register of Certificates, Recommendation Reports and Advisory Reports by the Secretary of State (the Register). The intended effect of the clause will enable the Secretary of State to make amendments to the 2007 Regulations to make data relating to Energy Performance Certificates ("EPCs"), Display Energy Certificates ("DECs") and air-conditioning reports more publicly available than the current regulations allow.

72. In particular, subsection (3) of the clause enables the Secretary of State, in regulations, to restrict access to documents and data from disclosure and the number of disclosures to

18 Sections 30 and 30E Gas Act, sections 27 and 27E Electricity Act.

persons as specified in the regulations. Subsection (4) allows the Secretary of State to specify conditions to which persons to whom disclosure is to be given are to be subject and to impose sanctions for non-compliance with such conditions.

73. The Department considers that this clause is compatible with ECHR.

74. The Register does, in respect of EPCs issued in respect of residential properties, contain the addresses of domestic properties (referred to as address level data) but, importantly for the purposes of this discussion, does not contain the names of the owners, landlords or tenants of those properties. For purposes of data protection and the ECHR assessment of this clause it is proposed that address level data be treated as personal data. The information contained on the Register is regarded as environmental information and, in general, to the extent that the 2007 Regulations do not apply, access to it is governed by the Environmental Information Regulations 2004 (EIR). Regulation 4 EIR imposes a positive obligation on public authorities to make environmental information more easily accessible and to actively disseminate such information. Under regulation 5 EIR a public authority is under a duty to make environmental information available on request. However, these duties do not apply to disclosure of personal data (such as the address level data which forms the subject of this discussion) except where the information can be disclosed in accordance with, in particular, the Data Protection Principles (the DPP) under the Data Protection Act 1998.

75. Given the fact that it is intended to use clause [72] to make for a more open disclosure of the Register and enable disclosure to be made to Green Deal Providers it is considered that Article 8 and the right to respect for family and private life is engaged in respect of the disclosure of address level data.

76. Article 8 protects the collection, retention and processing of personal data (e.g. forensic data: S & Marper v UK, Application Nos. 30562/04 and 30566/04, Grand Chamber judgment of 4 December 2008).

77. However, the application of the principles set out in the Data Protection Act 1998 will ensure compliance with Article 8; See Bouchacourt v France (Application No. 6035/06, Chamber judgment of 17 December 2009), Gardel v France (Application No. 19428/05, Chamber judgment of 17 December 2009) and MB v France (Application No. 22418/06, Chamber judgment of 17 December 2009).

78. The Department for Communities and Local Government have carried out a small scale Privacy Impact Assessment (PIA) in respect of the proposed policy underlying clause [72]. As part of the PIA, an assessment has been made of the compliance of the underlying policy proposals with the DPP. The Department proposes to publish the PIA upon introduction of the Bill in the House of Commons.

79. The following assessment, justifying any interference with the Article 8(1) right, covers more particularly those rights arising in respect of EPCs that have already been issued. This is because it is the intention that for EPCs issued in respect of domestic buildings following the proposed provisions in the Bill having effect, each EPC issued will have on it a fair dealing notice setting out in a transparent way on the face of the EPC indicating that the information contained in it and the recommendation report has been placed on the Register with limited access to some and unlimited access to others; the notice will explain

the purpose of sharing that data. It should be noted, though, that the following justification arguments have universal application to the release of address or personal data under clause [72].

80. Where names and addresses are to be passed on to commercial concerns for direct marketing purposes this amounts to an interference with the right to private life. In such circumstances it would now normally be the practice to give individuals the opportunity to opt-out of the proposed marketing. It should be remembered that in this case it is only address level data (not names of individuals) that is being handed over in controlled circumstances. Initially, it is proposed to limit direct marketing to homes that already have an EPC rather than blanket market all households. This is because it is considered that by targeting EPC holders marketing will be more meaningful as those households will already have some understanding of energy efficiency of their home, but will not necessarily have any understanding of how they might improve that energy efficiency. Giving Green Deal providers access to the address details of EPC holders will enable them to proactively market their services to a group of people who may be more likely to take up such services because they already have an independently produced certificate,[19] showing how energy efficient their home is and what could be done to make it even more energy efficient. As a result, there is an increased likelihood that the energy performance of more properties than would otherwise have been the case will be improved, increasing the likelihood that Government will meet its demanding targets to reduce CO2 emissions. If the Green Deal policy is implemented by targeting only those who do not yet have an EPC then the roll out of the Green Deal will take a very long time and would have limited impact as the issue of Green Deal specific EPCs depend upon future sales and rent. The impact of the Green Deal is likely to be lost; there would be very little work for Green Deal Providers, assessors etc and the system is unlikely to be able to sustain itself. Targeting existing EPC holders means that the Green Deal would have effect immediately with the necessary momentum to carry it forward. It is therefore considered crucial to the success of the Green Deal that Green Deal providers have access to those who already hold an EPC in order to market their Green Deal products and services which in turn may create some momentum for the type of behavioural change the Green Deal is hoping to encourage more householders to make to the way they use energy.

81. It is not proposed to provide an opt-out in relation to homes that have an EPC. Approximately 5 million domestic EPCs have been issued and there would be a disproportionate cost involved in contacting 5 million households to give them the choice of opting out or in. However, it is proposed that there will be a form of opt-out post-marketing.

