SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

MEMORANDUM BY DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Small Business, Enterprise and Employment Bill. The memorandum has been prepared by the Department for Business, Innovation and Skills, with input from the Treasury, HMRC, the Cabinet Office, the Department for Communities and Local Government, the Department for Education and UK Export Finance and the Insolvency Service. It has been amended to take account of the amendments made to the Bill in the first house (Commons).

2. Baroness Neville-Rolfe DBE, Parliamentary Under-Secretary of State for Business, Innovation and Skills and Minister for Intellectual Property has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights.

3. This memorandum deals only with those provisions of the Bill which raise ECHR issues, and addresses the UN Convention on the Rights of the Child as it applies to provisions of the Bill.

4. Since the Bill deals with diverse subject areas, each measure which does or may engage a Convention right does so for its own individual reasons. Accordingly, the Memorandum addresses each relevant measure individually. The Memorandum is structured so as to follow the structure of the Bill. There is a section at the end which addresses the UN Convention on the Rights of the Child.

5. This version accompanies the Bill upon its introduction into the House of Lords, and has been amended since it was first published to take account of amendments made to the Bill during its passage through the House of Commons. The changes made which are relevant to this memorandum are new provisions about the Payment Systems Regulator in Part 1 of the Bill, changes to the provisions for the Pubs Code Adjudicator and the Pubs Code in Part 4, and the extension of an information-sharing power for the purpose of assessing eligibility for free of charge early years provision in Part 5 of the Bill.

Overview of the Bill

6. The Small Business, Enterprise and Employment Bill delivers a number of government priorities.

7. Provisions in Part 1 aim to help business, and small businesses in particular, by making the payment practices of businesses more transparent, incentivising

improvements in payment culture, and helping small businesses agree fair payment terms.

8. Further provisions which aim to help business include those to improve access to finance through increasing the availability of investment for small businesses, and the introduction of 'Cheque Imaging', giving the added option of depositing cheques remotely via Smartphone or tablet, thus enabling a faster clearing cycle. There are also provisions which amend legislation to expand the powers available to UK Export Finance to support UK exports and exporters.

9. Part 2 deals with regulatory reform. Measures include requirements to make it easier for new companies to set up online, the establishment of a new office holder to scrutinise the processes for appeals and complaints against regulators to make them more effective for business, a requirement that regulations affecting business are reviewed frequently to remain effective, and require the government to publish a target for itself about the level of regulatory burdens in each parliamentary term, including transparent reporting on progress. There is provision to amend landlord and tenant legislation to enable more home businesses. There is also a power for the Competition and Markets Authority to make recommendations about proposals for legislation and a new statutory definition of small and micro businesses for use in future secondary legislation in order to allow businesses of this size to be exempted from that legislation in some cases.

10. Part 3 contains powers to streamline public procurement to remove barriers and help small business gain fair access to the £230bn public procurement market, Provisions also give additional powers to the Cabinet Office's Mystery Shopper scheme to monitor public procurement practice.

11. Part 4 contains provisions about the pubs industry. These aim to bring fairness to the sole traders and small businesses that run 20,000 or so tied pubs across England and Wales, with a new Statutory Code and independent Adjudicator to ensure that publicans who are tied to a pub owning company are treated fairly.

12. Part 5 contains measures which amend requirements for various aspects of registration required for the provision of childcare, and extends the existing exemption for schools from applying to Ofsted to provide care for children younger than school age to two year olds.

13. Part 6 contains provision for the sharing of student information. This will enable tracking of students through education into the labour market giving a fuller understanding of the impact of education choices on lifetime labour market outcomes.

14. Part 7 contains measures which amend UK company law. These aim to increase transparency around who owns and controls UK companies and to deter and

sanction those who hide their interest in UK companies to facilitate illegal activities or who otherwise fall short of expected standards of behaviour. The measures include requiring every company to keep a register of people with significant control over the company, the abolition of share warrants and corporate directors and the imposition of directors' duties to shadow directors.

15. Part 8 contains provisions that concern the filing requirements of companies. The measures amend requirements about the information which must be delivered to the registrar of companies in certain cases, providing a more flexible regime for companies in their dealings with the registrar. It also makes changes to improve the ability of the registrar to deal with situations where disputes as to the contents of the register arise.

16. Part 9 amends the directors' disqualification regime to strengthen the rules that prevent an individual from acting as a director where that individual has committed misconduct. The measures introduce new grounds for disqualification, create a new way in which creditors may receive financial redress for loss suffered through director misconduct, and update the matters that courts must take into account when considering a director disqualification. It also makes changes to increase the efficacy of the disqualification regime.

17. Part 10 modernises and streamlines insolvency law to remove unnecessary costs and burdens to creditors and others. It also contains provisions that will ensure effective oversight of insolvency practitioners.

18. In Part 11 of the Bill contains employment law provisions. These aim to deter employers from breaking National Minimum Wage legislation by allowing the maximum penalty for under payment to be calculated on a per worker basis; to stop abuse of 'exclusivity clauses' in zero hours contracts, which stop individuals from working for another employer, even if the current employer is offering no work; reform the employment tribunal system to encourage more efficient management of postponements to reduce delay and cost; and introduce a penalty to ensure that awards are paid so that the majority of employers that do comply with the process are not put at disadvantage by those that avoid their responsibilities and liabilities. There are also provisions to cap exit payments for workers leaving the public sector

ECHR issues in the Bill

Part 1: Access to Finance
Credit information (clauses 4, 5 and 6)

19. Clauses 4 and 5 give the Treasury a power to make regulations (a) imposing obligations on certain designated banks to provide information about small businesses to certain designated credit reference agencies ("CRAs") and online finance platforms and (b) imposing obligations for such credit reference agencies and online platforms to provide such information to finance providers. The underlying purpose is to tackle discrepancies in different finance providers' access to the market for providing finance to small businesses, including access to information used to judge the creditworthiness of small businesses.

20. Information about the financial requirements and position of a business may include personal information (and is likely to do so where the business is run by a sole trader). As such, regulations made under clauses 4 and 5 are likely to engage and potentially interfere with Article 8(1) as they will provide for the sharing of personal data.

21. The Government considers that any such interference would be justified under Article 8(2) as it is necessary in the interests of the economic well-being of the country. This is because the sharing of information about small businesses (and of any personal information included therein) will enable new finance providers to offer finance to small businesses when they would not otherwise be aware of the opportunity to do so, and make lending decisions on the same basis as the larger banks which offer business current accounts. This will in turn:

    a. provide a level playing field in the market for providing finance to small businesses;
    b. increase competition in, and lower barriers to entry to, the sector for finance providers; and
    c. increase the range of providers from whom small businesses may be able to obtain finance.

22. In addition, a requirement to share information on small businesses would be proportionate because:

    a. the requirement will only apply where the business has agreed to the sharing of the information, and information identifying a particular business will only be released to a finance provider by an online platform if the business has agreed to that particular finance provider receiving such information;
    b. any sharing of personal data will be subject to the restrictions in the Data Protection Act 1998, including the requirements that such data be processed fairly and lawfully, that it be adequate, relevant and not excessive, and that it be accurate and up to date;
    c. existing safeguards in the Data Protection Act 1998 and Consumer Credit Act 1974, relating to information held by CRAs will be extended to apply to all CRAs designated under this legislation;
    d. the opportunity to refer complaints to the Financial Ombudsman Service, which apply to CRAs and platforms authorised by the Financial Conduct Authority, will be extended to apply to all CRAs and platforms designated under this legislation;
    e. much of the information on creditworthiness of businesses is already shared lawfully between banks and CRAs, and in respect of that information the requirement will merely ensure that the information is made available to all finance providers equally.

23. Clause 6(5) gives the Treasury a power to make regulations imposing obligations for designated CRAs to provide to the Bank of England the information provided by banks pursuant to regulations made under clause 4(1). The information may include personal information (and is likely to where the business is run by a sole

trader). As such, regulations made under clause 6(5) are likely to engage and potentially interfere with Article 8(1) as it allows the sharing of personal data.

24. The Government considers that any such interference would be justified under Article 8(2) as it is necessary in the interests of the economic well-being of the country. The sharing of this information will support the Bank of England's assessments of credit conditions, inform monetary and macroprudential policy and support the work of the Treasury and the British Business Bank by allowing a much deeper understanding of the small business market. For example, it would provide a much fuller understanding of the regional and sectoral allocation of credit, of what type of small businesses are being granted credit, and the risk profiles of different types of small businesses.

25. In addition, any requirement to share information on small businesses would be proportionate because:

    a. the requirement would only apply where the business has originally agreed to the information being shared with CRAs by a bank;
    b. clause 6(5) requires that the regulations must include provision protecting the confidentiality of the information provided;
    c. any sharing of personal data would be subject to the restrictions in the Data Protection Act 1998, including the requirements that such data be processed fairly and lawfully, that it be adequate, relevant and not excessive, and that it be accurate and up to date.

Exports: Powers for the Secretary of State under section 1 of the Export and Investments Guarantees Act 1991 commitment limits under that Act (clauses 11 and 12)

26. Clauses 11 and 12 amend the existing provisions in the Export and Investment Guarantees Act 1991 ("EIGA"), under which the Secretary of State has powers to provide support for UK exports. These powers are exercised by the Export Credits Guarantee Department, which currently operates under the name of UK Export Finance.

27. Clause 11 broadens the support that the Secretary of State, acting through UK Export Finance, can provide to UK exports and exporters.

28. Clause 11 amends the financial limits which apply to the Secretary of State's ability to incur liabilities in supporting exports and overseas investments and in managing UK Export Finance's portfolio of liabilities.

29. These amendments do not engage Convention rights. However, there are more general arguments advanced by some NGOs in relation to the general exercise by UK Export Finance of its functions under the EIGA.

30. These arguments are around human rights in the general sense rather than Convention rights. They arise because UK Export Finance from time to time supports supplies of goods and services to overseas projects, the performance of

which may involve human rights issues for example, the acquisition of land from local residents.

31. UK Export Finance follows the OECD Recommendation on Common Approaches to Environmental, Social and Human Rights Due Diligence on Officially Supported Export Credits (known as the "Common Approaches") which governs the activities of OECD export credit agencies when supporting projects. This approach is consistent with government policy on advancing human rights.

32. The Common Approaches requires export credit agencies, when considering applications for support for certain projects, to classify those projects according to their environmental, social and human rights impacts and to require that international standards for mitigating unacceptable negative impacts should be adhered to when performing the relevant project.

Payment Systems Regulator – amendment of power of Payment Systems Regulator to require disposal of interests in payment systems (clause 14(2))

33. Clause 14(2) amends section 58 of the Financial Services (Banking Reform) Act 2013. That section confers on the Payment Systems Regulator (which is established pursuant to section 40 of that Act) a power to require a person who has an interest in the operator of a regulated payment system to dispose of all or part of that interest. Regulated payment systems are those designated under section 43 of the 2013 Act, subject to the criteria in section 44.

34. Similar competition issues may arise in relation to ownership of providers of infrastructure to payment systems as in relation to ownership of operators of payment systems. Therefore, clause 14(2) extends the existing power in section 58 such that it may also be exercised in relation to an interest in such an infrastructure provider.

35. Exercise of the existing power in section 58 would engage Article 1 of Protocol 1 to the Convention ("A1P1") since it interferes with the peaceful enjoyment of possessions. Exercise of the power as amended by the Bill would engage A1P1 in the same way.

36. However, the right is a qualified right, and the Government considers that such interference may be justified as proportionate and necessary in the public interest to resolve or prevent a competition problem caused by concentration of ownership interests, particularly considering the wide margin of appreciation afforded to states in this area (on which point see for example *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45).

