

SCHOOLS BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

MEMORANDUM BY THE DEPARTMENT FOR EDUCATION

Summary of the Bill

Part 1: Academies

This Part:

- a. Creates a statutory framework setting out obligations on Academy Trusts including many of those which are currently imposed on Academy Trusts by contractual documents including an Academy Trust's funding agreement.
- b. Provides the Secretary of State with powers to intervene in an Academy Trust's operation of its Academies.
- c. Provides for existing contractual powers of termination to be put onto a statutory footing and introduces new trust-level powers of termination.
- d. Confers on the Secretary of State a power to make regulations setting out specific governance requirements for academy schools designated with a religious character.
- e. Contains requirements for the provision of collective worship and religious education to pupils attending academy schools with a religious designation.
- f. Requires the Secretary of State to designate by order academy schools as grammar schools where their existing admission arrangements meet certain criteria and adjust the way in which selective admission arrangements in such schools can be removed.
- g. Extends the circumstances under which the Secretary of State may issue an Academy Order for the purpose of converting a maintained school to an academy school.
- h. Requires local authorities to transfer the land to site trustees where they provide a new site for a church academy school.

Part 2: Schools Funding

This Part:

- a. Confers on the Secretary of State responsibility for determining the funding allocation for state-funded schools in England in accordance with the National Funding Formula.
- b. Provides for particular aspects of school funding to be determined at local authority level.

Part 3: School attendance and children not in school

This Part:

- a. Provides for the registration by local authorities of children of compulsory school age who are not educated full-time at schools.
- b. Places a duty on parents to provide local authorities with certain information for such a register with sanctions for non-compliance in the form of a monetary penalty.
- c. Requires local authorities to provide support, if requested, to parents of children on such a register.
- d. Makes changes to the school attendance order regime in section 437 of the Education Act 1996, including extending the criminal offence.
- e. Imposes on local authorities a new duty to ensure that their functions are exercised with a view to promoting school attendance.
- f. Imposes on proprietors of schools a new duty to ensure that policies to promote regular attendance are pursued at the school and that this is contained in a publicised written policy.
- g. Extends the Secretary of State's power to make regulations about leave of absence to include certain schools that are academy schools.
- h. Amends the regulation-making power in relation to the giving of penalty notices.

Part 4: Independent Educational Institutions

This Part:

- a. Expands the category of institutions that are subject to the regulatory regime under the Education and Skills Act 2008 to include institutions which provide a narrow education and defines what "full-time education" for the purposes of this regime.
- b. Confers on the Secretary of State a power to set standards enabling him to reject proprietors on the basis that they are not fit and proper.
- c. Confers on the Secretary of State a power to impose a restriction on how a proprietor operates an independent educational institution where an unapproved material change takes place.
- d. Confers on the Secretary of State a power to suspend the registration of an independent educational institution where there are breaches of the independent educational institutional standards which cause him to consider that there is a risk of harm to students.
- e. Creates a criminal offence of continuing to operate an independent educational institution while registration is suspended.
- f. Amends section 124 of the Education and Skills Act 2008 to change the basis upon which a court determines a statutory appeal against certain decisions to remove an independent educational institution from the register of independent educational institutions under section 116 of that Act from a full-merits review to a judicial review.
- g. Amends the material change regime contained in the Education and Skills Act 2008 such that it treats all independent educational institutions consistently.

- h. Expands the existing powers of the Chief Inspector and introduces new powers to further the investigation, prosecution and sentencing of offences committed under Chapter 1 of Part 4 of the Education and Skills Act 2008 in relation to unregistered and registered independent educational institutions.
- i. Provides for the sharing of information between the Chief Inspector and an independent inspectorate.

Part 5: Miscellaneous and general

This Part:

- a. Widens the jurisdiction of the Teaching Regulation Authority to cover more teachers.

European Convention on Human Rights

1. The Parliamentary Under Secretary of State (Minister for the School System) will make 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, on introduction of the Bill in the House of Lords.
2. The following section includes an analysis of Convention issues in relation to particular provisions. We have mentioned for information where potential Convention issues arise in relation to policies that will be given effect by the exercise of powers under the Bill. The Department will undertake further analysis on compliance with the ECHR when making secondary legislation under these powers.

Summary of key ECHR issues under the Bill

Part 1:

- a. **The status of Academy Trusts under the ECHR and Human Rights Act 1998:** the Department considers it unlikely that an Academy would be considered a victim under the ECHR and HRA 1998 (see paragraphs 4 to 7).
- b. **Unilateral voiding of contract terms and replacement with statutory provisions** (*clauses 1, 2, 7, 19-27 and 30*): the Department considers that any interference under Article 1 Protocol 1 is justified as in the public interest and that appropriate safeguards are in place such that the provisions comply with the ECHR (see paragraphs 8 to 35).
- c. **Termination of Academy agreements and Academy framework agreements** (*clauses 8-18*): the Department considers that any interference under Article 1 Protocol 1 is justified as in the public interest and that appropriate safeguards are in place such that the provisions comply with the ECHR (see paragraphs 35 to 49).
- d. **Intervention powers imposing a legally enforceable restriction or requirement on how an Academy Trust operates and uses its property** (*clauses 5 and 6*): the Department considers that any interference with control of use of possessions under Article 1 Protocol 1 is justified as in the public interest and compliant with the ECHR (see paragraphs 50 to 57).
- e. **Intervention powers which impact the operation of a charity** (*clause 5*): the Department considers that, to the extent that an intervention amounts to the determination of a civil right, the availability of judicial review is sufficient for compliance with Article 6 (see paragraphs 58 to 60).
- f. **Academy schools with a religious character: education in conformity with religious and philosophical convictions** (*clauses 19-27*): the Department considers that these clauses are compliant with, and promote the principles of, Article 9 and Article 2 Protocol 1 (see paragraphs 61 to 62).

- g. **Academy schools with a religious character: differential treatment on the basis of religion** (*clauses 19-27*): The Department considers that there is an objective and reasonable justification for any differential treatment under these clauses and that the provisions comply with Article 14 (see paragraphs 63 to 70).
- h. **Academy grammar schools: differential treatment on the basis of ethnic background or disability** (*clause 28*): the Department considers that the risk of such differential treatment is not well-evidenced and, in any case, there is an objective and reasonable justification for any differential treatment and that these provisions comply with Article 14 (see paragraphs 71 to 74).
- i. **Transfer of land** (*clauses 29-30*): the Department considers that any interference with Article 1 Protocol 1 is justified as in the public interest (see paragraphs 75 to 79).

Part 2:

- a. **Change to expected funding provision**: the Department considers that any interference with Article 1 Protocol 1 is justified as in the public interest (see paragraphs 80 to 87).
- b. **Difference in funding provision for special schools and pupil referral units**: the Department considers that there is an objective justification for any difference in funding allocation for pupils with special educational needs and disabilities and that these provisions comply with Article 14 (see paragraphs 88 to 91).

