SKILLS AND POST-16 EDUCATION BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

MEMORANDUM BY THE DEPARTMENT FOR EDUCATION

Summary of the Bill

Part 1: Skills and Education for Work

1. This Part:

    a. in Chapter 1, provides statutory underpinning for local skills improvement plans, as part of the Skills Accelerator policy, including that relevant providers are required to collaborate in the preparation of and have due regard to these plans; places a duty on providers within the statutory Further Education (FE) sector to review their provision and structure;

    b. in Chapter 2, amends the powers of the Institute for Apprenticeships and Technical Education (the Institute) to enable it to define and approve new categories of technical education qualifications, and to have an oversight role for technical education provision. It amends the powers of the Institute and Office of Qualifications and Examinations Regulation (Ofqual) to clarify their respective roles in relation to the approval and regulation of technical education qualifications; and

    c. in Chapter 3, modifies the Secretary of State's regulation-making powers to make provision for student loans or grants to include specific provision for student support funding of modules of higher education and further education courses, and the setting of an overall limit to funding that learners can access over their lifetime, and to make clear that maximum amounts for funding can be set other than in relation to an academic year. It also amends the definition of "higher education course" in the Higher Education Research Act (HERA) 2017 to include a module of a course.

Part 2: Quality of Provision

2. This Part:

    a. in Chapter 1, allows the Secretary of State to make regulations to secure and improve the quality of further education teacher training courses; and

    b. in Chapter 2, puts beyond doubt the Office for Students' (OfS) ability to assess the quality of higher education provided based on student outcomes, and to apply minimum expected levels of outcome when assessing a higher education provider's compliance with registration conditions.

Part 3: Protection for Learners

3. This Part:

    a. In Chapter 1, allows the Secretary of State to make regulations to set up a list of post-16 education or training providers, in particular independent training providers, which meet certain conditions which will be specified by the Secretary of State. The Secretary of State may specify such conditions only if he considers that specifying the condition in relation to a provider may assist in preventing or mitigating the adverse effects of a disorderly cessation in the provision of education or training by the provider. The Secretary of State and other funding authorities are prohibited from entering into funding arrangements (or from allowing sub-contracting arrangements) for certain categories of education unless the proposed provider (or sub-contractor) is on the list. The overarching aim of the scheme set up by regulations will therefore be to protect learners and public money; and

    b. enables the Secretary of State for Education to intervene where there has been a failure to meet local needs, and to direct structural change, for example, mergers, by way of a direction to transfer property, rights or liabilities where that is required to secure improvement.

    c. In Chapter 2, amends the regulation-making power in the Technical and Further Education Act 2017[1] so that regulations can be made that allow an education administrator to propose a company voluntary arrangement in relation to a further education body in education administration; and

    d. expressly provides that in an education administration, a transfer scheme cannot transfer property subject to certain security, free of the security, except with an order of the court or an agreed amount attributed to the transfer paid to the secured creditor.

Part 4: Miscellaneous and General

4. This Part:

    a. In Chapter 1 simplifies the process by which the Secretary of State may designate an educational institution as falling within the statutory further education sector; and

    b. In Chapter 2 contains the General Bill provisions.

[1] Technical and Further Education Act 2017, c. 19.

European Convention on Human Rights

Statement under section 19 of the Human Rights Act

5. 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[2] 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.

6. 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. Part 4 of the Bill is not addressed below because no ECHR Articles are engaged by Part 4.

Part 1: Skills and Education for Work

Clause 7(4): Further powers to approve technical education qualifications

7. New section A2D6, inserted into the Apprenticeships, Skills, Children and Learning Act 2009 by this clause, engages article 6 (right to a fair trial) and article 1, Protocol 1 (right to peaceful enjoyment of property). The Department considers that it is compatible with the provisions of the ECHR.

8. This clause gives the Institute for Apprenticeships and Technical Education (the Institute) the power to withdraw approval of a technical education qualification under clause 7(4) of the Bill. The Institute can withdraw approval under its current approval powers, so the purpose of clause 7(4) is to create consistency between the existing scheme and the new approval scheme.