37. The Government takes this view in particular because—

    a. the power may be exercised only where the Payment Systems Regulator is satisfied that, if the power is not exercised, there is likely to be a distortion of competition;

b. the power enables a requirement for ownership interests to be disposed of, without enabling confiscation or a requirement to transfer an interest to any particular person; and

c. the exercise of the power is subject to a right of appeal to the Competition and Markets Authority under section 76 of the 2013 Act, and the appeal may relate to the merits of the decision.

Part 2: Regulatory Reform

Exemption from liability for bodies concerned with accounting standards (clause 37)

38. Clause 37 repeals section 18 of the Companies (Audit, Investigations and Community Enterprise) Act 2004 ("the 2004 Act") and inserts new section 18A into that Act.

39. Section 18 provides that where the Secretary of State has paid a grant to a body carrying on activities concerned with any of the matters set out at section 16(2) of the 2004 Act, that body (and its members, officers and staff) will not be liable in damages as regards certain of that body's acts or omissions occurring in the 12-month period beginning on the day the grant was paid. Those acts and omissions are things done or omitted to be done for the purposes of, or in connection with, the carrying on (or the purported carrying on) of activities concerned with any of the matters set out in section 16(2).

40. Section 18 nonetheless provides for exceptions to this exemption from liability. The exemption does not apply if the act or omission is shown to have been in bad faith or if the act or omission was unlawful pursuant to section 6(1) of the Human Rights Act 1998 i.e. was an act (or omission) of a "public authority" incompatible with rights under the ECHR. Section 6(3) of the Human Rights Act provides, inter alia, that "public authority" includes "any person certain of whose functions are functions of a public nature". The matters set out at section 16(2) are "functions of a public nature".

41. The matters set out at section 16(2) are various matters relating to financial reporting and the regulation of accountancy, audit and actuarial services.

42. New section 18A is similar to section 18. Instead of an exemption from liability on the face of the legislation, however, it provides that the Secretary of State may by order or by regulations exempt specified individuals or bodies from liability in damages. As with section 18, new section 18A provides that any such exemption conferred by an order or regulations will not apply if the thing done or not done was in bad faith or was unlawful under section 6(1) of the Human Rights Act

43. An exercise of the power in favour of a certain body could deprive someone of their right to recover damages in respect of certain acts and omissions of the body, and therefore could theoretically engage Article 6(1). However, in practice, the clause will prevent the right to damages arising in the first place, as opposed to

interfering with the pursuance of an existing right, and so Article 6, which confers procedural guarantees as regards legal rights, is not applicable.

44. Arguably the clause also raises Article 1, Protocol 1 issues. An exercise of the power could deprive a person of an award of damages. For the same reasons advanced above, the clause would prevent a right to recover damages from arising in the first place. The Government does not therefore consider that Article 1 of the First Protocol is engaged.

Part 4: The Pubs Code Adjudicator and the Pubs Code

Summary of clauses 40 to 70

The Statutory Code

45. The Secretary of State must, under Clause 41 make regulations about practices to be followed by pub-owning business in their dealings with their tied tenants, referred to in the Bill as the Pubs Code. The purpose of the Code is to provide all tied tenants of Pub owning businesses with 500 or more tied pubs with increased transparency, fair treatment, the right to request a rent review when tied product prices increase significantly and the right to take disputes to an independent Adjudicator. The Code will additionally require these pub owning businesses to offer parallel free-of-tie rent assessments to potential or existing tenants. This will strengthen the negotiating position of the tenant and help ensure pub-owning businesses are offering a fair share of risk and reward in their tied agreements.

46. Clause 42 of the Bill introduces a duty on the Secretary of State to include within the Pubs Code a market rent only option for pub owning businesses with 501 pubs of which at least one is tenanted. Where they are a brewery the provision enables such a pub owning business to continue to require that specified brands produced by the brewery are sold within its tied pubs. The clause sets out various circumstances in which the Pubs Code shall require the offer of the Market Rent only option including when the tenancy is renewed and when the pub owning business gives notices of a significant increase in the price it supplies products to a tenant. If no settlement is reached within 21 days on a mutually agreeable market rent, then an independent assessor, who is independent of both parties and competent by virtue of qualification and/or experience may be appointed to assess the market rent for the property as a pub with no tie and the pub tenant will no longer be subject to any alcohol tie. This duty on the Secretary of State will be implemented by Regulations under the negative resolution procedure.

47. The Bill provides at clause 44 for an affirmative regulation power which can make provision about the effect of a contractual term in a tenancy between a pub-owning business and a tied pub tenant which is inconsistent with provisions in the Code. The regulation makes provision for such a term to be void or unenforceable in both existing tenancies and tenancies entered into after commencement.

Establishment of the Adjudicator

48. A new independent Adjudicator will enforce the provisions of the Code with powers to arbitrate disputes, investigate systemic breaches and provide guidance on interpretation of the Code. The Government also intends that the Adjudicator will

have the power to impose sanctions – including financial penalties – if it finds that the Code has been breached.

Arbitration (clauses 45 to 49)

49. Clause 45 provides that a tied pub tenant may refer a dispute to the Adjudicator for arbitration on the question of whether a pub-owning business has breached the Code.

50. Clause 47 provides for circumstances in which the pub-owning business refers to arbitration under a contractual arbitration provision.

51. Clause 48 sets out the requirements in terms of fees paid by a tied pub tenant for referral for arbitration and makes provisions for the costs of the arbitrator and the costs of the arbitration.

52. Clause 44 sets out that any term of an agreement (entered into before or after commencement) between a pub-owning business and a tied pub tenant is void to the extent that it prevents a tenant from referring a dispute to the Adjudicator in accordance with clause 45. It also specifies that a term in any such agreement which is inconsistent with clauses 47 and 48 or regulations made under clause 48 is unenforceable.

Investigations (clauses 50 to 56)

53. Clauses 50 to 56 enable the Adjudicator to carry out an investigation if there are reasonable grounds to suspect that a pub-owning business has breached the Code or failed to follow a recommendation made by the Adjudicator following an earlier investigation. Following an investigation, the Adjudicator must publish a report and, if satisfied that a pub-owning business has breached the Code, consider whether to exercise any of the following enforcement powers:

- to make (non-binding) recommendations to the pub-owning business;
- to require the pub-owning business to publish information about the investigation;
- to impose a financial penalty on the pub-owning business.

Levy (clause 60)

54. The Adjudicator may, under clause 60, require pub-owning businesses to pay a levy towards the Adjudicator's expenses.

ECHR issues

The power by the Secretary of State to issue a statutory Code – "the Pubs Code"

55. The Code will apply to pub-owning businesses with 500 or more tied pubs save for those exempted under the power to exempt. It broadly replicates the current industry Code currently signed up to by the majority of pub-owning businesses. The costs of compliance with the provisions of the Code are broadly the same as complying with the current voluntary industry code with the exception of the sign off of rent assessments by a RICS qualified valuer. These costs are low. In so far as the

assessment by RICS qualified valuer some pub owning business already adopt this practice. For those who do not already employ the services of a RICS valuer the cost would involve getting their valuer RICS qualified (which takes 6 months and is in the region of £350 and then an annual fee of £100). The Government does not consider that the imposition of the majority of the Code's provisions engage Article 1 Protocol 1 because they are the same as the existing voluntary code and the costs of compliance are low.

56. The majority of the Code's provisions would not impose disproportionate costs: The cost of complying with the provisions of the Code will be broadly the same as complying with the current voluntary Code which is £40 per pub. The Government estimates the cost to the pub owning business of the Adjudicator will be £125 per pub. The statutory measures do not impose disproportionate cost. If pub owning businesses do not currently employ an experienced valuer to confirm that RICS guidance is being adhered to, there would be a cost to employ such a person which would engage Article 1 Protocol 1. This cost would be offset against the cost of a valuer currently employed and would be proportionate in light of the need for assessments to be in line with industry guidance and assessed by a suitably qualified person. In order for the policy underpinning the legislation to be delivered it is necessary for rent assessments to be accurate and in accordance with industry guidelines. In addition the cost of complying with these provisions are focused on those companies about which the Government has received the most evidence of abuse of the tie/ complaints.

57. The Government is of the view that the cost of complying with the Parallel Rent Assessment (PRA) requirement and the Market Rent only Option under the Code both engage Article 1 Protocol 1, although they are compatible with the right. To the extent that A1P1 is engaged, we consider that this is justified in the interest of ensuring a fair share of risk and reward between parties.

58. The imposition of the PRA requirement on pub-owning businesses with 500 or more tied pubs will increase the cost of compliance in circumstances where a PRA is requested. PRA is necessary to address the imbalance in bargaining power between the tenant and pub-owning business and ensure a fair share of risk and reward. The PRA enables the tenant to determine whether they are no worse off in a tied agreement and use the assessment to negotiate a better deal. The Government intends that the PRA will provide the tenant with the benefit of a point of comparison and better information, to address the imbalance in bargaining power between tenants and pub-owning businesses.

59. Again the costs of complying with the PRA provisions of the Code are focused on those companies about which the Government has received the most evidence of abuse of the tied model/ complaints. A PRA cannot be requested unless negotiations have failed – thus mitigating the cost for pub-owning businesses. The Government estimates that the total cost to pub-owning businesses of producing PRAs will be approximately £2.5m per annum.

60. The imposition of the Market Rent Only (MRO) option on pub owning businesses with 501 or more pubs of which one is a tied pub will increase the cost of compliance with the Code and will engage A1P1. With PRA the benefit is greater transparency over the value of the tie and may lead to an adjustment of the tied rent.

The difference is that the PRA will lead to an improved tied offer whereas with MRO the landlord is obligated to make a free of tie offer. It is considered that the Market Rent only option is necessary to address the imbalance in risk and reward between pub owning business and tied tenant. If the tied model is proved to deliver significant benefits to the lessee, then the MRO option would not be taken up, and the tied model would remain. There is a wealth of evidence from BIS Select Committees that there are too many cases of tenants unable to secure a fair share of risk and reward in their agreement and that over a period of time offering lessees the option of being tied or being free of the tie is the only way to judge properly the fairness of the tie. The MRO option addresses the incentives that get to the heart of how the tied model ensures tied tenants are no worse off than Free of tie tenants. There are arguments that pub closures could be increased under MRO and there would be additional costs in the compliance with the MRO requirements of approximately £4200. These costs would be shared between pub owning business and tied pub tenant. Some of these costs may be avoidable because the threat of MRO will provide greater incentives to provide a fairer tie agreement and to settle disputes earlier which would lead to an avoidance or decrease in costs. In light of the above the measure is proportionate to ensure fairness of the tie.

61. The new MRO introduces the right to MRO in a staged fashion. The right will be made available to tenants when their next rent review or tenancy renewal is due. It will only be triggered before then if the pub is sold or other extraordinary circumstances occur.

62. Subject to further deliberation by Ministers it is intended that the PRA and MRO would be mutually exclusive therefore there is minimal extra costs from the introduction of the MRO.

63. The Government considers that the additional costs of the PRA, MRO and the interference with ordinary commercial practices are proportionate and strike a fair balance between the general interest and the protection of the pub-owning businesses' property. In particular we have had regard to the rights of pub tenants – both in respect of their business and (for many) their homes (as pub tenants often live in the pubs that they run).

64. The Government considers that the interference with ordinary commercial practices and the effect on leases in terms of voiding tenancy terms which are inconsistent with the Statutory Code are proportionate and strike a fair balance between the general interest and the protection of the pub-owning businesses' property. In the case of this provision, the Code is not designed to expropriate property from pub-owning businesses but to introduce rules to encourage fairer dealing between them and their tenants.