82. It is proposed that individuals will be able to have some form of opt out of receiving information from Green Deal providers. Two useful safeguards in this respect would be (a) the Green Deal provider to make clear in mail shots that consumers can opt out of further communications and information provided to them on how to opt out; and (b) Green Deal providers will be required to remove the data from their database and ensure no further mail shots are sent to that household if there is no response from consumer after a specified number of mail shots. In addition, in respect of future EPCs there will be a fair

19 Requiring existing EPC holders to take out a new EPC for the purpose of including the Green Deal fair dealing notices is likely to impose an additional and unnecessary expense on householders which the Government does not think is desirable.

processing notice on the face of the EPC indicating that the information contained in it and the recommendation report has been placed on the Register with limited access to some and unlimited access to others and explain the purpose of sharing that data. These measures assist in ensuring that home owners know to whom their data is being disclosed and for what purpose.

83. On the basis that Article 8 is engaged, it is considered that any interference with Article 8 would be in pursuit of, in general, a legitimate aim on the following grounds:

- The Green Deal measures will assist the Government in improving the energy efficiency of buildings because specific measures will be recommended to building owners as to how this can be achieved, those owners will be assisted in implementing those measures through guidance and financial assistance. It is expected that this will help building owners to reduce their energy costs;
- Buildings represent 40% of all CO2 emissions produced. It is expected that the measures implemented under the Green Deal will support the Government in the reduction of CO2 emissions and will assist meeting CO2 emission targets set out in the Climate Change Act 2008;
- It will facilitate research which may be used to inform Government policy. There has been growing demand for this data for research and statistical analysis;
- It will increase access for the general public to useful data and should increase awareness among the general public of the energy efficiency of buildings; and
- It supports the Government's transparency agenda.

84. It is considered that the proposals are necessary (and proportionate) in a democratic society in order to justify any interference in Article 8. The dangers and problems posed by climate change are recognised at an international level (see for example the Kyoto Protocol). These dangers are also recognised at the European Union level and in relation to buildings (which are responsible for 40% of CO2 emissions) action has been taken through regulation in the form of Directive 2002/91/EC on the energy performance of buildings. The UK implemented its obligation, chiefly, through the 2007 Regulations. Through this Directive and the 2007 regulations the Register record EPCs issued in relation to domestic and non-domestic properties. The European Union has through a recast of Directive 2002/91/EC—Directive 2010/31/EU—made further amendments to deal with increased energy consumption and to ensure that member states take measures to reduce the Union's energy dependency and greenhouse gas emissions. As part of these measures the importance of "providing appropriate financing and other instruments to catalyse the energy performance of buildings and the transition to nearly zero-energy buildings, Member States shall take appropriate steps to consider the most relevant such instruments in the light of national circumstances."20 Member States are, therefore, encouraged to take such measures. Domestically, the importance of climate change and the need to take measures to reduce carbon emissions has been recognised. The Climate Change Act 2008 commits Government to reduce overall carbon emissions by at least 80% by 2050. Accordingly, it is recognised that in a democratic society there is a pressing social need to

20 See Article 10(1) Directive 2010/31/EU.

take action to combat climate change and, particularly, in relation to buildings. There is a recognition at international, EU and domestic levels that the need to combat climate change is becomingly increasingly urgent. Therefore, further steps need to be taken to address the issue.

85. Giving Green Deal providers access to the address details of EPC holders will enable them to proactively market their services to a group of people who may be more likely to take–up such services because they already have a certificate, produced independently of the Green Deal provider, showing how energy efficient their home is and what could be done to make it even more energy efficient. As a result, there is an increased likelihood that the policy (of providing access to existing households (and non-domestic premise) by Green Deal Providers) will be successful and that this will have the effect of a greater take-up of energy efficiency measures. Consideration has been given to the following particular issues:

- is it necessary to disclose the information in order to carry out functions in respect of the Green Deal? The policy of removing the restrictions will aid the aims and objectives of the Green Deal. For example, it is considered that the Green Deal will have the effect of improving the energy efficiency of existing domestic and non-domestic building stock, and will assist in the government meeting its duties under the Climate Change Act 2008;

- is there an alternative to sharing information in a form which enables individuals to be identified (in this case from the address)? The Department for Communities and Local Government do not consider that there is any real alternative to sharing address information with Green Deal Providers, other organisations providing energy efficiency advice, local authorities providing energy efficiency advice and/or with members of the public because such advice and services will needed to be addressed to the occupier of the address;

- are there rules in place to make sure the information remains adequately protected from misuse or improper disclosure? There will be safeguards, in terms of regulatory and licence conditions, as well as technical (software) provision to ensure that information remains as secure as possible taking account of the conditions imposed upon Green Deal Providers, local authorities, and other organisations who provide energy efficiency advice, organisations that provide advice on improving the energy efficiency of buildings, universities and other institutions that carry out relevant research and members of the public;

- what is the necessity of targeting EPC holder's now (when originally the address level data would only have been released in limited circumstances)? As already indicated there is an increasing urgency to take further steps to increase energy efficiency in existing building stock. The urgency necessitates steps which had previously not been considered. As already explained, the Government does not consider that contacting existing EPC holders and asking them whether they wish to opt-out is a viable option. Allowing Green Deal providers to contact existing householders with an EPC now (as opposed to applying the policy only to future EPC holders) enables the Government to address the urgent nature of its international, EU and domestic obligations; and

- why not leave EPC holders to make their own decisions on energy efficiency? The Government considers that action is needed now. Those with EPCs will not necessarily know how they can improve the energy performance of their homes and what benefits they and future owners may derive from such measures. Therefore, it is considered necessary to target EPCs holders (present and future) to ensure that there is an increase in the take up of such measures and to, generally, improve the energy efficiency of housing stock in Great Britain (the Bill extends to England, Wales and Scotland).