Article 6

9. The Institute's power to approve or withdraw approval of a technical education qualification will involve the exercise of judgement about whether a qualification has met or ceased to meet the criteria for approval or is no longer suitable. The Department has considered whether this has the potential to constitute a civil right which is subject to determination by the Institute, and therefore to engage Article 6.

10. The Department is of the view that, even if the approval constitutes a civil right for the purposes of Article 6, the decisions taken, whilst potentially determinative of the 'rights' in question, are a discretionary exercise of administrative functions. The Department considers this is a classic example of an administrative decision (an exercise of discretion based on public policy), of the kind which the European Court of Human Rights has held judicial review is sufficient to meet the requirements of Article 6 (see *R (Alconbury Developments Ltd)* v *Secretary of State for Environment, Transport and the Regions*[3]). This will be adequate to ensure that an awarding organisation's rights

[2] Human Rights Act 1998, s.19(1)(a).
[3] *R (Alconbury Developments Ltd) v Secretary of State for Environment, Transport and the Regions* [2003] 2 AC 295

under Article 6 are safeguarded. It is therefore considered compatible with the ECHR provision.

Article 1 of Protocol 1 ("A1P1")

11. The Department has considered whether an approval may be considered by a court to be a possession, in a similar light to a licence (*R (Mott) v Environment Agency* [4]– a salmon fishing licence*;* and *Tre Traktörer Aktiebolag v Sweden*[5] – a business licence*)*. The Department's view is that an approval does not amount to a possession under A1P1 because it is conditional; it is subject to meeting the criteria for approval set out in the clauses and published by the Institute.

12. If, contrary to the above, a court were to determine that an approval amounts to a possession for the purposes of A1P1, the Department has considered possible interference with this right. The effect of withdrawal would be that the qualification would no longer be eligible for public funding. Withdrawal of approval may also impact on an awarding organisation's ability to offer its qualification for delivery for reasons other than public funding (such as reputational damage).

13. However, the Department's view is that any deprivation of property (if, contrary to the above, an approval constitutes property) as a result of withdrawal would be in the public interest. The public interest in question is ensuring that technical education provision is of high-quality and relevant to the needs of learners and the economy. Withdrawal of an approval where a qualification no longer meets the criteria for approval is a proportionate approach to protecting this public interest. It would only be done where the qualification in question is no longer meeting the published criteria and would be done in a reasonable and proportionate way – giving the awarding body the opportunity to correct any difficulties with their qualification before such withdrawal is carried out, for example.

14. Even if withdrawal of an approval does not amount to a deprivation, it may still be considered control of the use of the property. The Department considers that the power to withdraw approval is necessary in the general interest of society, because no lesser measure would adequately safeguard learners' interests in the event that a qualification ceases to fulfil the criteria for approval. The general interest in question is specifically the interest of learners to access high quality and relevant provision. Any withdrawal would be a proportionate means of achieving this aim, as set out above.

Clause 11: Information sharing in relation to technical education qualifications

Article 8

15. This clause inserts new section 40AB into the Apprenticeships, Skills, Children and Learning Act 2009. It enables the Office for Qualifications and Examinations Regulation (Ofqual) to share information with the Office for Standards in Education, Children's Services and Skills and Her Majesty's Chief Inspector for Education, Children's Services and Skills (Ofsted), the Office for Students (OfS) and persons who can be prescribed by regulations, for the purpose of functions relating to technical

[4] *R (on the application of Mott) v Environment Agency* [2018] UKSC 10.
[5] *Tre Traktörer Aktiebolag v Sweden* [1989] 13 EHRR 309.

education qualifications. This information may include personal data, for example student results data.

