SKILLS AND POST-16 EDUCATION BILL

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

1. This Memorandum supplements the Memoranda dated May 2021 and October 2021 prepared by the Department for Education ("the Department"), which addressed issues arising under the European Convention on Human Rights ("ECHR") in relation to the Skills and Post-16 Education Bill ("the Bill"). This Supplementary Memorandum addresses issues arising under the ECHR in relation to government amendments concerning publication powers of the Office for Students ("OfS"), as tabled at Commons Report stage.

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

Summary of relevant amendments

3. The substantive new provisions before clause 33 of the Bill insert new sections 67A to 67C into the Higher Education and Research Act 2017 ("HERA"). The effect of the provisions will be to give a general power to the OfS to publish notices, decisions and reports given or made in the performance of its functions. Before deciding whether to publish, the OfS must consider various specified factors.

4. Section 67B concerns the publication of a decision to conduct an investigation. If a publication identifies a higher education provider or other body or individual whose activities are being investigated, and then subsequently makes no finding or takes no action, then the OfS must publish a notice stating that fact. Defamation protection is given where specified information is included in the publication.

5. The defamation protection relating to the OfS publication power is set out in section 67C. It provides for qualified privilege – that is, the publication is privileged unless it is shown to have been made with malice.

ECHR issues

6. The new clause ("Office for Students: publication and protection from defamation") engages Article 8 (right to private and family life). The Department considers that the new clause is compatible with the provisions of the ECHR.

Reputation of higher education providers: Articles 8 and 10 and Article 1 Protocol 1

7. Defamation is usually considered in light of Article 10 (freedom of expression) because one of the permitted reasons in Article 10(2) for the lawful restriction of the right to freedom of expression is "the protection of the reputation or the rights of others". A corporate entity, which may include a higher education provider, is a person for the purpose of the ECHR and there is case law to show that the reputation of others under Article 10(2) can include the reputation of a company[1]. Accordingly, the protection of a company's reputation may be a lawful reason to restrict someone else's freedom of expression, but Article 10 does not itself directly protect that reputation since it concerns the protection of freedom of expression, and therefore is not engaged here.

8. It is Article 8 that is relevant to the analysis of the reputational rights of a higher education provider. However, it is not established that companies have a protected right to reputation more generally under the ECHR, in particular under Article 8. The Strasbourg Court has left open the question of whether Article 8 protects the reputation of a legal person (see Firma EDV für Sie, EfS Elektronische Datenverarbeitung Dienstleistungs GmbH v Germany[2], MTE v Hungary[3] and Petro Carbo Chem v Romania[4]). The case law generally on the reputation of corporate entities suggests that, if called upon to make a firm decision on the issue in a future case, the Court is unlikely to view the reputations of legal persons as falling within the scope of Article 8.

[1] STEEL AND MORRIS v. THE UNITED KINGDOM (coe.int)
[2] FIRMA EDV FUR SIE, EFS ELEKTRONISCHE DATENVERARBEITUNG DIENSTLEISTUNGS GMBH v. GERMANY (coe.int)
[3] MAGYAR TARTALOMSZOLGALTATOK EGYESULETE AND INDEX.HU ZRT v. HUNGARY - 22947/13 (Judgment (Merits and Just Satisfaction) : Court (Fourth Section)) [2016] ECHR 135 (02 February 2016) (bailii.org)
[4] Application No. 21768/12, 30 September 2020, paragraph 63

9. Article 1 Protocol 1 ("A1P1") (right to peaceful enjoyment of property) may also potentially be relevant, insofar as reputation may in some contexts be related to business goodwill. However, while marketable goodwill is within scope of A1P1, case law[5] suggests that reputation is not protected under A1P1. Equally, to the extent that a claim for protection of business reputation is simply a concern about future earning potential, that would not be protected.

10. Specifically on the reputation of a university, the Court held in Kharlamov v. Russia[6] as follows:

> *"29. …In the present case there is no evidence that the domestic courts performed a balancing exercise between the need to protect the University's reputation and the applicant's right to impart information on issues of general interest concerning the organization of the academic life. They merely confined their analysis to the discussion of the damage to the plaintiff's reputation (see paragraph 10 above) without giving any due consideration to the Convention standards described above. Neither did the domestic courts consider that the "dignity" of an institution cannot be equated to that of human beings. The Court considers that the protection of the University's authority is a mere institutional interest of the University, that is, a consideration not necessarily of the same strength as "the protection of the reputation or rights of others" within the meaning of Article 10 § 2 (see Uj v. Hungary, no. 23954/10, § 22, 19 July 2011)."*

11. In Uj v. Hungary[7], the Court held that there was a difference between damaging an individual's reputation regarding his or her social status, with the repercussions that this could have on his or her dignity, and damaging a company's commercial reputation, which had no moral dimension. Similarly, in Margulev v. Russia[8], the Court emphasised that there is a difference between the reputation of a legal entity and the reputation of an individual as a member of society. Whereas the latter may have repercussions on one's dignity, the former is devoid of that moral dimension. This difference is even more salient when it is a public authority that invokes its right to reputation, noting that higher education providers are generally treated as public authorities.