Part 3:

- a. **Requirement of children to attend school in certain circumstances** (*clauses 48-51*): the Department considers that any interference with Article 8 or Article 9 is necessary and proportionate in the interests of protection of the right of a child to an education and for the protection of health and morals. The Department also considers that these clauses comply with Article 2 Protocol 1 (paragraphs 92 to 97).
- b. **Sharing of information** (*clause 48*): the Department considers that any interference with Article 8 is necessary and proportionate for the protection the right of children to an education and to protect health and morals through safeguarding (paragraphs 98 to 99).
- c. **Prosecution of parents for failure to comply with a school attendance order** (*clause 50*): the Department considers that this clause is compatible with Article 6 (paragraphs 100 to 101).
- d. **Penalty for failure to provide information or providing incorrect information** (*clause 48*): the Department considers that there are sufficient safeguards in place such that this framework is compatible with Article 6 (paragraphs 102 to 105).

Part 4:

- a. **Determination of the right to run a private school and other civil rights** (*clauses 56-62*): the Department considers that these clauses are compatible with Article 6 (paragraphs 106 to 113).
- b. **Education in accordance with religious beliefs or parental wishes**: the Department considers that any interference with Article 8, Article 9 or Article 2 Protocol 1 is necessary and proportionate in pursuit of legitimate aims (paragraphs 114 to 116).
- c. **Regulation of the use of land to provide education**: the Department considers that any interference with rights under Article 1 Protocol 1 is justified as in the public interest (paragraphs 117 to 118).
- d. **Disproportionate impact on certain religious institutions**: the Department considers that there is a rational justification for any difference in treatment in compliance with Article 14 (paragraphs 119 to 120).
- e. **Requirement to provide information to Chief Inspector** (*clause 63*): the Department considers that this provision is compatible with Article 6 as regards the privilege against self-incrimination (paragraphs 121 to 123).
- f. **New offences of obstruction etc** (*clause 63*): the Department considers that the provisions for the prosecution of new offences are compatible with Article 6 (paragraph 124).
- g. **Exercise of search powers on residential premises** (*clause 63*): the Department considers that any interference with Article 8 is proportionate and necessary in pursuit of legitimate aims including the right of a child to an education and the protection of health and morals through safeguarding (paragraphs 125 to 129).
- h. **Exercise of powers to seize evidence and require documentation** (*Clause 63*): the Department considers that any interference with Article 1 Protocol 1 is justified as in the public interest (paragraphs 130 to 133).

Part 5:

- a. **Interference with the right to practise the teaching profession** (*clause 65*): the Department considers that any interference with Article 8 is necessary and proportionate for the protection the right of children to an education and to protect health and morals through safeguarding (paragraphs 136 to 138).
- b. **Determination of right to practise the teaching profession** (*clause 65*): the Department considers that the conduct panel process is compatible with Article 6 (paragraphs 139 to 141).

Preliminary: The Schools Bill and Article 2 Protocol 1

1. There is an argument that the Schools Bill, in many of its provisions, engages the first sentence of Article 2 Protocol 1 (“No person shall be denied the right to education.”), especially where clauses may have an impact on the nature of an educational institution or the type of education a child receives.
2. The Department is of the view that Article 2 Protocol 1 is not in fact engaged in this way because it does not entitle a person to a specific type of education, or to be educated at a particular type of school.¹ It entitles a person to non-discriminatory access to the sort of education provided generally by the state. The Department considers that all provisions in the Bill are compatible with this right.
3. Compatibility with Article 2 Protocol 1 is therefore only analysed in detail below where the right of parents to ensure education in conformity with their religious and philosophical convictions is engaged.

¹ *Ali v Headteacher and Governors of Lord Grey School* [2006] UKHL 14

Part 1: Academies

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

4. Academy Trusts are independent charitable companies. Case law has not established whether they would be afforded victim status for the purposes of Article 34 of the Convention and [§ 7\(7\) of the Human Rights Act 1998](#). To be a “victim”, one has to be “any person, non-governmental organisation or group of individuals ...”.
5. In order to determine whether any given legal person falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out the context in which it is carried out, and the degree of its independence from the political authorities² As far as companies are concerned, the courts has considered a company to be “non-governmental” for the purposes of Article 34 where it was governed essentially by company law, did not enjoy in the exercise of its activities any governmental or other powers beyond those conferred by ordinary private law, and was subject to the jurisdiction of the ordinary rather than the administrative courts.
6. Academy Trusts clearly carry out functions of a public nature. In terms of independence from the state, whilst they are able to raise money privately, the majority of their funding comes from the Government and they are subject to a significant degree of control by the Government as to how they carry out their public functions. It is also widely accepted that the acts or omissions of an academy trust are, in principle, amenable to judicial review. In addition, although it has not been determined by the courts, the Department acknowledges that Academy Trusts are highly likely to be considered hybrid public authorities for the purposes of section 6 of the Human Rights Act 1998. For a body to be a hybrid public authority, some but not necessarily all, of its functions must be of a public nature (section 6(3)(b) HRA 1998).
7. 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. The Department recognises, however, that there are arguments that could be made to the contrary and, in the absence of case law clarifying the position, considers it necessary to assess the possible ECHR implications for academy trusts as set out below.

Unilateral voiding of contract terms and replacement with statutory provisions

Clauses 1 and 2: Academy Standards

8. Clause 1 confers on the Secretary of State the power to prescribe mandatory standards in relation to Academies. Clause 2 provides that, where a requirement of such standards relates to the same subject matter and is broadly equivalent to a provision contained in an agreement

² (Radio France and Others v. France (dec.), § 26; Kotov v. Russia [GC], § 93; Slovenia v. Croatia [GC] (dec.), § 61).

with an Academy Trust or a Multi-Academy Trust, the contractual provision is void. Together, these clauses engage Article 1 Protocol 1 (the right to peaceful enjoyment of possessions).

9. A contract between an Academy Trust and the Secretary of State is likely to amount to a possession attracting the protection of Article 1 Protocol 1. Clauses 1 and 2 unilaterally interfere with contractual agreements, which removes property from the Academy Trust's control to the control of Parliament or the Secretary of State. The effect of this is that the Trust will lose contractual bargaining power for certain matters and under the statutory regime there are further grounds on which action can be taken against Trusts in the event of a breach of academy standards requirements.
10. However, the Department considers that any interference is limited by several factors. While moving the majority of requirements from contract to statute is not something that Trusts are likely to have expected to occur at the time they entered into contractual agreements with the Secretary of State, the imposition of statutory requirements on Trusts is common practice.
11. The provisions which the Department intends to place into legislation will largely be based on the existing model funding agreements which form the basis of an Academy Trust's contractual relationship with the Secretary of State. The degree of interference may depend slightly on when a Trust entered into a funding agreement: the alignment between standards and contractual provisions will be greatest where an agreement is based on the most recent model funding agreement and the interference will arguably be correspondingly lesser.
12. Furthermore, Trusts will not be deprived of their capacity determine how they meet their obligations, or to their rights to bring a legal claim determined under existing law. Trusts will also retain the existing contractual right to terminate the funding agreement on 7 years' notice on a no-fault basis.
13. We do not consider that these measures will impact on the contracts Trusts have with third parties as the requirements imposed on Trusts will broadly remain the same and we expect the operational impact of moving the requirements from a contractual to a statutory footing to be minimal. This position reflects the current policy intention which is broadly to replicate the existing requirements on trusts, as set out in our White Paper³. However, for those provisions being moved to secondary legislation, there will be the possibility for the power to be exercised to achieve different outcomes in the future. However, such secondary legislation would require the Department to undertake further analysis on ECHR compliance.
14. Interference with the peaceful enjoyment of possessions can be justified on the basis that it is in the public interest. The Department considers that these clauses are necessary in the public interest in developing an educational system that provides consistency for both providers and users, with the aim of improving educational standards. The Secretary of State's

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063602/Opportunity_for_all_strong_schools_with_great_teachers_for_your_child__print_version_.pdf

ambition is to provide such consistency and improvement by moving the school system towards full academisation.