16. The use of a power to share personal data would likely engage Article 8. In some circumstances it may be capable of amounting to an interference with Article 8, although when processing the personal information the bodies will need to comply with UK data protection legislation and ensure that such processing is fair and lawful and compliant with the data protection principles. For example, it will be necessary for information to be accurate, stored securely and not kept for longer than necessary. Section 40D(3)(b) of the Apprenticeships, Skills, Children and Learning Act 2009, which will apply to new section 40AB, confirms this.

17. Notwithstanding the above, it is considered that if there were an interference with the right to privacy, the benefits that would be achieved by the sharing of the information, which would be to assist in the regulatory functions of the bodies listed, would be proportionate to any potential harm done by the interference with those rights.

Part 2: Quality of Provision

Clause 16: Initial teacher training in further education

18. If the powers under this clause are exercised, they may engage Article 6 (right to a fair trial) and Article 8 (right to private and family life). The Department considers that the clause is compatible with the provisions of the ECHR.

19. This clause enables the Secretary of State to make regulations for the purpose of securing or improving the quality of further education initial teacher training courses (FE ITT) offered by providers. By way of the regulations, the Secretary of State may also make provision requiring the governing body (or other specified person) of an institution that provides specified FE ITT courses to give the Secretary of State information about the individuals who are commencing, undertaking or have completed an FE ITT course provided by the institution.

Article 6

20. Article 6 may be engaged if the Secretary of State, when making regulations, prohibits a provider from offering specified FE ITT courses, if such a decision is determinative of civil rights and obligations. The right to provide further education may amount to a "civil right"[6] where it encompasses commercial interests. The Department considers that in some limited circumstances, such as where a provider exclusively offers the FE ITT course or courses that it has been prohibited from delivering, where it is in turn prevented from pursuing its commercial interests, such a decision may amount to a determination of a civil right for Article 6 purposes[7].

21. The Department's view is that the creation of this power will not infringe Article 6. Rather, when making the regulations, it will be for the Secretary of State to assess whether the exercise of the powers, and regulations made, are compatible with Convention rights – including whether the regulations should provide for appeal rights

[6] *Ingrid Jordebo Foundation of Christian Schools Ingrid Jordebo v Sweden* (1987) 51 DR 125
[7] *Kaplan v The United Kingdom* (1978) App No. 7598/76

if judicial review is not considered to afford "sufficiency of review" in the particular circumstances.

Article 8

22. This clause enables the Secretary of State to make regulations to require providers to share personal data with the Secretary of State. The Department will need to consider, when such regulations are laid, whether those provisions would likely engage Article 8. The Secretary of State must act compatibly with Convention rights, including when making regulations under this power, and is subject to the relevant obligations that engage Article 8 under the UK GDPR and the Data Protection Act 2018.[8]

23. This information may include personal data relating to the students who are participating in such courses at a particular provider. The use of a power to require the disclosure of personal data to the Secretary of State would likely engage Article 8. In some circumstances it may be capable of amounting to an interference with Article 8, although in these circumstances the Department considers that any interference would be justified, given that the data would only be shared between providers and the Secretary of State for specific purposes relating to ensuring the quality of FE teacher training.

24. The purpose of the regulation making power is to ensure that the Secretary of State can monitor and ensure the quality of provision of FE ITT courses, with wider benefits to learners who are taught by individuals who have completed good quality FE ITT courses. It will also help the identification of relevant skill sets and skill gaps of individuals undertaking FE ITT courses which will benefit their education and training, the wider FE teaching profession, and the students who are taught by them after completing their courses. Improved FE ITT will in turn raise the quality of teaching and learning across the FE sector, improve student achievement and job outcomes and lead to a more skilled workforce in various parts of the labour market (including in FE providers themselves). In addition, if data is collected using this power, the Department will more easily be able to monitor and address any equality and diversity issues that arise. It will also enable providers to address any recruitment and retention issues and plan training (including professional development training). This will benefit both the FE teaching profession and the learners who gain from being taught by the FE teachers who have undertaken these courses.

25. The Department will not be seeking to collect any data that will allow it to identify or contact individuals, only for anonymised tracking. Any monitoring of quality would be done at aggregate rather than individual student level.

