

SCHOOLS BILL

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

- 1) This supplementary ECHR memorandum is produced by the Department for Education (“the Department”), in relation to government amendments to the Schools Bill (“the Bill”) to Report stage in the House of Lords. This memorandum should be read in conjunction with the memorandum published on 11 May 2022 (“the first ECHR memorandum”).
- 2) The amendments to the Bill which in the Department’s view are relevant to the ECHR are as detailed below.

European Convention on Human Rights

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

Part 1: Academies

Academy Standards and intervention/termination powers

- 4) Amendments have been tabled by Peers to Clauses 1-18 (excluding Clause 2) with the effect of removing the academy standards and intervention provisions from the Bill. The Government will support these amendments at Report stage and is tabling further amendments which are consequential on the removal of these provisions from the Bill. This includes the removal of Schedules 1 and 2 of the Bill, which are redundant with Clauses 1-18 removed.

- 5) Paragraphs 8 to 24 of the first ECHR memorandum addressed the potential ECHR implications of a power to prescribe new academy standards and to provide that existing contractual funding agreement provisions which are broadly equivalent to an academy standard under Clauses 1 to 4. Paragraphs 33 to 60 of the first ECHR memorandum addressed the potential ECHR implications of Clauses 5 to 18.
- 6) The Department has faced significant opposition to the scope and policy intent underpinning Clauses 1-4. The Government considers that further work on these provisions should be undertaken this summer, with a view to return with revised clauses for the amending stage of House of Commons passage. The powers in Clauses 5 to 18 are interlinked from a policy perspective with Clauses 1-4 and the Department deems it appropriate to remove them at this time, so they can be considered within the context of clarity on our approach to Clauses 1 to 4.

Schools with a Religious Character

- 7) The Government's proposed amendment to clause 20 of the Bill would place a duty (rather than a power) on the Secretary of State to make regulations specifying provision that must be contained in articles of association or schemes of delegation of academy trusts that have academies with a religious character. The regulations must be made for the purpose of securing, as far as is practicable, the religious character of the relevant academy school and/or ensure the academy school is conducted in accordance with any relevant trust deed. The ECHR considerations relevant to clause 20 are set out at paragraphs 25 to 28 and 63 to 69 of the first ECHR memorandum. These considerations will apply equally to Clause 20 as amended. The Department does not consider there to be any further ECHR implications arising from this amendment.

Local authority power to apply for an Academy order

- 8) The Government's first amendment to clause 29 of the Bill extended to local authorities the consultation requirement under section 5 of the Academies Act 2010, which applies to maintained school governing bodies, when they are going through the process of asking for their schools to be converted into academies. The existing consultation requirement is for governing bodies of maintained schools to consult such persons as they consider appropriate about whether the conversion should take place. The consultation can be undertaken before or after an application for an Academy order has been made, or before or after the order itself has been made.
- 9) The Government's second amendment to clause 29 of the Bill relates to a different subsection in clause 29. The amendment seeks to ensure that all appropriate religious bodies are captured within the (existing) requirement to obtain the consent of certain bodies to a local authority application for an Academy order.
- 10) Paragraphs 75-79 of the first ECHR memorandum address the ECHR implications of Clause 29. The Department does not consider there to be any ECHR implications arising from these amendments other than, by extending the categories of person who are likely to be consulted, it further ensures that the measures are ECHR compliant.

Power to apply for an Academy order for schools with a religious character

- 11) The Government proposes an amendment to the Bill to allow key bodies involved in the governance of a maintained school with a religious character (such as religious bodies) to apply for an Academy order, in a similar way as a local authority will already be entitled to do under Clause 29 of the Bill.
- 12) The considerations raised in paragraphs 75-79 of the first ECHR memorandum will be relevant to this new power, although likely to a lesser extent. In summary, those paragraphs note that, as another body (not the local authority) can own the land, there may be engagement with Article 1 Protocol 1. This is because a local authority application for an Academy order could lead to the conversion of the school and the

transfer or occupation of the land by another party (such as an academy trust). However, those paragraphs note the limitations of this interference, including that there must be agreement by the landowner for the land to be occupied by an academy and, if not, there are statutory provisions for compensation.

13) The impact of these considerations is less for this measure because the primary concern in the first ECHR memorandum was potential Article 1 Protocol 1 interference with land held on trust for the purposes of a school by another body (this may be the appropriate religious body or may be a separate body). This new measure places the choice about applying for an Academy order with key bodies involved in the school, including the appropriate religious body. Therefore, where the applicant owns the land, interference of this kind is not relevant. Where a different body owns the land, they will be required to consent to the application, so such interference is effectively approved.

14) Given that this new measure gives a power to religious bodies, the Department has considered whether any Article 14 considerations are relevant but has concluded that they are not. The Department does not consider that this provision is within the ambit of Article 2 of Protocol 1 or Article 9, given that the status of a maintained school having a religious designation is not affected by academy conversion (section 6(8) of the Academies Act 2010). This measure will therefore not interfere with a person's right to freedom of thought, conscience or religion, or any person's right to education (and particularly any right to be educated in conformity with parental religious and philosophical convictions).

Part 3: School Attendance

Children not in school – use of (and sharing of) information

15) A Government amendment to Clause 49 will prohibit the publication of information, as recorded on the registers, relating to an individual. Paragraphs 98-99 of the first

ECHR memorandum address the ECHR implications of clause 49 (numbered 48 at the time) in respect of the sharing of information. This express prohibition against the publication of individual data will further ensure that the clause is ECHR compliant.

16) Another Government amendment to Clause 49 will allow for the voluntary provision by parents of some of the information prescribed in regulations by the Secretary of State (under new section 436C) and remove the mandatory requirement to provide the same (under new section 436D). As set out above, paragraphs 98-99 of the first ECHR memorandum address the ECHR implications of Clause 49 in respect of the sharing of information. Removing the mandatory requirement to provide some of the information as may be prescribed in regulations, e.g. ethnicity, sex, will further ensure that the clause is ECHR compliant – particularly with respect to the proportionality of any interference with Article 8.

17) ***Children not in school - information required for inclusion on the registers and/or sharing of information (Parliamentary procedure)***

18) The Government amendment to Clause 49(3) in respect of Parliamentary procedure will make provision for certain regulation-making powers to be subject to either the affirmative procedure the first time they are used (and then subject to negative procedure thereafter) or subject to the affirmative procedure every time. As set out above, paragraphs 98-99 (*Sharing of information*) and 92-97 (*Requirement of children to attend school in certain circumstances*) of the first ECHR memorandum address the ECHR implications of Clauses 49-50. The Department does not consider there to be any ECHR implications arising from these amendments.

DFE Legal Advisors

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