65. The degree of unfairness that may be suffered by pub owning companies in relation to the voiding of tenancy terms is substantially mitigated by the fact that there has been lengthy discussion over ten years about the pubs industry and the relationship between pub owning companies and tied tenants. In light of this, pub owning businesses have been on notice for a number of years that action by Government was a possibility. When consulting in 2013 the Government gave notice that the Code would apply to all agreements including existing agreements.

66. In considering the degree of unfairness, the voiding of terms of the tenancy which are inconsistent with the Statutory Code, it is significant that the precise terms of the Code are to be consulted on publicly, so pub owning businesses will be able to make representations to Government. In addition the Code is subject to the affirmative procedure in Parliament which will provide further consideration of compatibility with the ECHR.

67. Any unfairness arising from the voiding of tenancy terms is outweighed by the competing public interest. In order to achieve the policy intent of fairness and tied tenants are not disadvantaged, it is necessary for the Code to apply to all tenancy agreements, whenever they are made. There is no alternative to this, if all tied tenants are to be provided with the protections of the Code.

68. The Code provisions should be considered as the imposition of controls on the exercise of property rights. The controls are in part procedural rules which increase transparency for tenants in their negotiations and puts them into a better position to conduct those negotiations. This is necessary in the light of the evidence gathered about the inability of tenants to secure a fair deal in negotiations over their tied tenancies.

69. These controls regulate economic relations. Pub-owning businesses will still be able to arrange their businesses on a tied-pub model and will be able to raise rent on their property. The state's interference is aimed at putting both parties on an equal footing in commercial negotiations. The controls are therefore proportionate in meeting the public interest in preserving the economic well-being of the nation.

70. To the extent that there is any deprivation or interference of property rights, we rely on the following case law. National authorities have a wide margin of appreciation in assessing the existence of a problem of public concern and the remedial action to be taken. In *James v United Kingdom* (1986) EHRR 123 the ECtHR held that, in addition:

"the notion of 'public interest' is necessarily extensive… the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court… will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation…"[1]

71. This was followed by *Mellacher v Austria* (1989) 12 EHRR 391 where the court concluded that "in remedial social legislation and in particular in the field of rent control, it must be open to the legislature to take measures affecting the further execution of previously concluded contracts in order to attain the aim of the policy developed".

72. In conclusion, the deprivation or interference of the property rights of pub-owning businesses is justified and proportionate. Furthermore, there will be consideration of compatibility with ECHR rights when the Code (both *Core* and *Enhanced* provisions) is implemented through secondary legislation.

[1] At paragraph 46

The Pubs Adjudicator

73. The Pubs Code Adjudicator and the power to arbitrate and investigate breaches of the Code are modelled on the Groceries Code Adjudicator set up under the Groceries Code Adjudicator Act 2013. The Groceries Code Adjudicator Bill 2013 was considered by Ministers as being human rights compliant and successfully passed through Parliament. The Pubs Code Adjudicator raises the same issues and therefore does not raise issues of concern. We do not propose to rehearse the same arguments here.

Arbitration

74. The issues of statutory arbitration, independence and impartiality of the Adjudicator, equality of arms in arbitration, public hearings and pronouncement of judgements, information about arbitration and its interaction with Articles 6 and 8 were considered to be human rights compliant under the Groceries Code Adjudicator Bill and similarly raise no concerns here..

75. The interference in so far as the effect of voiding tenancy terms on costs (in existing tenancies or future tenancies) which are inconsistent with provisions on arbitration in the Act are proportionate and strike a fair balance between the general interest and the protection of the pub-owning businesses' property. Where a pub-owning business refers for arbitration under contractual arbitration agreements, any contractual terms relating to who should bear the costs of the arbitration are void to the extent that they are inconsistent with provisions on costs set out in the Act. This may mean that the pub-owning business bears more of their own costs of the arbitration process than they would have done under the contractual arbitration clause (although it is possible for the Adjudicator to require the tenants to pay costs over the cap in certain circumstances) or that the Adjudicator seeks to recoup any unrecovered costs via the levy at clause 54. As against this, tied tenants will now have access to a low cost, transparent arbitration service. In the past tied tenants often did not refer to arbitration because there was a potential for them to face significant costs. Tied tenants were therefore more likely simply to agree to terms set by the pub-owning businesses, who were in a better negotiating position. This had the effect of limiting the tenants' bargaining position and potentially reducing their ability to run a profitable pub.

76. The policy would be undermined if tenancy terms which are inconsistent with the arbitration provisions were not unenforceable as the arbitration provisions of the Bill could apply only in relation to new tenancy agreements and pub tenancies can be up to 20 years in duration. The effect of the clauses making arbitration provisions within existing agreements unenforceable is not to remove arbitration rights from either tenants or landlords completely but to give precedence to the new statutory rights the Bill which will create an even playing field across the sector.

77. The statutory Adjudicator model provides the tied tenant with a low cost, independent and transparent arbitration service. Tied tenants are less likely to accept disadvantageous terms and more likely to refer to arbitration. Pub tenants are in a significantly weaker financial position than the pub-owning businesses (many earn as little as £15,000 per annum) and the prejudice to tied tenants of not having access to this low cost independent Adjudication model far outweighs the prejudice to pub-

owning businesses who may face costs higher than those in their contractual arbitration terms.

Investigation powers

78. Article 8, Article 6 and Article 1 Protocol 1 were considered in relation to the Groceries Code Adjudicator's investigation and enforcement powers. The Adjudicator's investigation and enforcement powers were considered and deemed to be human rights compliant under the Groceries Code Adjudicator Bill 2013.

79. The Adjudicator's power to make recommendations, the requirement to publish, the ability to impose financial penalties and the ability to require payment of costs were considered to be human rights compliant under the Groceries Code Adjudicator Bill 2013.

Levy funding

80. The fact that the Adjudicator is funded primarily by levy was considered to be human rights compliant in relation to the Groceries Code Adjudicator and the same principles apply to the Pubs Adjudicator.

Part 5: Childcare and schools

Assessing eligibility for free of charge early years provision (clause 71)

81. Clause 71 amends sections 13A and 13B in the Childcare Act 2006 ("CA"). Section 13A currently 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 for the purposes of determining eligibility for free early years provision (as defined in regulations under Section 7 of the CA). The information supplied pursuant to these powers is used to populate an electronic system, which local authorities can use to check that a particular child is eligible.

82. The Government now wishes to make available a new strand of funding for the most disadvantaged 3-4 year olds in receipt of free early years provision. Clause 71 of the Bill seeks to make use of the existing information gateway under section 13A for the purpose of assessing eligibility for this new strand of funding. This has been achieved by amending subsection 13A(3) to extend the purposes for which data specified at subsections 13A(1) and (2) can be used by the Secretary of State and local authorities to include funding for free early years provision. The clause also amends subsection 13A(6) to allow information to be supplied to persons exercising functions on behalf of local authorities for the specified new purpose.

83. Section 13B currently provides that a person commits an offence where he discloses information received from Her Majesty's Revenue and Customs (HMRC) or the Department for Work and Pensions (DWP) under section 13A, except if the disclosure takes place in one of the circumstances listed in subsection 13B(2).

84. Clause 71 amends section 13B by extending the grounds for lawful disclosure under section 13B(2) to include the disclosure in connection with exercising functions relating to determining eligibility for funding for free early years provision. This amendment is necessary to ensure that individuals using information for the new purpose in section 13A(3) of the CA are not committing an offence.

85. 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.

86. However, an interference with Article 8(1) can be justified in accordance with Article 8(2). We consider 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 funding for free early years provision, and thereby reduce fraudulent claims or mistakes as to eligibility.

87. The measure is proportionate, as section 13A makes clear that the information can only be shared and used for the specified purposes 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, under section 13B.

88. All parties will be data controllers or data processors and therefore also subject to the requirements of the Data Protection Act 1998 including the requirements that such data be processed fairly and lawfully, that it be adequate, relevant and not excessive, and that it be accurate and up to date. This will also help to ensure compliance with Article 8(1). We therefore consider that the amendments to section 13A and 13B do not breach Article 8.

Part 6: Education Evaluation

Education Evaluation (clauses 75 to 77)

89. Clause 75 enables the sharing of information between Her Majesty's Revenue and Customs ("HMRC"), the Secretary of State and a devolved authority for the purpose of evaluating the effectiveness of education or training provision and assessing policy in relation to such provision. The clause extends an existing power for HMRC to disclose tax information for the purpose of evaluating the effectiveness of education or training and assessing related policy for persons in further education who have attained the age of 19. The clause also enables the Secretary of State and a devolved authority to share personal data with HMRC for the same purpose

90. This clause engages and potentially interferes with Article 8(1). This is because it extends the scope of current data sharing powers held by HMRC, the Secretary of State and a devolved authority in relation to persons in higher education and training or education provided for persons under 19 (rather than in relation to persons in further education only and who have attained the age of 19).

91. However, the Government considers that any such interference would be justified under Article 8(2) as it is necessary in the interests of the economic well-being of the country. This is because the data sharing power will enable the Secretary of State and a devolved authority to:

- significantly improve knowledge and information on pathways through learning and outcomes.

- improve upon information, advice and guidance available on learning outcomes to assist public decision making on educational choices.

- improve upon the ability of these organisations to carry out their functions.

92. In addition, the sharing is proportionate because:

- any sharing of personal data will be subject to the restrictions in the Data Protection Act 1998 that apply to personal data, including the requirements that such data be processed fairly and lawfully, that it be adequate, relevant and not excessive, and that it be accurate and up to date;

- some but not all of the data may already be held by each of the organisations, which will serve to limit the amount of new data to be shared under this clause; and

- information disclosed in reliance on these data sharing powers may only be used in connection with specified functions of the Secretary of State or a devolved authority (relating to the assessment of education or training provision) and, so far as is reasonably practicable, must not be used in such a way that the identity of an individual is disclosed to a person carrying out one of those functions.

93. Clause 76 enables a person to share student information with the Secretary of State, Welsh Ministers, an information collator, a prescribed person or a person falling within a prescribed category.

94. The clause further enables the Secretary of State and Welsh Ministers to make regulations which define the circumstances in which student information may be shared, the description of such student information and the persons with whom the information may be disclosed to other than the Secretary of State, Welsh Ministers and an information collator. In this way, the regulations will serve to limit the scope of data sharing between different private providers of qualifications.

95. This clause closely resembles existing data sharing powers held in relation to schools. It engages and potentially interferes with Article 8(1) as it allows the sharing of personal data. The Government considers that any such interference would be justified under Article 8(2) as it is necessary in the interests of the economic well-being of the country. This is because the collection of such personal data will enable the Secretary of State and Welsh Ministers to:

- form a more complete picture of the attainment data for qualifications accredited by Ofqual, irrespective of where the learning was undertaken or the age of a student and thereby gain a more "joined-up" view of individuals' progression through education; and

- more effectively measure progress towards Departmental Key Performance Indicators and quality assure performance data published about assessment centres

96. This will, in turn, enable the Secretary of State and Welsh Ministers to make better use of their resources, inform policy development and help to identify barriers to student progression.

97. In addition, the measure is proportionate because:

- any sharing of personal data will be subject to the restrictions in the Data Protection Act 1998 that apply to personal data, as set out in relation to clause 75 above;

- some of the student information may already be held by the Secretary of State and Welsh Ministers , which will serve to limit the amount of new data to be shared under this clause; and

- the receiver of any student information will not be able to publish it in any form which identifies the individual to whom it relates.