Clause 17: Office for Students ("OfS"): power to assess the quality of higher education by reference to student outcomes

26. This clause may engage article 1 of Protocol 1 (right to peaceful enjoyment of property) ("A1P1"), including in conjunction with Article 14 (freedom from discrimination), and Article 2 of Protocol 1 (right to education) ("A2 P1") including in conjunction with Article 14. The Department considers that it is compatible with the provisions of the ECHR.

27. This clause puts beyond doubt the OfS' power to assess the quality of higher education provided by reference to student outcomes, and to apply minimum expected levels of

[8] Data Protection Act 2018.

student outcome to all providers without being required to adjust them, for example, according to any particular student characteristics.

Article 1 of Protocol 1, including in conjunction with article 14

28. Section 13 of the Higher Education and Research Act 2017 ("HERA")[9] enables the OfS to impose a condition of registration on higher education providers relating to the quality of higher education provided. Section 23[10] imposes a duty on the OfS to assess the quality of higher education which is provided by a registered higher education provider for the purposes of determining whether any registration condition as to quality of education is satisfied. Sections 14 to 21 of HERA[11] allow the OfS to impose a range of sanctions where there is a breach of registration condition by a higher education provider, including monetary penalties (section 15) and ultimately deregistration (section 18).

29. As registration with the OfS automatically means that a provider's courses attract tuition fee loans (which are paid direct to providers on behalf of students), the Department has considered whether legislative measures that potentially facilitate deregistration interfere with a provider's A1P1 rights. The Department does not believe this is the case, based on the *Guildhall College case*[12] which held that designation of courses did not constitute a possession within the meaning A1P1. The Department has also considered whether measures which facilitate the imposition of a monetary penalty (which imposition is subject to an existing right of appeal to the First-tier Tribunal) interfere with a provider's A1P1 rights.

30. As regards article 14, in conjunction with A1P1, analysis shows that students attending higher education providers which do not secure the outcomes expected by the OfS are more likely to share certain protected characteristics (such as being of black or minority ethnic origin) than students who attend providers which achieve good outcomes for students. The Department has considered whether legislative measures impacting on the ability of higher education providers to refuse registration or to deregister, serve to provide students with a place of study in an indirectly discriminatory way.

31. The view of the Department is that this clause itself will not infringe A1P1. The OfS is itself exercising public functions when undertaking regulatory activity and is therefore itself subject to the ECHR[13]. The OfS must therefore comply with the Convention when exercising its functions on a case-by-case basis. Additionally, whilst the most serious regulatory step the OfS could take relating to poor quality provision (deregistration) would lead to a provider's courses no longer attracting tuition fee loans for students, in the Guildhall College case, the Court of Appeal held that designation of a course for student finance was no form of possession of the college within the meaning of A1P1.

32. Whilst the Department considers there is no interference with A1P1 or Article 14, it also considers that any interference could, in any event, be justified by the legitimate aim of ensuring that students in general do not pursue courses (and incur substantial

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[9] Higher Education and Research Act 2017, s.13.
[10] Higher Education and Research Act 2017, s.23.
[11] Higher Education and Research Act 2017, ss.14-21.
[12] *Guildhall College Ltd v Secretary of State Business Innovation and Skills* [2014] EWCA Civ 986
[13] *R on the application of Barking and Dagenham College v Office for Students* [2019] EWHC 2667 (Admin) and *R on the application of Bloomsbury Institute Limited v Office for Students* [2020] EWHC 580 (Admin) and [2020] EWCA Civ 1074

debt in so doing) which only deliver poor course completion and employment outcomes, and that higher education providers with a high intake of students sharing protected characteristics are not subject to lower regulatory expectations than those without. It is considered that the measure is a proportionate method of achieving that aim.