86. It is considered that these measures are necessary for the economic well-being of the country. It is recognised in the re-cast Directive 2010/31/EU ("the recast") on the energy performance of buildings that reduced energy consumption and an increased use of energy from renewable sources have an important part to play in promoting security of energy supply, technological developments and in creating opportunities for employment and regional development (see recital (3) of the re-cast). In addition: "Management of energy demand is an important tool enabling the Union to influence the global energy market and hence the security of energy supply in the medium and long term" (recital (4)). What applies in the context of the EU is also applicable to the domestic energy market. Ensuring efficient use of energy in buildings with the effect of reducing energy demand means that Great Britain will be less reliant on importing energy supplies. Whilst the proposed measures will not provide the complete answer to coping with dwindling energy supplies and escalating prices, given that buildings take up a significant proportion of energy use the measures will go some way in assisting the Government in managing the energy supply and security as well as prices to preserve the economic well-being of the country.

Breach of confidence

87. For Article 8 purposes it is also necessary to consider the common law protection from disclosure information (whether personal or not) that is given in circumstances giving rise to an obligation of confidence on the part of the person to whom the information has been given. Names and addresses (in these circumstances the disclosure is just limited to addresses) of individuals that are supplied to public bodies in pursuance of their functions would in some cases amount to confidential information subject to the common law tort of breach of confidence. Confidentiality is not, however, an absolute right. It has long been established that just cause or excuse and acting in the public interest are defences to an action for breach of confidence.

88. In relation to EPCs already issued (prior to the Bill having effect), it should be remembered that what is being released is only address level data. The nature and quality of the information contained on the EPC gives cause for some doubt as to whether it could amount to information to which the law of confidence could attach. In addition, where such information is contained on a document which is intended to be transferable to other persons that also may limit the nature of the confidentiality of the information. In relation to the last point, the validity period of an EPC is 10 years and therefore during that period one might expect the information on it to be transferred several times where a transfer of the property has occurred. It is also the case that certain information from the EPC will be open to the public in any event, as regulation 6(2) of the 2007 Regulations requires that when a residential property is put up for sale then the estate agent must either attach the energy asset ratings to the property or the EPC itself. Therefore, anyone who is interested

in viewing the property can either obtain the EPC or asset rating with the particulars or, more likely, view that information over the web. This would therefore, indicate that any confidentiality in relation to the information is either very limited or non-existent. In any event, to the limited extent such information is confidential, the Government believes that there is "just cause" as increasing energy efficiency and reducing carbon emissions from buildings (given that 40% of carbon emissions in the EU come from buildings) is in the public interest. In addition to which, the underlying policy should provide benefits to EPC holders as they will receive advice and assistance which will enable them to lower their energy bills.

89. Given the positive obligations placed upon the government, under the Environmental Information Regulations 2004, to progressively make environmental information more available, under its international and EU law obligations to take increased measures to combat climate change, bearing in mind the Government's intention to comply with the Data Protection Act 1998 the limited nature of the information to be disclosed, it is considered that the correct balance between respecting individuals' privacy and disclosure for purpose of achieving the Government's policy has been struck and therefore, it is considered that this clause is compatible with the ECHR.

Part 2: security of energy supplies

Chapter 2: gas supply

90. We consider clause [77] to be compliant with Convention rights. The clause confers a power on the Gas and Electricity Markets Authority (the "Authority") to direct the gas Network Transmission System operator (National Grid) to make modifications to those parts of the Uniform Network Code ("UNC"), which concern a Gas Supply Emergency. It inserts a new section 36C into the Gas Act 1986. The Authority may only make modifications, which it considers will decrease the likelihood, duration or severity of an emergency and which it considers to be market based. (A modification is "market-based" if it "relates to the creation of financial incentives for gas shippers or transporters"). Decisions of the Authority are capable of appeal to the Competition Commission under existing principles set out in section 172 et seq. of the Energy Act 2004.

91. By way of background the UNC is a network code put in place by gas transporters pursuant to a condition to the licence issued by the Authority under the Gas Act 1986, which sets out the terms on which gas transporters must transact certain aspects of their business with gas shippers. Clause [77] potentially engages Article 1, Protocol 1, ("A1P1") because it gives the Authority the power to modify existing contractual rights under the UNC, and Article 6, insofar as a decision to modify affects a licensee's civil rights.

92. As regards A1P1 we consider the measure to be justified on the basis, that it is in the public interest that measures be taken to limit the likelihood, severity or duration of a gas supply emergency, given the ramifications such an event could have for wider society. We consider the power to be proportionate on the basis, that it is limited to emergency arrangements and is subject to procedural constraints, namely a duty on the Authority to consult such persons as it considers appropriate prior to taking a decision. The nature of the modifications the Authority may make is limited further to the creation of financial incentives.

93. So far as Article 6 is concerned we consider the decision making process as a whole to be compliant. Both the Authority and the Competition Commission are legally distinct from the executive, being statutory bodies corporate and we are satisfied that both are capable of taking impartial decisions in this respect. Clause 77 also imposes a duty on the Authority to give reasons for its decisions. Section 172 of the Energy Act 2004 gives the Commission a reasonably broad appellate jurisdiction, and decisions of both bodies are amenable to judicial review. It will be clear that the role of the Authority in making changes to the emergency arrangements will involve complex and expert decisions and that findings of fact will be little more than "staging posts on the way to much broader judgments" (per Lord Bingham in Runa Begum). The fullness of the jurisdiction of the administrative court in judicial review (in particular to review facts and its inability to substitute its conclusions for those of the CC) should not therefore cause problems, in accordance with the principles laid down in Tsfayo.

Chapter 3: upstream petroleum infrastructure

94. We consider that the new regime implemented by clauses [80–89] will engage three provisions of the ECHR, namely Article 1 of the First Protocol to the ECHR, (the right to peaceful enjoyment of possessions ("A1P1")), Article 6 and Article 8 of the ECHR itself.