98. Clause 77 enables the Secretary of State and Welsh Ministers to share information relating to a former student, including details of that person's next destination, with their further education institution. This clause makes similar provision to existing data sharing powers that the Secretary of State has in relation to schools and thus widens such powers, so that they cover not just schools but further education institutions too.

99. This clause engages and potentially interferes with Article 8(1) as it allows the sharing of personal data. However, the Government considers that any such interference would be justified under Article 8(2) as it is necessary in the interests of the economic well-being of the country. This is because the data sharing power will enable further education institutions to:

- have confidence in the robustness of the Department's aggregate destinations data;

- support their own self-evaluation and self-improvement; and

- make more informed decisions about their choice of curriculum and qualifications, and assess the effectiveness of their support to students.

100. In addition, the measure is proportionate because any sharing of personal data will be subject to the restrictions in the Data Protection Act 1998 that apply to personal data, as set out in relation to clause 75 above; and some of the data may

already be held by further education institutions, which will serve to limit the amount of new data to be shared under this clause. Furthermore, the clause enables the Secretary of State and Welsh Ministers to make regulations which define the term "activities", and thereby set parameters for the disclosure of information about a former student's activities either by setting a time bar, beyond which point details of such activities cannot be shared back with the former student's further education institution, or by limiting the types of activity which fall within the definition of "destination information".

Part 7: Companies: Trust and Transparency

Register of people with significant control (clause 78 and Schedule 3)

101. This clause introduces a new Part into the Companies Act 2006 that requires companies to identify and obtain information on people with significant control over the company ("PSCs").

Article 8

102. This new clause requires an individual who is a PSC or who has knowledge of a PSC to notify companies of certain particulars, including the PSC's name, service and residential address(es), country of usual residence, nationality, date of birth and details regarding the control the individual exerts over the company. This information must be kept on a register by the company and made available for inspection.

103. To the extent that this policy interferes with the right to a private life, the Government considers the requirements of the register to be justifiable under Article 8(2) ECHR, and necessary in a democratic society both in the interests of the economic well-being of the country and for the prevention of crime. The PSC register is necessary as a means of helping law enforcement and tax authorities identify and sanction those who ultimately control companies that are used for criminal purposes, as well as potentially deterring the criminal misuse of UK companies. There is also a wider economic benefit in increasing the transparency surrounding business ownership and control. This is linked to reducing the risks around economic activity and increasing trust by reducing information asymmetry between those that trade with, or invest in, the company and those that control it.

104. The Government also considers the measure to be proportionate to the aims. There are safeguards in place where the release of this information would be harmful to the individual: provision is made for a protection regime to prevent personal information being publicly available where the individual might be at risk. Further, certain information regarding the PSC will never be available publicly and will instead be available only to law enforcement bodies and other specified authorities at the discretion of the registrar of companies. Regulations will set out under what circumstances the registrar may release such information to the specific authorities, who must treat the information in accordance with Article 8 ECHR and the Data Protection Act

Article 1 Protocol 1

105. Clause 78 creates a procedure enabling a company to restrict certain interests in that company belonging to individuals or legal entities where a person fails to respond to a notice by the company, thus controlling the individual's use of the property. These interests include the enjoyment or exercise of rights attached to shares, for example to receive a dividend or to vote in shareholder meetings, or to exercise other rights such as the right to appoint directors of the company. Where a company imposes restrictions on the interests, a person will not be able to enjoy the benefit, exercise, transfer or otherwise make use of the interest.

106. This procedure engages Article 1 Protocol 1. However this is a qualified right and the Government considers this procedure to be proportionate and necessary in the public interest for the legitimate purpose of effectively enforcing the law requiring a PSC register, which register as discussed above is necessary for the economic well-being of the country and the prevention of crime.

107. The Government considers this particular enforcement mechanism necessary and proportionate since, where a person wishes to hide their identity in relation to an interest in a company, they may not respond to a notice from the company. While failure to respond to a notice is a criminal offence, there is concern that people served notice outside of the UK in particular will not be incentivised to respond to the notice by the threat of a criminal offence alone. However if restrictions are placed on the interest of the person so that a person cannot enjoy their interest in the company without responding to the notice, this will incentivise either a response, or an abandoning of the interest.

108. As to parties who have complied with the Part but who hold interests jointly so are affected by restrictions, a company is required to have regard to these third party rights when considering whether to subject the interest to restrictions. However, on application by an aggrieved party, a court may order the removal or relaxation of restrictions where the restrictions unfairly affect the rights of the party. These provisions safeguard the rights of third parties sufficiently to prevent disproportionate infringement of Article 1, Protocol 1 rights.

Article 6

109. Clause 78 could also be argued to engage Article 6, as it enables a company to restrict the rights of an individual, effectively allowing a company to determine a person's civil rights. "Civil rights" are those civil rights in private law[2] between two private persons and includes rights as to property.

110. In order to maintain the freedom guaranteed by Article 6(1) to a fair hearing in the determination of the legal rights provided for by law, the clause makes provision for an individual to apply to the court for an order overturning or relaxing the restrictions. The Government considers this route of appeal sufficient to guard the Article 6 rights of a person affected by the restrictions placed on interests by a company. Any aggrieved party may apply to the court and the court may re-examine the facts of the individual case, including the initial decision to impose restrictions.

[2] *Ringeisen v Austria* A 13 (1971)

The court has a wide discretion to make any order that it sees fit. The appeal process is therefore Article 6 compliant and so Article 6 rights are respected.

Abolition of share warrants to bearer (clause 81 and Schedule 4)

111. Clause 81 provides that no share warrant may be issued after the coming into force of this provision.

112. A share warrant, otherwise known as a bearer share, is a special type of share where the owner of the share is not registered on the register of members but legal ownership is determined by physically holding the warrant. Title to the shares referred to in the warrant is transferred by simply passing the warrant onto the new owner and there is no requirement to register the transfer with the company. However, in practice a warrant holder will probably want to notify the company of the new address to which correspondence and dividends should be sent.

113. Clause 81 also gives effect to Schedule 4 which sets out the mechanism for converting existing share warrants into registered shares and provides for the cancellation of any share warrant that has not been surrendered or converted within nine months of the coming into force of the provision.

114. Schedule 4 requires a company to give two notices to the warrant holder, (six months apart) informing them of their right to surrender and convert their warrant into registered shares and sets out the consequences of the failure to surrender the warrant. If the warrant is not surrendered by the end of the seventh month, voting rights, the right to receive dividends and other rights associated with the share warrant are suspended pending surrender. After the end of the surrender period the company must apply to court for the cancellation of the share warrant and serve notice of the application on the warrant holder. The notices to be given to the warrant holder and to the registrar contained in the Schedule are backed up by criminal sanctions.

115. The application for cancellation must be accompanied by the nominal share value, any share premium paid and any dividend due to the warrant holder during the period of suspension. This is paid into court. Once the cancellation order is made, any further dividend due from the date of the application to the date of the cancellation order must also be paid into court. Following the making of the cancellation order a former warrant holder who failed to surrender a share warrant may apply to court within three years of the cancellation order for the sums paid into court to be paid to them.

116. Clause 81 engages Article 6, Article 8 and Article 1, Protocol 1.

117. Under Article 6 everyone charged with a criminal offence is entitled to a fair and public hearing. The criminal sanctions created in Schedule 4 can only be imposed by a court and there is a right of appeal built into the judicial system. Accordingly, the new criminal sanctions are Article 6 compliant.

118. The requirement that share warrants are converted into registered shares engages Article 8 because the bearer of the share warrant will not be able to retain anonymity as a shareholder. Article 8 is a qualified right and can be interfered with in

the interests of national security, public safety or the economic wellbeing of the country or for the prevention of crime. To the extent that this policy interferes with the right to a private life, the Government considers the requirement to convert share warrants into registered shares to be proportionate and necessary for the legitimate purpose of the prevention of crime and for the economic wellbeing of the country. The rationale for abolishing share warrants and converting existing share warrants into registered shares is to increase transparency in share ownership. This is required to prevent money laundering and evasion, avoidance or delay in the payment of taxes.

119. The abolition and the cancellation of share warrants engages Article 1, Protocol 1 as the right to peaceful enjoyment of one's possessions is interfered with. Article 1, Protocol 1 is a qualified right and can be interfered with where it is in the public interest to control the use of property or to secure the payment of taxes.

120. The policy behind the abolition of share warrants is in the public interest to prevent crime by reducing the opportunities for money laundering and ensure taxes are paid. These clauses deal with existing share warrant holders. The intention is not to deprive warrant holders of their property but to require them to hold their shares in a transparent way by converting them into registered shares.

121. To achieve this, companies will be required to give a number of notices to warrant holders about the need to convert the warrants or face cancellation and will need to apply to court for the cancellation of the share warrant. A cancellation order will not be made where the court is not satisfied that the notices were given. The mechanism for converting share warrants is backed up with criminal sanctions to encourage companies to follow the notification procedures.

122. Where the warrant holder chooses not to exercise the right to surrender and convert into registered shares within seven months, the warrant holder's shareholder rights will be suspended and eventually any warrant holder who chooses not to convert their share warrant into registered shares will be deprived of the warrant following a court order. This step is necessary to ensure that warrant holders surrender their warrants as quickly as possible. Without the ultimate sanction of cancellation, the warrant holders at whom the policy is directed would not apply to convert their warrants into registered shares.

123. The long period of policy development, including public consultation and commitments, coupled with the strong notice requirements in the process, should reinforce the impact of the ultimate sanction of cancellation. Company stakeholders have confirmed that they can meet the timeframe for converting share warrants into registered shares.

124. Where the warrant is cancelled the nominal value of the shares contained in the warrant and the payment of any outstanding dividend is required to be paid into court by the company. This will be used to compensate warrant holders who were unable, rather than unwilling, to surrender their warrant within the timeframe. They will be able to apply to court for the money paid into court by way of compensation. Compensation will be restricted to all but exceptional circumstances as part of the process of incentivising compliance of share conversion during the surrender period.

Compensation will protect vulnerable share warrant holders who were unable to convert their shares during the surrender period, for instance through illness.

125. In some cases the nominal share value may be substantially less than the actual value of the share or shares if the warrant holder was to sell them. This is consistent with the analogous position if a shareholder were to surrender their share to the company – they would only be entitled to its nominal share value. Any assessment of market value would be costly and onerous and potentially spurious since these shares are not usually traded, the majority of warrants being issued in small private companies. Moreover, the company is required to fund the payment into court and if they were required to pay in the market value, this could adversely affect the value of the business or even the viability of the company to continue trading. A balance has to be drawn between the company and its members holding registered shares on the one side and the individual who has chosen not surrendered the share warrant.

126. Cancellation of share warrants involves a potential transfer of value to other members of the company. This is justified because of the policy aim of greater transparency and is fair as these members are prepared to hold their shares in a registered and transparent manner, whereas the warrant holder has elected not to do so.

127. The interference is necessary. Transparency in share ownership is necessary to ensure that taxes are paid, that the purchase of shares cannot be used to enable money laundering, and that the UK complies with its international obligations to share information on share ownership. The UK committed to action to tackle bearer shares in the UK's G8 Action Plan at the Lough Erne Summit in June 2013[3].

128. Following the reasoning in *JA Pye (Oxford) Ltd and another v United Kingdom*[4] and *Islamic Republic of Iran Shipping Lines v Turkey*[5] the Government believes that the interference with the right to the peaceful enjoyment of possessions strikes a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. There is a reasonable relationship of proportionality between the means employed and the aim pursued. States enjoy a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.