Article 2 of Protocol 1, including in conjunction with Article 14

33. The Department has considered whether measures which facilitate the OfS' ability to impose a sanction on a higher education provider such as suspension from the register or deregistration impact upon a student's choice of provider or choice of course. Further, that if providers which have an intake of students sharing particular socio-economic or protected characteristics are more likely to fail to meet minimum expected student outcomes, those students may be subject to indirect discrimination. However, the Department does not consider there to be any interference with students' A2P1 rights. That article does not entitle a person to a particular type of education, or to access a particular higher education provider, but rather to non-discriminatory access to the general system of education provided by the state in question[14]. As with A1P1, it is not considered that legislative provisions which create a power for the OfS to measure and apply outcomes in a particular way, but which do not oblige it to, interfere with any Convention rights; the OfS will be exercising public functions for the purposes of the Human Rights Act 1998 and is obliged to comply with the ECHR when making individual regulatory decisions.

34. Whilst the Department does not think there is any interference with students A2P1 rights, including in conjunction with article 14, it is considered that any interference would be justified in any event. This would be on the grounds that students should not be publicly funded to pursue higher education courses (incurring a substantial debt in so doing) which lead to poor completion or employment/further study outcomes, and that this is a positive outcome for all students whatever their particular socio-economic or protected characteristics.

Part 3: Protection for Learners

Clause 18: List of relevant providers

35. This clause engages Article 6 (right to a fair trial), Article 8 (right to private and family life), Article 1 of Protocol 1 (right to peaceful enjoyment of property) and Article 1 of Protocol 1 (right to education). The Department considers that it is compatible with the provisions of the ECHR.

36. Regulations may be made under this clause to introduce a list of post-16 education or training providers and to impose conditions for being on the list ("the list"). Decisions made by the Secretary of State as to whether a provider of education or training should be on the list will require the exercise of discretion. The Secretary of State will consider matters such as whether a provider has met the conditions for being on the list and whether a provider ought to be removed for no longer meeting those conditions.

Article 6

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

37. The view of the Department is that this clause itself will not infringe Article 6. When making the regulations under this power and when implementing the scheme, the Secretary of State must assess whether the exercise of the powers is ECHR compliant. The regulation-making power allows the Secretary of State to make provision regarding appeals against decisions made under the scheme and, importantly, such decisions taken under the scheme will ultimately be amenable to judicial review. The Department is of the view that this is a classic example of an administrative decision (an exercise of discretion based on public policy), of the kind which the European Court of Human Rights has held judicial review is sufficient to meet the requirements of Article 6[15]. The Department's view is that these clauses do not lead to a breach of this article, or prevent the Secretary of State from tailoring the scheme and then implementing it in a way which is ECHR compliant.

Article 8

38. Clause 18 enables the Secretary of State to set up a list of certain post-16 education or training providers. By way of the regulations the Secretary of State will impose conditions for being on the list which may include conditions relating to the provision of information by providers including providing access to student records, or to financial information regarding those who are in control of the provider. The regulations may also impose requirements for the disclosure of such information. The records may include personal data relating to the students who are participating in education and training at that provider and relating to those who manage and control, or who have legal responsibility and accountability for that provider. The use of a power to require the disclosure of personal data by one party to another will engage, and be capable of amounting to an interference with, Article 8, depending on how those powers are used.

39. The purpose of the power to set conditions for being on the register will be to prevent and mitigate the adverse effects of a disorderly exit of a provider from the provision of education and training, which has a disruptive effect on the learning of a student and is costly for the Department. To mitigate against such effects will therefore be the purpose of the sharing of any personal data and as such the sharing of the data will be justifiable. Where students are concerned the Department is likely already to hold personal data which identifies students taking part in education and training at that provider but may not have information regarding their achievements which helps with transfer to a new provider should that be necessary. Where those who manage or control providers are concerned the Department may or may not already hold information about them such as information relating to their financial position or serious offences that they may have committed, but that information will be relevant to making judgements about whether the person is fit to be running an educational institution.

40. In addition, where the Secretary of State and the provider are processing personal information they will need to comply with UK data protection legislation, and ensure that such processing is fair and lawful and compliant with the data protection principles. For example, it will be necessary for information to be accurate, stored securely and not kept for longer than necessary.