95. The new regime for third party access to upstream petroleum infrastructure replaces a number of different regimes in various legislation which individually covered determinations for third party access to a number of different parts of the upstream petroleum infrastructure. The new regime provides a unified system for access to the whole of the upstream petroleum infrastructure which gets rid of discrepancies in the existing, piecemeal legislation and, in addition, extends the Secretary of State's powers to make determinations for access.

96. The regime provided by clauses [80–89] is primarily a dispute resolution regime under which the Secretary of State can determine access to upstream petroleum infrastructure where commercial negotiations for such access between the owner and a third party are stalling. The provision of such a regime is required by the Second Gas Directive (2003/55/EC) in respect of upstream petroleum pipelines and it is therefore appropriate that the remainder of the regime reflects this approach. Under clause 80, the Secretary of State's power to make a determination about such access is triggered where a person has made an application for access to an infrastructure owner. If the applicant and the owner do not reach agreement on this application, then the applicant may apply to the Secretary of State for a notice under 80(3), which secures such access. Clause [80(4) and (5)] set out what the Secretary of State must do on receipt of the such an application. This includes giving both parties an opportunity to be heard in relation to the application (see [80(5)(b)]), if he decides to consider it further.

97. Clause [81] provides an alternative trigger for the Secretary of State's power to issue a notice under [80(10)]. This is again set against the circumstances of a third party making an application for access to upstream petroleum infrastructure. However, rather than requiring an application from the applicant for a determination, under clause [81], the Secretary of State is able to issue a determination notice of his own volition, provided that the following criteria are met:

i. the applicant and owner have had a reasonable time in which to reach agreement on the application for access; and

ii. there is no realistic prospect of them doing so.

98. The same procedural safeguards provided by clause [80] in making a determination notice apply equally to determination notices considered under clause [81].

99. The powers provided by clauses [80] and [81] are supplemented by clause [82], which provides that where a person has made an application for access to an infrastructure owner and the Secretary of State is considering giving a notice determining such access, he may issue a notice ordering the infrastructure in question to be modified so that its capacity is increased etc. Again, this power is subject to a number of safeguards, including giving the applicant and owner the opportunity to be heard before a modification notice is given.

100. Clauses [83–86] are provisions which are ancillary to the third party access regime provided by clauses [80–82]. Clause [84] provides for the variation of a notice issued under clause [80(10)]; clause [85] provides the Secretary of State with a power to require information, including financial information, in connection with the third party access regime; clause [85] provides sanctions for failing to provide information or giving false information in response to a request made under clause [83] and clauses [88 and 89] are definition clauses.

Article 1 of the First Protocol

101. The very nature of the regime in granting rights to third parties to use and provide modifications to the property of another, raises issues of compliance with Article 1 of the First Protocol ("A1P1") and the Department considers that this right is engaged by clauses [80-89]. Nevertheless, A1P1 is a qualified rather than absolute right, being subject to the control of the use of property in the public interest or to secure the payment of taxes or other contributions or penalties. Further, it is subject to the conditions provided by law and the general principles of international law. As mentioned, the Second Gas Directive already provides for a legal regime for the resolution of disputes over access to upstream petroleum pipelines and to the extent that the new regime covers such disputes, there seems little doubt that this meets the qualifications set out in A1P1.

102. Moreover, even where there is not overlap with the areas covered by the Directive, we consider that provision of an effective dispute resolution power for third party access to upstream petroleum infrastructure is in accordance with the general interest since it secures a route through which third party access may be achieved when commercial negotiations have broken down. Such access to the upstream petroleum infrastructure is important for the fostering of an open and competitive market within the petroleum industry, in accordance with the general interest of both the industry and, ultimately, consumers. It also assists in ensuring that there is maximum economic exploitation of the remaining resources of the UK continental shelf. Without an effective and comprehensive third party access regime, it would be unfeasible for many of the smaller fields to go into production, resulting in a loss of resource. Maximising the economic recovery of the UK Continental Shelf's hydrocarbon resources is a key aim for energy policy and our ability to achieve this will play a key role in maintaining reliable supplies of energy. Connected to this is the general interest in protection of the environment which is met by the existence of

an effective third party access regime to the upstream petroleum infrastructure. Because it is possible for third parties to access the infrastructure which is already in place, the need for more pipelines, gas processing plants and oil terminals to be built is reduced.

103. In our view, the dispute resolution model for this regime is proportionate to achieve these aims, as it remains a backstop which can only be used in failing negotiations, either at the instigation of the third party applicant or, under clause [81], the instigation of the Secretary of State. Furthermore, the new regime as provided by clause [80] has a number of safeguards to protect the various parties' interests. The Secretary of State can only give a notice under clause [80(10)] if satisfied, under clause [80(8)], that the notice will not prejudice:

a) the conveying or processing by the infrastructure of the quantities of substances reasonably required (or expected to be required) by the owner or the owner's associate;

b) the conveying or processing by the infrastructure of the quantities of substances which another person with third party access rights has to be conveyed or processed in exercise of those rights.

104. Subsection (9) of this clause provides that where a notice does contain provision which prejudices either of these matters, any person who suffers loss as a result may recover payments from the applicant to compensate for this loss. This is to enable the Secretary of State to provide for compensation where allowing the applicant to use the infrastructure might affect others' use of the infrastructure, for example, in circumstances where having another user of the infrastructure leads to a need for more frequent shut down for the purposes of maintenance. While it may still be appropriate to grant overall access to the applicant in such circumstances, the rights of the other users will be safeguarded by the provision of compensation for the loss of their use of the infrastructure during such periods. We therefore consider that this compensation provision constitutes a proportionate incursion into the users' rights under A1P1. Moreover, it enables the Secretary of State to make provisions in a notice which are closer to those reached in the commercial sector, where compensation payments are common in such circumstances. In applying this subsection, the Secretary of State would still remain bound by the general principles of public law in deciding whether the incursion into other users' rights could be adequately met by the payment of compensation or whether the prejudice would be so great as to weigh against allowing access to the applicant at all.