129. The interference is a control of use, rather than a deprivation of possessions. The share warrant holder will be given plenty of notice and opportunity to avoid cancellation by converting the shares and there is compensation available in the

[3] The 2007 evaluation of the UK by the international "Financial Action Task Force" recommended the "UK [..] consider the justification and need for the on-going existence of bearer shares given the apparent lack of demand and potential risk of abuse." The 2011 review of the UK system by the international "Global Forum on Transparency and Exchange of Information for Tax" recommended the "UK should […] eliminate such [bearer] shares." The UK committed to action to tackle bearer shares in the UK's G8 Action Plan at the Lough Erne Summit in June 2013.

4 [2007] 23 BHRC 405

5 [2007] ECHR 40998/98

exceptional circumstances where the warrant holder is unable rather than unwilling to exercise the right of surrender. Cancellation without compensation only arises in the unlikely situation that a person chooses not to convert their share warrant into registered shares.

130. The Government considers the abolition of share warrants to be proportionate and necessary for the legitimate purpose of encouraging transparency in transactions to prevent hiding the proceeds of crime, to secure the payment of taxes and to comply with international obligations and commitments.

Corporate directors (clause 84)

131. Clause 84 makes provision requiring company directors to be natural persons except in cases prescribed through secondary legislation.

132. Legislation prohibiting legal persons from being company directors potentially engages Article 1, Protocol 1. The meaning of possessions under the European Convention on Human Rights is not limited to ownership of physical goods. It has been held to include for example goodwill in a business and licences and permits. Here the interference relates to the economic or commercial interest of the corporate director. The prohibition does not deprive natural persons who are directors of the corporate director from becoming directors in their own right. Any deemed interference would therefore amount to a control of the use of the economic or commercial interest of the corporate director.

133. In *Fredin v Sweden*[6] the ECHR held that the revocation of the applicant's permit to exploit gravel on their property for commercial purposes, seemingly with no provision for compensation, did not amount to a breach of Article 1 of Protocol 1. In *Van Marle v the Netherlands*[7], a case in which accountants were refused registration by their chartered institute following a change in the law, the court concluded that the interference was not disproportionate since there is a legitimate aim in regulating a profession and providing for registration by proving competence.

134. The present prohibition aims to provide transparency and enhance trust in corporate structures. Corporate directors can obscure identification and liability of those who control companies, with the potential for criminal activity and poor corporate governance. Therefore restrictions on legal persons holding directorships are justified in the public interest. The clause allows the Secretary of State to make exceptions to the general prohibition. It is also still open to natural persons who are directors of an existing corporate director to become directors of the company of which the corporate director is currently a director. The restriction is therefore proportionate.

Part 8: Company Filing Requirements

Company registers (clause 91 and Schedule 5)

6 (1991) 13 EHRR 784, ECtHR
7 (1986) 8 EHRR 483, ECtHR

135. Clause 91 amends the Companies Act 2006 to provide private companies with the option to no longer keep and maintain certain private registers (register of members, register of directors and directors' residential addresses, register of secretaries and the a register of persons of significant control). Where this option is exercised, the company will be required to provide to the registrar of companies all the information that would otherwise have been available on the private registers. With the exception of directors' residential addresses, the registrar must record the information on the public register of companies and make it available for public inspection.

136. Whilst most information in the private registers mirrors that already on the public register, some information such as a member's address is not available on the public register. Where the option is exercised with respect to a register of members, members' addresses will become more readily available and accessible through the public register. There is the risk this information may be abused, thereby potentially engaging Article 8. Interference with this right is, however, justified when it is the economic well-being of the country. The Government considers that the clause is justified and proportionate in this case because:

(a) the new legislation is providing an option to the company (i.e. it is not mandatory) to exercise the option not to keep a private register;
(b) there is already an existing provision allowing objections to an address being made available for public inspection under regulations made under section 1088 Companies Act 2006; and
(c) the option to no longer hold the register of members may only be exercised if there is assent by all the members (essentially providing any member a veto in the exercise of the option if they do not want their address to be made available on the public register).

Registered Office disputes (clause 96)

137. Clause 96 inserts a new section into the Companies Act 2006. The new section gives the Secretary of State a power to make regulations under which, following a successful application, the registrar of companies will be required to change the registered office address of a company, where the registrar is satisfied that the company is not authorised to use the current address.

138. If the power is exercised, the registrar will have to make an administrative decision (arguably of "quasi-judicial" nature) determining whether a company is authorised to use an address as its registered office. In doing so, the process may engage Article 6. However, the company and any applicants will be entitled to appeal any decision of the registrar to the court. It is established that where an appeal to a judicial body is provided, there is no violation of Article 6, irrespective of whether the adjudicatory body in question does not comply with Article 6[8]. This process allows an appeal on the facts.

139. Consequently, the Government does not consider clause 96 to violate Article 6 and any regulations made under the clause will similarly be compatible.

[8] Albert and Le Compte v Belgium (1983) 5 EHRR v533, ECt HR, para 29

Director disputes (clause 99)

140. Section 1095 of the Companies Act 2006 (and the regulations made under it)[9] provides a means of removing material from the public register by allowing specified persons to apply to the registrar to remove inaccurate information, or any information deriving from anything invalid or ineffective, from the register. If any valid objection to an application is made, the registrar must reject the application.

141. This clause amends section 1095 to provide a new procedure for removing material about company directors from the public register, replacing the current section 1095 mechanism in relation to any person appearing on the public register as a director who wishes to be removed. The person, or someone acting on the person's behalf, must apply to the registrar, stating that the person did not consent to act as a director. If the company does not respond to the registrar within a specified timeframe stating, with the necessary evidence, that the person did consent to the appointment, the registrar will effect the removal.

142. The clause potentially interferes with the Article 6 right to a fair and public hearing by an independent and impartial tribunal established by law. Any decision-making process by the registrar on whether a person is or is not a director would engage Article 6 as a determination of that person's role as a director, and would therefore need to follow an Article 6 compliant process.

143. The Government considers, however, that a decision to remove a person from the public register if the requisite proof is not provided would not constitute a judicial or quasi-judicial decision on whether or not they are in fact a director of the company since the public register is not determinative of whether a person is a director. Given the nature of the decision made under the new procedure, it is considered that no issue arises under Article 6, as there is no determination of civil rights.

Strike off (clause 100)

144. Clause 100 amends Chapter 1 of Part 31 of the Companies Act 2006. The clause reduces the period after which the registrar may strike off (remove) a company from the register of companies. The measures in the provisions will reduce the time from around 6 months to around 4 months.

145. The lengthy time periods currently required to strike off companies are primarily in place to protect the companies themselves and the rights of creditors, by providing sufficient opportunity and notice to object to a proposed strike off. Without such protection, the right of creditors to enforce their debts may be jeopardised.

146. Shortening the time period would increase this risk, and arguably engage Article 1 Protocol 1. However, the Government does not consider this right to be engaged, as the reduced time periods are still sufficient for creditors, and the company themselves, to object to the striking off of a company). In any event, if it were, any interference with the right would be proportionate and necessary as the

[9] The Registrar of Companies and Applications for Striking Off Regulations (SI 2009/1803),

reduction in the time period for strike off is in accordance with the general interest as it strikes a right balance between slimming down the number of companies on the company register and providing enough time for creditors or other persons to object.

Part 9: Directors' Disqualification etc

Directors disqualification (clauses 101 to 113)

147. Clauses 101 to 113 amend the Company Directors Disqualification Act 1986 ("CDDA") (c.46), the Company Directors Disqualification (Northern Ireland) Order 2002 and make consequential amendments to other enactments. The key changes can be summarised as:

(a) introducing a new ground for disqualification of directors for conviction overseas of a serious offence relating to the management of a company;
(b) introducing a new ground for disqualification of a person who causes a director to behave in an unfit manner;
(c) removing the restriction on information to be used by the Secretary of State in determining whether to bring disqualification proceedings;
(d) extending the time period within which an application for the making of a disqualification order may be made from 2 to 3 years;
(e) increasing the factors to be taken into account by the court in determining disqualification applications;
(f) requiring office-holders to submit a conduct report on directors to the Secretary of State in all cases of a company's insolvency; and
(g) expanding the provisions that automatically disqualify bankrupts from being directors across the UK.

Article 6

148. Directors disqualification legislation engages article 6(1) (right to a fair trial) as disqualification of an individual from being able to act as a director of a company is a determination of a person's civil rights and there is a clear body of case law that states that action that restricts or grants the right to engage in a commercial activity or to practise a profession falls within Article 6(1)[10]. However the Government does not believe that any of the changes being made to the CDDA infringe the Article 6(1) right, because they do not affect the rights of individuals to have their disqualification proceedings heard in a fair and public trial. However three clauses raise specific Article 6(1) issues which are explored further below.

149. Clause 101 allows a disqualification proceeding to be brought on the grounds that an individual has been convicted of a serious offence concerning the management of a company overseas. It could be argued that this infringes Article 6(1) rights since the overseas conviction might have not been made in compliance with Article 6(1) if in a country with a less open or impartial judicial system.

150. However any risk consequent on this new ground for disqualification is mitigated by the fact that the court has discretion to disqualify, rather than being

[10] For example, *Kingsley v UK* 2002-IV; 35 EHRR 177 GC

obliged to disqualify an individual so convicted, and may take matters including the robustness of the overseas conviction and the standard of the relevant foreign judicial system into consideration when deciding whether to disqualify an individual. A further safeguard is provided by the requirement that the courts will only consider the matter on application by the Secretary of State, who must first decide that the disqualification of the individual would be in the public interest. In addition, the judgment to disqualify or decision to accept a disqualification undertaking are subject to appeal, and the Secretary of State's decision to apply to the court or to accept an undertaking is subject to judicial review. These safeguards to the Article 6(1) right to due process results in such Article 6 rights being respected.

151. Regarding clause 106, it is noted that the information passed from regulators might include information obtained under compulsion. This potentially engages the Article 6 right not to self-incriminate. However disqualification has been held to be a civil procedure, and as such the full extent of Article 6 ECHR (including the right not to self-incriminate) does not apply[11]. Following an ECHR decision in 1996[12], amendments to the CDDA were made that prevent information obtained in disqualification proceedings from being used in criminal proceedings (section 20(2) CDDA). The Government does not consider that Article 6 is engaged by clause 106.

152. With respect to clause 105, the increase in the time period within which an application for disqualification proceedings against a director of an insolvent company may be brought from 2 to 3 years could arguably engage Article 6. Article 6 guarantees that a right to a hearing within a "reasonable time". However, the Government considers 3 years to constitute a reasonable time within which to initiate disqualification proceedings and so Article 6 is not engaged.

Article 7

153. Clause 101 creates a new ground for disqualification where an individual has been convicted of a serious offence concerning the management of a company overseas. While there is no intention to allow applications for disqualification of individuals convicted before this legislation comes into force, conduct leading to a criminal offence may have occurred before this legislation came into effect.

154. Article 7 protects individuals from retroactive criminal offences and punishment. This retrospection may on the face of it engage Article 7, however it is the Government's view that this is not the case. Article 7(1) explicitly limits the application of the Article to cases where an individual is held guilty of a criminal offence, and Article 7(2), which forbids ex post facto penalties, is limited to criminal penalties.

155. As regards disqualification proceedings, there is case law that holds that disqualification proceedings are not 'criminal' in nature[13].