41. Notwithstanding the above, it is considered that if there were an interference with the right to privacy, the benefits that would be achieved by the sharing of the information,

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[15] *R (Alconbury Developments Ltd) v Secretary of State for Environment, Transport and the Regions* [2003] 2 AC 295

including the minimisation of disruption to students' education, is proportionate to any potential harm done by the interference with those rights.

Article 1 of Protocol 1 ("A1P1")

42. These clauses will prohibit certain funding bodies from entering into funding arrangements with providers for the delivery of relevant education and training, unless the provider in question is on the list. Those funding arrangements must also include provision allowing the funding body to terminate the funding agreement, if the provider is removed from the list. It will also prevent funded providers from entering into sub-contracts other than with providers who are on the list and those sub-contracts must also allow for termination of the funding agreement if the provider is removed from the list or if the provider enters into sub-contracts where those contracts are prohibited in the principal funding arrangements. Breach of conditions for being on the list which lead to removal from the list or entering into otherwise prohibited sub-contracts could therefore have an effect on the obligations in relation to concluded contracts/ grant funding agreements. Such contracts and grant agreements are likely to amount to possessions under Article 1 Protocol 1[16] and the effect of removal of the provider from the register will be to control the use of this property. The provision expressly only applies prospectively to funding arrangements entered into while the regulations are in force.

43. The Department considers that any such interference would be justified as being in the general or public interest due to the wider policy objective of protecting learners and public money, particularly given that the conditions for remaining on the list will all relate to preventing or mitigating the effects of a disorderly exit, which is very disruptive to students. Providers will enter into the funding arrangements in the knowledge that they must remain compliant with the conditions for being on the list and must not enter in otherwise contractually prohibited sub-contracts (i.e. there will be no retrospective effect). Removal from the list will only occur where it is reasonable to do so and the funding bodies themselves will decide on the exact nature of the steps taken under a contract or grant agreement in response to a removal from the list or in response to contractually prohibited sub-contracting arrangements being entered into.

Article 2 of Protocol 1 ("A2P1"), in conjunction with Article 14

44. The Department takes the same approach in relation to Clauses 18-20 in Part 3 regarding a list of post-16 education and training providers as it does regarding clause 17 (see above) and does not consider that these provisions interfere with the right to education. Whilst the clauses will regulate which providers of a certain type are funded to provide certain education or training, they do not amount to a prevention of access to education within the meaning of A2P1.

45. Even if interference could be established, there are strong justifications for such interference, based on the protection of students (from providers who are likely to cease to provide education and training in a disorderly way) and the public purse (from the costs associated with dealing with such disorderly exits). A proportionate approach to that interference where a provider is removed from the list and a student is already in education or training at that provider, is ensured by the clauses stating that where a provider ceases to be on the list the funding arrangements must allow for termination.

[16] *Mellacher v Austria [1990] 12 EHRR 391; Murungaru v Secretary of State for the Home Department [2008] CA Civ 1015.*

But the action to be taken under the contracts (including the manner of termination if relevant) is left for the funding body to consider in order to avoid the clauses themselves forcing a disorderly exit from provision when a provider is removed from the list. The funding authorities are public bodies and so must themselves comply with the ECHR.

Clause 22: Further education in England: intervention.

46. This clause engages Article 6 (right to a fair trial) and Article 1 of Protocol 1 (right to peaceful enjoyment of property). The Department considers that it is compatible with the provisions of the ECHR.

47. Clause 22 enables the Secretary of State to direct the governing body of a further education college, sixth form college and institutions that are designated as part of the statutory FE sector, to transfer property, rights or liabilities to another body or bodies (which in effect would amount to a merger or another form of structural change).

