

## SKILLS AND POST-16 EDUCATION BILL

### EUROPEAN CONVENTION ON HUMAN RIGHTS SUPPLEMENTARY MEMORANDUM BY THE DEPARTMENT FOR EDUCATION

1. This supplementary ECHR memorandum is produced by the Department for Education (“the department”), in relation to government amendments to the Skills and Post-16 Education Bill (“the Bill”) brought forward at Report stage in the House of Lords.
2. The amendments to the Bill which in the department’s view are relevant to the ECHR are as follows:
  - a. New chapter *Cheating services provided for post-16 students at English institutions*, which creates new criminal offences of providing, arranging or advertising cheating services for students studying for a qualification in an institution in England providing post-16 education, or enrolled at English higher education providers; and
  - b. New clause *16 to 19 academies: designation as having a religious character*, which enables the Secretary of State to designate a 16 to 19 academy as having a religious character.

#### **European Convention on Human Rights**

3. The former Parliamentary Under Secretary of State (Minister for the School System) made a statement on introduction of the Bill in the House of Lords under section 19(1)(a) of the Human Rights Act 1998<sup>1</sup> that, in her view, the provisions of the Bill are compatible with the Convention rights. The analysis of the department continues to be that the provisions are compatible with the Convention rights, including the government amendments. The analysis is set out below.

#### **Part 4 : Miscellaneous and General**

**New clauses Cheating services provided for post-16 students at English Institutions- creates the offences of providing or arranging cheating services and of advertising those services**

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<sup>1</sup> [Human Rights Act 1998, s.19\(1\)\(a\).](#)

4. The new clause 'Offence of providing or arranging a relevant service' engages article 6 (right to a fair trial). The department considers that the new cheating services offence clause is compatible with the provisions of the ECHR.
5. This clause creates a new offence aimed at preventing the provision of cheating services to students studying for a qualification at a post-16 institution or sixth form in England or enrolled at an English higher education provider. The clause will prohibit a person from providing, or arranging for another person to provide, in commercial circumstances, a 'relevant service', i.e. a service of completing all (or part of) an assignment on behalf of a student, where the assignment, completed in that way could not reasonably be considered to have been completed personally by the student.
6. To fall within the ambit of the offence, the assignment completed by the person must be one which the student is required to complete personally (a) as part of the relevant course which the student is undertaking, or (b) in order to obtain the qualification to which the course leads or for which the student has been entered. An assignment is one which the student is required to complete personally where it is to be completed with only permitted assistance. An assignment is completed on behalf of a student where material is provided to a student in connection with the assignment in circumstances where the student could use the material in completing the assignment, or part of it, and the material is prepared in connection with the assignment or has not been published generally (i.e. is available generally without payment, or is included in a publication that contains other educational or training material and is available generally, such as a text book or study guide.) An assignment is defined as including an exam and any piece of work.

#### Article 6

7. Under the cheating services offence, there is a reverse burden of proof as the prosecutor only has to prove the *actus reus* and the Defendant must prove the defence, on the balance of probabilities. They must prove, as the case may be, that they did not know, and could not with reasonable diligence have known, (a) that the student would or might use the relevant service in completing all or part of the assignment; (b) that the student was required to complete the assignment personally; (c) that the relevant service was not permitted assistance.
8. There is also a presumption of fact at [*meaning of "relevant service" and other key expressions*] subsection (4)(a) that where a student seeks provision of a relevant service in connection with an assignment, any material provided as a result is to be regarded as provided in connection with that assignment. That is

to deal with the scenario of a student choosing provision of material from a catalogue of options.

9. Article 6 is therefore engaged: the principle that a trial should be fair, the presumption of innocence being a fundamental right directed to that end, however, the department considers that this reversal of the burden of proof is compatible with Article 6. In coming to this view, the department has had regard to the principles set out in case law<sup>2</sup>. In particular, having regard to the nature of the offence, that it will be within the defendant's own knowledge what precautions he or she took to ensure that the student was not using the services to complete all or part of an assignment, or was required to complete it personally, or that the relevant service was not permitted assistance, as the case may be and what they knew as a result of those precautions. There is also a compelling reason for reversing the burden of proof in these circumstances (and in the case of subsection (4)(a) that the facts are presumed): namely safeguarding the academic integrity and standards of post-16 and higher education in England and protecting students from cheating services.

#### Article 1 Protocol 1

10. The department considers that the right to conduct a business such as an essay mill, is not a possession within the meaning of Article 1 Protocol 1. Future income is only a possession once it has been earned or an enforceable (not just arguable) claim to it exists<sup>3</sup>. If it were successfully argued that Article 1 Protocol 1 were engaged, the department would argue that the criminalisation of certain services provided by such businesses was a proportionate means of protecting the academic integrity of post 16 education and as such the provision is compatible with Article 1 Protocol 1.

#### ***New clause: 16 to 19 academies: designation as having a religious character***

11. *New clause 16 to 19 academies: designation as having a religious character* inserts sections 8A and 8B into the Academies Act 2010.
12. The new clause engages articles 9 (freedom of thought, conscience and religion), 14 (prohibition of discrimination) and article 2 protocol 1 (right to education). The department considers that it is compatible with the provisions of the ECHR.