105. Once given, the determination notice is to be enforced as a contract between the parties, without further intervention of the Secretary of State (unless one of the parties applies under clause 83 to vary the notice). It will be possible to assign rights under the notice freely, as with a standard contractual agreement. This minimises the involvement of the Secretary of State.

106.We therefore consider that the proposed new regime is in accordance with the provisions of A1P1.

Application of Article 6

107. We consider that clauses [80–89] engage Article 6 of the Convention in a number of different respects:

a) The role of the Secretary of State in making a determination of access rights of a third party to infrastructure owned by another, engages Article 6. We consider that there are two aspects to this; first, the fact that the Secretary of State is, in effect, called upon to act as an arbiter in a private dispute about civil rights and, second, the procedural safeguards which are built into the regime to protect those rights.

   i. With regard to the first aspect, we consider that the Secretary of State is an appropriate person to act as an independent arbiter of disputes over third party access in the first instance, and the availability of Judicial Review of decisions made under these powers is sufficient safeguard for the purposes of appeal. The Secretary of State is the regulator of the upstream petroleum industry generally and so, although he also has a role in the formation of policy, he is also in possession of the technical engineering and economic expertise required to make the determinations as described by the new regime in a way that a stand-alone tribunal would not be. Moreover, we do not consider that the more general interest in policy that the Secretary of State possesses would compromise his independence in resolving an individual dispute over access between parties. As regulator, the Secretary of State is accustomed to make similar regulatory decisions with regard to private rights in respect of granting petroleum exploration licences and we do not think that his role in the new regime (which is the same as his role in the current third party access regime in this regard) increases the risk that this independence will be compromised.

   Furthermore, even if it is felt that there is an issue surrounding the role of the Secretary of State in making such determinations under the new regime, we believe that this is safeguarded by the availability of Judicial Review of his decisions by the Court.

   We take the view that these decisions to direct third party access to upstream petroleum infrastructure or to determine that a modification to such infrastructure should be made are distinguishable from the decision in Tsfayo v United Kingdom. The issues to be considered in determining access/modifications require a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims, as opposed to simple questions of facts. Each case needs to be assessed based on the economic circumstances relating to that part of the infrastructure over which there is an access (and/or modification) dispute. This will involve, among other things, considerations of available capacity in the infrastructure, any prejudice which access might cause the owner of the infrastructure, the kind of petroleum which is in question and the appropriate market price for allowing access or carrying out the modifications requested. Any factual findings would be purely incidental to the reaching of broader judgments of policy. Tsfayo is also distinguishable because of the fundamental lack of objective impartiality of the review board in that case, which could not be said to be true of the decision maker in this case (again the Secretary of State) whose role is akin to that of an independent arbiter of unresolved disputes in this area. Therefore we have concluded that the structure of the regime with the Secretary of State as decision maker is compliant with the provisions of Article 6.

ii. Turning to the second aspect, we think that there are sufficient procedural safeguards in the regime to give both parties a fair hearing in the determination of access. In clauses [80, 81 and 82 (compulsory modifications to infrastructure)], both parties are given the opportunity to be heard before a determination notice is given. Furthermore, it is intended that the whole regime will be supplemented by guidance. As part of this guidance, it will be made clear that both parties will be shown a copy of the draft determination notice for comment before it is finalised. In addition, should there be a fundamental issue relating to the working of the notice, clause 81 will be engaged, enabling the parties to apply for a variation to the determination notice in certain circumstances (again with an opportunity for both to be heard in relation to the application).

b) We think that the use of a power by the Secretary of State to apply to the courts for an injunction to get a party to comply with an information notice issued under the new information gathering power provided by clause [85] will engage Article 6 as it provides for the determination of a person's civil rights. However, since the exercise of this enforcement aspect of the power will inevitably be seized of the courts, we think that it will be considered to be compliant with the provisions of this Article.

c) We note that Article 6(2) is also engaged by the creation of the criminal offence of knowingly or recklessly providing false information to the Secretary of State under 86(1). Nevertheless, we do not believe that this offence infringes Article 6(2) as the proof of mens rea remains on the prosecution throughout— the burden of proof does not shift to the defence in any regard.

Application of Article 8

108. The information gathering power in clause [85] could engage the provisions of Article 8(1). However, Article 8 is a qualified right and we consider that in this case, the clause in question is justified and proportionate in accordance with the provisions of Article 8(2). In general terms, we consider that the provision of this information is necessary in the interests of the economic well-being of the country, namely the effective operation of a third party access dispute resolution regime to cover all upstream petroleum infrastructure. Such a regime will foster access to the market for smaller and newer enterprises and therefore promote competitiveness and reduce the ability of owners to restrict access to the infrastructure by refusing to negotiate with applicants or setting unrealistically high tariffs. In addition, a more effective third party access regime should reduce the need for the construction of more oil and gas pipelines and processing facilities and therefore further the more general interest in protecting the environment.

109. Moreover, we consider that the power is proportionate, as, even though the Secretary of State will have the ability to require financial information by virtue of [85(5)], the Secretary of State is not permitted to disclose any of the information obtained under the power unless the person from whom the information was obtained consents to the disclosure or he is required to do so by virtue of an obligation imposed on him by or under an enactment [(85(6))].