Article 6

48. The Department has considered whether a direction made by the Secretary of State requiring a governing body to transfer property, rights or liabilities to another body, may engage Article 6. Such a direction may amount to a determination of a "civil right" for Article 6 purposes. The right of a college corporation to provide further education may amount to a "civil right"[17] where it encompasses commercial interests. In addition, although Further Education/Sixth Form College corporations are exempt charities, and designated institutions are registered charities and/or exempt charities, they may in some cases have commercial interests (in conjunction with their obligations relating to charitable status). A direction that could affect its commercial interests is likely to amount to a civil right for Article 6 purposes[18].

49. The Department's view is that the clause is compatible with Article 6, because any direction that is made by the Secretary of State, resulting in a merger or other form of structural change, may be challenged by judicial review. In addition, wherever possible, affected bodies will have the opportunity to make representations to the Secretary of State prior to a direction being made. It is considered 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 i.e. whether it is appropriate to exercise the powers in the circumstances, rather than on a question of fact[19].

Article 1 of Protocol 1

50. The Department has considered whether a direction under clause 22 made by the Secretary of State may interfere with the rights of third parties who have contractual (and therefore A1P1) rights with an affected corporation (such as leases or loans). The Department has also considered whether it would interfere with the A1P1 rights of a body that assumes assets or liabilities from another. The Department considers that any such interference is more likely to amount to a control of use, rather than a deprivation of property, although this will depend on the particular circumstances of

[17] *Ingrid Jordebo Foundation of Christian Schools Ingrid Jordebo v Sweden* (1987) 51 DR 125
[18] *Kaplan v The United Kingdom* (1978) App No. 7598/76
[19] *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

each case and will be considered in accordance with its facts. The Secretary of State will have to exercise this power compatibly with the ECHR. Where this would require compensation to be paid, the provisions give him the power to do so.

51. The Department considers that any such interference would be justified as being in the public interest due to the wider policy objective of ensuring the quality of further education provision, that effective intervention action can be taken and, importantly, to protect learners, employers and the taxpayer. The ability of the Secretary of State to make such a direction is a proportionate response because it is intended to be used only as a last resort measure where other forms of intervention action have not succeeded, and where the needs of learners cannot effectively be met. Before making any direction leading to a merger or structural change, the Secretary of State would carefully consider whether such action is proportionate in the circumstances on the basis of objective evidence, including independent advice from the Further Education Commissioner. In addition, there is provision requiring that any transfer of property, rights or liabilities to a body specified in a direction requires the consent of that body. A key element, included in clause 22 to ensure that any direction is compatible with A1P1, is a power for the Secretary of State to give financial assistance to any person, in connection with the giving of a direction under this section. This will help to ensure that any interference with A1P1 rights is proportionate and a fair balance between the rights of the affected corporation and the general or public interest.

Clause 23: Further education bodies in education administration: application of other insolvency procedures

52. This clause engages Article 1 of Protocol 1 (right to peaceful enjoyment of property) and is compliant with that right. Clause 23 will extend the power under section 33 of the Technical and Further Education Act 2017 (TFEA) to allow amendments to be made to Schedules 3 and 4 TFEA to clarify that an education administrator may propose a company voluntary arrangement in education administration.

53. A company voluntary arrangement is a procedure that allows a company to settle debts by paying a proportion of the amounts owed to creditors, and to come to another arrangement with creditors over payment of its debts. The company voluntary arrangement process exists under the Insolvency Act 1986; and provisions of the Insolvency Act are applied by the TFEA with modifications. The amendments will clarify that the procedure can be used to exit education administration, and provide certainty regarding use of the procedure in future education administrations. These amendments will enable the TFEA and education administration to operate as intended and in line with authority and will bring education administration in line with other special administration regimes. As such, the provision will enhance the A1P1 protections afforded to creditors.

Clause 24: Further education bodies in education administration: transfer schemes

54. This clause engages Article 1 of Protocol 1 (right to peaceful enjoyment of property) but the Department does not consider there to be any interference with such rights. Clause 24 clarifies that a transfer scheme cannot transfer assets to which a secured creditor's rights attach free of the security, without either an amount attributed to the transfer in the transfer scheme being agreed by and paid to the secured creditor, or a court order.

