CHILDREN'S WELLBEING AND SCHOOLS BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

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1. This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR") in relation to the Children's Wellbeing and Schools Bill. It has been prepared by the Department for Education.

2. On introduction of the Bill the Secretary of State for Education 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.

Summary of Bill provisions

3. The seven groups of measures in the Children's Wellbeing and Schools Bill are:
    a. **Keeping families together and children safe.** The Bill includes a measure to mandate local authorities to offer family group decision making to all families. It also includes four measures to keep children safe: improving information sharing between agencies and delivering the manifesto commitment to enable the creation of a single unique identifier for children; strengthening the role of education in safeguarding; requiring local safeguarding partners to establish multi-agency child protection teams, and updating the legislation that ensures children are employed safely.

    b. **Supporting children to thrive.** This covers four measures that will require local authorities to publish their local offer for children in kinship care and their carers, extend the virtual school head role to children in kinship care and those with a social worker, strengthen our offer of support for care leavers by requiring local authorities to provide 'staying close' support to eligible care leavers up to the age of 25 where their welfare requires it – which gives support to help find and keep suitable accommodation and access services – and publish the arrangements it has in place to support and assist care leavers in their transition to adulthood and independent living as part of their published local offer for care leavers.

    c. **Making the care system child-centred**, supporting the manifesto commitment for every child to have a loving, secure home. These five measures will: provide a statutory framework to authorise the deprivation of liberty of children with complex needs in a wider range of provisions, when required to keep them safe; strengthen Ofsted's powers in children's homes

by giving them the power to issue fines to unregistered providers and hold children's homes to account at a group level; limit the use of agency social workers in children's social care; and protect 16- and 17-year olds from ill-treatment or wilful neglect.

d. **Improve the children's social care placement market and tackle profiteering** , supporting the delivery of the manifesto commitment to strengthen regulation of the children's social care sector by creating a power for the Secretary of State to direct local authorities to establish regional co-operation arrangements (known as regional care cooperatives) to improve the commissioning of placements; establishing a financial oversight regime to increase financial and corporate transparency of care providers and their corporate owners, providing an early warning system to local authorities of possible business failure; and giving the Secretary of State the power to introduce a profit cap on non-local authority children's homes providers and fostering agencies . The latter power is only intended to be used if other market interventions do not have the desired effect.

e. **Removing barriers to opportunity in schools:** the Bill includes two measures that deliver manifesto commitments on free breakfast clubs and limiting the number of branded uniform items that schools can require. This is to support the government's mission to break down barriers to opportunity, including by supporting children to arrive at school ready to learn.

f. **Creating a safer, higher-quality education system for every child:** the Bill includes nine measures that were originally introduced in some form in the Schools Bill 2022, covering the duty for local authorities to have and maintain Children Not in School registers, changes to the regulation and inspection of independent educational institutions (though the measures here have since been developed), and improving investigation of serious teacher misconduct. These will support the government's commitment to raise school standards for every child by supporting attendance and quality education across all institutions. Eight of these nine measures are Regulatory Provisions due to introducing regulations that directly impact businesses. Children Not in School measures additional to those in the Schools Bill are included in the Bill. These include, firstly, a requirement for parents to seek local authority consent before the following children are removed from school to be home

educated: those subject to section 47 Children Act 1989 enquiries, those on child protection plans, and those at a special school maintained by a local authority, special academy or non-maintained special school, or at an independent special school under arrangements made by a local authority. Secondly, the measures include a power whereby if a child is subject to a s47 enquiry or on a child protection plan and is already being home educated, the local authority will be able to require them to attend school. Thirdly, there are amendments to the School Attendance Order process to specifically require local authorities to consider the home and any other learning environments when determining whether or not children should be required to attend school.

g. **Promoting a fairer education system for every child:** the Bill includes eleven measures aimed at providing consistency between different school types to support raising school standards and fairness across the education system. Five measures deliver Labour manifesto and Opportunity Mission commitments on school admissions, qualified teacher status and the national curriculum. Five other measures concern parity between academy schools and local authority-maintained schools.

Summary of the Government's ECHR analysis

4. The Government considers that all the measures in the bill are compatible with Convention rights.

5. The Government notes that if a legislative provision is capable of being operated in a manner which is compatible with Convention rights, the legislation itself will not be incompatible with Convention rights (*Abortion Services (Safe Access Zones) Northern Ireland Bill case (2022 UKSC 32)*). Lord Reed, giving the judgment of the Court, stated that in order to establish that a legislative provision is incompatible with Convention rights, such provision would need to give rise to an unlawful breach 'in all or almost all cases' [18]. The test derives from that set out in *Christian Institute v Lord Advocate [2016] UKSC 51.*

6. Therefore, where a provision in the Bill creates a power or a duty to take a subsequent action, which may or may not be compatible with Convention rights, the provision itself cannot be said to be incompatible with such rights. The provision is

lawful, insofar as actions taken under it are capable of operating in such a way as to be compatible with such rights.

7. This analysis is relevant in relation to several of the measures in the Bill, including for example, clause 3, which enables further functions of multi-agency child protection teams to be specified in regulations; clauses 13 and 14, which give the Secretary of State the power to specify in regulations the conditions which will bring children's social care providers and their parent businesses within a scheme of financial oversight and the profit limit to be set for relevant providers of children's homes and fostering agencies; clause 18, which gives the Secretary of State a regulation-making power to prohibit local authorities from entering into arrangements for children's social care work to be done by individuals who are not workers and the ability to impose requirements on English local authorities in relation to those arrangements; clause 20, which gives the Secretary of State the power to make regulations in relation to child employment permits; and clause 37, which enables the Secretary of State to make regulations to apply enactments, which apply in relation to independent schools, in relation to independent educational institutions (which are not independent schools).

ECHR analysis by measure

Part 1: Children's Social Care

Family group decision-making

Clause 1: Family group decision making

8. This measure will place a duty on local authorities to offer a family group decision making ("FGDM") meeting to a child's parents, or anyone with parental responsibility for the child where the point has been reached at which a local authority is considering applying for a care or supervision order, pursuant to s.31(1)(a) & (b) of the Children Act 1989, notwithstanding any exceptional circumstances. This stage is referred to as the pre-proceedings stage.

9. The measure will create a mandatory requirement for local authorities to offer a FGDM meeting, which the local authority will only be expected to arrange, if the offer is accepted by the child's parents or anyone else with parental responsibility for the child.

Article 8

10. This measure will engage Article 8 and is designed to enhance rights in this sphere for both the child concerned and those within their family network. The legal duty imposed on local authorities to offer FGDM will crystallise at the point at which the local authority issues a letter before proceedings to the child's parents or those with parental responsibility for the child. Given the potential for such proceedings to have a significant impact on Article 8 rights, it is important that those who will be affected have a role in the decision-making process. The FGDM duty will ensure that their views are heard from the outset, before proceedings are even issued. The clause also provides that, where appropriate, the child should attend the FGDM meeting.

11. The measure provides local authorities with an exemption from the duty where they consider that it is not in the child's interests to offer FGDM. The existence of this discretion is not considered to breach Article 8 rights because it is recognised that there will be exceptional cases in which this approach is not appropriate due to the child's personal or family circumstances. Moreover, the decision to proceed without offering FGDM can be challenged, as can other decisions that the local authority makes in connection with this duty. For instance, a family member may assert that the local authority's decision to exclude them from the FGDM process, or to include someone else, amounted to a breach of their Article 8 rights. The local authority would need to give reasons for concluding that its decision was in the child's best interests. Furthermore, if a decision is made to forgo FGDM entirely, the parties concerned will have the opportunity to challenge any further interference with Convention rights via the care proceedings process itself.

12. Given the safeguards in place, the Department considers that this measure will enhance Article 8 rights. Alternatively, any interference with these rights is justified as a necessary and proportionate means of protecting the safety and welfare of the child.

Child protection and safeguarding

Clause 2: Inclusion of childcare and education agencies in local safeguarding arrangements

13. This measure formalises provisions which are currently contained in statutory guidance Working Together to Safeguard Children 2023.

Article 8

14. This measure will engage Article 8 as it is designed to enhance the rights of children by strengthening the role of education in multi-agency safeguarding arrangements (MASAs) to better protect children from abuse, neglect, and exploitation.

15. Information shared as a result of education and childcare settings' participation into the local safeguarding partners' safeguarding arrangements may include personal data (relating to individuals). Article 8 is therefore engaged.

16. The Department considers that to the extent that there is any interference with Article 8, that it is necessary and proportionate since the measure authorises the sharing of particular information only where this may enable agencies to take action to safeguard and promote the welfare of children. Further, any disclosure will still need to be compatible with Convention rights, the UK GDPR and the Data Protection Act 2018. Any potential interference with Article 8 rights caused by compliance with this duty can be justified on the basis that it is pursuing a legitimate aim of protecting health and morals.

Clause 3: Multi-agency child protection teams for local authority areas

17. This measure requires safeguarding partners (being the local authority, police and integrated care board for an area) to establish one or more multi-agency child protection teams ("MACPT") for their area. An MACPT will have a prescribed minimum membership, which includes nominations by the safeguarding partners of persons from health, police, education and social work. The purpose of the MACPT is to support the local authority in discharging its duties under s47 Children Act 1989. Further MACPT functions, in connection with such support, may be specified in regulations. Safeguarding partners may request relevant agencies, as designated by regulations, enter into a memorandum. The purpose of the memorandum is to set out how the relevant agency will work with the safeguarding partners to facilitate the operation of MACPT arrangements.

Article 8

18. This measure will engage Article 8 as it is designed to enhance the rights of children by creating duties which will assist local authorities to better protect children from abuse, neglect, and exploitation.

19. Information may be shared with the MACPT under existing safeguarding duties in legislation or best practice set out in guidance. Information shared may include personal data . Article 8 is therefore engaged.

20. Any disclosure will still need to be compatible with Convention rights, the UK GDPR and the Data Protection Act 2018. Any potential interference with Article 8 rights caused by compliance with this duty can be justified on the basis that it is pursuing a legitimate aim of protecting health and morals.

Clause 4: Information-sharing and consistent identifiers

21. This clause aims to improve data sharing across services to better support children and families, with a power to specify a consistent identifier for children and information sharing duties. The clause has two elements: it authorises the sharing of information (about a child or another individual, where the information is relevant to safeguarding or promoting the welfare of the child) between specified types of agencies, where sharing the information may facilitate the exercise of functions related to safeguarding or the promotion of welfare of children; and requires specified agencies to use a consistent identifier when processing children's information, where this is likely to facilitate the exercise of safeguarding or promotion of welfare functions. The consistent identifier itself will be specified in regulations.

22. Where the disclosure of information meets the test set out in what will be the new section 16LA(2) of the Children Act 2004 (as qualified by subsection (3)), new section 16LA(7) provides that the disclosure will not breach any obligation of confidence owed by the person making the disclosure.

Article 8

23. Information shared may include personal data (relating to individuals) or private correspondence. Article 8 is therefore engaged.

24. The measure authorises the sharing of particular information only where this may enable agencies to take action to safeguard or promote the welfare of children. Any disclosure will still need to be compatible with Convention rights, the UK GDPR and the Data Protection Act 2018. There is an additional safeguard in that the duty to disclose information does not apply where the person in scope of the duty considers

that the disclosure would be more detrimental to the child than not disclosing the information.

25. There is evidence that, without overriding the duty of confidentiality, certain information that may assist agencies to carry out functions in relation to safeguarding or promoting the welfare of children would not be shared without consent, which would limit the effectiveness of the duty in supporting the safeguarding of children.

26. Where there is any interference with the right to privacy, the Department considers that this will be necessary and proportionate for the discharge of functions designed to protect health and morals through safeguarding children.

27. The Department notes in particular that, where personal data is concerned, the requirement to comply with relevant data protection law will act as a significant safeguard.

Support for children in care, leaving care or in kinship care and carers

Clause 5: Information: children in kinship care and their carers

28. This clause will provide for a duty for local authorities to publish information about the local authority's general approach to supporting children in the local authority's area who live in kinship care and persons in the local authority's area who are kinship carers, and to publish information about financial support that may be available for children in kinship care and their carers.

Article 8

29. This measure will engage Article 8 as it is designed to support the rights of children in kinship care arrangements so that they can have a stable and happy family life.

30. This measure is about increasing the availability and accessibility of information for children who live in kinship care and kinship carers. It is therefore not considered that it constitutes state interference with any of the Convention rights.

Clause 6: Promoting educational achievement

31. This measure introduces a strategic duty on local authorities to promote the educational achievement of children who are or have been relevant children in need

and children in kinship care (which in practice is likely to be discharged by an officer of the local authority known as a Virtual School Head).