15. There is also a public interest in building confidence in the education system, in particular, that the Secretary of State is seen as having the appropriate powers to ensure that he can satisfy the duties set out above.
16. The Secretary of State has a general duty to promote the education of the people of England and Wales ([s.10 Education Act 1996](#)) and to improve standards in schools ([s.11 Education Act 1996](#)).
17. Although the case centred on Article 2 Protocol 1 rather than Article 1 Protocol 1, improving the standard of education has been held to constitute a legitimate aim (*Kilic v Turkey* App no. 29601/05 (ECtHR, 5 Mar 2019)). The Department believes that such improvement would also be considered to be in the general interest within the meaning of Article 1 Protocol 1 given the wide range of interests which have been held to be such: for example, the protection of morals (*Handyside v UK* [1976] ECHR 5493/72 (7 December 1976)), the elimination of social injustice (*James and others v UK* App no 8793/79 (ECtHR, 21 Feb 1986)), the protection of the environment (in numerous cases).
18. In this context, the Department considers that these clauses are necessary to improve how requirements are imposed on Academy Trusts by establishing a mechanism that enables the Secretary of State to uniformly update the requirements of Trusts; efficiently improve educational standards; bring greater clarity to the matters that Trusts are required to comply with, and ensure public confidence in the Academies programme and the equitable treatment of Academies. These are all matters within the public interest.
19. The shift from fixed contractual requirements to amendable statutory requirements will enable the Government to respond (with appropriate Parliamentary scrutiny of any new requirements) to a need for improvement in, for example, the quality of academy management and governance, teacher qualifications, the curriculum, or exclusion of pupils.
20. As public bodies responsible for providing education, Trusts accept that they operate within a system that demands a flexible response to the changing needs of schools and pupils and to policy developments. Currently, the Department updates its key model governing documents approximately every 12-18 months. In addition to such updates, generally, educational providers can and should expect the Government to periodically review and implement systemic changes in the public interest and to satisfy statutory duties. Given this system, Trusts could not reasonably have expected the system to remain settled or significantly unchanged.
21. As regards procedural safeguards to protect Trusts' rights, the Department intends to engage widely with the sector to raise awareness of the changes and allow a sufficient notice period before the changes are implemented. As part of the Schools White Paper the Department engaged key stakeholders including the Charity Commission, Confederation of School Trusts and the main faith education bodies.

22. Statutory guidance will be produced, intended to support Trusts with discharging their statutory functions and meeting the Secretary of State's expectations.
23. Going forward, Trusts will continue to have the opportunity to contribute to the process for updating the requirements as the regulations are likely to be updated every 2-3 years. When exercising a power to make these regulations, the Secretary of State will be required to comply with the provisions of the ECHR.
24. Given the legitimate aim of improving the standards of state education through introducing greater legal clarity, consistency and efficiency, the Department considers that these clauses are compliant with the ECHR and that the power under clause 1 can be exercised in an ECHR compliant manner.

Clauses 19-27: Academy Schools with a religious character: governance; collective worship and religious education

25. The considerations which apply to clauses 1 and 2 apply similarly to these clauses. Article 1 Protocol 1 is engaged by the replacement of contractual provisions relating to governance, collective worship and religious education in academy schools with a religious designation with statutory provisions.
26. The analysis in paragraphs 13-18 and 20-21 above is applicable to these clauses. Additionally, the measures pursue the legitimate aim of ensuring that the religious ethos of a faith academy is reflected and supported through its governance arrangements, teaching and facilitation of children's engagement with their faith through collective worship.
27. The Department will engage with the sector and provide a sufficient notice period before implementing these changes. Decisions taken in respect of governance, collective worship and religious education will ultimately be amenable to judicial review
28. The Department considers that the provisions are compliant with the ECHR and the powers they confer can be exercised in an ECHR compliant manner.

Clause 28: Academy grammar schools

29. The considerations which apply to clauses 1 and 2 apply similarly to clause 29. Article 1 Protocol 1 is engaged by the replacement of contractual provisions relating to selective admissions arrangements with statutory provisions. This will largely involve replicating in legislation rights and obligations which are currently contained in funding agreements, but the provision in such agreements for an Academy Trust to initiate the ending of selective admission arrangements will also be unilaterally voided without an equivalent legislative provision being put in place.
30. The analysis in paragraphs 13-18 and 20-21 above is applicable to these clauses. In addition,

the Government's overarching public policy aim is to support the existence and work of the 163 grammar schools that exist, and in particular in relation to their capacity to enhance social mobility. Grammar schools play an important role in the school system and will continue to do so in the future. Grammar schools are popular with families – being constantly oversubscribed – and provide an excellent education – 99% of them are rated Good or Outstanding and 75% are Outstanding.

31. As regards procedural safeguards to protect Trusts' rights, we will engage with the sector to raise awareness of the changes and allow a sufficient notice period before the changes are implemented. Further, decisions taken in respect of designating academy grammar schools or removing grammar school status will ultimately be amenable to judicial review.
32. The measures are considered to be proportionate, and to strike a fair balance between the general interest of the community and the private interest of Trusts. The Department considers that the provisions are compliant with the ECHR and the powers they confer can be exercised in an ECHR compliant manner.

Clause 7: Powers to appoint or require appointment of directors

33. Clause 7 arguably engages Article 1 Protocol 1 as it will override the terms of a Trust's Articles of Association (a contract) in relation to the appointment, removal and remuneration of trustees.
34. The intention is for this power to be used where the Academy Trust has failed to address the weaknesses in the Notice to Improve but where the Secretary of State is satisfied that the Trust has the capacity to address the issues with the assistance of the additional trustees. The Department considers this a proportionate measure for these circumstances.
35. The Department considers that any such interference is likely to be limited and would amount to a control of use, rather than a deprivation of property and would be capable of being justified in accordance with general public interest.

Termination of Academy agreements and Academy framework agreements

Clauses 8 – 18: Academy agreements and Academy framework agreements: termination

36. These clauses engage Article 1 Protocol 1 in that they unilaterally amend all funding agreements, which amounts in itself to an interference with the peaceful enjoyment of property (a contract) for the purposes of Article 1 Protocol 1.
37. The substantive effect of these unilateral amendments will also potentially engage Article 1 Protocol 1 because they will expand the circumstances in which the Secretary of State may terminate funding agreements. For many Academy Trusts they will also change the procedure

for, and consequences of, termination. These provisions are likely to amount to the most significant interference with Article 1 Protocol 1 rights in the Bill.