55. The Department has considered whether the change may engage A1P1 rights because it affects secured creditors' rights. Under Part 2 of the TFEA, a special

administration regime known as education administration, may be used where a further education body is unable to pay its debts or is likely to become unable to pay its debts. An education administrator is appointed to manage the body's affairs with a view to avoiding or minimising disruption to the studies of existing students. Under section 16(2) of the TFEA, the means by which an education administrator may achieve the objective of an education administration include: rescuing the further education body as a going concern; transferring some or all of its undertaking to another body; keeping it going until existing students complete their studies; or making arrangements for existing students to complete their studies at another institution.

56. Under section 25 of, and Schedule 2 to TFEA, an education administrator has the power to make a transfer scheme. This is a scheme for the transfer of property, rights and liabilities from the further education body to one or more persons or bodies prescribed for the purposes of the Further and Higher Education Act 1992[20]. Paragraph 71 of Schedule B1 Insolvency Act 1986 is applied to education administration by TFEA and provides protection to secured creditors. However certain provisions in Schedule 2 to TFEA could be interpreted as allowing a transfer scheme to transfer secured property, as if it were free of the security, without either a court order or consent of the secured creditor. The amendments deal with this ambiguity and expressly provide that such a transfer of secured property, is subject to the protections of Insolvency Act 1986 (as applied and modified by TFEA).

57. The amendments will provide certainty on secured creditors' rights, removing ambiguity around the possibility that a transfer scheme could transfer assets to which secured creditors' rights attach, without either a court order or consent of the secured creditor. This is in line with a statement made by the Government in 2018 that such a transfer of secured assets under Schedule 2 TFEA should be subject to consent or a court order. As such, the provision will enhance the A1P1 protections afforded to creditors.

International human rights issues

United Nations Convention on the Rights of the Child

58. The Department has considered whether the provisions in Part 1, relating to technical education qualifications (which can be undertaken by persons under the age of 18) 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 purpose of these provisions is to drive up the quality of technical education qualifications and to align them more closely with the needs of employers (such that by taking such a qualification a child might be more likely to progress into employment when an adult). For example, the measures on local skills improvement plans and will ensure the training provided in areas meets local needs.

59. In addition, the Department has considered whether the OfS quality assessment provisions in Part 2 of the Bill are in the best interests of children, in accordance with Article 3 of the UNCRC, and whether these measures will have any impact on access to higher education by children in accordance with Article 28.1. The vast majority of persons accessing higher education are over 18. These provisions are about the

[20] Section 27 B(1) or section 33 P(1)

outcomes which higher education courses lead to after access has been gained, and they concern the assessment of the quality of courses rather than individual student cohorts. Their aim is to drive up outcomes for all students. This proposal therefore promotes and supports the rights of any children who are also higher education students.

60. The Department has also considered whether the provisions in Part 3 relating to a List of Post-16 education or training providers are in a child's best interests. Any conditions for being on the list (to be set by regulations) are those which the Secretary of State considers will prevent or mitigate the adverse effects of the disorderly cessation in the provision of education or training. Such a disorderly exit is very disruptive to students and so to prevent it or to mitigate its effects is in the best interests of those who are taking part in the education or training, which may be children over the age of 16 (and also adults). The Department has also considered whether these measures will have any impact on access to education by children in accordance with Article 28.1 of the UNCRC. Whilst the clauses will regulate which providers of a certain type are funded to provide certain education or training, they do not amount to a prevention of access to education and indeed the conditions of entry on to, and remaining on, the list are intended to ensure the continuation of the education or training and the prevention of a disorderly cessation. The provisions are therefore considered to be compatible with the provisions the UNCRC and supportive of the interests of children undertaking post-16 education or training.

61. The Department is of the view that the provisions of this Bill will have a positive effect on the interests of children because the provisions are aimed at improving the flexibility and quality of post-16 education and training, and to protect learners from any disruption to their education and training.

62. No other provisions of the Bill engage the UNCRC.

Department for Education

May 2021