156. As to whether disqualification is a criminal penalty, prima facie it is not since it results from civil proceedings, rather than any criminal offence. In addition, the

[11] *R v Secretary of State for Trade and Industry Ex p. McCormick* [1998] BCC 379
[12] *Saunders v United Kingdom*, (1996) ECHR 43/1994/490/572
[13] *R v Secretary of State for Trade and Industry Ex p. McCormick* [1998] BCC 379

penalty, disqualification, is not punitive but preventative in nature, having as its main aim the protection of the public and the wider economy from the danger of potentially bad directors. Further, the nature and severity of the remedy does not render the proceedings offence "criminal" for the purposes of Article 7. Disqualification orders under clause 101 provide for a maximum period of 15 years. It is considered that the range of potential disqualification, given at the discretion of the court, means the penalty is not so high or severe to be considered criminal.

Article 8 and Article 1 Protocol 1

157. Disqualification proceedings in general engage Article 8 and Article 1, Protocol 1 as they may affect an individual's ability in his private life to enjoy his property, in this case his profession. The changes to the disqualification regime contained in these provisions are likely to result in more directors being disqualified and are also likely to result in the disqualification of individuals who are not directors but cause a director to behave in an unfit manner. This is because the provisions introduce new grounds for disqualification and a more efficient regime. Consequently these additionally disqualified directors and other individuals will suffer interference with their Article 8 and Article 1, Protocol 1 rights.

158. However, both Article 8 and Article 1 Protocol 1 rights are qualified and it is the view of the Government that any interference is justified as necessary for the economic well-being of the country due to the protection the public is afforded by disqualification of bad directors[14] or those who cause directors to behave in an unfit manner.

Compensation awards (clause 107)

159. Clause 107 amends the CDDA to allow the Secretary of State to apply to the court for a compensation order or to accept an undertaking to pay compensation from a director who has been disqualified and whose behaviour has caused loss to one or more creditors of an insolvent company. The provision also allows for compensation awards to be sought from a person who is disqualified on the ground of having caused a director to behave in an unfit manner. Legislation requiring compensation to be paid potentially engages Article 6 and Article 1, Protocol 1.

Article 6

160. This clause gives the ability to the Secretary of State to seek compensation from disqualified directors and other disqualified persons, either through a court or non-court route. Article 6 is engaged as the making of a compensation order or the agreement and acceptance of a compensation undertaking are likely to be a determination of a civil obligation under Article 6(1). The policy must therefore ensure that there is a fair and public hearing within a reasonable time to ensure that the Article 6(1) right is maintained. Where a compensation order is made by the court, there is a clear fair judicial process and article 6 rights are preserved.

[14] See for example *Funke v France* (1993) 16 EHRR 297

161. The ability for the Secretary of State to accept a compensation undertaking removes the requirement that the determination for compensation is made in a public hearing. However the fact that the Secretary of State *is able* to accept an undertaking does not remove the ability for a director or other disqualified person to *require* the Secretary of State to apply to the court for a compensation order. As such, the director or other disqualified person can never be compelled to give a compensation undertaking and there is no removal of the director's ability to request a public hearing.

162. The inclusion of the right of review by an independent body (the court) is necessary to remove the possibility of contravening the Article 6(1) right to a fair trial, which might arguably be engaged by the same person (the Secretary of State) investigating, 'judging' and 'sentencing' a director in cases where a compensation undertaking is accepted. On review of the undertaking, the court may order the removal of the requirement to pay or reduce the amount of compensation due. No equivalent right of review is required where a court makes a compensation order as the usual routes of appeal and review of court orders will exist. It has been recognised by the ECtHR that the ability to appeal a decision to an independent court which complies with Article 6(1) and can examine the appropriateness and proportionality of the decision-maker's actions is a sufficiently adequate safeguard for the purposes of Article 6.[15] For this reason, Article 6 rights are respected.

Article 1 Protocol 1

163. The Article 1, Protocol 1 ECHR right to peaceful enjoyment of possessions is engaged as directors or other disqualified persons will have to pay compensation when subject to a compensation order or undertaking, which is clearly a deprivation of possessions. However this is a qualified right, with states able to enforce laws that can deprive an individual of his possessions or control the use of property in accordance with the general interest.

164. The possibility of a director having to pay compensation if disqualified establishes an incentive for directors to comply with their duties and legislation. This compliance is indisputably in the public interest. It is also in the public interest that creditors of a company that has become insolvent receive financial redress for their loss where possible, not only because of the benefit to the creditors but also because this additional protection for creditors will improve the conditions more generally for economic investment. As a result, the Government believes that the proposed interference with the right to peaceful enjoyment of property has a legitimate aim.

165. As to whether the policy of allowing compensation to be awarded is proportionate to the legitimate aim, the Government is of the view that it is. The compensation awarded cannot be more than the loss caused to creditors of the company, and any other financial redress already paid by the director must be taken into account by the court or Secretary of State in fixing the amount of compensation to be paid. The compensation is not punitive in nature. .

Part 10: Insolvency

[15] *Le Compte, Van Leuven and De Meyere v Belgium* 4 EHRR 1 para 51 PC.

Insolvency practitioner regulation (Clauses 134-143)

166. Clauses 134 to 143 amend Part 13 of the Insolvency Act 1986, to strengthen the regulatory regime for insolvency practitioners. Among other changes, the amendments introduce a range of sanctions which the Secretary of State may use against a recognised professional body (an RPB) which fails to discharge its functions in a way which is compatible with specified regulatory objectives[16]. The clauses also allow the Secretary of State to apply to the court for sanctions against individual insolvency practitioners in certain circumstances. The provisions also contain a backstop power to revoke the recognition of all seven RPBs and to designate a single independent regulator in their place.

167. There are currently seven RPBs. All are legal persons because they are bodies incorporated by Royal Charter[17], or a body established by statute[18] or are companies limited by guarantee[19]. In the Government's view, they are not public authorities, which, the Government notes, cannot themselves be victims for the purposes of Article 34 of the Convention.[20] RPBs are not governmental in nature. So may be recognised and supervised under a legal framework that they themselves do not exercise any governmental power, they are not publicly funded, they are not all established by statute and they are not democratically accountable. It is therefore likely that they are protected by the Convention. The ECHR provisions which may be engaged by these changes are considered below.

Article 6

168. The new regime includes the ability for the Secretary of State, having considered representations from the RPB, to issue directions, reprimands or fines against an RPB or to revoke its recognition if it fails to discharge its functions in a way which is compatible with the regulatory objectives.

169. The Secretary of State's decision whether to direct, reprimand or to revoke recognition of an RPB is a determination of the RPB's civil rights and obligations, which engages Article 6 ECHR. It will be made following a quasi-judicial procedure

[16] The regulatory objectives are having a system of regulating persons acting as insolvency practitioners which delivers fair treatment for persons affected by their acts and omissions; reflects the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principle which is considered to be best regulatory practice; encouraging an independent and competitive insolvency practitioner profession whose members deliver quality services transparently and with integrity; consider the interests of all creditors in any particular case, promoting the maximisation of the value of returns to creditors and also promptness in making those returns; and ensuring fees charged by insolvency practitioners represent value for money and protecting and promoting the public interest.

[17] The Institute of Chartered Accountants for England and Wales, the Institute of Chartered Accountants Scotland, the Association of Chartered Accountants, the Institute of Chartered Accountants Ireland, the Association of Chartered Certified Accountants and the Law Society of England and Wales.

[18] The Law Society of Scotland was established under the Legal Aid and Solicitors (Scotland) Act 1949.

[19] The Insolvency Practitioners Association

[20] *Rothenthurm Commune v Switzerland*, App. No. 13252/87; and *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37

designed to give the recognised professional body a fair hearing on the facts and any other basis on which the decision has been proposed.

170. The Government accepts that when considering representations by an RPB, the Secretary of State will not constitute an independent and impartial tribunal for Article 6 purposes. The Secretary of State is one of the parties to the dispute, and also part of the Executive[21]. It is nevertheless established that is the overall decision making process which must satisfy the requirements of Article 6. An administrative decision determining civil rights may be made by a body that is not sufficiently independent to satisfy Article 6, provided there is a subsequent appeal to a tribunal that has full jurisdiction to hear the case and provides the guarantees of Article 6(1)[22]. An RPB will be able to challenge a decision to direct it, reprimand it or to revoke its recognition to the court by way of judicial review. On the question of whether judicial review gives a court full jurisdiction, the ECtHR held that judicial review will be sufficient where administrative discretion comprising of specialist knowledge has been exercised if the initial decision on the merits is taken by an administrative body which follows a procedure which complies with Article 6[23]. In any event, traditional judicial review grounds do give the courts the flexibility to conduct a review of the evidence underpinning a decision as well as the legality of the decision if that is warranted in the circumstances of the case.[24] The Government therefore considers that this, together with the procedure which the Secretary of State must follow to reach its initial decision meets the requirements of Article 6.

171. RPBs will not have to rely on judicial review to challenge a financial penalty in relation to RPBs breach of a requirement. RPBs will be able to appeal a financial penalty to the court on certain statutory grounds, including that the requirement in question was complied with before the Secretary of State issued the RPB with notice of the penalty and that the amount of the financial penalty was unreasonable. It is the Government view that the statutory grounds are sufficiently broad to enable a body to challenge the facts and the law underlying the finding of liability against the body if that is appropriate, as well as the reasonableness of the decision and the amount of the penalty. The court, in being given the ability to substitute a financial penalty for a lesser amount and also to increase the time limit for the RPB to pay, will be able to award remedies which are more effective in this context than traditional judicial review remedies.

172. The provisions allow the Secretary of State to apply to court for an order imposing a disciplinary sanction on an insolvency practitioner if it appears to the Secretary of State that the practitioner has breached professional standards and rules of professional conduct or an enactment whilst undertaking professional work and it is in the public interest that a sanction be imposed. There is no time limit in which the Secretary of State must make its application to ensure that a trial takes place within a reasonable time. This potentially engages the Article 6 right to a hearing within a reasonable time. However the Secretary of State will only bring actions where it is in

[21] Le Compte, Van Leuven and De Meyere v Belgium [1981] ECHR 3 in which it was held that a tribunal must be independent both of the parties before it and of the Executive.
[22] Schmauzer v Austria (1996) 21 EHRR 511 and Ozturk v German (1984) 6 EHRR 409,
[23] Tsfayo v UK [2009]48 EHRR 18
[24] R (on the application of JB) v Dr Haddock and others [2006] EWCA Civ 961.

the public interest, which will result in actions brought within a reasonable time, i.e. when the issues that raised by the misconduct are still relevant.

Article 1 Protocol 1

173. The clauses make provision for the court to order the insolvency practitioner to pay a contribution which is equivalent to his fees or a proportion of his fees to one or more creditors of an insolvent estate where the creditors have suffered a loss as a result of the insolvency practitioner's misconduct. This may be an interference of his or her right under Article 1 Protocol 1 ECHR to the peaceful enjoyment of his possessions. However the Government considers the interference to be justified in the public interest and proportionate. The court will only be able to order repayment of fees or a proportion of fees, if the practitioner's misconduct has caused loss to creditors. Since insolvency practitioners' expenses are paid in priority to the large majority of creditors, loss to an estate caused by insolvency practitioner misconduct is more likely to be felt by the creditors, than it is by the insolvency practitioner. The purpose of this policy is to increase the likelihood of returns to creditors, notwithstanding the mishandling of a debtor's estate by the insolvency practitioner. At the same time it will deter future misconduct of the same type. Both these outcomes will serve to benefit the economy as a whole.

174. The exercise of a reserve power (clauses 141 to 143) to revoke the recognition of all seven RPBs and to designate a single regulator will potentially interfere with the RPBs' Article 1 Protocol 1 rights. The authorisation and regulation of insolvency practitioners forms a significant proportion, if not the entirety, of an RPB's business. Once recognition is revoked or responsibility for the authorisation and regulation of insolvency practitioners is handed over to a single regulator, RPBs would no longer be able to continue with this part of their business. The interference would, be justified in the public interest and proportionate. It will not come about unless there has been a review and consultation which concludes that the existing regulatory system, even with the improvements made to it in this Bill, is not achieving the regulatory objectives. The interference with the RPB's rights will only be exercised if the creation of a single regulator is absolutely necessary to improve public confidence and consistency in the regime.