110. In addition, the power of the Secretary of State to publish notices and variations (or parts of a notice or variation or summaries of a notice or variation) at clause [84] could also

engage Article 8(1). It is possible that information contained in a notice or variation could constitute the private information of the applicant, owner or other user of the infrastructure to which access has been granted, such as commercial information relating to the amount of production from a field, or financial information. However, we consider that the publication of such notices and variations is necessary in the pursuance of the interests of the economic well-being of the country and is therefore in accordance with the qualification provided by Article 8(2). The publication of notices and variations is integral to the efficient operation of the third party access regime as a dispute resolution process. We consider that publication will lead to greater transparency and therefore certainty, about the terms and circumstances on which the Secretary of State is likely to determine access. This greater certainty will mean that the industry will be more likely to reach private commercial agreements about access, in the full knowledge of the type of terms that the Secretary of State would be likely to set, if he were to become involved in the dispute. This should give smaller enterprises operating in the upstream petroleum industry a greater ability to negotiate reasonable terms with larger infrastructure owners.

111. Furthermore, we consider that to the extent that Article 8(1) is engaged by this power, it is proportionate. Clause [84] provides that the Secretary of State must give the opportunity to be heard to the parties to whom the notice was given, and such other persons as he considers appropriate, before publishing the notice or variation. This gives the parties the safeguard of being able to argue that sensitive parts of the notice or variation should be redacted, or that the effect of the notice or variation should be published in summary form only. Likewise, if the Secretary of State takes the view independently that any information in the notice or variation should be redacted for reasons of sensitivity, this course remains open to him.

112. We do not consider that the interpretation provisions of this chapter (clauses 88 and 89) engage the ECHR.

Chapter 4: special administration regime for gas and electricity suppliers

113. Clauses [90–99] introduce a special administration regime for energy supply companies in financial difficulty. Instead of being dealt with in accordance with normal insolvency rules, such a company may be placed in energy administration, the aim being to ensure the continuation of energy supply at the lowest cost, which it is reasonably practicable to incur pending the company being rescued or its energy supply business being transferred to another company.

114. We believe that this type of situation gives rise to two human rights issues:

- First, could the continued operation of the company in energy administration—with the possible increased losses to creditors—engage Article 1 of Protocol 1, given that the special administration regime is being introduced at a time when creditors may already have made loans (or given other credit) to energy supply companies?;

- Second, does the fact that the business of a company in special administration may be transferred to another company by way of a statutory scheme—which provides that the transfer may take place even though a third party would otherwise have been able to object to the transfer engage Article 1 of Protocol 1?

115. We are content that despite Article 1 Protocol 1 being engaged in both cases that the provisions establishing a special administration regime are compatible with Article 1 Protocol 1.

116. As to the first issue, there will be no deprivation of property as such. The clauses provide for restrictions on other insolvency procedures so that a creditor of an energy supply company may not be able to make use of such procedures. Although there may be a "control of use", we consider that this will be in the general interest. It must also be shown that the measures are proportionate to the aim pursued, although unlike where there is a deprivation, this does not require the payment of compensation in all cases. In assessing the proportionality of the measures, the importance of maintaining the continuation of energy supply and the stability of the energy market is likely to be accorded considerable weight; as will the fact that creditors are aware that they are lending into a regulated environment. While the extent to which a creditor may suffer loss in any case will be important in assessing whether the application of the regime was proportionate, we do not consider that the provisions themselves violate creditors' ECHR rights.

117. As to the second issue, there is a greater chance that this may involve a deprivation of property. However, although a deprivation will normally give rise to a requirement to pay compensation, the Secretary of State will be required to exercise the powers given under the Bill compatibly with Convention rights. In assessing the proportionality of the measures, again the importance of maintaining the continuation of energy supply and the stability of the energy market will be considered. It will not be possible to address this until it arises in practice, though the Bill does provide a pointer to the need for compensation in appropriate cases by requiring the Secretary of State to take the interests of third parties into account when approving the scheme. Again, this does not prevent the making of a declaration of compatibility.

Part 3: low carbon generation

Offshore electricity (Clauses [101] and [107])

Outline of proposals

118. In summary, DECC seeks to extend the life of powers available to the Secretary of State under sections 90 and 91 of the Energy Act 2004 (c. 20)("the 2004 Act") to amend offshore transmission and distribution licences which powers sunset on 18 December 2010. It also seeks to extend by order the life of the powers of the Gas and Electricity Markets Authority (GEMA), commonly known as Ofgem and referred to as such in this chapter, under Schedule 2A to the Electricity Act 1989 (c. 29)("EA89"). Ofgem may make property transfers schemes in respect of a tender exercise for an offshore transmission licence. The powers to make such schemes expire in 2013 unless extended by order until 2016. DECC seeks the power by order to be amended to allow extension until 2025.

Section 90 of the 2004 Act

119. Section 90 provides for the Secretary of State to modify the standard conditions of offshore transmission licences and offshore distribution licences, modify codes relating to such licences and agreements giving effect to such codes. There are requirements for consultation before making the modifications. In respect of licences granted after

modifications are made by the Secretary of State, Ofgem must make equivalent modifications of the standard conditions of those licences.

120. Section [90(8)] provides that the Secretary of State's powers under the section are exercisable during the 18 months beginning with the commencement of the section. The period ended on 18 December 2010.

121. DECC, Ofgem and industry have worked hard to make all the necessary modifications to the standard conditions, following decisions in 2010 to provide additional flexibility in the enduring regime. However, further changes need to be made to one of the industry codes for full implementation.