38. The most significant changes to the existing termination provisions are summarised below. In view of the fact that these provisions are expressly designed to allow the Secretary of State to terminate funding agreements, it is acknowledged that the interference could potentially amount to a deprivation of property for the purposes of A1P1.

Termination on grounds other than Ofsted Inadequate

39. Since 2016, by virtue of section 2A of the Academies Act 2010, all funding agreements are deemed to include a standard provision allowing the Secretary of State to terminate a funding agreement if the relevant academy has been rated Inadequate by Ofsted. All funding agreements, regardless of when they were entered into, allow the Secretary of State to terminate on grounds other than Ofsted Inadequate but those grounds have been expanded over the years and the procedure for termination has become more favourable to the Secretary of State over time.

Adding new termination provisions to the Master Funding Agreement

40. At present, Master Funding Agreements (funding agreements with Multi-Academy Trusts relating to all schools within the Trust) can only be terminated on limited grounds relating primarily to the solvency of the Academy Trust or the suitability of the trustees. These clauses provide for a series of new termination powers that will allow the Secretary of State to terminate the MFA on the following grounds:
- a. Where the Academy Trust has breached the provisions of the Funding Agreement;
 - b. Where there has been a serious breakdown in the management or governance of the Academy Trust;
 - c. Where the safety of the pupils or staff is threatened at one or more of the Academies in the Academy Trust;
 - d. Where the Academy Trust has failed to comply with a direction issued by the Secretary of State;
 - e. Where the Secretary of State is satisfied that any weaknesses identified in a Notice to improve have not been sufficiently addressed.
41. The above will apply to all Master Funding Agreements and Single Funding Agreements for the first time and will represent a significant change to the legal position by extending the circumstances in which the Secretary of State may terminate a Master Funding Agreement and transfer all schools out of a failing Academy Trust.
42. Although Article 1 Protocol 1 contains no explicit procedural requirements, it has been construed to mean that persons affected by a measure interfering with their “possessions” must be afforded a reasonable opportunity to put their case to the responsible authorities for the purpose of effectively challenging those measures (pleading, as the case might be,

illegality or arbitrary and unreasonable conduct) and that these guarantees are inherent in the principle of lawfulness (*Lekić v. Slovenia* App no 36480/07 (ECtHR, 11 Dec 2018) § 95).

43. A number of procedural safeguards are in place to ensure the powers are exercised lawfully. Firstly, save for where the Academy Trust has breached the funding agreement or where there has been a serious breakdown, the new termination powers will be the final step in a series of interventions. Academy Trusts will therefore have had a reasonable opportunity to avoid termination proceedings being commenced. Secondly, the procedure for termination under the new powers requires the Secretary of State to serve a Termination Warning Notice affording the Academy Trust a further opportunity to address the concerns and/or make representations challenging termination before the FA is terminated. This ensures that their exercise is proportionate.
44. Lastly, where funding agreements are terminated under the new powers, the Secretary of State intends to continue to apply the current policy of considering indemnities or paying compensation to the Academy Trust, in appropriate circumstances. The Department is satisfied that these procedural safeguards and the availability of compensation means that a fair balance can be struck between that general or public interest and those of the Academy Trust (see *Howard v United Kingdom* App no 10825/84 (ECtHR, 16 Jul 1987)).
45. The Department considers that the interference with the rights outlined above can be justified on the basis of the public interest in developing an educational system that provides consistency for both providers and users, with the aim of improving educational standards, protecting pupils and staff and creating a stable education (see paragraphs 14-17 above).
46. The new powers are essential to strengthen the legislative framework regulating the Academies system as the academy sector grows and Academy Trusts become the predominant suppliers of education. Currently, Academies are regulated through Funding Agreements and intervention powers are concentrated at school and not trust level. This means that the Secretary of State's ability to take action is limited to where a trust is not delivering for the individual Academies within it to an extent that warrants intervention at a single academy level: systemic failure is hard to address. This also means that cases of Academy Trust failure can become protracted, risking the provision of education and costing significant amounts of public funds. The Department does not currently have powers to remove a good school from a failing trust so the performance of these schools is at risk of decline the longer an Academy Trust remains in a concerning state. Additionally, protracted cases of Academy Trust failure can cause reputational damage to the sector and the government.
47. The Secretary of State has a general duty to promote the education of the people of England and Wales (s.10 Education Act 1996) and to improve standards in schools (s.11 Education Act 1996). There is also a public interest in building confidence in the education system. In particular, it is important that the Secretary of State is seen as having the appropriate powers to ensure that he can satisfy the duties set out above.

48. As regards procedural safeguards, we will engage widely with the sector to raise awareness of the changes and allow a sufficient notice period before the changes are implemented. Statutory guidance will be produced, intended to support Trusts with discharging their statutory functions and meeting the Secretary of State's expectations. Further, decisions taken in respect of such requirements will ultimately be amenable to judicial review. The measures are considered to be proportionate and to strike a fair balance between the general interest of the community and the private interest of Trusts.
49. Given the legitimate aim of improving the standards of state education through consistency and efficiencies, we consider that the provisions can be exercised in an ECHR compliant manner.

Intervention powers imposing a legally enforceable restriction or requirement on how an Academy Trust operates and uses its property

Clause 5: Power to give compliance directions

50. This clause engages Article 1 Protocol 1 to the extent that the issuing of a direction imposes a legally enforceable restriction or requirement on how an Academy Trust operates and uses its property.
51. The Secretary of State will have the power to direct the Academy Trust to take or not take specified action as the Secretary of State considers to be necessary and proportionate for the purposes of enforcing the performance of the relevant duty in a reasonable way. The bar for intervention on the grounds of an unreasonable exercise of a duty is high (Wednesbury unreasonableness).
52. While there are circumstances in which the issuing of a direction could interfere with a right protected by Article 1 Protocol 1, such as if the Secretary of State issues a direction to prevent expenditure which would amount to a breach of the Academy Standards Regulations, the Secretary of State will nevertheless be under a duty to exercise the power in [an ECHR-compatible way](#) and issue such a direction only where it is proportionate in the public interest.
53. Any such interference is likely to amount to a control of use, rather than a deprivation of property and would not amount to a breach of Article 1 Protocol 1 where it is justified in accordance with general public interest (see paragraphs 14-17 above).

Clause 6: Power to give a notice to improve

54. This clause engages Article 1 Protocol 1 as subsections (5) and (6) provide specifically for financial restrictions resulting from the issue of a Notice to Improve, in particular a requirement for an Academy Trust to seek the Secretary of State's permission before entering into certain transactions or certain types of transactions. A Notice to Improve may therefore amount to a control of use of property.