Article 2, Protocol 1

32. This clause will enhance the Article 2, Protocol 1 rights of children who are or have been relevant children in need and children in kinship care, as the officer of the local authority will have a duty to promote the educational achievement of these children.

33. The role of the Virtual School Head was created to champion the education of all children and young people in care within a local authority and to address the considerably lower educational outcomes of children in care. The role of the Virtual School Head is currently discharged on a non-statutory basis and has had considerable impact since introduction – galvanising the care and education systems to work together to improve educational outcomes.

Clause 7: Provision of advice and other support

34. This clause requires each local authority to consider whether all former relevant children (*young people who have previously been in care and meet the definition of former relevant child in section 23C of the Children Act 1989*) (up to age 25) require the following support (known as 'staying close support') and if it is the LA's view that their welfare requires it, to offer that support:
    a. to find and keep suitable accommodation; and
    b. to access services relating to health and wellbeing, relationships, education and training, employment and participating in society.

Article 8

35. This clause may engage Article 8 as it relates to the support offered to former relevant children (up to age 25) to find and keep suitable accommodation and to access services relating to their health and wellbeing, relationships, education and training, employment and participating in society.

36. Local authorities will be required under the Human Rights Act 1998 to ensure that any decision they take to comply with this new duty is compatible with Convention rights.

37. This clause is about increasing the level of support available for former relevant children (up to age 25). It is therefore not considered that it constitutes state interference with any of the Convention rights.

Clause 8: Local offer for care leavers

38. Local authorities in England are already required to publish a local offer for care leavers. This clause requires each local authority to include the arrangements it has in place to support and assist care leavers in their transition to adulthood and independent living as part of that offer. This must include information about its arrangements for anticipating the future needs of care leavers for accommodation, co-operating with the local housing authorities in its area and providing assistance to eligible care leavers who are at risk of homelessness.

Article 8

39. This clause may engage Article 8 as it is concerned with ensuring that care leavers have sufficient information about the support that is available to help them transition to adulthood.

40. This clause is about increasing the level of support available for care leavers. It is therefore not considered that it constitutes state interference with any of the Convention rights.

Accommodation of children

Clause 9: Accommodation of looked after children: regional co-operation arrangements

41. These measures provide for regionalisation of the commissioning, analysis, and sufficiency practices of local authorities, by giving the Secretary of State the power to direct two or more local authorities to make arrangements to carry out their strategic accommodation functions jointly, for those functions to be carried out by one local authority on behalf of the others or for a body corporate to support the local authority to carry out those functions.

42. It will be the arrangements made by local authorities under any direction made by the Secretary of State which may engage Convention rights and not the measure itself. Local authorities are public bodies and must act in a way that is compatible with Convention rights.

Clause 10: Use of accommodation for deprivation of liberty

43. This measure amends section 25 Children Act 1989 to provide a statutory framework that allows a family court to authorise the deprivation of liberty of a child in a

provision other than secure children's homes which are designed or have as their primary purpose deprivation of liberty. The measure allows children to be deprived of their liberty in accommodation that has the primary purpose of care and treatment, and where restrictions that amount to deprivation of liberty, can be imposed but it is not designed for that purpose alone.

Article 5 and 8

44. The authorisation of the deprivation of liberty will be where it is necessary for the care and treatment of the child, and if they have a history of absconding from other types of accommodation and are at risk of serious harm if they abscond or if they are at risk of injury to themselves or others in other types of accommodation (excluding secure children's homes). The primary purpose of the accommodation will not be deprivation of liberty but will be a therapeutic purpose, with the ability to deprive a child of their liberty if required to keep them safe.

45. Currently the only ways to deprive a child of their liberty (outside of other relevant frameworks such as in relation to mental health assessment and treatment) are either through a placement in a secure children's home that is designed for, or has as its primary purpose, depriving liberty and is authorised by the family court under section 25 Children Act 1989, or through a Deprivation of Liberty Order (DOLO) under the inherent jurisdiction of the High Court.

46. Under the current regime, sufficiency issues mean local authorities are often unable to find a place in a secure children's homes, and for some children such settings do not always meet their needs. A gap in therapeutic provision for children deprived of their liberty often means children are placed in unregistered or otherwise unsuitable placements. The combination of these issues has led to increasing applications from local authorities to the High Court for a DOLO under the courts' inherent jurisdiction. A statutory scheme for these cases will provide clear criteria for when a deprivation of liberty would be appropriate, and ensure these children have access to the right safeguards and review points, to ensure that no child is deprived of liberty for longer than is required to keep them safe. The measure will also allow the child to remain in the same placement with no restrictions if this is appropriate for their needs.

47. The measure will ensure compliance with the right not to be deprived of liberty except in permitted cases and in accordance with a procedure prescribed by law (Article 5). The measure will also engage a child's right to a private and family life

(Article 8) and will interfere with that right: however, it is justified as a proportionate and necessary way to ensure the safety of the child and/or others who would likely otherwise be at risk of a breach of their Article 2 or 3 rights. The statutory scheme will be overseen by the courts who will determine whether the criteria to deprive a child of their liberty is met in an individual case.

Regulation of children's homes, fostering agencies etc.

Clauses 11 and 12: Power of CIECSS in relation to parent undertakings; Power of CIECSS to impose monetary penalties

48. The parent undertaking oversight measure will impose certain requirements on parent undertakings that sit above and own or control the subsidiary registered provider and will include a power for Ofsted to issue monetary penalties on those undertakings for failing to comply with any of those specific requirements.

49. The parent undertaking subject to the provider oversight regime will not be registered with Ofsted but it will be the parent undertaking of a subsidiary, or subsidiaries registered with Ofsted in respect of at least two establishments (e.g. children's homes) or agencies (e.g. independent fostering agencies) where Ofsted has a reasonable suspicion there are grounds to cancel the registration of the subsidiary. The requirements will include the parent undertaking having to prepare and implement an improvement plan which will deal with the issues in all the establishments or agencies that ultimately fall under the parent undertaking via one or more subsidiaries. A failure to comply with either the requirement to prepare or fully implement an improvement plan will lead to Ofsted being able to issue monetary penalties against the parent undertaking. It may also lead to a restriction in further registration applications by subsidiaries of the same parent undertaking.

50. The monetary penalties measure provides Ofsted with a power to issue monetary penalties ("penalty notice"), as an alternative to criminal prosecution, in respect of specific conduct or omissions which constitute offences under the Care Standards Act 2000 (CSA 2000). In order to issue the penalty notice, Ofsted would have to be satisfied to the criminal standard (beyond a reasonable doubt), and the person could not also be prosecuted in respect of the same conduct and the penalty notice would not result in a criminal conviction. The key principles of this regime will be set out in the primary legislation (the behaviour that will lead to a sanction being imposed, specific offences already subject to criminal prosecutions under Part II CSA 2000,

the standard of proof required, the maximum amount of the fine, the process for the issue of the monetary penalty and the applicable appeals process).

51. Clause 11(4) also extends the powers of the Secretary of State to make Regulations which essentially would allow Ofsted to cancel or suspend the registration of a subsidiary registered provider, or find that new applications for registrations should not be granted where its parent undertaking is in breach of the financial oversight or profit cap requirements (cf clauses 13 and 14 below).

Article 6

52. The issue of a requirement to comply with requirements by a parent undertaking which could lead to certain restrictions or the issue of a monetary penalty for this or generally for what is otherwise criminal conduct under the CSA 2000 is the determination of a civil right and/or obligation and as such would engage the right to a fair and public hearing by an independent tribunal.

53. Although Article 6 is engaged, there is no interference with this right as provision is made for determination of any appeal against relevant decisions of Ofsted by an independent and impartial tribunal. No amendment is being made to the criminal sanctions which are already established in respect of the offences contained in Part II CSA 2000.

54. The appeals process is compatible with Article 6. For the monetary penalties as an alternative to criminal prosecutions of offences under the CSA 2000, the provision includes a comparable protection as found in Article 6(2) and (3) in requiring Ofsted to be satisfied beyond a reasonable doubt of the conduct having been undertaken. This matches the standard of proof for the alternative criminal sanction which Ofsted may choose to apply for any Part II CSA 2000 offence. Ofsted are required to issue a notice of intention before imposing a monetary penalty. This notice of intention is designed to inform the recipient of the reasons to impose the penalty, amount of the penalty and their rights (including timelines) to make representations to Ofsted about the proposal. If Ofsted decides to issue a penalty, a penalty notice must be sent informing the individual of the reasons for the penalty, amount of the penalty, how to pay the penalty, by when to pay, consequences of non-payment and their rights to appeal (including timelines) to the First-tier Tribunal. If an appeal is issued, the individual is not required to pay the penalty until the appeal is determined or withdrawn.

55. The measure mirrors existing CSA 2000 provisions which require Ofsted to issue a notice of its proposals before making a decision in connection with registration, provides time for representations, and following the adoption of a proposal provides for an appeal process.

Article 1, Protocol 1

56. The imposition of a financial penalty (and in the case of the parent undertaking measure, the ability to take further action against a registered provider including suspending or cancelling registration which would prevent the provider from operating) may engage a person's right to peaceful enjoyment of property.

57. There is no interference with that right however as any financial penalty will be imposed, or further enforcement action taken, for breaches of requirements set out in the legislation only. This would be control of the use of property in accordance with the general interest of ensuring that the providers of accommodation for vulnerable children operate that accommodation in accordance with legislative requirements to ensure the safety and well-being of children accommodated.

Clause 13, together with clauses 15, 16 & 17: 13 - Financial oversight; 15 - Power of Secretary of State to impose monetary penalties; 16 - Procedure for imposing monetary penalties; 17 - information sharing

58. The Bill will introduce new powers for the Secretary of State to require on demand from those non-local authority providers of children's homes and independent fostering agencies, and their corporate owners which meet prescribed conditions, such information as will enable the Secretary of State to assess any risks to their financial sustainability, together with a plan (a "Recovery and Resolution Plan" or "RRP") which sets out how such entities propose to mitigate any financial risks and adverse impacts on local authorities and looked after children, should they need to cease operating.

59. The purpose is to enable the Secretary of State to provide local authorities with advance warning if there is a real possibility of establishments or agencies ceasing to operate due to risks to financial sustainability which will mean those local authorities having to provide emergency accommodation or other services for vulnerable looked after children. A failure to provide the required information may

mean the person who is not complying being liable to an unlimited civil monetary penalty, or up to a maximum prescribed in regulations.

60. The Bill will establish the financial oversight scheme for the children's social care sector which is itself unlikely to interfere with Convention rights; but the Bill will also contain regulation-making powers to set out conditions which, if met by providers and/or their owners, will mean that they are subject to the financial oversight requirements set out in the Bill. It is these regulations, along with how powers in the Bill are exercised that are more capable of interfering with Convention rights. The measures in this Bill for the financial oversight scheme and prospective regulations may engage: Article 6, Article 8, A1P1.

61. Financial oversight is one of a number of measures which enable information to be shared with the Ofsted, in this case, information obtained from those providers and parent owners which are subject to the financial oversight scheme. Clause 17 both facilitates that information sharing by providing its provision does not breach any obligation of confidence or any other restriction on disclosure, and also provides safeguards in stating that information which breaches the data protection legislation is not authorised.

Article 6

62. Where the children social care provider and/or any parent undertakings within the corporate structure of the provider fail to comply with any requirement of the financial oversight scheme, then they may have committed a civil offence and be liable to pay a monetary penalty. Anyone subject to such a penalty under the financial oversight scheme may argue they have a right to a fair hearing to challenge the decision.

63. The measure will provide a fair process before any penalty may be imposed and a right of appeal. A notice of intention to impose a monetary penalty (with reasons) as a pre-cursor to a final decision by the Secretary of State will be required to be sent by DfE. DfE will consider all the circumstances relating to the failure to comply with a requirement of the scheme, including any representations made by the person subject to the penalty. If final notice of a monetary penalty is given, this will be appealable to the First-tier Tribunal. We do not therefore consider that there is interference with Article 6(1) of the convention under either the criminal or civil limb, arising from the civil monetary penalty.

64. As with Article 6 considerations relating to the profit cap below, to the extent that the civil monetary penalty engages the criminal limb of Article 6, Article 6(2) is not incompatible with a reversed burden of proof (which in this scheme takes the form of the person's right to make representations to the Secretary of State – *Lingens and Leitgens v Austria (1981) 4 EHRR 373; International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158*. The procedural safeguards in Article 6(3) are satisfied by the scheme including the right of appeal to the First-tier Tribunal.

Article 8

65. Any provider or parent/linked business that falls within the remit of the financial oversight scheme will be expected to provide certain financial information to DfE (which may be shared with Ofsted). The intention is not to require that any personal data is provided unless that is absolutely necessary. It may be the case, however, that personal information relating to individuals with roles in the registered provider or an entity in the corporate group could be collected and shared with local authorities, therefore engaging Article 8 Convention rights.