[5] *R (Malik) v Waltham Forest* [2007] EWCA Civ 265 and *Ajinomoto Sweetners v Asda* [2010] EWCA Civ 609, paragraph 29
[6] KHARLAMOV v. RUSSIA (coe.int)
[7] UJ v. HUNGARY (coe.int) paragraph 22
[8] MARGULEV v. RUSSIA (coe.int) paragraph 45

12. In light of the above, the Department does not consider that the ECHR specifically protects a higher education provider's right to reputation (except potentially in the context of a justification for a restriction under Article 10), or at least the ECHR does not ascribe significant weight to it.

Reputation of individuals: Article 8

13. Publication by the OfS under the new provision may include information relating to individuals. In some cases, the OfS may wish to publish information about an investigation which requires the identification of an individual because of the specific factual matrix. For example, one of the registration conditions that providers must comply with refers to an individual (condition E3[9] on good governance mentions the accountable officer, who is the Vice Chancellor); and members of the governing body, those with senior management responsibilities, and individuals exercising control or significant influence over the provider must all be fit and proper persons[10]. In the event of an investigation referring to those offices, any publication would have the effect of identifying such individuals. The same is true where a body which is part of an investigation is a sole trader.

14. An individual's reputation is within the scope of Article 8 and that can include in relation to professional activities. However, Article 8 cannot be relied upon in order to complain of damage to reputation which is a foreseeable consequence of a person's own actions[11]; this covers criminal offences and other misconduct. This is particularly relevant in the context of a decision by a regulator – a finding by the OfS of misconduct by an individual who is, say, employed by a provider in the context of a regulatory investigation is likely to mean that any damage is a foreseeable consequence of their own actions.

15. When balancing freedom of expression protected by Article 10 and the right to respect for private life enshrined in Article 8, the Court has applied several criteria. These include the contribution to a debate of general interest; how well known is the person concerned and what is the subject of the report; his or her prior conduct; the method of obtaining the

[9] Condition E3: Nominate to the OfS a senior officer as the 'accountable officer' who has the responsibilities set out by the OfS for an accountable officer from time to time.
[10] Public interest governance principle IX: Fit and proper: Members of the governing body, those with senior management responsibilities, and individuals exercising control or significant influence over the provider, are fit and proper persons.
[11] SIDABRAS AND DŽIAUTAS v. LITHUANIA (coe.int) paragraph 49

information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed (Axel Springer AG v. Germany[12]).

16. In the context of whether Article 8 is engaged by a decision by a regulator, and whether any interference is justified, certain aspects of these criteria may be relevant. In particular, the decision will be of interest to the sector and to students and prospective students, noting the value of transparency in the work of a regulator. Any individual named will likely be of sufficient seniority, representing the provider that they work for. Where there has been an investigation by the OfS, those mentioned in the decision will have the opportunity to make representations. Lastly, any sanction will be imposed on the provider, not the individual.

17. The OfS will have to carefully consider whether it is appropriate to identify an individual in any given publication and as part of this will consider whether to engage with the individual before publication. There is the specific safeguard provided in section 67A(5)(b) requiring the OfS to consider whether publication may have a serious and prejudicial effect on the interests of an individual. This is in addition to the general requirement in section 2 of HERA for the OfS to have regard to "the principles of best regulatory practice, including that regulatory activities should be "(i) transparent, accountable, proportionate and consistent, and (ii) targeted only at cases in which action is needed". There is also another safeguard in the clause that, where the OfS has published a decision to conduct an investigation which identifies an individual whose activities are being investigated, and then subsequently makes no finding or takes no action in relation to that individual, then the OfS must publish a notice stating that fact. Finally, the OfS is of course a public authority, and as such is required to act compatibly with the ECHR and is amenable to judicial review claims.

18. These safeguards mean that the identification of an individual will be limited to where the OfS considers that it is necessary. Any potential harm to that person's reputation as a result (where there is no finding of a criminal offence or misconduct) will also be limited as much as possible. Protection from defamation claims is appropriate and necessary in order to ensure that the OfS can act in the public interest, in particular in the interests of students and prospective students, and to increase confidence in the regulator through transparency around its regulatory activity. The processes undertaken by the OfS, as a regulator required to act compatibly with public law and the ECHR, alongside the

[12] Axel Springer AG v. Germany (Application no. 39954/08), paragraphs 89-95

safeguards set out in the new provision and in HERA more generally, will ensure that the prohibition of someone bringing a defamation claim (except where there is shown to be malice) is proportionate to the public interest in the publication by the OfS of its notices, decisions and reports.

19. It should be noted that there is widespread precedent for regulators to be given protection from defamation claims in respect of publication of notices, decisions and reports – see, for example, the Competition and Markets Authority, Ofsted and the Children's Commissioner.

20. Accordingly, the Department considers that Article 8 is engaged but there is no unlawful interference. If there were any interference based on the facts of a specific case, it would be justified for the reasons set out above.

Department for Education

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