55. As a safeguard, the Secretary of State must give notice of the Notice to Improve and allow the Academy Trust to make representations before it is formally issued. This will afford an opportunity for the Academy Trust to agree to remedy the weaknesses before any restrictions are imposed or to make representations challenging the Notice. This ensures that such a Notice is only given where a Trust has not used this opportunity to address a weakness and the Notice is therefore necessary.
56. The Secretary of State must exercise this power in a way which is compatible with the ECHR. In particular, restrictions can be tailored such that they are proportionate to the seriousness of the identified weakness(es) and the Secretary of State's discretion in refusing or granting permission to enter into certain transactions must be justified and reasonable.
57. Given the general public interest in improving consistency and standards in education (see paragraphs 14-17 above), the Department considers that that clause 6 is compliant with the ECHR and that the power it confers can be exercised in an ECHR compliant manner.

Intervention powers which impact the operation of a charity

Clause 5: Power to give compliance directions

58. Clause 5 also arguably engages the civil limb of Article 6 (right to a fair trial) as a direction could have a significant effect on the operation of a charity, which could amount to a determination of a civil right.
59. The Department considers that judicial review (rather than a full-merits appeal) in these circumstances is sufficient, since a challenge is more likely to turn on the exercise of a policy judgement: whether it is appropriate to exercise the powers in the circumstances, rather than on a question of fact⁴.
60. the Department considers that clause 5 is compliant with the ECHR and that the power it confers can be exercised in an ECHR compliant manner.

Education in conformity with religious and philosophical convictions

Clauses 19-27: Academy Schools with a religious character: governance; collective worship and religious education

61. These provisions promote the fundamental principle in Article 9, in which there is explicit recognition of the importance of religion and devotion to individuals, as well as the objective of Article 2 of Protocol 1, which requires the state to respect the rights of parents to ensure

⁴ *Bryan v The United Kingdom* (1995) 21 EHRR 342; *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 A.C. 430; *Tsfayo v United Kingdom* [2006] All ER D 177

teaching which conforms to their religious and philosophical convictions. States enjoy a considerable margin of appreciation concerning matters relating to the relationship between the state and religions and the significance to be attached to religion in society, particularly where these matters arise in the sphere of teaching and state education⁵.

62. Sixth-form students can request to be excused from collective worship and religious education is not compulsory beyond compulsory school age. There is no legislative right for pupils younger than sixth-form age to withdraw themselves from religious education or worship (as is the case in existing maintained school legislation). However, the Department does not consider that there is any infringement of Article 2 Protocol 1 in this as the article itself says (our underlining): *“In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”*.

Academy schools with a religious character: differential treatment on the basis of religion

Clauses 19-27: Academy Schools with a religious character: governance; collective worship and religious education

63. The Department considers these clauses to be compliant with Article 14. The Department considers it arguable that these provisions are within the ambit of Article 9 because of the direct link to religion given that the purposes of the provisions are to secure the religious ethos of an Academy school and ensure the provision of religious worship and education.
64. The Department acknowledges that these provisions potentially allow for differential treatment between those in an analogous position on the basis of religion. Where an academy is a designated faith academy, a pupil of that faith may be treated more favourably than a pupil not of that faith as they are able to access education at a school whose ethos aligns with their faith. This arguably the case in particular in relation to those who subscribe to Christian faiths since Catholic and Church of England schools make up the vast majority of faith schools. Clauses 19 and 20 contemplate a situation where trustee, member or staff appointments (or their termination) are made with religious body input. It is therefore likely that those of the same faith as the faith academy may be treated more favourably in being preferred for appointment to such posts than those who are not of the relevant faith.
65. The Department’s view is that there is an objective and reasonable justification for any differential treatment.
66. The clauses pursue the legitimate aim of ensuring that the religious ethos of a faith academy is reflected and supported through its governance arrangements, teaching and facilitation of children’s engagement with their faith through collective worship. This supports the social

⁵ Page 42 of the ECHR’s [guide](#) on Article 9.

policy of allowing religious education, which brings plurality and diversity to the education system.

67. It is considered that this aim is sufficiently important because the United Kingdom has a strong tradition of faith schools as, historically, religious bodies largely provided education. There remains significant demand from parents for education for their children which is in accordance with their religious and philosophical beliefs and the significant proportion of religious designated schools in the sector reflects this. The existence and operation of schools designated with a religious character is a key social policy objective, which has been enshrined in legislation. For example, and importantly, there are well established exemptions in legislation allowing faith schools to operate with a religious ethos, with key exemptions set out in the Equality Act 2010. The provisions contemplated are intended to operate within the ambit of the Equality Act 2010 and not create any additional exceptions.
68. The clauses also provide reassurance to stakeholders concerned about the effect on the religious character of a faith school of joining a Multi-Academy Trust. This supports the legitimate aim, in the public interest, of supporting the Secretary of State's ambition for improving educational standards by moving the school system towards full academisation, led by strong Multi-Academy Trusts.
69. The Department considers that the provisions are rationally connected to the social policy objectives. The Department considers that providing for the security of the religious ethos of faith Academies in relation to governance arrangements, collective worship and religious education are a proportionate part of a structure that supports the important social policy of allowing religious education and facilitating proposals for full academisation.
70. The Department believes that it has struck an appropriate balance between the rights of the parents and children of the same faith as the religiously designated school and parents and children of other faiths attending the school: it is not compulsory for a child to attend a school with a religious designation and parents who do choose to send their children to a designated faith school can apply for their child to be excused from religious education and collective worship obligations.

Academy grammar schools: differential treatment on the basis of ethnic background or disability

Clause 28: Academy grammar schools

71. Through this measure we are arguably further entrenching the grammar school system (i.e. a system that allows schools to select pupils by high ability) by making it harder to remove selective admission arrangements.

While Article 2 Protocol 1 is not engaged on a standalone basis, there is a tenuous argument (in the Department's view) that Article 14 is engaged within the ambit of Article 2 Protocol 1 if argued that the entrenchment of the grammar school system in this way indirectly subjects those of certain ethnic backgrounds, and more tenuously, those with special educational

needs and disabilities to differential treatment. There is some evidence that those from white lower socio-economic backgrounds may be subject to differential treatment because they are less likely to pass grammar school entrance tests than those from minority ethnic backgrounds⁶. There is also some research that argues that children with special educational needs or disability are less likely to obtain a grammar school place⁷. However, it is unclear whether this research took into account the ability profile of applicants. DfE data shows that, if we look at only high ability SEND children, SEND pupils are proportionately represented.