66. Sharing of personal information would amount to an interference with Article 8 right to respect for private life and correspondence. The financial oversight scheme is being established to protect looked after children and personal information will only be collected to understand the financial and ownership arrangements and shared where necessary. Any potential for interference caused by the operation of this measure is therefore justified in pursuit of a legitimate aim of protecting health and morals; to support the welfare of children accommodated or otherwise looked after and to best ensure continued stability in their accommodation. Breach of confidential issues were raised in connection with the (similar) market oversight regime for adult social care in the case of R. (on the application of *Advinia healthcare Ltd) v Care Quality Commission [2022] EWHC 965 (Admin*) and was dismissed by the High Court because the duty to protect vulnerable people outweighed the necessity to keep the provider's business details confidential, so long as appropriate safeguards were in place within the system. The Department considers that the measure is rationally connected to the aim and that the aim is sufficiently important to justify any potential interference.

Article 1, Protocol 1

67. It may be argued that a financial oversight scheme which applies only to persons who meet conditions which are set out in regulations lacks sufficient legal certainty at

this stage because the provisions are not sufficiently precise or foreseeable in their application. However, a registered provider of relevant children's social care or a parent company of a registered provider will know that they are such, and will know that they may be subject to requirements in the future, which are on the face of the Bill now. Additionally, the Bill does not subject any person to the oversight scheme at this stage, and when the conditions for the application of the scheme are prescribed, they will have to be sufficiently certain to enable people to assess whether and how they may be affected.

68. The sending of an Advance Warning Notice to local authorities, which will represent the Secretary of State's assessment of the likelihood of financial unsustainability or business failure on the part of the registered provider or of a group/parent undertaking, may lead local authorities to make arrangements for the emergency accommodation of and services for children, and to avoid entering into new contracts with that provider, or those within the same corporate group.

69. However, we do not consider that there is interference with a person's A1P1 rights, as to the extent that the Secretary of State is under a duty to send an advance warning notice, a local authority would only be able to terminate existing contracts with providers through contractually permitted termination provisions and such providers will have no enforceable expectation of new contracts being awarded.

70. Additionally, the question of any possible interference only arises at the point the Secretary of State decides whether to send an advance warning notice. Even at that stage, the Department does not consider that there will be interference and therefore a need for justification, given that the sending of an Advance Warning Notice to local authorities does not affect any enforceable rights of a provider to contractual income.

Clause 14, together with clauses 15 and 16: 14 - Power to limit profits of relevant providers; 15 - Power of Secretary of State to impose monetary penalties; 16 - Procedure for imposing monetary penalties

71. These clauses provide for a new power for the Secretary of State to prescribe, through affirmative regulations, caps on the profits of non-local authority providers of children's homes and fostering agencies which are registered with Ofsted. A breach of the cap may lead to a civil monetary penalty, which may be unlimited, or up to a

prescribed maximum level set by the Secretary of State. Any decision to impose such a penalty, and its amount, will be appealable to the First-tier Tribunal.

Article 6

72. As is the case with the civil monetary penalties which attach to other measures within the Bill, this civil sanction engages the civil limb of Article 6 and possibly also the criminal limb, although we consider the latter to be unlikely given that the profit cap is directed solely at a specific group within the children's social care sector, rather than being of a generally binding character – see *Bendenoun v France 1994* - and does not protect the general interests of society – see *Produkcija Plus Storitveno podjetje d.o.o. v Slovenia 2018.*

73. We do not consider there to be interference with either the civil limb, or to the extent it applies, to the criminal limb because of the procedural safeguards built into the monetary penalty regime. The Secretary of State will be required to send a notice to the relevant provider who is accused of breaching the cap, stating the intention to impose a monetary penalty at a particular level, with the reasons for doing so. The provider will then have time to make representations before any final decision is made. If the Secretary of State's decision to issue a monetary penalty is confirmed as final, then there will be an unrestricted right of appeal to the First-tier Tribunal which may confirm the penalty, withdraw it or vary it. The Tribunal will be free to adopt a 'merits-based' approach, meaning that it will not have to find irrationality on the part of the Secretary of State to uphold a challenge.

74. To the extent that the criminal limb is engaged, as with the 'Children not in school' clauses, Article 6(2) is not incompatible with a reversed burden of proof (which in this scheme takes the form of the person's right to make representations to the Secretary of State – *Lingens and Leitgens v Austria (1981) 4 EHRR 373; International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158*. The procedural safeguards in Article 6(3) are satisfied by the scheme including the right of appeal to the First-tier Tribunal.

Article 1, Protocol 1

75. The clauses in the Bill will not set a profit cap; only provide the power to prescribe one in the future (which the Secretary of State intends to do only if other legislative and non-legislative measures fail to curb excessive profit-making in relation to children's social care placements paid for out of public funds). It will only be when regulations setting the cap and the means of calculating profit are made that the

question of engagement and possible interference with Article 1 of Protocol 1 rights arises. At that stage, the regulations will need to contain sufficient information to enable providers to be able to assess exactly whether and how they may be affected Nonetheless, we consider it proper to assess compliance at this stage as the enabling power in the Bill could be used to interfere with a registered provider's rights under that Article.

76. The Bill contains a number of safeguards designed to prevent undue interference in a registered provider's A1P1 rights. For example, the Secretary of State may only make regulations in the first place if she considers it necessary, having regard to the public interest in securing value for money in securing children's social care placements. Then, she must, before making any regulations prescribing a profit cap, take into account the interests of those providers, including their right to make a profit as well as the interests of local authorities and the welfare of looked after children. The Secretary of State is also obliged to undertake a consultation at this stage. Before issuing a monetary penalty, the Secretary of State will be required to provide notice of that intention, with reasons and to consider any representations made by the provider. Any final decision to issue a monetary penalty will be appealable to the First-tier Tribunal, which will be free to adopt a merits based approach and substitute the Secretary of State's decision for its own, whether that be to confirm or withdraw the penalty or to vary its amount.

77. Should it emerge that there is any interference in a provider's A1P1 rights at the point regulations are made, then such interference would be possible to justify under the four-stage test resulting from *Bank Mellat UKSC 39*.

78. In this regard, the objective is to ensure that excessive levels of profit are not made from local authorities and from finite public funds, through providing accommodation and services for vulnerable looked after children in England. The profit cap is rationally connected to that objective.

Care workers

Clause 18: Regulations about the use of agency workers for children's social work

79. This measure gives the Secretary of State a regulation-making power to prohibit local authorities from entering into arrangements for children's social care work to be done by individuals who are not workers for that local authority and impose requirements on English local authorities in relation to those arrangements.

Article 1, Protocol 1

80. While the measure itself does not engage Convention rights, regulations made under the power may do so. The Department considers that it is arguable that both individual children's social care workers and employment businesses ("EBs") A1P1 rights may be engaged by future regulations; individual CSC workers on the basis that the intended use of this power will diminish their earning capacity, and EBs on the basis that the profits from their business may decrease.

81. The "possession" that individual CSC workers will lose is the opportunity to earn more money by working via an EB than they do when directly employed by a local authority. It is settled case law that future income cannot amount to a possession within the meaning of A1P1 unless the income has already been earned or a legally enforceable right to it exists. Consequently, we believe that it will be difficult for an individual CSC worker to demonstrate that the impacts that they may experience because of the restrictions imposed are within the ambit of A1P1.

82. We consider that the situation is more nuanced with respect to EBs. Although future income does not fall within the scope of A1P1, we understand that goodwill in a business can be a "possession".

83. To the extent that EBs can argue that they have a qualifying "possession", the Department's assessment is that the restrictions would amount to control rather than deprivation. It is noteworthy that the restrictions will apply to the engagement and management of child and family CSC workers only. Furthermore, individual CSC workers will retain the right to practise their profession:
    a. They can continue existing arrangements as modified where necessary by the measures we introduce (e.g. continue being engaged via an EB with their rate of pay now capped in compliance with the regulations that will be introduced).
    b. They can end their contract with the EB and work directly for a local authority.
    c. They can work for a charity, voluntary organisation, adoption agency etc.
    d. They can transition from child and family CSC work to the adult social work sector.

84. CSC worker EBs can remain economically active:

a. They can continue to operate existing arrangements as modified where necessary by the measures we introduce (e.g. continue supplying child and family CSC workers to local authorities with the workers' pay rate now capped).

b. They can transition to supplying workers for the adult social care sector which will be unaffected by these measures.

c. They can transition to supplying other practitioners/professionals, whether allied to the health and social care sector or not.

85. Requirements contained in regulations made under this power would be designed to preserve public funds, raise professional standards and safeguard the interests of vulnerable children. The Department considers that it is a proportionate response in pursuit of a legitimate aim, given the severity of the issues that local authorities are facing in recruiting and retaining child and family CSC workers. Furthermore, stakeholders will have had ample notice that restrictions will be imposed, and it is expected that commercial agreements will have been negotiated in anticipation. Consequently, the Department's assessment is that the creation of this power is well within the state's margin of appreciation.

Article 8

86. Case law has established that the right to a private life can encompass professional activities, including the right to form and maintain professional or business relationships with others. Therefore, regulations made under this power will engage the Article 8 rights of individual CSC agency workers.

87. As above, Article 8 is a qualified right and whilst any regulations made under this measure imposing such requirements will interfere with the rights of individual CSC workers to form business and employment relationships with EBs, it does not prohibit them from doing so. Moreover, it does not preclude the CSC worker from continuing to be directly employed by the local authority or indeed any other social work provider (and direct employment can be arranged with the local authority itself or via an EB). As such we consider any interference with Article 8 rights of individual CSC workers to be no more than is necessary to pursue the legitimate aim of protecting health and morals by securing a sufficient social care workforce and efficient use of local authority funds.

Article 14

88. The concept of “other status” has been interpreted widely and child and family CSC workers/EBs will undoubtedly be subject to a more onerous regime than their colleagues who work in adult social care. On the assumption that the initial hurdle of establishing that rights under Article 8 or A1P1 are engaged is cleared, the Department considers that any differential treatment could be justified as a proportionate means of pursuing a legitimate aim. The basis of this justification is the evidence we have that the workforce challenges are far greater in the CSC sector.

Clause 19: Ill-treatment or wilful neglect: children aged 16 and 17

89. The measure amends ss. 20, 21 and 25 of the Criminal Justice and Courts Act 2015 (the 2015 Act) to extend the offences in relation to ill-treatment and wilful neglect to those committed by care workers providing care or support to children aged 16 and 17 in regulated establishments in England.

90. Currently, under section 20 (the care worker offence) and section 21 (the care provider offence) of the 2015 Act, an offence involving “social care” can only be applied where the victim is 18 years or older. In respect of children under 18, sections 20 and 21 can only be applied in respect of persons where “health care” is being provided and this will not be the case for staff in children’s homes and other children’s social care settings who are not health care workers and do not provide health care.

91. The clauses define ‘regulated establishments’ to include all establishments and agencies in England under the Care Standards Act 2000 in which 16- and 17-year-olds are accommodated, and youth detention accommodation in England under section 248 of the Sentencing Act 2000.

Article 6

92. Article 6 is engaged because this clause extends the application of existing criminal offences. Where an offence is suspected it will be referred to the police for investigation and will be prosecutable in the courts with all the procedural safeguards which that entails. If someone is found to be guilty of the prohibited behaviour in this clause, they will be subject to all the normal criminal procedures and therefore the clauses are compatible with Article 6 rights.

Clause 20: Employment of children in England

93. Part II of the Children and Young Persons Act 1933 (CYPA 1933) makes provision for the employment of children. Currently section 18 CYPA 1933 confers a power on local authorities to make bylaws in relation to child employment. In practice, these bylaws are normally based on model bylaws and include a requirement for employers to obtain a child employment permit to employ a child.

94. This measure will move the requirement for a child employment permit to primary legislation for children working in England. It also contains a power for the Secretary of State to make regulations in relation to child employment permits for children working in England, including in relation to the application process, the appeal process and to specify the information which must be included in a permit etc. Regulations may also allow a local authority to impose conditions on a permit and/or to revoke it.

95. Actions taken by local authorities in accordance with these prospective regulations may engage rights under the ECHR. These issues will be considered in detail when the regulations are prepared, but a high-level summary of the key issue is set out below.

Article 6

96. If an application for a child employment permit is refused or the licence is revoked, an employer or the employee/prospective employee may argue that Article 6 is engaged and they have a right to a fair hearing to challenge the decision to refuse or revoke the permit. Regulations made under this measure may create a right of appeal which will ensure that an appropriate appeals process can be established if it is considered necessary.

Article 8

97. Requiring an employer to obtain a child employment permit and decisions to revoke or refuse a permit may engage Article 8 because it will affect the young person’s right to personal development, the right to establish and develop relationships with others and to earn a living. It may also impact an employer’s right to private and family life where the employment is in a family-owned business.