Article 8

175. Clause 139 introduces a power enabling the Secretary of State to investigate a suspected failure by an RPB to act compatibly with the regulatory objectives or a suspected breach by an insolvency practitioner of the rules which govern his practice and conduct in order to determine whether proceedings against a RPB or an insolvency practitioner should be commenced. The Secretary of State will be able require specified persons to provide such information as the Secretary of State may require for the exercise of his functions under Part 13 of the Insolvency Act 1986 and will be able to apply to court for a compliance order against a person who fails to comply.

176. This provision engages Article 8 ECHR, since the collection and storage of information by officials of the state about an individual without his consent will

interfere with his right to respect for his private life.[25] The Government considers that the interference will be justified because the information will be collected in accordance with the law, pursuant to a statutory power, in pursuit of a legitimate aim which would be to investigate a suspected failure by an RPB of the regulatory objectives or a suspected breach by an insolvency practitioner of the rules which govern his practice and conduct so that action may be taken where appropriate to remedy the breach. Personal and other sensitive data will not be collected with a view to sharing it with other agencies. If it transpires that it is necessary to share personal and other sensitive data with the police or another regulator, the Government will do so in accordance with Article 8 ECHR, the Data Protection Act and the law of confidence. The ultimate benefit would be increased protection of consumers and creditors.

Part 11: Employment

Employment Tribunals

Financial penalty for failure to pay Employment Tribunal awards, etc. (clause 145)

177. The amendments to the Employment Tribunals Act 1996 in this clause create a new financial penalty regime to address non-payment of Employment Tribunal awards (including any costs awarded to allow a worker to recover Tribunal fees) and sums due under settlement agreements reached following the procedure in sections 18 to 19A of the 1996 Act. The financial penalty provisions are intended to incentivise timely payments to workers and to level the playing field between, on the one hand, employers who take the Employment Tribunal process seriously, properly defending claims against them and dealing with the consequences and, on the other, employers who try to avoid paying compensation to workers.

178. The penalties are not intended to be punitive and their level has been set with that in mind: half the sum owed to the worker with a minimum of £100 and a maximum of £5,000. In other words, the penalty will be proportionate, having regard to the sum owed. That there is no requirement for a finding of culpability or intent is also consistent with the penalties not being punitive in nature.

179. The ECHR provisions that may be engaged are Article 6 and Article 1 Protocol 1. Article 6(1) is relevant because the procedure for imposing financial penalties involves the determination of employers' civil obligations. However, the procedure allows for a fair and public hearing to an appropriate court. In addition, judgment will be "pronounced publicly". This means that the requirements of Article 6(1) are satisfied.

180. The Government has considered whether Article 6(2) and (3), which require additional safeguards for those "charged with a criminal offence", might be engaged. Case law has provided a three stage test to determine if a matter is a criminal offence for the purposes of Article 6. That test requires consideration of:

[25] *X v UK* No 9702/82 (Census data)

- the classification of the offence in the Member State;
- the nature of the offence;
- the possible punishment.

The financial penalty regime here is not classified as criminal either by the clauses themselves or by application of the general law in England and Wales or Scotland so it remains for us to consider the nature of the "offence" in this case and the possible punishment.

181. It could be argued that the main purpose of the new financial penalty regime is to exert pressure on employers to comply with their legal obligations and to punish breaches of those obligations. This has been held to be enough to engage the criminal provisions of Article 6[26]. However, as discussed above, the primary policy reason for having financial penalties here is to support provisions about compensating workers that are clearly civil in nature. In particular, the penalties respond to a concern about the current low rate of compliance with Employment Tribunal orders having the effect of distorting competition. The relatively low level of the penalties has been fixed with that in mind. The Government therefore considers it unlikely that they would be considered to be criminal for the purposes of Article 6.

182. Article 1 Protocol 1 is relevant because the financial penalties will amount to a deprivation of the possessions of natural or legal persons. However, for the reasons given above this deprivation will be in the public interest. It will also be subject to conditions imposed by law. The Article itself makes clear that there is no objection in principle to penalties imposed by States. Therefore, the Government considers that there will be no breach of the right contained in Article 1 Protocol 1.

Introducing criteria on the granting of postponements in Employment Tribunals ("ET") (amendment to section 7 of the Employment Tribunals Act 1996) and changes to cost rules in relation to late postponements of hearings in the ET (amendments to section 13 and 13A of the Employment Tribunals Act 1996) (clause 146)

183. The amendment to this section will provide that the power for making ET procedural regulations can include provision about postponement of hearings which limits the number of postponements available to a party in proceedings. This will allow the ET to consider any previous relevant successful applications for postponement made by the applicant in the case.

184. Policy intent is that the Employment Tribunal Rules of Procedure ("ET Rules") will provide that if a party has already been granted a specified number of postponements in the same case then any further applications will only be granted in exceptional circumstances.

185. The Government considers that there will be no ECHR issues with this approach, in particular with Article 6(1). The rule will be subject to judicial discretion so that the ET can grant applications in exceptional circumstances.

[26] See e.g. *Janosevic v. Sweden 2002-VII; 38 EHRR 473 paragraph 68*

Moreover, the ET Rules made under these powers must be in accordance with the overriding objective[27] of the ET Rules and ECHR compliant, and of course the ET exercising its discretion in this regard is also required to act compatibly with Article 6(1) ECHR.

186. The clause also amends sections 13 and 13A ETA to require that in the making of any regulations on costs (s.13) and time preparation orders (s. 13A) the Secretary of State must also make regulations to require the Tribunal to consider making a costs order where a party has made a late application for a postponement.

187. The aim of these provisions is to require the Secretary of State to discourage unnecessary delay in Tribunal proceedings and reduce the occurrence of parties suffering financially as a result of behaviour which causes unnecessary delay.

188. Again, the Government considers there will be no ECHR issues with the ET rules made under these duties, as the rules will enable judicial discretion to ensure the operation of the new postponement regime, and associated costs orders, are ECHR compliant.

National Minimum Wage

Penalties (clause 147)

Civil and criminal penalties for NMW underpayment

189. The Secretary of State has powers conferred by National Minimum Wage Act 1998 ("NMWA") to appoint officers to enforce the NMW. At present HMRC enforcement officers carry out these duties. There are two routes; civil enforcement through a notice of underpayment (NOU) issued in accordance with section 19A of the NMWA and powers under section 31 to prosecute criminal offences under the NMWA. Prosecutions are conducted by the CPS.

190. The NOU contains a fixed civil penalty calculated in accordance with section 19A(4) to (7) of the NMWA. Section 19B of the NMWA ensures that an employer is not subject to a civil financial penalty and a criminal fine for refusing or wilfully neglecting to pay NMW in relation to the same incident.

191. Currently, if an enforcement officer determines that the NMW has been underpaid he may issue a NOU to that employer; this notice will set out the amount of the underpayment and require the employer to pay a fixed penalty, in addition to the underpayment stated in the notice.

192. The employer has a right of appeal against the penalty to an employment tribunal (ET) under section 19C of the NMWA. The employer can appeal against the decision to serve the NOU, the requirement in the NOU to pay an amount to a worker or the requirement in the NOU to pay a penalty.

[27] Rule 2 of the Employment Tribunals Rules of Procedure in Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2012

193. At present HMRC prepare the evidence to support a NOU on the basis that HMRC would be able to prove on the balance of probabilities the underpayment identified in the NOU before an ET if an employer were to appeal under section 19C. Whilst the NMWA does not place the burden of proof on either HMRC or the employer in any such appeal, the evidence which HMRC will rely on will be that which supported the decision to issue the NOU and so will normally be sufficient for HMRC to be able to prove its case.

The penalty is calculated as a percentage of the amount of arrears owed by the employer, as specified in the NOU. The percentage is specified in section 19A(4) and may be modified by secondary legislation. The maximum and minimum levels of the penalty are set down in section 19A(6) and (7) and may also be modified by secondary legislation. The powers to set these limits are contained in section 19A(8) of the NMWA. In March 2014, the maximum limit was raised to £20,000 from £5,000 and the percentage was increased from 50% to 100% by the National Minimum Wage (Variation of Financial Penalty) Regulations.

194. Clause 147 amends section 19A so that the maximum penalty is £20,000 per worker, as regards the arrears owed under a NOU. (The current maximum is £20,000 per NOU, however many workers the arrears may relate to.). This means that there will be no overall limit to the maximum penalty, as at present. It will remain the case that an enforcement officer will not have discretion as to whether to impose a penalty, as was the case when this penalty was first introduced. The Secretary of State will continue to have powers (as at present) to direct that a NOU should not be served in specified circumstances.

Article 6

195. There are arguments that penalties in excess of £20,000 may be considered criminal penalties for the purposes of Article 6 ECHR, and that there are not sufficient safeguards for employers to satisfy the criminal procedural requirements of Article 6. However, the Government considers that the penalties under these provisions are not criminal in nature and that, in any event, there are sufficient safeguards to meet the requirements of Article 6.

196. Article 6 provides procedural guarantees in cases which determine a person's civil right and obligations. These guarantees also apply to a person subject to a criminal charge. In addition there is a higher level of safeguards guaranteed under article 6(2) and (3) which apply only to those subject to a criminal charge. Whether a penalty is civil or criminal for ECHR purposes is determined by (a) the categorisation of the allegation in domestic law, (b) the nature of the offence and (c) the severity of the penalty[28].

197. The penalty which is imposed under section 19A of the NMWA is characterised as civil, but it is arguable whether the nature of the offence is civil or criminal. There is no requirement for culpability which would suggest that it is civil but it has a deterrent and punitive nature which would support a conclusion that it is

[28] Engel v Netherlands (No 1) (1976) 1 EHHR 647

criminal in nature. The criteria are not cumulative but where they are finely balanced they can be considered cumulatively. When this approach is adopted, the higher the level of penalty, the greater the severity and the more likely that the penalty is criminal for ECHR purposes.

198. However, even if the penalty could be categorised as criminal for ECHR purposes it is compatible with article 6(2) ECHR (which requires that everyone charged with a criminal offence shall be presumed innocent until proven guilty in accordance with the law) if HMRC assume the burden of proof in any appeal under section 19C. In such circumstances, whilst the NOU would continue to be imposed without HMRC having proved its case, the requirements of article 6(2) would be met if the burden of proof on the balance of probabilities applied at the appeal stage.

199. The Government considers that on balance, whilst there is a risk of a court concluding that a financial cap of £20,000 per worker would mean that the regime is to be considered criminal in nature for ECHR purposes, the better view is that the regime remains civil in character.

200. This is in part because the level of the penalty would prevent the employer from benefiting from the money saved through the underpayment and to that extent it was not punitive. In addition, there is no need to establish culpability (which again favours the conclusion that it is a civil penalty) and there is no public finding of guilt which occurs with a criminal offence. The revised NMW Naming scheme which came into effect on 1 October 2013 made it easier for the Secretary of State to name employers that break National Minimum Wage law and to this extent there is some public finding of guilt for employers who do not comply with the NMW, albeit not through a court process.

Compatibility

201. Based on this view, the Government considers that the introduction of a power to set the maximum fine by reference to the amount of arrears owed to each worker with no overall limit on the amount of penalty which can be imposed through one NOU does not result in the penalty which can be imposed under section 19A of the NMWA becoming criminal for ECHR purposes. As a result, the Government considers that the procedures for the imposition of that penalty and for an appeal against it are compatible with article 6(1) ECHR and article 6(2) and (3) have no application.