72. The Department's view is that there is an objective and reasonable justification for any differential treatment, to the extent that differential treatment exists.
73. The measure relating to grammar schools pursues the legitimate aim of supporting the Secretary of State's public policy ambition for improving educational standards by moving the school system towards full academisation led by strong MATs. The Secretary of State has identified that to reassure stakeholders connected to grammar schools about the prospect of joining strong MATs, there is a need to provide legislative safeguards preventing an Academy Trust from proposing the removal of selection. The aim is also to prescribe a consistent and equal system common to all grammar schools about how their selective admission arrangements can be removed. This measure is therefore rationally connected to this legitimate aim. In addition, the Government's overarching public policy aim is to support the existence and work of the 163 grammar schools that exist, and in particular in relation to their capacity to enhance social mobility. Grammar schools play an important role in the school system and will continue to do so in the future. Grammar schools are popular with families – being constantly oversubscribed – and provide an excellent education – 99% of them are rated Good or Outstanding and 75% are Outstanding.
74. This measure also goes no further than is necessary to accomplish the objective. It is anticipated that very few Academy Trusts would wish to remove selective admissions but their ability to do so under current contractual arrangements acts as a real barrier to the Secretary of State's ambition to move as many schools as possible into strong Academy Trusts. The measure is therefore expected to have very limited operational impact while providing an important safeguard for grammar schools wishing to convert to Academy status. Finally, the department considers that it strikes a fair balance between the rights of the individual and the interests of the community because it puts the ability to remove selection democratically in the hands of parents who have the main interest in, and knowledge of the relevant schools, and allows existing grammar schools to continue in areas where there is this parental support for them.

Transfer of land

⁶ E.g. [Education Datalab demographic analysis](#)

⁷ [Gorrard and Siddiqui \(2016\) Grammar schools in England: a new analysis of social segregation and academic outcomes](#)

Clause 29: Local authorities: power to apply for an Academy order

75. A local authority cannot have victim status under Article 34. However, the Department believes that this clause arguably engages Article 1 Protocol 1 to a limited extent because the measure also enables an application for an academy order to be made by a local authority where that authority does not own the land on which the school is situated. This is most commonly the case with faith schools where trustees – often a Diocese or other religious body – hold the land on trust for the purposes of a school.
76. In such circumstances, the application for and the making of an academy order may interfere with the landowner's Article 1 Protocol 1 rights, as the academy order sets in train a process which can lead to the land's transfer to or occupation by another party such as an Academy Trust. However, where the land in question is privately owned, including by charitable trustees, even the making of an academy order cannot forcibly transfer that land out of that private ownership. There must be agreement on the part of the landowner for the land to be occupied by an academy.
77. Where the land in question is "publicly funded land" within the meaning of paragraph 22 of Schedule 1 to the Academies Act 2010, because it has been acquired or enhanced through the expenditure of public funds, there are already provisions in the Academies Act 2010 which enable the landowner to be compensated, should the Secretary of State take the unusual step of exercising his power to direct the transfer of the land to another party.
78. The measure contains no new provisions relating to land or other assets but will merely result in the application of provisions introduced by the Academies Act 2010.
79. The Department considers that on the occasions where it is necessary to compensate a landowner for the transfer of publicly funded land to an academy trust, there may still be an interference in a property right. However, the Department considers that the advancement of the academy conversion programme is in the public and general interest, as the purpose of the interference is to improve educational standards through creating more good schools (see paragraphs 14-17 above), and that the availability of compensation means that a fair balance can be struck between that general or public interest and those of the landowner – see *Howard v United Kingdom*.

Part 2: Schools Funding

Change to expected funding provision

80. It is arguable that Article 1 of Protocol 1 is engaged as school funding or the legitimate expectation that a certain amount of funding will be received by a school or group of pupils, could constitute a “possession” for the purpose of this right⁸.
81. Governing bodies of maintained schools and local authorities cannot have victim status, For the reasons set out at paragraphs 1-4 above the Department considers that victim status also does not extend to Academy Trusts. The Department recognises however that it might be argued in the absence of settled case law on the point that Academy Schools (and some early years providers) could be considered victims for the purposes of the Human Rights Act. We address that argument below for completeness.
82. A pupil or group of pupils in local authorities or schools whose funding has been adversely affected by the policy adopted could potentially fall within the definition of victim as this includes someone “*directly or indirectly affected*”⁹ by the alleged violation. However, the Department considers that this connection is remote and that the impact is rather on the governing body or proprietor of a school as opposed to individual pupils; to argue otherwise would undermine/subvert the will of Parliament in respect of [section 7\(7\) HRA](#).
83. Implementing a national funding formula to ensure that school funding is distributed in a fair consistent way, based on the needs of the pupil and accounting for the differing needs of differing parts of the sectors, is a legitimate aim in the public interest.
84. Providing flexibility in the system in respect of certain parts of the national funding formula, enabling local authorities to make decisions where that is deemed most appropriate, helps ensure that this is a proportionate means of achieving this aim.
85. The Department considers that any interference will be minimal and will be proportionate, as the Department’s position is that all schools will receive sufficient funding.

⁸ *In Špoljar and Dječji Vrtić Pčelice v. Croatia (dec.)*, §§ 38-46 the Court considered the applicants’ complaint, about not receiving the same amount of subsidies as public kindergartens, to be “manifestly ill-founded” since the private and public kindergartens were not in an analogous or relevantly similar position. The judgement did not directly discuss the extent to which such funding/subsidy could be a possession for a purpose of A1P1, but it seemed to be assumed that this was the case. *It is noted that welfare benefit is a possession falling within A1P1 for persons satisfying its requirements (Stec and Others v. the United Kingdom (dec.) [GC], § 54)*. School funding is not directly analogous as it is not an *individual* benefit but rather funding provided to institutions. But given that an essential characteristic of a “possession” is that there is economic value, the Department concedes it is possible that the court could extend this reasoning to *access to childcare and educational settings/school funding* given that this could be construed to entitle the applicant to a real economic benefit (e.g. entitlement to statutory free childcare that is provided at a maintained nursery school).

⁹ *Vallianatos and Others v. Greece* (2014) 59 E.H.R.R. 12 §47

86. In relation to the provision about national-to-local budget reallocation (clause 40), it is integral to the fairness of this system that there is sufficient flexibility to enable the movement of funding to address pressures on high needs funding. Having a mechanism for the movement of funding can address the risk of high needs pressures escalating to an unsustainable level for local authorities. Such a mechanism is similar to that contained in the current funding arrangements.
87. Any interference with Article 1 Protocol 1 rights resulting from this provision is, in the Department's view, proportionate, because it strikes a fair balance: providing for a fair funding system, that ensures that all key players play their part in providing education for children with special educational needs and disabilities, in the most appropriate setting (which may be mainstream provision) is a legitimate public-interest aim and there are safeguards in place to ensure that the views of those affected are taken into account. Reducing the funding in the following year will give the Department sufficient time to assess the school's actions and to make a fair deduction.

Difference in funding provision for special schools and pupil referral units:

88. Article 14, taken with Article 1 Protocol 1, may also be engaged as these provisions enable different types of schools to be funded differently. In particular, special schools and Pupil Referral Units (PRU) (which will have a higher proportion of children with disabilities and long-term health needs than mainstream schools) will not receive the "national formula allocation" unless the Secretary of State exercises the regulation making power to bring such types of schools within scope.
89. The provisions do not make significant changes to the way high needs provision is funded; and all schools will receive a minimum level of funding regardless of the funding mechanism.
90. The view of the Department is that these provisions do not constitute an infringement of Article 14. There is an objective justification for the difference in treatment: the high needs funding system has been widely consulted on and reflects the complexity of provision, the complexity of needs of children with high needs and the resulting increased cost of provision.
91. Article 14 does not prohibit the different treatment of different groups to address "factual inequalities" and in some cases compels such different treatment (where it would be discriminatory not to address an inequality). The Department's view is that funding allocation which takes into account variations in funding requirements occasioned by specific, complex provision and needs, rather than according to the National Funding Formula, is differential treatment which addresses a factual inequality.