98. To the extent that a requirement to have a child employment permit in place to employ children interferes with Article 8, such interference is necessary and proportionate in the public interest. The aim of the permitting scheme is to ensure that, if a child is employed, their employment does not have a detrimental impact on their health, development or education. It is clearly in the public interest to safeguard and promote the wellbeing of children, to protect a child's right to education and for the protection of health and morals.

99. Local authorities will be required under the Human Rights Act 1998 to ensure that any decision to refuse or revoke a child employment permit is compatible with Convention rights.

Article 1, Protocol 1

100. A1P1 protects the right to peaceful enjoyment of possessions, which can include business interest. An employer may argue that requiring permits to employ children interferes with their ability to run their business or affects their economic interests by limiting the workforce or increasing regulatory burdens. To the extent that there is any interference with property rights, the Department considers that such interference is in the public interest as it is necessary to protect the health, wellbeing and education of children.

C138 – Minimum Age Convention, 1973 (N. 138)

101. The Department has considered C138 - Minimum Age Convention, 1973 (No. 138) and is satisfied this measure is compatible. Article 7 provides that States may permit the employment of children aged 13 to 15 years old in light work which is not likely to be harmful to their health or development or prejudice their attendance at school or education and training. This clause provides that a child may not be employed to do any work other than light work (which is defined to ensure compliance with Article 7).

Part 2 - Schools

Breakfast clubs etc.

Clause 21 and 22: 21 - Free breakfast club provision in primary schools in England; 22 – Food and drink provided at Academies

102. These measures will impose a statutory duty on all state-funded schools in England to secure the provision of a free breakfast club for all qualifying primary pupils. That provision must include breakfast plus at least 30 minutes of childcare. As regards the

food offer, schools will be required to adhere to the Requirements for School Food Regulations 2014 - ‘the School Food Standards’.

103. The measures grant the Secretary of State the power to designate a school as one to which the duty to secure breakfast club provision does not apply if the appropriate authority of that school can satisfy her that the discharge of the duty would seriously prejudice the efficient use of resources or would be contrary to the best interests of qualifying primary pupils at the school . They also impose a duty on the Secretary of State to issue statutory guidance in connection with breakfast club provision; applications for a designation and the exercise by the Secretary of State of the power to designate a school. Schools must ‘have regard’ to the guidance. The measures will also require the appropriate authority of the relevant school to consult parents of the children registered at the school and the local authority before applying for a designation and the Secretary of State to keep a list of relevant schools in relation to which a designation has been made and ensure the list is publicly available.
104. Additionally, to the extent that academy funding arrangements do not already require compliance with the entirety of the School Food Standards, the measures require academy arrangements to include provision to that effect.

Article 9

105. The measures will require state-funded schools to adhere to the School Food Standards in respect of the food offer in breakfast clubs. Academies must already comply with the School Food Standards in respect of their school lunches by virtue of sections 512(3), (4) and 512B of the Education Act 1996. However, some academies are not currently required to adhere to the School Food Standards in respect of food and drink served at other times of the day under their existing funding agreements. Where this is the case, these measures will extend the requirement to adhere to those Standards to food and drink served during the rest of the day.

106. The School Food Standards impose an unqualified requirement to provide meat three times a week as part of school lunches. This engages Article 9 rights of those for whom eating meat does not adhere with their belief system.

107. However, no such unqualified requirements in relation to the serving of meat apply in respect of food provided outside of lunch, therefore the Department considers it unlikely that Article 9 will be engaged by these measures.

School uniforms

Clause 23: School uniforms: limits on branded items

108. This measure places a limit on the number of branded school uniform items (including PE items) that relevant schools can require pupils to have for use during a school year. The limit is 3 branded items, but schools will be able to require pupils receiving secondary education or education at a middle school to have 4 branded items provided one of those items is a tie. The limit will however not prevent schools from offering branded items on an optional basis. The proposed commencement date is September 2026.

Article 1, Protocol 1

109. The Department considers that A1P1 is arguably engaged for three reasons: i) the measure may reduce the value of schoolwear suppliers' existing contracts; ii) the measure may reduce the value of schoolwear suppliers' business goodwill; and iii) schoolwear suppliers or schools may have existing stock that can no longer be sold because of the measure. The Department considers any possible interference with these possessions to be relatively limited as set out below.

110. On i), existing, concluded contracts may amount to possessions under A1P1 (Breyer Group plc v Department of Energy and Climate Change [2015] 1 WLR 4559). Schools will need to review their school uniform policies in light of the measure being introduced, which will result in many schools reducing the number of branded items they require. This may lead to schools seeking to terminate or re-negotiate contracts with uniform suppliers, if they already have contracts in place that extend to or beyond the proposed September 2026 commencement date. Therefore, the measure itself will not directly interfere with the value or terms of existing contracts, but the value of these contracts may be affected by the actions schools take following the introduction of the measure.

111. On ii), case law is clear that future income is not a possession for A1P1 purposes, but business goodwill can be. Courts have acknowledged that this is often a challenging distinction to make, but they have defined goodwill as the present-day value of a business derived from its reputation and what it has built up (Breyer Group plc v Department of Energy and Climate Change [2015] 1 WLR 4559). The measure is likely to have an overarching impact on the sales of branded uniform items, as the schools in scope will have a limit on the number of branded items they can require. This will likely affect the overall value of specialist schoolwear businesses. However,

the measure will not prevent schools from offering branded items on an optional basis and independent schools are not in scope, which should mitigate interference with these businesses' goodwill.

112. On iii), it is possible that schoolwear suppliers or schools are left with existing stock that cannot be sold, because schools may change their school uniform policies in light of the measure to no longer include items which have already been produced. Suppliers tend to order branded uniform stock by December to ensure it is delivered by the following June or July for the back-to-school period, but they may hold stock over multiple years.

113. The Department considers that, to the extent this measure creates any interference with A1P1 rights, it would amount to a control of use, rather than a deprivation; the possessions may be interfered with but the underlying right to them has not been eliminated. The measure does not ban branded items entirely, allows branded items to be offered on an optional basis, and has a sufficient lead in time to help avoid excess stock accumulating. This means that compensation would not normally be payable to the affected persons (Mott v Environment Agency [2018] 1 WLR 1022).

114. In any event the Department considers that there are strong arguments that if there were any interference with A1P1 rights, it is justifiable, as the measure is pursuing a legitimate aim of ensuring that no parent is dissuaded from sending their child to their preferred school due to the cost of uniform.[1] There is significant evidence that branded school uniform items are more expensive than generic uniform items and that the high cost of those items disproportionately impacts those on low incomes. The limit will therefore give parents more choice over which school uniform items they purchase and where from, which will allow families to make choices that best fit their financial circumstances.

115. The limit is proportionate. The Department has considered the average number of branded items which schools currently require and set the limit at an appropriate level to reduce the number of branded items that pupils will be required to have, without requiring schools to make disproportionate changes to their school uniform policies.

[1] Parents still report that the cost of school uniform remains a concern, with Department for Education research (Cost of School Uniforms Survey 2023) finding that only 56% of parents were happy with the cost of school uniform. This compares with figures of 69% in 2015 and 75% in 2007. The same report found that parents of secondary school children reported the greatest drop in satisfaction, with only 37% being happy compared with 58% in 2015. Satisfaction with the costs of uniform (including PE kit) was lower amongst low-income families. Lastly, 8% of parents reported that uniform costs had affected their choice of school, an increase of 5 percentage points since 2015.

For example, the median number of branded items required by primary schools is 3.44 and for secondary schools is 6.18. Schools will have the option of requiring secondary pupils to also have a tie, in addition to the 3 branded items, which takes into account the difference in the number of branded items typically required by primary versus secondary schools. Schools will still be able to offer branded items on an optional basis, which should mitigate impacts on existing contracts. Not all schools are in scope of the limit, notably independent schools (other than academies) will not be captured by the measure, which should mitigate impacts on business goodwill as there will still be many schools relying on specialist retailers. Finally, the proposed commencement date of September 2026 has been specifically chosen to enable suppliers and schools to wind down stock levels in anticipation of the measure coming into force.

Children not in school

Clauses 24 to 29: 24 - Local authority consent for withdrawal of certain children from school; 25 - Registration; 26 – School attendance orders; 27 – Data protection; 28 – Guidance on children not in school and school attendance orders; 29 – Children not in school: consequential amendments

116. The registration aspect of the measure provides for certain children who are not educated full-time at schools to be registered with their local authorities. It requires certain information about those children to be provided by their parents and certain other persons providing them with education. It requires local authorities to provide support to the parents of some such children to promote those children's education.

117. The registration and information provisions are intended to improve local authorities' ability to check that the children in question are receiving an efficient full-time education suitable to their ages, abilities, aptitudes, and special educational needs (where they have any).

118. This may result in an increased incidence of local authorities taking action where children appear not to be receiving such education, or if a child is sent to school following local authority intervention but parents later try to withdraw them from the school without following the proper process, potentially resulting in parents being required to send those children to school and being prosecuted and fined and / or imprisoned if they do not.

119. The measure also makes changes relating to the school attendance order process by setting deadlines for certain stages of the process and extending the existing criminal offence so that an offence is also committed if a parent has complied with a requirement to send their child to a school but later withdraws the child from that school without going through existing statutory procedures, or if there is an ongoing failure to comply with the order even after a conviction.

120. The measure provides for certain persons who appear to be providing education to eligible children to be required to provide specified information to local authorities on request and to be subject to monetary penalties, recoverable as a civil debt if they do not, or if they provide incorrect information.

121. Before imposing a penalty, the local authority must first give the person in question a warning notice and the opportunity to make written representations to the local authority, which the local authority must consider before deciding whether to issue them with a penalty. There is also a right of appeal to the First-tier Tribunal. If the local authority is no longer satisfied that the grounds for the penalty are made out, then the local authority is prohibited from imposing the penalty.

122. The measure also requires local authorities to share information from the register with the Secretary of State, if directed to do so, as well as making provision for the sharing of information from the register to persons (who will be described on the face of the bill) for the purposes of promoting or safeguarding education or welfare, and to other local authorities when a child on the register moves (engaging Article 8). The Secretary of State will also have power to share the information that has been provided by a local authority with other persons (to be prescribed) if she considers it appropriate to do so for the purposes of promoting or safeguarding the education, or welfare of children.

123. The measure will also provide that:

    a. parents of children subject to child protection processes from the point that a s.47 Children Act 1989 enquiry is initiated onwards who are registered at school; and

    b. children who are at a special school maintained by a local authority, special academy or non-maintained special school, or at an independent school which is specially organised to make special educational provision for pupils

with special educational needs, where the child became a registered pupil at that school under arrangements made by the local authority

c. must obtain consent from the local authority in order to remove them from school for the purposes of education outside of school. The school would not be allowed to delete the child's name from the register pending this decision and in circumstances where consent was refused. The local authority will be under a duty to make a decision on these consent applications by determining whether it is in the best interests of the child to be educated outside of a school and whether the education to be provided will be suitable.

124. The measures will also empower local authorities to determine that for the above categories of children who are subject to child protection processes and who are already being educated at home, it is in their best interests to attend school and that they must therefore be registered at a school.

125. The measures will also require the local authority to consider all settings where home educated children are being educated as well as the child's home(s), as part of its decision on suitability and (for children subject to child protection processes) best interests. Local authorities will also have a power to request access to inside of the child's home(s) to see the child and if this is refused, must consider this to be a relevant factor when considering whether the child must be registered at a school.

Article 6

126. Failure to comply with a school attendance order is an offence under s443 Education Act 1996 unless the parent can prove that they are causing the child in question to receive efficient full-time suitable education otherwise than at school.

127. The Bill expands the existing offence so that it is also committed if a parent has complied with a requirement to send their child to a school but later withdraws the child from that school without going through existing statutory procedures or if there is a continuing failure to comply with the order (overturning the effect of *Enfield London Borough Council v Forsyth & Forsyth*, also reported as *Enfield London Borough Council v F & F [1987] 2 FLR 126*). It will also increase the maximum sentence for the offence, raising the maximum fine from £1,000 to £2,500 and introducing a potential custodial sentence (up to three months, or up to 51 weeks after section 281(5) of the Criminal Justice Act 2003 comes into force).

128. The circumstances in which a school attendance order can be given will be extended so that the parents of children subject to child protection processes who are not registered at school can be issued with an order, where it is considered to be in the best interests of the child to attend school.

129. The local authority will be under a duty to start the school attendance order process where the parent has failed to demonstrate that the child is receiving suitable education; or for children subject to child protection processes, that it is in their best interests to receive education by regular attendance at school.

130. The clauses give the local authority a power to request to visit the home(s) of all children being home educated and to see the child.