202. However, if the penalty were criminal for ECHR purposes, the Government considers that HMRC enforcement procedure is compliant with the requirements of article 6(2) and (3) ECHR (that is the procedural protections which exist for those subject to a criminal charge). In particular, when imposing penalties under section 19A, HMRC accept that the burden of proof to establish failure to pay the NMW falls on HMRC.

Staff exit payments in the public sector

Power to make regulations in connection with public sector exit payments (clause 149)

203. Clause 149 confers a power upon the Treasury to make regulations that introduce provisions which allow public sector bodies to recover some or all of an exit payment from a worker who returns to work in the public sector before a defined period. Further details of this power are contained in clause 150.

204. Other general powers enables the regulations to include different provision for different purposes, general and specific provision, exceptions, incidental, supplementary, consequential, and transitional measures (including amendments to any legislation).

205. The payment recovery provisions are subject to any waivers made by the Secretary of State under clause 151. That clause also provides the Treasury with a power to direct how any waivers are made by the Secretary of State under the clause, or require the Treasury consent to waivers. Clause 151 is not considered separately, as the effect of that waiver on human rights in inextricably intertwined with the power in clause 149.

Article 1 Protocol 1

206. Article 1 Protocol 1 provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions, and that 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. Deprivation of possessions or interference with their peaceful enjoyment may be justified if they:

(a) are subject to conditions provided for by law;
(b) are for a legitimate aim in the general interest; and
(c) strike a fair balance between the rights of the owner of possessions and the public interest: in striking a fair balance any interference with the right must be reasonable and proportionate to the legitimate aim pursued.

207. The Government recognises that where a public sector worker had received an exit payment, that payment is likely to be considered their property within the meaning of Article 1 Protocol 1, and those property rights are affected by the imposition of payment recovery provisions.

208. However, the Government considers that in any event any interference with Article 1 Protocol 1 rights will be lawful and proportionate. The general principles applied by the Courts in deciding whether interference with possessions is lawful are[29]:

(a) The principle of lawfulness presupposes that the applicable provisions of domestic law are sufficiently accessible, precise, and foreseeable in their application. No viable challenge can arise on this basis. Primary and secondary legislation will clearly set out the provisions which may give rise to interference with Convention rights. These are likely to have been widely publicised and will be consulted upon before they are made.

[29] *Hutten-Czapska v Poland* (2006) 42 EHRR 15 and (2007) 45 EHRR 4

(b) The principle of a legitimate aim presupposes the existence of a general interest in the community which is inherent in the need for a fair balance. Reform to staff exit payments across the public sector is, generally, a legitimate aim for the government. In 2011-12, the public sector paid out £2.7 billion in payments to workers leaving the public sector. These payments are unlocking very substantial reductions in staff costs in the medium to longer term and so playing a crucial role in meeting the challenge of reducing the fiscal deficit. For the worker who receives them, they provide a financial bridge into new employment or retirement. But there also needs to be reassurance that these kinds of payments are fair, fulfil their correct purpose, and represent good value for money. Potential inefficiencies in existing exit payment systems have been highlighted by cases where workers who have received large payments and quickly returned to public sector roles. The Government notes that the purpose of an exit payment is to provide the worker who leaves employment or office with a financial bridge to new employment or into retirement. However, when the worker returns to work in the public sector, the exit payment does not fulfil that purpose, but instead enriches the worker at the taxpayer's expense. The Government accordingly considers that it is fair and proportionate for such a worker to repay some or all of the exit payment that is not required for its original purpose.

(c) The principle of fair balance requires an investigation to ascertain whether any person bears a disproportionate and excessive burden, and whether in turn this has been fairly balanced with the legitimate aim. This clause does generally constitute a fair balance between the interests of workers in the public sector who leave work, and fairness to the taxpayer who underwrites the payments made upon exit. It enables steps to be taken to ensure that such payments are value for money and used for a proper purpose. It also enables general and specific exceptions and waivers to be made in cases where this would not be appropriate (including situations where the operation of the payment recovery provisions would be a disproportionate interference with Article 1 Protocol 1 rights).

209. This macro-economic judgement has been recognised by the Courts as the preserve of Government policy which should not be interfered with short of manifest unfairness or impropriety, which the clause does not constitute. For example, the case of *Stec* stated "*a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy*" and "*Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation".*"[30]

210. Although the judgement in *Stec* is of broad application, the issue before the Court in that case (and in previous cases[31]) related to Article 1 Protocol 1 in relation to social security benefits provided by the state (including state pensions). The Government acknowledges that staff exit payments are likely to be treated as part of

[30] *Stec v UK* (2006) 43 EHRR 1017, paragraph 52
[31] *Muller v Austria* (1975) 3 DR 25 and *Stec*, ibid

remuneration and in that respect are distinct from social security benefits[32]. However, the Government contends that a similar margin of appreciation will exist in this case, by analogy, given that:

(a) The Court in *JA Pye*[33] extended the same wide margin of appreciation to legislation covering rights to private property, stating "*The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgement as to what is in the public interest unless the judgement is manifestly without foundation.*"

(b) Remuneration of public servants is both a macro-economic policy under the Government's direct control and a matter of Government spending, given that staff exit payments are, in the main, funded from general taxation and are in any case underwritten by funds from general taxation.

211. The Government recognises that the position may be slightly different for staff exit exercises that are underway at the point where bodies reform their schemes (either on or before April 2016), or at the point where bodies are brought within the scope of the reform after April 2016. The clause benefits from a general power to make transitional provision so that these staff exit exercises can be allowed to continue under their original terms. As such, there will be no interference with these Article 1 Protocol 1 rights.

Article 14

212. Article 14 provides that Convention rights shall be secured without discrimination on any ground such as sex, race, ethnic origin, age, national or social origin, or any other status. This is an illustrative and not an exhaustive list[34]. Article 14 does not provide a free-standing right but only applies when another Convention right is engaged – in this case, Article 1 Protocol 1. A breach of Article 14 does not presuppose that the linked Article is breached[35]. Discrimination occurs when a public authority, for no objective or reasonable reason:

(a) treats a person less favorably than others in similar situations on the basis of a particular characteristic;

(b) fails to treat people differently when they are in significantly different situations; or

(c) applies apparently neutral policies in a way that has a disproportionate impact on individuals or groups.

213. Discriminatory law or treatment is lawful where there is a reasonable justification for the measures imposed. This will require a legitimate aim and there is

[32] *Barber v GRE* [1990] ICR 616
[33] *JA Pye (Oxford) Ltd v. UK* [2005] ECHR 921, paragraph 44
[34] *Engel v Netherlands* (1976) 1 EHRR 647
[35] *Airey v Ireland* (1979) 2 EHRR 305

a reasonable relationship of proportionality between that aim and the measures applied. The Government enjoys a wide margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background[36]. The level of justification required will also vary depending upon which ground is affected, and will be higher in the case of discrimination on grounds such as race, sex, nationality, religion or sexual orientation.

214. The Government does not accept that the power in this clause, when used, will generally amount to discrimination. The payment recovery provisions will operate in the same way regardless of the gender, ethnicity, sexuality, age, or other relevant characteristics of the public sector worker. The payment recovery provisions will be created to achieve the legitimate aims discussed above. The payment recovery provisions will be tapered so that the amount of money repaid is calculated according to the value of the payment and the time spent outside of the public sector. That will ensure that only that part of the exit payment which does not fulfill its original purpose – to act as a financial bridge into further employment – will be repaid. And there is the ability to create general and specific exceptions and waivers to be made in appropriate cases (including situations where the operation of the payment recovery provisions would be unlawful discrimination within the meaning of Article 14).

Human Rights Act 1998

215. In any event, when this power is exercised by the Treasury, it will of course be required by section 6 of the Human Rights Act 1998 to act in a manner that is compliant with the ECHR.

CONSIDERATION OF THE SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL PROVISIONS IN LIGHT OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

216. In preparing for the Bill, in addition to giving consideration to the compatibility of provisions in the Bill with the ECHR, the Government has considered the Bill provisions in light of those rights set out in the United Nations Convention on the Rights of the Child (UNCRC).

Part 5: Childcare and Schools (Clauses 71 to 74 and Schedule 2).

217. These provisions have been considered in light of the most relevant rights set out in the United Nations Convention on the Rights of the Child.

218. The provisions contain amendments to Part 3 of the Childcare Act 2006 which regulates childcare in England. The provisions reduce the age for which schools have to register separately with Ofsted from three year olds to two year olds, give childminders more flexibility in the premises from which they operate by allowing them to also provide care on non-domestic premises and allow other providers to

[36] *Rasmussen v Denmark* A 87 (1984) 7 EHRR 371

register once in respect of more than one set of premises rather than requiring separate registrations for each premises.

219. It is anticipated that the provisions will reduce bureaucracy and make it easier for schools and other providers to offer more flexible child-care services for children of working parents and in doing so the Government is mindful of Article 18(3) requiring States to take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

220. The Government has had regard to Article 3(1) – that the best interests of the child shall be a primary consideration and Article 3(3) - that State Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities. In operating out of more than one set of premises providers will still be required to notify, and obtain the approval of, the Chief Inspector (or a childminder agency for providers registered with agencies) to ascertain the suitability of the premises for providing childcare. Existing provisions in relation to inspections, suspension or cancellation of registration and protection of children in an emergency will continue to apply so that the interests of children are protected.

221. In addition the government has been mindful of Article 29 (goals of education) and Articles 31 (leisure, play and culture) in making it easier for schools to take two year olds. The measure is not about requiring two year olds to sit at school all day. It is about improving the affordability and quality of childcare, including the educational element. Providers, including schools, are already required to deliver the Early Years Foundation Stage Framework (EYFS) which comprises a mix of welfare and learning and development requirements. The EYFS recognises the importance of learning and developing through play and for providers to consider the individual needs of each child and this will continue to be the case. The Government is satisfied that these provisions comply with the UNCRC.

Part 7: Companies (transparency)
Register of persons with significant control (Clause 78 and Schedule 3)

222. As discussed above, clause 78 introduces a new Part into the Companies Act 2006 that requires companies to identify and obtain information on people with significant control over the company ("PSCs").

223. The definition of a PSC covers any person who can be said to control or exercise influence over a company. This includes every shareholder who owns more than 25% of the shareholding of a company. Since there is no restriction on a child being a shareholder, where a child is the legal owner of more than 25% of the shares of a company that child will be a PSC. A child may also be a PSC through other forms of control, although this is unlikely.

224. The result of the child being a PSC is that information about the child will be made available both on a register kept by the company and on the public register kept by the registrar of companies. This information includes name, date of birth, service and residential address (although the residential address will not be available for

public inspection), nationality, usual country of residence and details about the form of control the PSC has in relation to the company.

225. On the face of it, this potentially engages article 16 of the UNCRC, which guarantees that "no child shall be subjected to arbitrary or unlawful interference with his or her privacy". However the Government is of the view that while there is clearly an effect on the child's right to privacy, any interference is proportionate and necessary in accordance with the law, so neither arbitrary nor unlawful. The policy intention behind the implementation of the PSC register is to make transparent the ownership of companies, reducing the possibility to use companies for criminal purposes, and ultimately benefiting the economic well-being of the country.

226. Further, there are appropriate safeguards in place to mitigate any risks to the child of the information being available. There are two protection regimes built into the provisions providing different levels of data suppression where there is a recognised risk of violence or serious intimidation to a PSC caused by being on the PSC register.

BIS

November 2014