Part 3: Children not in school and school attendance

Requirement of children to attend school in certain circumstances

92. Under certain circumstances, a parent may be required to send their child to a school in addition to whatever education they may choose to provide outside school and be prosecuted if they fail to do so. A requirement for a parent to send their child to school arguably interferes with private and family life and so engages Article 8. Article 9 and Article 2 Protocol 1 are also arguably engaged as such a requirement has the potential to interfere with the “right of parents to ensure ... education and teaching in conformity with their own religious and philosophical convictions.”¹⁰
93. 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* app no 35504/03 (ECtHR, 11 Sept 2006). The Court in this case rejected claims that Articles 8 and 9 of the Convention and Article 2 Protocol 1 were breached when home education was banned requiring education in a private or state school.
94. The Department considers that any interference with Article 8 or Article 9 is necessary and proportionate in the interests of protection of the right of the child to an education, following *Konrad v Germany* (2006). Interference can also be justified as necessary for the protection of health and morals, as the measure will help to identify children who may be neglected or socialised in ways that are harmful to them or make them harmful to others.
95. The Department is of the view that the proposals comply with Article 2 Protocol 1, 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.
96. 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 efficient full-time suitable education, which ensures that the measure does not go beyond what is necessary for protecting these interests.
97. The Department considers that there are appropriate safeguards in place under the framework, including that the parent can apply for a school attendance order to be revoked and may also refer the question to the Secretary of State.

Sharing of information

98. The Department considers that the provisions relating to the sharing of information by the local authorities to the Secretary of State and others comply with Article 8. They do not require a course of action that is incompatible with Article 8. The sharing of any information

¹⁰ Article 2 Protocol 1: “No person shall be denied a right to an education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions.”

will still have to be compatible with Convention rights, the UK GDPR and the Data Protection Act 2018 (where personal data is shared). The requirement to comply with data protection law will act as a significant safeguard.

99. 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.

Prosecution of parents for failure to comply with a school attendance order

100. 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. Clause 50 arguably engages Article 6, as it expands this offence and increase the maximum sentence for the offence, raising the maximum fine and introducing a potential custodial sentence.

101. The offence is subject to all the normal criminal procedures including the presumption of innocence, trial in the magistrates' court, and onward appeal. 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 this is not necessarily incompatible with Article 6 (see below at paragraph 105). The 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.

Penalty for failure to provide information or providing incorrect information

102. Under new section 436E of the Education Act 1996 (clause 48), there is a duty on certain persons to provide information under threat of a monetary penalty recoverable as a civil debt.

103. Under new Schedule 31A to that Act, if a local authority proposes to require a person providing education to pay a penalty for failure to provide information or provides incorrect information, they 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. If the local authority is no longer satisfied that the person has failed to provide the information or has provided incorrect information, it may not issue the penalty. There is also a right of appeal to the First-Tier Tribunal.

104. 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.

105. 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. As the liability is likely to be considered 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's 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. The Department considers that the framework is compatible with Article 6.

Part 4: Independent Educational Institutions

Determination of the right to run a private school and other civil rights

106. The right to run a private school is a civil right (*Jordebo Foundation of Christian Schools v Sweden* App no 11533/85 (ECHR, 8 Dec 1987). A decision about the registration or deregistration of an independent educational institution therefore involves the determination of a civil right and engages Article 6. Article 6 may also be engaged by decisions to suspend registration.
107. The provisions may also involve determinations of other civil rights of proprietors, for example, whether they may continue to use their land for an independent educational institution or restrictions on the manner in which they may continue to operate their institution.
108. The Department considers that the provisions relating to registration and material change (clauses 56 and 62) 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 the decision would have the effect of changing the status quo, it is suspended pending the determination of an appeal.
109. The effect of the measure relating to deregistration appeals (clause 61) is that if the Secretary of State takes enforcement action against a proprietor of a registered independent educational institution in the form of a deregistration decision under section 116 of the 2008 Act *and* that proprietor appeals the deregistration decision *and* certain conditions are met, that appeal will be considered on the basis of judicial review principles. If those conditions are not met, the proprietor may still exercise the existing right to appeal under section 124 of the 2008 Act and their appeal will be decided on the basis of a full-merits review.
110. It is in the public interest that appeals against deregistration decisions of persistently failing schools are resolved expeditiously, as whilst an appeal is pending a school (which is potentially subjecting pupils to substandard safeguarding and education) remains open. These amendments will address this issue as a further inspection report will no longer need to be commissioned in preparation for a full merits appeal hearing. The composite approach, consisting of an administrative decision combined with a judicial review has been held to be compatible with Article 6 in *R (Alconbury) v SSETR* [2003] 2 AC 295 (paragraph 59). The Department considers judicial review to be appropriate here on the basis that the subject matter of the decision being challenged would be a classic exercise of an administrative discretion involving an evaluative judgment and when combined with a judicial review as well as the proposed procedural safeguards, will give an opportunity to have a curative effect on, inter alia, any unfairness, lack of independence or impartiality, failure to consider relevant factors of consideration of irrelevant ones.
111. The procedural measures introduced will mean that any interference will be proportionate and compatible with Article 6. The conditions will ensure that the proprietor will be well aware of the school's longstanding failure to meet one or more independent

school standards and the risk of de-registration and have an opportunity to make representations as to why the school should remain open prior to a decision being made. An appeal determined on the basis of judicial review principles will provide a review of the legality of the Secretary of State's deregistration decisions. The First-tier Tribunal, which will hear this appeal, will be able to confirm the decision or direct that it is of no effect.

112. Suspension of a registration is subject to a number of procedural safeguards, including a requirement for the Secretary of State to give a warning notice and the opportunity for a proprietor to make representations. Suspension is a temporary measure and is available only where there is cause to believe that one or more students at an institution will or may be exposed to the risk of harm as the result of a failure to meet a relevant standard. The Department considers this provision to be compatible with Article 6 because an affected proprietor is able to appeal to the First-tier Tribunal on the merits against a suspension decision.

113. It might also be argued that proprietors or members of proprietor bodies have their civil rights determined where a refusal to authorise a material change of proprietor, or 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 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. See also the case of *X v UK* 25 EHRR CD 88, where Article 6 was engaged in relation to a decision that prevented someone being a chief executive of a particular company. In such cases, the Department considers that judicial review is sufficient to ensure Article 6 compliance. The decision-making here, in the Department's view, is a classic exercise of administrative discretion, involving a judgmental inquiry.¹¹

Education in accordance with religious beliefs or parental wishes

114. Article 9 and Article 2 Protocol 1 will be engaged where additional institutions are subject to a requirement to meet the 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. Article 8 will be engaged by new requirements for secular elements to education in circumstances where parental beliefs mean that their children ought to have an exclusively religious education.