131. Where a parent refuses this request the local authority must consider that to be a relevant factor in deciding whether to issue a school attendance order.

132. The clauses will prohibit certain children currently registered at a school from being removed from the school register for home education without local authority consent. These are children subject to child protection processes from the point that a s47 Children Act 1989 enquiry is initiated onwards, or where the child who is at a special school maintained by a local authority, special academy or non-maintained special school, or at an independent school which is specially organised to make special educational provision for pupils with special educational needs, where the child became a registered pupil at that school under arrangements made by the local authority.

133. If consent is not obtained and the parent fails to ensure that that child attends school regularly, they will be committing a criminal offence under s444 Education Act 1996.

134. Under a new schedule where a local authority proposes to require a person providing education to pay a penalty for failure to provide information or provides incorrect information, it must give the person a warning notice. The person has the opportunity under the proposed regime to make written representations to the local authority before the local authority decides whether to require them to pay the penalty. Where the local authority is no longer satisfied that the grounds are made out, it must not issue the penalty. There is also a right of appeal to the First-tier Tribunal.

135. In relation to the duty on certain persons to provide information under threat of a monetary penalty recoverable as a civil debt, it is possible for such a penalty regime to be compatible with Article 6 provided that such a decision can be reviewed by an independent and impartial tribunal.

136. Whether a liability is civil or criminal for the purposes of Article 6 is an autonomous question of Convention law to be determined by considering how domestic law classifies it, what the nature of the liability is, and how severely it is penalised. If a liability is criminal, then Articles 6(2) and 6(3) set out certain specific procedural safeguards that are not necessarily guaranteed for civil matters; however in relation to the fundamental question of what constitutes a fair hearing by an independent and impartial tribunal the distinction between civil and criminal may be less crucial than a broad assessment of what fairness requires in the circumstances.

137. In this case, the Department considers that the right of appeal to the First-tier Tribunal provides sufficient safeguards to satisfy the requirements of Article 6. To the extent that the liability is a criminal one, the requirement of presumption of innocence in Article 6(2) is not incompatible with a reversed burden of proof (which in this scheme takes the form of the person's right to make representations to the local authority and the prohibition on the authority imposing a penalty if they are no longer satisfied that the grounds for the penalty are made out) (*Lingens and Leitgens v Austria (1981) 4 EHRR 373; International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158*). The procedural safeguards in Article 6(3) are satisfied by the scheme including the right of appeal to the First-tier Tribunal.

138. In relation to the expansion of the circumstances in which a school attendance order can be given, parents will be able to make representations to the local authority, they will be able to complain to the local authority and to the Secretary of State.

139. In relation to the offence of failure to comply with a school attendance order (largely replicating the existing section 443 of the Education Act 1996), this is subject to all the normal criminal procedures including the presumption of innocence, trial in the magistrates' court, onward appeal, etc. The burden of proving the substantive charge is on the prosecuting local authority. There are two additional special statutory defences in respect of which the burden of proof is reversed but, as above, this is considered to be compatible with Article 6 as matters to be proved are well within the

knowledge of the defendant. Section 443 was held to be compatible in *Oxfordshire County Council v JL [2010] EWHC 798*.

140. In relation to offences under s444 Education Act 1996 (failure to secure regular attendance at a school), this is also subject to all the normal criminal procedures as set out above.

Article 8 and Article 14

141. Under the registration and information provisions, if a parent does not provide the required information or appears to provide incorrect information, their local authority will have the power to send them a notice requiring them to satisfy the authority that the child in question is receiving suitable education. If they do so, no further consequence arises. If the local authority is not satisfied, the parent may be required to send their child to a school chosen by the local authority (in addition to whatever education they may choose to provide outside school) and be prosecuted if they fail to do so.

142. A requirement for a parent to send their child to school or to keep their child in school engages Article 8.

143. Under the provisions relating to the sharing of information by local authorities with the Secretary of State and other persons, the information shared from the register may include personal data (relating to individuals), so Article 8 is also engaged in this respect.

144. The clauses extend the School Attendance Order process so that the local authority will be under a duty to consider the home and any other learning environment when assessing whether home education is suitable (and for children subject to child protection processes, whether it is in their best interests).

145. Separately to this, in order to determine whether to serve a school attendance order, the local authority may request access to the child's home(s) and to see the child in their home. Where a parent refuses physical access to a domestic setting, the local authority must consider that to be a relevant factor when determining whether the education is suitable or whether (in the case of children subject to child protection processes) it is in the best interests of the child to receive education otherwise than by regular attendance at school.

146. From an Article 14 perspective (within the ambit of Article 8), this could in theory have a differential impact on those from particular groups, for example, disabled children or those from lower socio-economic groups. It is also noted that certain religious groups are more likely to home educate their children than others.

147. The safeguarding measures also engage Article 14 because they allow for differential treatment between those in an analogous position on the basis that they create different requirements for children in special schools (who will need local authority consent to deregister) compared to children with Education Health and Care Plans (EHCP) (potentially with the same needs) in mainstream schools (who will not need local authority consent to deregister).

148. The Department notes that the proposals do not increase the state's control over or interference with the content of education provided by electively home-educating parents to their children, and the system of registration of children not in school is not mandatory. A parent's refusal to provide information can trigger the school attendance order process but the parent can still prevent an order being made (or, if prosecuted, secure acquittal) by demonstrating that their child is receiving suitable education. A parent's refusal to allow access to the child's home may contribute to a local authority making an adverse determination when deciding whether to issue a school attendance order, but this can be mitigated by allowing such access.

149. The Department considers that to the extent that there is any interference with Article 8 and 14 rights, that it is necessary and proportionate in the interests of protection of the right of the child to an education under Article 2, Protocol 1, and integration into society, following *Konrad v Germany (2006) app. 35504/03*. Interference can also be justified as necessary for the protection of health and morals, as the measures will help to identify children who may be neglected or socialised in ways that are harmful to them or that will make them harmful to others and will offer certain children some protection from harm by requiring them to attend or remain at school. School is considered a protective environment for most children.

150. Consideration of the home and any other learning environments as part of the assessment of suitability of education and the best interests test and in particular requiring local authorities to consider the refusal of physical access to the home as a relevant factor when making these assessments, can also be justified under Article

8(2) as being necessary in a democratic society in view of the public interest in ensuring children's education.

151. Based on engagement with local authorities and home education representatives, the Department knows that the majority of children receiving education outside of regular attendance at school will receive a significant proportion of their education in the child's home. For the minority of children who do not receive their education at home, but in another setting, it is still considered that the home environment will have a bearing on the suitability of education and whether (in child protection cases) home education is in the best interests of the child. However, the legislation allows for the parent to refuse the home visit, and the local authority only needs to consider this as a relevant factor when determining whether education is suitable or in child protection cases, in the best interests of the child. If a parent refuses a home visit because the child does not receive education at the home and the local authority are satisfied that they therefore do not need to see the home, they will have the discretion to not proceed with further action.

152. Any potential for differential impacts on certain groups arising out of assessments of the home environment will be mitigated by guidance, to ensure that local authorities are aware of the potential for any unfairness which could arise and that they carry out assessments ensuring that this does not occur. Local authorities have their own legal obligations and must comply with the Equality Act 2010 and the Human Rights Act 1998.

153. The circumstances in which a parent would be required to send their child to a school will only arise where the local authority is not satisfied that the child is receiving suitable full-time education or where the child has already been identified as vulnerable and it is in their best interests to be at school. The circumstances in which a child will not be able to be deregistered from school for home education will be where the child has been identified as vulnerable and the local authority has not consented as no suitable arrangements have been made for the education of the child otherwise then at school, or that it would not be in the child's best interests to receive education otherwise than by regular attendance at school. This ensures that the measure does not go beyond that which is necessary for protecting these interests.

154. The Department considers that there are appropriate safeguards in place under the framework, including the local authority's discretion as to whether to initiate the process in response to a parent's failure to provide information or allow access to the child's home, and the fact that the parent can apply for a school attendance order to be revoked and may also refer the question to the Secretary of State. In circumstances where permission to home educate has been refused, parents can complain to the local authority and to the Secretary of State, who will consider the merits of the decision made by the local authority.

155. The Department considers that the provisions relating to the sharing of information by the local authorities to the Secretary of State and others, and by the Secretary of State to others do not require a course of action that is necessarily incompatible with Article 8. The sharing of any information will still have to be compatible with Convention rights, the UK GDPR and the Data Protection Act 2018 (where personal data is shared).

156. Where there is any interference with the right to privacy, the Department considers that this will be necessary and proportionate for the discharge of functions designed to protect the right of children to an education and to protect health and morals through safeguarding. The Department notes in particular that where personal data is concerned, the requirement to comply with relevant data protection law will act as a significant safeguard.

157. With regards to the safeguarding measures and the differential treatment between different groups of potentially disabled children, this is justified because children in special schools tend to have greater needs and the consent mechanism enables local authorities to determine whether safeguarding issues will arise from the loss of the support that the child is receiving in school through their EHCP. It is also considered harder for parents of children with greater needs to provide a suitable education themselves and therefore it is important that the local authority assesses suitability before the child is removed from school. Requiring all children with EHCPs to obtain consent would mean that more children with likely less complex needs would need to obtain consent, which would constitute a greater interference with Article 14. Confining the consent mechanism to those children who are likely to have more complex needs is deemed to be a more proportionate way of meeting the safeguarding aim.

Article 2 of Protocol 1, together with Article 9

158. In addition to providing that no person shall be denied the right to an education, A2P1 requires the state to "respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

159. A requirement that a parent send their child to school interferes with this right. Article 9 is also engaged for the same reason.

160. The Department is of the view that the proposals comply with A2P1, as the right of parents to respect for their religious and philosophical convictions is secondary to the fundamental right to education outlined in the first sentence of the Article, and these measures are intended to protect that right. The Department also considers that the proposals comply with Article 9 and are justified under Article 9(2).

161. There is no consensus amongst Contracting States in relation to compulsory attendance at school, so the ECtHR has accepted this as falling within the State's margin of appreciation – see *Konrad v Germany (2006) app. 35504/03*. The Court in this case rejected claims that Articles 8 and 9 of the Convention and A2P1 were breached when home education was banned requiring education in a private/state school, finding that:

    a. The state has a role in ensuring children are educated, and ensuring 'pluralism' in education, which is key to a democratic society.

    b. The child's right to an education takes priority over respect for parental religious and philosophical convictions if the two are incompatible.

    c. The state can insist on compulsory education, in school, and that the aims of ensuring acquisition of knowledge and of integrating minorities into society are legitimate justification for insisting on this and are within a country's own 'margin of appreciation'.

    d. The ability of parents to educate their children after school and at weekends in conformity with their religious convictions was sufficient to establish that their rights were not restricted in a disproportionate manner.

162. As with Article 8, the Department considers that there are appropriate safeguards in place under the framework, including local authority discretion and that the parent can apply for a school attendance order to be revoked and may also refer questions to the Secretary of State.