122. DECC therefore seeks amendment of section [90(8)] of the 2004 Act such that the powers are available for an additional period of 18 months from the commencement of the amendment.

123. The amendment should have effect as soon as possible given there is a gap in powers after 18 December 2010. DECC seeks commencement of the amendment on passing of the Bill.

Section 91 of the 2004 Act

124. Section [91] supplements section [90]. It concerns the co-ordination licence (i.e. the licence held by National Grid as the system operator (SO) of the transmission system in Great Britain). In order to extend the role of National Grid as SO to the offshore transmission network, the Secretary of State was granted powers to modify the co-ordination licence and to make incidental or consequential modifications to the conditions of other licences and to the standard conditions of licences. There are provisions for consultation before the Secretary of State may make the modifications and equivalent provision for Ofgem to modify new licences as apply under section 90.

125. Section 91(11) provides that the Secretary of State's powers under the section are exercisable during the 18 months beginning with the commencement of the section. The period ended on 18 December 2010.

126. Proposed modifications under section [91] are interwoven with those proposed under section 90 and the same position therefore applies as explained below.

127. DECC therefore seeks amendment of section 91(11) of the 2004 Act such that the powers are available for an additional period of 18 months from the commencement of the amendment.

128. The amendment should have effect as soon as possible given there is a gap in powers after 18 December 2010. DECC seeks commencement of the amendment on passing of the Bill.

Schedule 2A to EA89

129. This is given effect by section 6E of EA89 inserted by section 44 of the Energy Act 2008 (c. 32). Under paragraph 1 of Schedule 2A, Ofgem may make a scheme for the transfer of property, rights and liabilities in relation to a tender exercise for an offshore

transmission licence. For the conduct of tender exercises by Ofgem, see section 6C of EA89. The powers under Schedule 2A arise where transmission assets (paragraph 1(3) of the Schedule) have been transferred to the successful bidder or, for operational reasons, it is necessary for their transfer but only where the assets were not constructed by the successful bidder.

130. The power is triggered when an application is made under paragraph 3 of the Schedule, by the preferred bidder (defined in paragraph [35] of the Schedule), the successful bidder (defined in paragraph 36 of the Schedule) and other persons who own the property etc.

131. An application may only be made during the transitional period under paragraph [5] of the Schedule. The effect of paragraph [5(3)] is that the period ends in 2013 but under paragraph [5(5)] that period may be extended by order until 2016. No such order has been made.

132. The powers enable Ofgem to resolve disagreements between generators, bidders and third parties about what property and rights need to be transferred (and the valuation of them) as part of the appointment of the bidder as the holder of the offshore transmission licence. The powers also protect generators by effectively limiting pricing disputes with the successful bidder prior to transfer. Ofgem has the power to require the award of compensation to third parties (see paragraph [17(5)] of the Schedule). Its determinations are subject to review by the Competition Appeal Tribunal (see paragraph [23] of the Schedule).

133. The first offshore transmission licence tender round has taken place. When the powers were introduced, it was envisaged that generators of offshore renewable energy installations would not, after the first round, want to construct the transmission assets in addition to the generation assets. The transmission assets would be constructed by the prospective offshore transmission owner (OFTO). However, for the next phase of construction, the information received by DECC and Ofgem is that some generators do wish to construct the transmission lines to the generation installations they construct. This is despite the requirement under the Third Energy Package (in force March 2011) that a generator cannot hold both a generation licence and a transmission licence and therefore they have to divest themselves of either the generation or transmission assets they build, or possibly both. So far as electricity is concerned, the relevant instrument in the package is Directive 2009/72/EC which can be found at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009L0072:EN:NOT

134. The knowledge by industry that Ofgem has the powers in Schedule 2A is understood to lead to confidence that there will not be drawn out disputes relating to transfer of transmission assets from generator to OFTO and that assets will not be stranded after construction. Otherwise, OFTOs would factor in the risk that assets are not transferred in a fair and timely manner, resulting in a price premium that would be passed onto customers. This confidence reduces investor perceptions of risk and encourages the early investment in the construction of offshore transmission generation and transmission assets. There is a strong public policy drive to ensure obstacles to the construction and operation of offshore renewable generation are reduced.

135. To enable future planned rounds of offshore construction, DECC therefore seeks an extension of the transitional period under paragraph 5 of Schedule 2A to EA89 from 2016 until 2025, when it is understood that most assets should be completed.

Article 6

136. In respect of sections 90 and 91 of the 2004 Act and the powers to amend licence conditions, the same points arise under Article 6 as described under paragraphs above related to Part 1, Chapter 4 of the Bill (smart meters). It should also be mentioned that clause 98 in the Bill seeks to revive the powers after they sunset. Some licence conditions have already been modified and no objection has been raised by the affected licensees.

Article 1 of Protocol 1

137. In respect of sections 90 and 91 of the 2004 Act and the powers to amend licence conditions, the same points arise as made under paragraphs above related to Part 1, Chapter 4 of the Bill (smart meters)

138. The power to make amendments to licence conditions without the consent of the licence holder is regarded as justified in terms of the fair balance between the rights of the licence holder and the general interest. There is a general interest in the development of offshore renewable energy generation and of the transmission system which brings electricity from that generation to the national grid and hence to homes and businesses in Great Britain. Without such a system, there is likely to be a significant risk of insufficient electricity supply unless that supply can be met from other sources. To the extent those sources are not renewable, this may prejudice the general interest in achieving climate change and renewables targets if fossil fuels are required for electricity generation. It may also require electricity or the fuels to generate it to be acquired from outside the UK and so prejudice security of supply.