115. The Department considers that the changes are compatible with Articles 8 and 9 and Article 2 Protocol 1. The provisions in these clauses will require the proprietors of the institutions in question to cease to provide education to children or to provide it in accordance

¹¹ 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

with the standards that relate to them, in pursuance of the legitimate aims of protecting the right of a child to an education and the protection of health and morals through ensuring adequate safeguarding.

116. Children who attend such institutions may continue to be educated there or may be educated at home. Given that the measures do not prevent home-education and meets the aims set out in *Konrad v Germany* (see paragraph 93 above), we consider that the extension of the regulatory arrangements to these additional institutions is compatible with Articles 8 and 9 and Article 2 Protocol 1.

Regulation of the use of land to provide education

117. Article 1 Protocol 1 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 benefit is capable of being a possession under Article 1 Protocol 1 (see *Tre Traktorer Aktiebolag v Sweden* [1989] 13 EHRR).

118. 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

Disproportionate impact on certain religious institutions

119. 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 disproportionately 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 all institutions offering narrow educational provision on a full-time basis under regulatory control for the first time, those institutions affected are likely to be disproportionately *yeshivas*.

120. 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.

Requirement to provide information to Chief Inspector

121. Article 6 is engaged where powers are exercised to require individuals to provide information, as the act of doing so may constitute interference with the privilege against self-incrimination.
122. Section 6 of the Human Rights Act 1998 will require the Chief Inspector to act in a manner that is compatible with Convention rights.
123. In accordance with the established principle of the privilege against self-incrimination, any information provided by a person following a requirement to do so may not be relied upon against that person, their spouse or civil partner, as evidence in any proceedings.

New offences of obstruction etc

124. Where an individual is prosecuted for 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 burden of proof for the offence will rest with the Crown. Further, once a defendant has evidentially raised the defence of “reasonable excuse”, the Crown will bear the burden of proof in persuading the court that it cannot be satisfied of the defence. The Department considers that these provisions are compatible with Article 6.

Exercise of search powers on residential premises

125. Article 8 will be engaged where search powers are exercised on residential premises. Material subject to legal privilege 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*.
126. Any interference with Article 8 rights is necessary for the protection of the right of children to education and the protection of health and morals through safeguarding standards that independent educational institutions subject to enforcement action, in the form of a relevant restriction and/or a registration suspension, are complied with.
127. Interference may also be justified on the basis that it is necessary to ensure that the law is complied with and does not fall into disrepute (to prevent and detect crime).

128. Where inspections occur, safeguards have also been incorporated, which apply whenever the right of entry and search is exercised. These include that the search must take place at a reasonable time and only where there is a reasonable cause to believe that the relevant offence is or has been committed. Should the premises being inspected be domestic premises, a warrant from a justice of the peace is required. Additionally, section 6 of the Human Rights Act 1998 will require the Chief Inspector to act in a manner that is compatible with Convention rights.
129. In light of the above safeguards, it is the Department's view that any interference will be necessary and proportionate in pursuit of a legitimate aim.

Exercise of powers to seize evidence and require documentation

130. Article 1 Protocol 1 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.
131. The Department considers that any interferences with rights under Article 1 Protocol 1 are justified by the need to effectively investigate, prosecute and sentence criminal offences committed under Chapter 1 of Part 4 of the Education and Skills Act 2008.
132. 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.
133. It is also in the public interest that requirements under enforcement action are complied with. This interest is 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.
134. 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.
135. In light of these safeguards, it is the Department's view that any interference will be proportionate and compatible with Article 1 Protocol 1.

Part 5: Miscellaneous and Final Provisions

Interference with the right to practise the teaching profession

136. Article 8 is engaged because the provisions may interfere with the right of an individual to practise their chosen profession, should they be prohibited by the Secretary of State on a recommendation of a Professional Conduct Panel.
137. Clause 65 has the effect that more teachers will fall under the jurisdiction of the Teaching Regulation Authority. The Department considers that any interference beyond that of the current regime is mitigated by the fact that it should be in the reasonable contemplation of any teacher that conduct which may bring the profession into disrepute would be investigated by a professional regulation body.
138. Regulating all teachers and safeguarding all children and young people equally during their education pursue the legitimate aims of protecting a child's right to an education and protecting public health and morals. The Teaching Regulation Authority will continue to apply the public interest and proportionality tests and ensure that they operate these provisions so that they are compatible with teachers' ECHR rights.

Determination of right to practise the teaching profession

139. Clause 65 engages Article 6 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 subject to an independent Professional Conduct Panel.
140. While the effect of this clause is that more teachers will now fall under the jurisdiction of the Teaching Regulation Agency, the procedural requirements and safeguards of the current regime remain the same and the Department does not consider that the clause changes the compatibility of the regulatory framework with convention rights. Teachers remain entitled to representation throughout the process.
141. The Department considers that the process is compliant with Article 6.

International human rights issues

United Nations Convention on the Rights of the Child

142. The Department has considered whether the provisions of the Bill are in the best interests of children in accordance with Article 3 of the United Nations Convention on the Rights of the Child (UNCRC). The Bill's has two primary purposes. The first of these is to improve the quality of education for children of compulsory school age, by facilitating the provision of education by academy schools in strong Multi-Academy Trusts and applying and enforcing standards more consistently for academy schools and independent educational institutions. The second is to improve safeguarding of children, whether they are educated in schools, at other independent educational institutions or at home. The Department is of the view that the Bill will have a positive effect on the interests of children, which have been a primary consideration in the development of its provisions.

143. The Department considers that the strengthening of the school system, by means of the provisions in Part 1 in particular, support the implementation of the core commitment in Article 28, the right of the child to education. The Department further considers that clauses 48 to 55 support the commitment under Article 28(1)(e), in that they encourage regular attendance at school.

144. The Department has also considered Parts 1 and 4 in relation to the commitment under Article 3(3) to ensure that institutions responsible for the care or protection of children conform with standards established by competent authorities. The Department is of the view that the positive effect on safeguarding that improving the consistency of application and availability of enforcement mechanisms for both academy schools and independent educational institutions will have supports the implementation of this commitment.

145. The Department has considered Article 14 (freedom of thought, conscience and religion) in relation to clauses 19 to 27, 48 to 51 and 56 to 58 and considers that, for the reasons set out above in relation to Article 9 and Article 2 Protocol 1 of the ECHR, these clauses are compatible with this right.

146. Furthermore, the Department considers that clauses 19 to 27 have a role in implementing the commitment in Article 14 and also that in Article 29(1)(c) (in relation to a child's cultural identity) by protecting the religious ethos of certain schools. The Department, for the reasons set out above in relation to Article 9 and Article 2 Protocol 1 of the ECHR, does

not consider that the rights of children who are of a religious minority, under Article 30 UNCRC, are infringed.

147. The Department considers that the provisions of Part 2, in providing for high-needs funding and allowing for different provision for special schools, supports the commitment to recognising the special needs of disabled children under Article 23.

Department for Education

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