Independent educational institutions

163. Clauses in this part of the Bill make a number of changes to the legislation that regulates independent educational institutions:

a. They will expand on the category of institutions that provide full-time education to children of compulsory school age that are subject to the regulatory regime in Chapter 1 of Part 4 of the Education and Skills Act 2008 ("the 2008 Act"). Institutions that are not schools, because they provide a narrow education, will now be covered. In addition, a definition of what "full-time education" means, for the purposes of this regime, is provided. Registration with the Secretary of State is needed to conduct an independent educational institution, otherwise a criminal offence is committed (see section 96 of the 2008 Act).

b. The regulation-making powers in section 94(1) of the 2008 Act that allow the Secretary of State to set standards for independent educational institutions will be amended. Amongst other things, to allow standards to be set that will enable the Secretary of State to reject proprietors (and members of proprietor bodies) on the basis that they are not fit and proper. In being able to reject a proprietor on this basis, the Secretary of State will be entitled to refuse applications to register an institution or applications to approve a change of proprietor, where the proprietor is unsuitable.

c. A new power will be provided to the Secretary of State to suspend the registration of an independent educational institution where there are breaches of the independent educational institutional standards and as a result the Secretary of State considers that there is a risk of harm to students attending that institution. It will be a criminal offence for the proprietor if the institution continues to operate, i.e. provide education or supervised activity , when its registration is suspended. Similar provision is made empowering the Secretary of State to require that boarding ceases – to impose a "stop-boarding requirement". There are defences to the criminal

offences – and the burden of proof will be on the defendant proprietor to prove these.

d. Proprietors of independent educational institutions may appeal to the First-tier Tribunal against decisions of the Secretary of State, under section 116 of the 2008 Act, to remove their institution from the register of independent educational institutions. These decisions are made where there is non-compliance with the independent educational institution standards. Amendments will put the burden of proof in such appeals, on proprietors, to satisfy the Tribunal that the standards will be met on an on-going basis.

e. A new order-making power will be provided to the court (to make a prevention order), against someone who has been convicted of the offence of conducting an unregistered independent educational institution.

f. The 2008 Act provides for regulatory oversight where independent educational institutions change certain aspects of their operations – what are called “material changes”. Currently, the 2008 Act would regulate (the relevant provisions have not been commenced) many more types of material changes where an institution is a special institution (institutions that are specially organised to make special educational provision for pupils with special education needs) than for other types of institution - such as where there is an increase in capacity or a change in the age range of pupils or there is a change of proprietor. Changes are to be made to rectify this so that regime for material changes in the 2008 Act treats all independent educational institutions similarly – broadly speaking covering all the material changes that currently only relate to special institutions. In addition, a completely new type of material change related to a change of the buildings occupied by an institution and made available to students is introduced, and provision is made to make it clear that the material change of an institution starting or ceasing to provide boarding (which is already covered by the 2008 Act) also extends to the provision of boarding under arrangements made by the institution with a third party. Other changes are made to the regime, notably to give the Secretary of State a power to impose a restriction on how an institution operates where an unauthorised material change is made.

g. New powers are provided to HMCI to investigate offences in Chapter 1 of Part 4 of the 2008 Act, in relation to unregistered and/or registered independent educational institutions. These offences include conducting an unregistered independent educational institution (see section 96 of the 2008 Act), a proprietor of a registered independent educational institution breaching a relevant restriction (see sections 118, 121 and 127 of the 2008 Act), providing education or supervised activity at an institution when registration is suspended (under new s118C of the 2008 Act) and providing boarding accommodation in breach of a stop boarding requirements (under new section 118F of the 2008 Act).

h. The Bill provides HMCI with powers to share information with certain bodies that inspect independent educational institutions or that inspect the boarding provision made by schools or colleges.

i. Finally, the Bill provides a new power for the Secretary of State to remove an institution from the register kept under section 95 of the 2008 Act. Since this new power may only be exercised with the consent of the proprietor of the affected institution, it does not appear to the Department to raise any significant issues as regards Convention rights and so it is not covered in detail below. In any event, as a power, it is capable of being exercised compatibly. Similarly, there are new powers to direct His Majesty's Chief Inspector of Education, Children's Services and Skills to carry out inspections for the purposes of certain appeals to the First-tier Tribunal. Again, the Department does not consider that the direction-making powers raise any significant issues.

Clauses 30, 31, 33, and 35: 30 – Expanding the scope of regulation; 31 – Independent educational institution standards; 33 – Material changes; 35 – Imposition of relevant restrictions

Article 6

164. The right to run a private school is a civil right (*Jordebo Foundation of Christian Schools v Sweden, (1987) 51 DR 125*). A decision about the registration or deregistration of an independent educational institution therefore involves the determination of a civil right – whether made by the Secretary of State or the First-tier Tribunal.

165. The provisions related to what will constitute a material change and those giving the Secretary of State the power to impose a relevant restriction (where there is an unapproved material change) may also involve determinations of the civil rights of proprietors. This is because they affect how proprietors may continue to use their land for an independent educational institution or relate to the imposition of restrictions on the manner in which they may continue to operate their institution.

166. It might also be argued that proprietors or members of proprietor bodies have their civil rights determined where there is a refusal to grant approval for a material change consisting of a change of proprietor, or a refusal to grant registration, on the basis that they are not fit and proper, results in them losing their post. Decisions by public authorities in relation to the rights of one person may have effects on a third parties civil rights, so as to give rise to a right of access to court by the latter – see, for example, *Zander v Sweden (1993) 18 EHRR 175*. See also the case *of X v UK (1998) 25 EHRR CD 88*, where it was determined that Article 6 was engaged in relation to a decision that prevented someone being a chief executive of a particular company.

167. It is likely that Article 6 is engaged by decisions to suspend registration (or to require boarding to cease) because there has been a determination of a civil right. Exercise of the powers in question has the potential to cause serious and irreparable reputational and financial harm to a proprietor of an independent education institution by withdrawing rights (albeit temporarily) that the State has already licensed. In addition, Article 6 will be engaged in relation to criminal proceedings for the offences of providing education or supervised activity when registration is suspended or boarding in breach of a stop boarding requirement and in particular because the defences to these offences involve a reverse burden of proof.

168. The Department considers that clauses 30 and 33, insofar as they apply to registration and material change, are compatible with Article 6 because there are rights for the affected proprietor to appeal to the First-tier Tribunal on the merits against regulatory decisions; and, where a decision would have the effect of changing the status quo, it is suspended pending the determination of an appeal.

169. In addition, regarding the power to make standards requiring “fit and proper” proprietors (clause 31(2)), if a decision which leads to a proprietor or member of a proprietor body losing their post can be properly said to constitute the determination

of their civil rights, then we consider that judicial review is sufficient to ensure Article 6 compliance. The decision-making here, is in our view, a classic exercise of administrative discretion, involving a judgmental inquiry (see, for example, *X v UK (1998) 25 EHRR CD 88*, a case in which judicial review in the Court of Session was found to be sufficient to ensure Article 6 compatibility of a decision by the Secretary of State that someone was not "fit and proper" to be a chief executive - and which was cited with approval in *R (Alconbury Developments Ltd) v Secretary of State [2001] UKHL 23 [2003] 2 AC 295*).

170. The Department believes that the Bill's provision related to the suspension of registration and stop boarding requirements (clause 31(4)) will be compatible with Article 6 because (a) they will require consultation, in appropriate cases, with a proprietor before suspension takes place or a stop boarding requirement imposed; (b) they will confer a right of appeal on an affected proprietor on the merits to the First Tier Tribunal against the suspension of their registration or the imposition of a stop-boarding requirement and (c) Tribunal Procedure Rules will be able to confer a power on the First Tier Tribunal to grant a stay of a suspension or stop-boarding requirement. In addition, the Department intends to enter into an MOU with the MOJ for appeals to be heard on an expedited basis. Finally, whilst defences to the offences of providing education or supervised activity when registration is suspended, or boarding in breach of a stop boarding requirement, involve a reverse burden of proof, in the Department's view a fair balance is struck between the individual's interests and the public interest. For example, the offences are regulatory designed to protect children from harm, the prosecution still needs to prove non-compliance and the defences cover matters within the knowledge of the defendant (see, for example, *R v Chargot Ltd (t/a as Contract Services) and others [2008] UKHL 73*).

171. Article 6 does not prescribe upon whom the burden of proof lies in civil proceedings, providing the equality of arms principle is not infringed – see *G v France*, App No 11941/86; 57 D.R.100. The Department considers that there is no imbalance between the Secretary of State and the appealing proprietor created by clause 31(5) in the case of the appeals in question against de-registration. This is because the proprietor is being required to demonstrate something that they are best equipped to show (and indeed, it is something within their control whether standards will be complied with in the future). Furthermore, the burden of proof will still be on the Secretary of State to demonstrate that the decision to de-register the institution was appropriate in the first place.

Article 8

172. Decisions on whether someone is fit and proper to be a proprietor or involved in a proprietor body engage Article 8 because they affect a person's ability to develop relationships with the outside world or the possibility of earning a living.

173. The Department is of the view that any interference which the Bill gives rise to is in the public interest because it is necessary and proportionate to ensure that those with responsibility for the management of independent educational institutions are the appropriate people, people who are suitable to be ensuring that children are, for example, properly safeguarded and receive an adequate standard of education. The public interest includes the protection of the right of children to an education and the protection of health and morals.

174. There will be rights of appeal for proprietors to appeal against decisions to refuse registration or a material change involving a change of proprietor, and affected members of proprietor bodies will have recourse to judicial review against decisions that they are not fit and proper. In addition, the Secretary of State must act compatibly with Convention rights and there is nothing in the Bill which requires the Secretary of State not to do so.

175. The powers in section 94(1) of the 2008 Act mean that standards can be imposed on independent educational institutions that require a secular education to be taught. Such standards will engage Article 8 in circumstances where parental beliefs mean that their children ought not to have such an education. However, the powers in section 94 do not mandate that such standards must be made in all cases. In any event, the Department considers that it is possible to make standards requiring a secular education (despite parental beliefs) compatibly with Article 8, for the purpose of ensuring that children receive an education that suitably equips them for, for example, adult life. See further what is said about the decision of *Konrad v Germany (2006) app. 35504/03,* in paragraphs below.

Article 9 and Article 2 of Protocol 1

176. Article 9 and A2P1 will be engaged because additional institutions will be subject to a requirement to register and to maintain that registration to meet prescribed standards which may conflict with the religious beliefs of parents or children or mean that children are not educated in accordance with parental wishes.

177. The Department considers that the changes are compatible with Article 9 and A2P1.

178. As set out above, the court found in the case of *Konrad v Germany* that (a) the State has a role in ensuring children are educated, and ensuring 'pluralism' in education, which is key to a democratic society (b) the child's right to an education takes priority over respect for parental religious and philosophical convictions if the two are incompatible and (c) the State can insist on compulsory education, in school, and that the aims of ensuring acquisition of knowledge and of integrating minorities into society are legitimate justification for insisting on this and are within a country's own 'margin of appreciation'.

179. Consistent with the approach in *Konrad v Germany*, the provisions in question are designed to ensure that children attending independent educational institutions, institutions that provide a full-time education, are properly educated and safeguarded.

180. As regards proportionality, parents may choose to educate their children at home (instead of at the institutions in question) or proprietors of the institutions in question may choose to go part-time so as not to be subject to regulation. In addition, parents will still be able to educate their children after school and at weekends in conformity with their religious convictions and the current system of standards is able to permit schools to have a religious ethos.

Article 1, Protocol 1

181. In addition, the right to the enjoyment of possessions, under A1P1, is engaged because the use of land to provide education is being regulated, resulting in a control of use. Similarly, whilst the case law has not considered this question, registration appears to confer an economic benefit equivalent to a licence – such a benefit is capable of being a possession under A1P1 (see *Tre Traktorer Aktiebolag v Sweden [1989] 13 EHRR 309*).

182. The Department considers that the measures, to the extent that they interfere with property rights, are in the public or general interest given their underlying rationale of ensuring that children of compulsory school age, who spend a very significant portion of their week in educational institutions, have their welfare, health and safety protected, get a quality of education that is assured to a minimum standard, and that they become capable of integrating themselves into society.

Article 14

183. Article 14 is arguably engaged because the proposed legislation within (for example) the ambit of Article 1 Protocol 1 or Article 9, might be said to have particularly prejudicial effects on Orthodox Jewish parents and young men educated at yeshivas (a Jewish educational institution that focuses on the study of traditional religious texts). Although the new regulatory arrangements will bring institutions offering narrow educational provision on a full-time basis under regulatory control for the first time, those institutions which are likely to be predominantly affected are yeshivas.

184. In cases of indirect discrimination, the State needs to show that its actions have a rational justification regardless of the ground for the different treatment. In this case the legislative amendments pursue a legitimate aim – to provide a regulatory framework that ensures that children who are educated full-time in the independent sector are assured a minimum quality of education and are properly safeguarded. In addition, they strike a fair balance because the proposals do not prevent part-time education being provided which is wholly or predominantly religious, whether at home or at another institution nor will they prevent the institutions affected having a religious ethos or providing extensive religious education.

Clause 32: Unregistered independent educational institutions: prevention orders

The Bill provides for the introduction of prevention orders (Orders). Where an individual is convicted of an offence under s.96 of the 2008 Act (for conducting an unregistered independent educational institution) the court is able to make an Order. An Order can require the individual to do anything specified in the Order, or prohibit the individual from doing anything specified in the Order. This could involve an individual being restricted from engaging in specified activities, within a certain geographic area, within set hours. However, the Court may only make an Order if it thinks it is appropriate to do so for the purpose of protecting children from the risk of harm.

Section 6 of the Human Rights Act 1998 will require the Court to act in a manner that is compatible with Convention rights. Article 6

185. This clause provides for an Order to be made on application as part of the overall sentencing for the s.96 offence under the Education and Skills Act 2008. The Department considers that Article 6 is engaged as such an Order may interfere with the civil right of creating and running a private school, and involves the determination of a criminal charge.

186. However, the defendant will have an opportunity to make representations as part of the sentencing hearing. They will also have the right to apply for the Order to be varied or discharged, in accordance with this clause. It is, therefore, the Department's view that these provisions are compliant with a defendant's Article 6 rights.