139. In order to deliver the offshore transmission system in a timely manner, it is regarded as justified that the Secretary of State has the powers to amend licence conditions rather than to rely on changes only if the licence holder agrees.

140. Further, these powers existed until recently and no change in their effect is sought by clause 98 beyond their operation for 18 months from passing of the Bill. This period is regarded as reasonable based on previous experience of developing, consulting on and making changes to the industry framework.

141. In respect of Schedule 2A to EA89, the powers granted to Ofgem exist now and allow schemes for the transfer of property or rights which fall within Article 1 of Protocol 1. Clause 98 seeks to extend the life of the existing powers which expire in 2013 unless extended by order (none yet made) until 2016. There is therefore no immediate change to the current effect on property and rights.

142. The scheme powers are part of the regime required to deliver offshore generation and transmission and the same issues of justification apply as mentioned above.

143. Applications for a scheme are made by a bidder for an offshore transmission licence. Other persons who may be affected by a scheme must be notified of the application (paragraphs 6 and 7) and the application must be published (paragraph 8). If Ofgem is not

satisfied that the property transfer is necessary and expedient, the application must be refused (paragraph 18). Ofgem must consider whether compensation must be provided to the property owner or for any third party adversely affected (paragraph 17). Determinations made by Ofgem in respect of a scheme may be reviewed by the Competition Appeal Tribunal (paragraph 23) and a decision by that body may be subject to appeal on a point of law to the court (paragraph 33).

144. We therefore believe that there is an open and fair process for the determination of property rights, requirements that rights may be affected only where necessary and expedient, that compensation may be paid and that there are sufficient processes for review and appeal. Having regard to these matters and the general public interest, it is believed the provisions of Schedule 2A are justified.

145. DECC would mention the experience obtained by the first round of generation build offshore. Ofgem has found it has not needed to use the powers to affect property and rights. The parties involved in generation build and offshore transmission, knowing that Ofgem can intervene if necessary, have been encouraged to reach agreement rather than have a solution imposed. It has also been found that the availability of the powers has prevented any one party becoming dominant and so distorting the bargaining position of the parties. In general, the feedback on the existence of the powers has been positive.

146. In terms of the new date sought for sunset of the powers (2025, if so extended by order), this is regarded as necessary. There are future planned rounds of offshore construction, but allowing time for construction of relevant generation and transmission assets, subsequent bidding for a licence will not take place until the early 2020s. Although an applicant for a scheme need not wait until a late stage, DECC understands that parties in negotiation are reluctant to be seen to be the first one to apply to Ofgem. Therefore, applications at a late stage of the next round cannot be excluded. However, the life of the powers will only be extended by order for such period as is necessary in the circumstances at the time.

147. For the reasons stated above we consider that this clause is compatible with the ECHR.

List of Reports from the Committee during the current Parliament

Session 2010-11

First Report	Work of the Committee in 2009–10	HL Paper 32/HC 459
Second Report	Legislative Scrutiny: Identity Documents Bill	HL Paper 36/HC 515
Third Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)	HL Paper 41/HC 535
Fourth Report	Terrorist Asset-Freezing etc Bill (Second Report); and other Bills	HL Paper 53/HC 598
Fifth Report	Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010	HL Paper 54/HC 599
Sixth Report	Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill	HL Paper 64/HC 640
Seventh Report	Legislative Scrutiny: Public Bodies Bill; other Bills	HL Paper 86/HC 725
Eighth Report	Renewal of Control Orders Legislation	HL Paper 106/HC 838
Ninth Report	Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010—second Report	HL Paper 111/HC 859
Tenth Report	Facilitating Peaceful Protest	HL Paper 123/HC 684
Eleventh Report	Legislative Scrutiny: Police Reform and Social Responsibility Bill	HL Paper 138/HC 1020
Twelfth Report	Legislative Scrutiny: Armed Forces Bill	HL Paper 145/HC 1037
Thirteenth Report	Legislative Scrutiny: Education Bill	HL Paper 154/HC 1140

List of Reports from the Committee during the last Session of Parliament

Session 2009-10

First Report	Any of our business? Human rights and the UK private sector	HL Paper 5/HC 64
Second Report	Work of the Committee in 2008–09	HL Paper 20/HC 185
Third Report	Legislative Scrutiny: Financial Services Bill and the Pre-Budget Report	HL Paper 184/HC 184
Fourth Report	Legislative Scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill	HL Paper 33/HC 249
Fifth Report	Legislative Scrutiny: Digital Economy Bill	HL Paper 44/HC 327

Sixth Report	Demonstrating Respect for Rights? Follow Up: Government Response to the Committee's Twenty-second Report of Session 2008–09	HL Paper 45/ HC 328
Seventh Report	Allegation of Contempt: Mr Trevor Phillips	HL Paper 56/HC 371
Eighth Report	Legislative Scrutiny: Children, Schools and Families Bill; Other Bills	HL Paper 57/HC 369
Ninth Report	Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010	HL Paper 64/HC 395
Tenth Report	Children's Rights: Government Response to the Committee's Twenty-fifth Report of Session 2008–09	HL Paper 65/HC 400
Eleventh Report	Any of our business? Government Response to the Committee's First Report of Session 2009–10	HL Paper 66/HC 401
Twelfth Report	Legislative Scrutiny: Crime and Security Bill; Personal Care at Home Bill; Children, Schools and Families Bill	HL Paper 67/HC 402
Thirteenth Report	Equality and Human Rights Commission	HL Paper 72/HC 183
Fourteenth Report	Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill	HL Paper 73/HC 425
Fifteenth Report	Enhancing Parliament's Role in Relation to Human Rights Judgments	HL Paper 85/HC 455
Sixteenth Report	Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In	HL Paper 86/HC 111