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<sup>2</sup> *Sheldrake v Director of Public Prosecutions*; *Attorney General's Reference* (no4 of 2002) [2004] UKHL 43; *R v Johnstone* [2003] UKHL 28; *R v Lambert* [2002] 2 AC 545

<sup>3</sup> *R (Countryside Alliance & Others) v Attorney General & Another* [2007] UKHL 52 at [21]; *Andrews v UK* (App No. 37657/97); *Gialouris v Greece* (App No. 24581/94); *Ambruosi v Italy* (2002) 35 EHRR 5

13. This clause enables the Secretary of State to designate a 16 to 19 academy as having a religious character. It makes provision for 16 to 19 academies with a religious character to conduct the academy in a way that reflects the tenets of the religion or religious denomination. It also requires that the articles of association must provide that the majority of the directors of the academy are appointed to secure, so far as practicable, that the character of the academy reflects the tenets of the religion or religious denomination.

14. This clause also imposes obligations on 16 to 19 academies with a religious character to provide religious education and collective worship in a manner that reflects the traditions of the relevant religious denomination. The clause has the effect of exempting designated 16 to 19 academies from compliance with section 91(2) of the Equality Act 2010 by means of the exemption in paragraph 1 of Schedule 22 of the Equality Act 2010. This replicates the position currently applicable to sixth form colleges designated as having an established character under section 33J(2) of the Further and Higher Education Act 1992 and independent schools designated as having a religious character under section 69(3) read with section 124B of the School Standards and Framework Act 1998.

#### Article 9

15. The new clause *16 to 19 academies: designation as having a religious character* (through new section 8B) engages article 9 because it places obligations on proprietors of designated 16 to 19 academies in relation to opportunities for religious collective worship and religious education at the education institution. This provision forms the basis of the enjoyment of article 9 freedoms for students who wish to attend a 16 to 19 academy. It does not make attending such collective worship and religious education mandatory. The view of the department is that these provisions do not infringe Article 9.

#### Article 14

16. The view of the department is that the new clause does not constitute an infringement of Article 14. It is useful to conduct analysis under article 14 by reference to four elements, set out in *R (oao Stott) v SSJ* [2018] UKSC 59. The elements are:

- a. is the provision within the ambit of another right?;
  - b. is there a difference in treatment on the basis of a status listed in Article 14?;
  - c. are any applicant and chosen comparator(s) in an analogous position?;
- and

- d. is there an objective and reasonable justification for the differential treatment?
17. In answer to question *a* above, the department considers it arguable that the new clause is within the ambit of article 9.
18. The department acknowledges that this provision potentially allows for differential treatment on the basis of religion, which is relevant to question *b* above. In relation to collective acts of worship and religious education, a student who was of a faith other than that of the designated 16 to 19 academy may not be offered the same opportunities as a student whose faith is the same as that of the academy. For example, a non-Catholic student attending a 16 to 19 academy with Catholic designation, may be treated less favourably than a Catholic student, who would be the beneficiary of the obligations in new section 8B.
19. The department's view is that there is an objective and reasonable justification for this differential treatment. In respect of this justification four questions (set out in *R (oao Quila) v SSHD* [2011] UKSC 45) should be considered. These are:
- a. Is the legislative objective sufficiently important to justify limiting a fundamental right?
  - b. Are the measures which have been designed to meet it rationally connected to it?
  - c. Are they no more than are necessary to accomplish it?
  - d. Do they strike a fair balance between the rights of the individual and the interests of the community?
20. The United Kingdom has a strong tradition of faith schools, as historically, religious bodies largely provided education. There remains significant demand for this type of education (as parents want to have their children educated in accordance with their religious and philosophical beliefs) and the existence and operation of these institutions is a key social policy objective, which has been enshrined in legislation (Schedule 22 to the Equality Act 2010). The department is of the view that without these measures 16 to 19 academies would be legally prevented from being designated as having a religious character and so these measures are rationally connected to this social policy objective. In answer to questions *c* and *d* from the *Quila* case outlined above, the department considers that providing for the religious designation of 16 to 19 academies is a proportionate way to enshrine the important social policy of allowing religious education, which brings plurality and diversity to the education system.
21. There is explicit recognition in Article 9 of the importance of religion and

devotion to individuals. We consider that making provision for 16 to 19 academies to have the benefit of the exemptions in schedule 22 to the Equality Act 2010 promotes the fundamental principle in Article 9, as well as the objective of Article 2 of Protocol 1.

22. The department notes that the statutory obligations under this power mirror those that are already included in the Further and Higher Education Act 1992 and currently apply to 16 to 19 sixth form colleges.

#### Article 2 of Protocol 1

23. New clause *16 to 19 academies: designation as having a religious character* engages Article 2 of Protocol 1 because it facilitates parents' enjoyment of their right to ensure education and teaching in conformity with their own religious and philosophical convictions. This is because it requires 16 to 19 academies to provide religious education and opportunities for collective worship that reflects the tenets of the religion or religious denomination.

24. Although, as discussed above, the provisions may result in differential treatment based on religion, the department does not consider that this is in conflict with Article 2 of Protocol 1. This is because there is no obligation on students to attend the mandated collective worship or religious education, and also because attendance at a 16 to 19 academy with religious designation will be voluntary.

**Department for Education  
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