Article 8

187. The purpose of an Order is to protect children from harm. The Department has therefore considered possible interference with the individual's Article 8 family rights. Article 8 rights may be limited to the extent necessary in a democratic society for the protection of the rights and freedoms of others. An Order may be used to place restrictions on an individual by restricting an individual's ability to work. The Department is clear that this new provision is a necessary and proportionate measure to offer enhanced protection to children that may be at the risk of harm. The prohibitions, restrictions, requirements, and other terms that may be included in an Order are only those that the Court considers are appropriate for its purpose, to protect children from harm. The Department is satisfied that any interference with a respondent's right to respect for family life is justified.

188. There is a legitimate interest in introducing the power to make Orders in that they are intended to reduce the likelihood of re-offending and reduce the risk of a child being subjected to a substandard quality of safeguarding and education.

Article 1 Protocol 1

189. A1P1 may also be engaged where a court exercises its discretion to use the new sentencing power if the terms of the Order restrict an individual's use of their property.

190. The justification for this measure is to ensure that children are not at risk from harm from an individual re-offending or otherwise. The restrictions placed on an individual will be those that are appropriate with reference to the overall purpose of protecting children from harm.

Clause 36: Powers of entry and investigation etc.

191. These measures expand existing powers and introduce new powers to further the investigation, prosecution and sentencing of offences committed under Chapter 1 of Part 4 of the Education and Skills 2008 Act (the 2008 Act), involving unregistered and registered independent educational institutions. These offences include those which

may be brought against a person for conducting an unregistered independent educational institution (under section 96), breaching a relevant restriction (under sections 118, 121 and 127) providing education at an institution when registration is suspended (under s118C of the 2008 Act) or providing boarding accommodation in breach of a stop boarding requirement (under new section 118F of the 2008 Act). The measures also include the new offences relating to the obstruction of or failure to comply with an investigation and breach of a prevention order.

192. Section 6 of the Human Rights Act 1998 will require the Chief Inspector to act in a manner that is compatible with Convention rights.

Article 6

193. The clause requires individuals to provide information to Ofsted as part of Ofsted's investigation of the premises. The Department considers that this is an interference with an individual's Article 6 right as the act of doing so may constitute interference with the privilege against self-incrimination. The Department considers that there are appropriate safeguards in place relating to this process of inspecting documentation.

194. The clause introduces the four new offences of intentionally failing or refusing to provide information in interview, failing to provide facilities and assistance, failing to provide documents or failing to provide information stored in any electronic format, without reasonable excuse. The Department considers that Article 6 is engaged by these measures (as they relate to criminal charges). Appropriate safeguards have been included in that the burden of proof for the offence will rest with the Crown. Once a defendant has raised the defence of "reasonable excuse" in evidence, the Crown will bear the burden of proof of disproving the defence.

195. These measures are being introduced to ensure that Ofsted can enter and inspect premises where Ofsted has reasonable cause to believe that a relevant offence is being or has been committed or there may be evidence in relation to a relevant offence has been committed on the premises. The clause provides for appropriate safeguards.

Article 8

196. The clause provides Ofsted with a power of entry and investigation to all premises. This includes dwellings and mixed-use properties. These powers may therefore engage Article 8 as they may involve interference by a public authority with an individual's right to respect for their private and family life.

197. Safeguards have been incorporated, which apply whenever the right of entry and search is exercised. The clause provides a tiered approach to the powers. New s.127B provides a general power of entry which is meant to largely mirror the provision in existing section 97 of the 2008 Act. The provision allows for Ofsted to enter any premises and to inspect documentation. Ofsted is required to provide certain information before entering the premises under this power, and can only use this power at a reasonable hour. Entry is only possible where there is a reasonable belief that one of the relevant offences is being or has been committed on the premises to be entered, or that evidence of the commission of a relevant offence may be found on or accessed from the premises to be entered. The provision is designed to ensure safeguarding of children. The relevant offences are not administrative or

bureaucratic and intend to keep children safe by preventing settings operating outside the regulatory regime.

198. Where entry to the premises is refused, or likely to be refused (unless a warrant is produced), or where it is not practicable to communicate with any person entitled to grant entry, or where entering or attempting to enter the premises without a warrant may frustrate or seriously prejudice the purpose of entering, Ofsted may apply for a warrant. This is provided for in s.127C. The power of entry under a warrant must be exercised at a reasonable hour unless the Chief Inspector considers that the purpose of entry and investigation may be frustrated by entry at a reasonable hour. Safeguards in relation to the warrants are provided for by the incorporation of relevant provisions from the Police and Criminal Evidence Act 1984.

199. Where Ofsted wants to undertake a more extensive inspection, a warrant is required. This includes where Ofsted intends to seize documentation. The power of entry warrant will authorise these particular powers. This is provided for under s.127C(7). Material subject to legal privilege (as well as other categories of documentation) is excluded from the above powers. This is to ensure an approach consistent with Article 8 and Article 6 case law, including Niemetz v Germany (1992) 16 EHRR 97. Material seized should only be retained for so long as is necessary in all the circumstances.

200. Any interference with Article 8 rights is necessary for the protection of children from risk of harm. As per the above, the relevant offences are not administrative or bureaucratic and intend to keep children safe by preventing settings operating outside the regulatory regime. By taking a tiered approach, the interference is appropriately balanced, with safeguards to ensure that any interference will be necessary and proportionate in pursuit of a legitimate aim (of protecting children from harm). The clause incorporates the safeguards in the Home Office Code of Practice on powers of entry which will also apply to Ofsted's use of these powers. We do not expect that Ofsted will enter a premises without consent or a warrant.

Article 1 of Protocol 1

201. A1P1 will be engaged by the extended search powers, powers to seize evidence and to require documentation, as premises will be searched and property interfered with. Powers of seizure exercised in connection with the enforcement of domestic legislation are generally treated as a control of the use of property rather than a deprivation, per Handyside v UK (1976) and Air Canada v UK (1995) 20 EHRR 150.

202. Any interferences with rights under A1P1 are justified by the need to effectively investigate, prosecute and sentence criminal offences committed under Chapter 1 of Part 4 of the 2008 Act.

203. It is in the public interest that institutions providing all, or substantially all, of a child's education are registered and monitored in compliance with the independent school standards. It is also in the public interest that independent educational institutions subject to requirements under enforcement action, in the form of a relevant restriction and/or suspension of registration, is complied with. This interest in not only in ensuring the law is complied with and does not fall into disrepute (i.e. the legitimate aim of preventing and detecting crime) but also about ensuring that minimum standards of safeguarding and education are met.

204. In relation to new powers to seize evidence, safeguards have been included so that seized property is returned once it is no longer required for use as evidence in legal proceedings. In light of these safeguards, it is the Department's view that any interference will be proportionate and compatible with A1P1.

Clause 38: Inspectors and inspectorates: reports and information sharing

205. Clause 38(4) inserts a new section 107A, into the Education and Skills Act 2008, allowing the Chief Inspector to share information with an independent inspectorate. Clause 38(2) also inserts a similar provision, a new section 87BB, into the Children Act 1989 enabling the Chief Inspector to share information with inspectors of boarding accommodation (appointed under section 87A of that Act).

Article 8

206. Information shared may include personal data relating to individuals or private correspondence. Article 8 is therefore engaged.

207. The powers conferred under this clause are not intended to increase the volume, or change the nature, of information currently shared between the Chief Inspector and an independent inspectorate (or inspector appointed under section 87A of the Children Act 1989). Information to be passed between Ofsted and an independent inspectorate (or inspector) is currently routed through the Department, which presents operational problems, slowing down information sharing. The clause is designed to address this. There is, therefore, unlikely to be a significant increase in the interference with any Article 8 rights as compared with that which is currently the case.

208. The clause will only authorise the sharing of information and therefore it does not require a course of action that is not compliant with Article 8.

209. In fact, any disclosure of information needs to be compliant with, the UK GDPR and the Data Protection Act 2018 (where personal data is shared) – which constitutes a significant safeguard. In addition, the clause only authorises the disclosure of information to enable or facilitate the inspections of independent educational institution or the inspection of boarding accommodation. These inspections are carried out to assure that pupils are receiving a reasonable quality of education (to protect their right to education) and that their welfare is properly safeguarded (to protect health and morals).

210. Finally, the Department notes that where information relates to a legal entity, the State has a wide margin of appreciation in assessing the necessity of any interference. For these reasons, the Department considers that the clause here is compatible with Convention rights.

Teacher misconduct

Clause 39: Teacher misconduct

211. Under current legislative provisions, the Teacher Regulation Agency (TRA) is only able to consider referrals of cases of teacher misconduct where the person was engaged in teaching work (1) at the time of the conduct in question or (2) at the time the referral is made. It only covers teachers teaching in a school, a sixth form college, a 16 to 19 academy, relevant youth accommodation or a children's home.

212. The Bill amends the current regime to bring into scope those teaching in Further Education institutions, Independent Education Institutions, online education providers, Special Post 16 Institutions and Independent Training Providers. This means that all teachers will be held to the same standard of conduct and all children are offered the same protection.

213. The Bill also amends s.141A(1)(a)) of the Education Act 2002 to allow the Secretary of State to investigate the conduct of a teacher regardless of when that conduct took place. At the moment the teacher in question either needs to be employed as a teacher at the time the conduct comes to light and is referred to the TRA, or the conduct (even if outside the classroom) needs to have occurred when the person was working as a teacher. As it stands, TRA have no jurisdiction over a teacher who, for example, finishes their teaching assignment with a school in July, commits serious misconduct in August, then returns to teach on a new contract in September.

214. It is essential that the Secretary of State should be able to prohibit from the teaching profession anyone who is not suitable to work as a teacher. The combined effect of these proposed amendments is that more teachers will now fall under the jurisdiction of the TRA.

Article 6

215. Article 6 is engaged because teachers who may be guilty of unacceptable professional conduct or conduct that may bring the teaching profession into disrepute, or have been convicted at any time of a relevant offence, will be capable of being

referred to the TRA. If an investigation finds that there is a case to answer, then the teacher will be subject to an independent Professional Conduct Panel who hear the case. The Professional Conduct Panel report the facts found to the Secretary of State and recommends to the Secretary of State whether to prohibit the teacher or not, with a review period or not. Having regard to that recommendation the Secretary of State then decides whether or not to prohibit the teacher, and with what, if any, review period. Regulation 17 of the Teachers' Disciplinary (England) Regulations 2012/560 provides a statutory basis to appeal the decision of the Secretary of State to the High Court.

216. The combined effect of all of the teacher misconduct provisions is that more teachers will now fall under the jurisdiction of the TRA. The nature and severity of the interference is no more than that of the current regime, the provisions just mean that the TRA are likely to have more cases and therefore more people whose rights are affected, but the provisions do not change the compatibility of the regulatory framework with this right. The existing regime has procedural safeguards in place which will continue to apply, such as a hearing before an independent and impartial panel. The Department encourages teachers to engage legal representation to assist them with the proceedings.

Article 8

217. This measure engages Article 8 as an investigation will require the TRA to collect private information about the person in question and interference with that person's private life will occur as a consequence of the investigation and the hearing before the Professional Conduct Panel. However, any interference can be justified on the basis that it is pursuing a legitimate aim of protecting health and morals. The Secretary of State needs to ensure that that those who are entrusted with teaching children conduct themselves in an appropriate and professional manner and in a way that upholds public confidence in the teaching profession and state-funded education system.

218. Furthermore, that conduct which may bring the profession into disrepute would be investigated by a professional regulation body should be in the reasonable contemplation of any teacher, regardless of their employment status at the time the conduct in question took place, what specific type of school they teach or taught in and whether it was a DfE civil servant, or another person, which referred their conduct to the TRA.

219. The interference is no more than is necessary to conduct a full and fair investigation. While the regime brings into scope conduct committed by qualified teachers who may be taking a break from teaching, or conduct committed before the person qualified as a teacher, the Department anticipates that there will be very few cases and that any cases would fall under the "conduct which may bring the profession into disrepute" bracket rather than "unprofessional professional conduct". As always, the public interest and proportionality tests will be applied when considering whether to investigate.

School teachers' qualifications and induction

Clause 40: School teachers' qualifications and induction

220. This measure provides that new teachers entering the classroom must have, or be working towards, Qualified Teacher Status. It will also extend to academies the requirement (which currently applies to local-authority maintained schools) for statutory induction to be undertaken by early career teachers, in order for them to work there as a teacher.

Article 2, Protocol 1

221. The Department considers the proposed measures to be compatible with the ECHR. Article 2 of Protocol 1 protects a child's right to effective education. This provision could be said to further enshrine that right. The Department considers this measure to further support rights under A2P1 as it ensures that teachers in schools across the academies and maintained sector are qualified to the same high standard, including satisfactorily completing an induction process that meets specified standards. This is intended to ensure a consistently high threshold of teaching professionalism is provided for pupils, regardless of the type of school they go to.

Academies

The status of Academy Trusts under the ECHR and Human Rights Act 1998

222. Academy Trusts are independent charitable companies that are funded by central government, perform public functions and are amenable to judicial review. They are a "hybrid public authority" for the purposes of s 6 of the *Human Rights Act 1998 (*"*HRA 1998"*).

223. In order to enjoy the protection of Convention rights a party must be "an individual, non-governmental organisation or group of individuals" (s 7(7) *HRA 1998* read with Art 34 *ECHR*), in order to possess the required victim status. It is highly likely that

hybrid public authorities only possess the required victim status when acting in a private capacity; see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37 ("Aston")* at paragraph 11 in which Lord Nichols concluded hybrid organisations are not absolutely incapable of enjoying the protection of Convention rights as they are not public authorities in respect of acts of a private nature. However, the law is not entirely clear on the point: see *YL v Birmingham City Council [2007] UKHL 27*, at paragraph 74 in which Lady Hale implied *Aston* has not completely settled the question of whether they may also enjoy Convention rights when acting in a public capacity. This lack of clarity is acknowledged by the editors of *Lester, Pannick and Herberg: Human Rights* (Lester, Pannick, Herberg (ed), LexisNexis UK, 3rd ed, 2009, [2.6.3] n 2) and there is academic commentary to the effect that hybrid public authorities should enjoy ECHR protection when acting in any capacity on the basis they are 'non-governmental organisations' (Howard Davis, *Public Authorities as 'Victims' Under the Human Rights Act*, [2005] CLJ 64(2), 315-328*).*

224. In view of the above, the Department considers it unlikely that an Academy Trust would be considered a victim for the purposes of the ECHR and the HRA 1998. However, in view of the unsettled nature of the law on this point we have provided justifications for any potential ECHR infringements.

Clause 41: Academy schools: duty to follow National Curriculum

225. This measure will ensure that the national curriculum is implemented in all state-funded schools (to include academies).

226. The Department proposes that the measure will not come into effect until the conclusion and implementation of recommendations from the Government's Curriculum and Assessment Review, which will be implemented via a mixture of secondary legislation and possibly new primary legislation in a forthcoming bill. This measure will have legal effect from its coming into force date.

Article 2, Protocol 1

227. The Department is of the view that this measure supports A2P1 rights by ensuring pupils in academies and maintained schools are able to access curriculum content that is thorough and internationally recognised, and mitigates against the risk that pupils are missing out on key learning.

Clause 42: Academy schools: educational provision for improving behaviour

228. Section 29A of the Education Act 2002 gives the governing body of a maintained school the power to require a pupil to attend a place outside the school premises to receive education intended to improve their behaviour, and requires the Secretary of State to make regulations about various procedural matters in relation to such cases. This measure enables the Secretary of State to make regulations extending the same power of off-site direction to academy trusts and applying the associated procedural regulations to cover academy trusts as well.

Article 2, Protocol 1

229. The measure enables an academy trust to require a pupil to attend a place outside the school without their parent's permission, and to that extent it arguably engages the second limb of Article 2 of Protocol 1.

230. Case-law is clear that a parent's right to influence how the state educates their child is limited in various ways. It is subject to the child's right to education; and it does not amount to a right to dictate exactly how a particular institution educates the child, especially when the parent has the option of choosing a different institution or educating the child themself, nor does it amount to a right to have the child educated at any particular institution. Giving academy trusts this limited power (which is already held by governing bodies of maintained schools) makes it easier for them to enlist specialist help in improving a pupil's behaviour, to improve the pupil's educational prospects and protect the education of other pupils from disruption, consistently with the pupil's right to education. The provision is clear that an off-site direction must involve the pupil receiving education, not just behavioural support or discipline. It is temporary and must be kept under review. The measure goes no further than necessary to achieve consistency between maintained schools and academies and the A2P1 rights engaged are protected by procedural safeguards. A parent who is dissatisfied has a statutory entitlement to complain to the school, and can also complain to the Secretary of State; ultimately they also have the right to move the pupil to another school or to home-educate them.

Clause 43: Academies: power to secure performance of proprietor's duties etc

231. This measure empowers the Secretary of State to issue a compliance direction to an academy trust to prevent academy trusts from using powers given to them in their articles of association and funding agreements unreasonably or inconsistently with the legal requirements imposed upon them. Compliance with the direction will be

enforced by application for a mandatory order. The compliance direction replicates a similar power that applies to maintained schools in s.496-7 of the Education Act 1996.

Article 1, Protocol 1

232. The compliance direction power will be used by the Secretary of State to prevent academy trusts from using powers given to them in their articles of association and funding agreements in a way in which the Secretary of State considers unreasonable. Therefore, in exercising this power, academy trusts' A1P1 rights are engaged as the contracts are their possessions.

233. Contracts are possessions under A1P1, however, as stated above, as hybrid public authorities, the Department does not consider that academy trusts enjoy the protection of Convention rights when performing acts of a public nature. It is anticipated that compliance directions will almost always be issued to academy trusts in respect of their public functions and for that reason the Department considers that in the vast majority of cases Convention rights will not be engaged under this measure.

234. To the extent that there is an argument to be made that A1P1 rights are engaged and issuing a compliance direction results in an interference, this could be justified in the general interest, on the grounds of promoting the education of children. A compliance direction would be issued based on evidence of unreasonable behaviour on the part of the academy trust and would be limited in scope to the single use of a contractual power, with the trust given the opportunity to make representations in all but exceptional cases, such as when a direction must be issued urgently to prevent harm, making this a proportionate means to achieve a legitimate aim.

235. We expect the circumstances in which we would issue a compliance direction against a trust acting in a private capacity to be rare. As an example of using the compliance direction against a private act, there may be circumstances in which a trust is proposing to generate or spend private revenue in an unreasonable way. In those circumstances there may be an interference with the trust's A1P1 rights if a compliance direction was issued.

236. When the power is used in these circumstances, the proportionality of issuing a compliance direction must be carefully assessed and we will only issue a direction when it was judged to be proportionate to the benefit to the public in issuing a

direction. Protection against misuse of the power is provided by the ability of the trust to make representations prior to being issued with a direction and by challenging the issuing of a compliance direction by judicial review.

Clause 44: Repeal of duty to make Academy order in relation to school causing concern

237. This measure converts the Secretary of State's existing duty to issue an academy order to maintained schools assessed to be in a statutory category causing concern to a discretionary power.

238. The Department does not consider any ECHR rights to be engaged by this measure because local authorities are public bodies not capable of having Convention rights. Local authorities as public bodies must conduct their duties in accordance with the ECHR. In some maintained schools land is held by a third party non-governmental organisation, known as a foundation trust or foundation body. The Department does not issue transfer directions in respect of privately funded land owned by foundation trust/bodies during the academisation process so there is no A1P1 interference. There is statutory provision for compensation for any deprivation of property or interest that is not publicly funded, so there is no A1P1 interference should that policy change.

Teachers' pay and conditions

Clause 45: Extension of statutory pay and conditions arrangements to Academy teachers

239. This measure extends the scope of the Secretary of State's power to determine pay and other employment conditions to school teachers in all academy schools and alternative provision academies. At present, the Secretary of State determines pay in maintained schools after receiving a recommendation from the School Teachers Review Body. This measure will ensure that those impacted by the extension are appropriately consulted.

Article 1, Protocol 1

240. An Academy Trust's Funding Agreement enables it to set teacher's pay. The Department is of the view that this measure will not engage rights under A1P1 for the reasons explained in the paragraph above covering academies more broadly.

241. However, to the extent that an argument can be made that this measure does engage the A1P1 rights of academy trusts, the Department considers any potential interference would constitute a control of use, rather than a deprivation of property and can be justified as being in the general public interest, to ensure consistent pay in publicly funded schools and to help with recruitment by further professionalising the teaching profession by providing for consistent levels of pay. This is balanced against the private interests of trusts which in practice will suffer no or limited detriment as most already pay the same as in maintained schools. The measure is not intended to reduce pay or funding for academies.

242. Teachers' employment contracts will be altered as a result of this measure, so that the Secretary of State rather than the Academy Trust prescribes pay. The Department's view is that a teacher's contract of employment in this measure is unlikely to be a possession under A1P1 but if there is engagement with A1P1 rights, there is unlikely to be any interference as the policy intention is to avoid any reductions in pay. To further protect teachers there will be transitional provisions (to protect the estimated small number of teachers in academies in scope who currently earn more than those in maintained schools). The transition will be implemented via secondary legislation and we will need to ensure those transitional provisions are compatible with the ECHR when we make them (including ensuring any interferences with teachers' A1P1 rights are justified).

School places and admissions

Clauses 48 and 49: 48 – Power to direct admission: extension to Academies; 49 – Power to direct admission: additional triggers

243. Local authorities have the power to direct schools to admit individual children under ss. 96 and 97A of the School Standards and Framework Act 1998. This includes particularly extensive powers in relation to looked after children (LAC).

244. These clauses:

a. extend local authorities' powers of direction to cover academy schools;
b. give local authorities a new power to use s96 where the Fair Access Protocol (the process for securing school places for unplaced and vulnerable children and those who are having difficulty in securing a school place in-year) fails to secure a place for a child; and
c. enable the lowering of the threshold for directing admission in relation to previously looked after children (PLAC).

245. PLAC are children who were looked after until they became the subject of a Special Guardianship Order or a Child Arrangement Order.

246. Measure (c) will mean a local authority can direct admission of a PLAC in circumstances to be defined in the School Admissions Code: intended to be where parents have made at least one unsuccessful in-year application to a school which is a reasonable distance from the child's home and which provides suitable education, or the local authority has confirmed that there are no places available at any such school. LAC will continue to be subject to more extensive powers which allow the local authority to direct to any maintained school in the country, and now any academy, from which the child has not been permanently excluded. For other children, who are not LAC or PLAC, the current arrangements are unaffected by this clause and so local authorities will continue to direct admission only where a relevant child has been refused admission by and/or permanently excluded from every suitable school within a reasonable distance of their home.

Article 14 together with Article 2, Protocol 1

247. The threshold for a local authority to direct a PLAC into a school will be lower than that for non-LAC/non-PLAC and the threshold for directing a LAC will be lower still. Non-LAC/non-PLAC may therefore be out of school longer than their counterparts, arguably affecting their right to education per A1P2. However, there is a clear difference between those who are or have been in care and those who have never been. On the other hand, LAC and PLAC could be said to be in an analogous situation in that they are both more likely than their counterparts to have experienced disrupted learning and to face emotional issues.

248. The lower threshold for LAC than PLAC amounts to a proportionate interference with the A14 rights of a PLAC child in respect of A2P1, justified with reference to the legitimate aim of the need to ensure that LAC can secure school places when they are urgently placed in care. If they are not placed in a suitable school quickly, that care placement may break down. For example, if a LAC in Essex needs a care placement and one is found in Sussex, Essex needs the power to secure a school place in Sussex urgently so the child can take up the placement as soon as possible, whereas PLACs are less likely to need urgent placement, as by definition they have a guardian or a parent who is subject to a child arrangement order.

249. The objective of swiftly placing LAC outweighs any Article 14 interference with the rights of PLAC. It would not be necessary to give local authorities identical powers for PLACs as with LACs given that PLACs do not face the same risk of the breakdown of a care placement due to the lack of a local school place and therefore the interference is a proportionate means of achieving a legitimate aim.

Establishment of new schools

Clauses 51 to 55: Establishment of new schools

250. These clauses makes changes to the legal framework that local authorities and others follow in order to open new state-funded schools. Among other changes, it removes the requirement for a local authority to first seek proposals for the establishment of an academy when a new school is needed in its area.

251. The Department does not consider any Convention rights to be engaged by these clauses because local authorities are public bodies not capable of having Convention rights. Local authorities as public bodies must conduct their duties in accordance with the ECHR. The ability of private persons to initiate the establishment of new schools is not reduced by this measure and in some respects is increased, and in any event does not engage their Convention rights.

Position under the United Nations Convention on the Rights of the Child (UNCRC)

252. This Bill supports the ongoing implementation of the UK's commitments under the United Nations Convention on the Rights of the Child (UNCRC).

253. The Bill's provisions make various changes which aim to strengthen the school system in England to ensure that all children have access to good quality education, fulfilling the core commitment in Article 28 UNCRC.

254. Individual provisions of the Bill more specifically further the implementation of UNCRC obligations, such as measures to encourage regular attendance at school (in particular clauses 22 to 27), in line with Article 28(1)(e). Clauses 42 to 47 strengthen the enforcement of appropriate standards in academy schools and those in clauses 28 to 35 in respect of independent educational institutions, in line with Article 3(3) UNCRC.

255. Measures which provide for the sharing of information about children engage article 16 of the UNCRC, but are compatible with it for the same reasons that they are compatible with Article 8 of the ECHR.

256. To the extent that this bill protects the safety and welfare of children it enhances rights under the Convention. There are no measures which risk breaching international obligations.