

## **MEMORANDUM ON EUROPEAN CONVENTION ON HUMAN RIGHTS COMPATIBILITY FOR THE ENERGY BILL 2012**

### **INTRODUCTION**

1. This memorandum analyses the issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Energy Bill. Where no specific reference is made to a provision, we consider that that provision does not raise any ECHR issues. This memorandum has been prepared by the Department of Energy and Climate Change and the Ministry of Defence. The Secretary of State for Energy and Climate Change has made a statement under section 19(1)(a) of the Human Rights Act 1998 (“HRA”) that, in his view, the provisions of the Bill are compatible with Convention rights.

### **SUMMARY OF THE ENERGY BILL 2012**

2. The Bill has 5 Parts.
  - (a). Part 1, on electricity market reform, contains chapters on:
    - general considerations (a duty to have regard to certain factors when exercising certain functions);
    - contracts for difference (powers to make statutory instruments and licence and code modifications to provide a new price support scheme to encourage low carbon generation);
    - the capacity market; (powers to make regulations and licence and code modifications to provide support to ensure the security of electricity supplies for consumers);
    - conflicts of interest and contingency arrangements (power to make licence and code modifications in relation to the institutions that will administer the contracts for difference and capacity market, power to make orders and transfer schemes to transfer functions and property to a new delivery body, amendments to the special administration regime for energy network companies);
    - investment contracts (arrangements for early contracts to encourage low carbon generation);
    - access to markets (power to amend licences and codes to put in place measures to increase liquidity in the electricity markets and the availability of routes to market for generators);
    - transitional arrangements for the renewables obligation (the creation of a new support scheme to which participants in the renewable obligation scheme can be transitioned when the scheme is closed in 2027); and
    - an emissions performance standard (which limits the permissible levels of emissions from new electricity generating stations).
  - (b). Part 2, on nuclear regulation, contains measures for the creation of a new Office of Nuclear Regulation, and sets out its purposes and functions, together with various supplementary measures.

- (c). Part 3 makes provision in relation to the government pipe-line and storage system.
- (d). Part 4 makes provision for a strategy and policy statement to which the Gas and Electricity Markets Authority must have regard.
- (e). Part 5 contains miscellaneous measures on consumer redress, offshore transmission and nuclear decommissioning costs.

## **PART 1: ELECTRICITY MARKET REFORM**

### ***Introduction to EMR***

- 3. The context of Electricity Market Reform is the system of electricity legislation which is already in place, particularly under the Electricity Act 1989. The system has been amended and supplemented by, in particular, the Utilities Act 2000 and the Energy Acts of 2004, 2008, 2010 and 2011. An overview of the system is set out below.
- 4. The electricity regulation system makes it an offence to carry out certain activities – generation, transmission, distribution, supply, and participation in an interconnector – unless the person carrying out the activity is licensed or exempt (by general or specific order) from licensing.
- 5. The Gas and Electricity Markets Authority (“the Authority”), acting through Ofgem, issues and maintains the licences, which contain a wide range of conditions. Licences often require licensees to be signatories to “industry codes”. Industry codes are agreements between market participants which set out systems to be followed in, for example, the settlement of debts, connecting to the grid and customer switching.
- 6. Market participants may also be subject to statutory requirements, set out in the 1989 Act or other legislation. In some cases, statute provides for these to be, or to be treated as being, “relevant requirements” under section 25 of the 1989 Act, which means that they are treated in the same way as “relevant conditions” (conditions of the licence) and may be enforced by the Authority using an enforcement regime in the 1989 Act.
- 7. The enforcement regime operates as follows. Where the Authority identifies a breach of a relevant condition or a relevant requirement, it may issue an “order for securing compliance”. No action can be taken by anybody else at that stage. But if an order for securing compliance is breached, Ofgem may fine the market participant up to 10% of its turnover. At the same time, a breach of an order for securing compliance is also actionable by a person who can show that they have suffered loss as a result of the breach.
- 8. Many of the EMR provisions described in this memorandum build or rely on the licensing and enforcement mechanisms in the 1989 Act in order to operate effectively.

### ***General ECHR issues under Part 1: Article 6***

- 9. Some of the arguments on why these provisions are compatible with the ECHR are consistent across some of the sections of this Part of the Bill. Rather than repeat these arguments in respect of each clause for which they are relevant we set out here the arguments which are of general application in relation to Art. 6. These are expanded where necessary in respect of individual provisions. We accept that companies are

capable of benefiting from the protections offered by the ECHR<sup>1</sup> and the below is predicated on that basis. We also keep in mind that under s.6 HRA public authorities, including the Secretary of State, are required to act in a manner consistent with the ECHR.

10. The modification by the Secretary of State of licence conditions or industry codes maintained under licence conditions may constitute a determination of the licence holders' civil rights. In *Ringeisen v Austria* (No 1)<sup>2</sup>, the European Court of Human Rights ("ECtHR") recognised that the concept of civil rights and obligations could extend to proceedings between a private party and a public body the result of which is decisive for private rights and obligations. The modification of licence conditions is determinative of a licensee's rights and obligations under the licence, and these are rights of a private and economic nature. Licensees (and their customers) will bear the costs of the regulatory changes.
11. However, the modification of licences using powers under this Part of the Bill will be done through measures which are likely to be considered to be legislative measures. The modifications will be made by the Secretary of State and will be subject to parliamentary scrutiny in a similar way to other subordinate instruments. Legislative measures affecting an individual's civil rights are not generally regarded as being determinative of those rights for the purposes of Article 6.<sup>3</sup>
12. This position is not absolute, though and the ECtHR has recognised that the mere regulation of a particular activity by the state is not sufficient in itself to bring the matter exclusively within the public sphere such that they do not determine civil rights. In *Pudas v Sweden* (1987), the court rejected an argument that the revocation of a licence to carry out transport services did not involve a civil determination and was instead public law activity regulated by public authorities and funded by the taxpayer:

"These features of public law do not suffice to exclude from the category of civil rights under Article 6(1), the rights conferred on the applicant by virtue of the licence."
13. Therefore, although we take the view that it is unlikely, there may be an argument that the licence modifications may still engage Art. 6, even where the amendments are effected through legislative measures. We have therefore considered the compliance with these provisions in case they do engage Art. 6.
14. To the extent that modification of licence conditions using the powers provided in this Part does constitute a determination of a licensee's civil rights and obligations, we consider that sufficient safeguards are in place to satisfy the requirements of Article 6. The Secretary of State must consult licence holders before making a modification, and the terms of the modification will be susceptible to judicial review. The decision in *Tsfayo v UK*<sup>4</sup>, on the sufficiency of judicial review as a remedy, is distinguishable, since the content of any licence modification will be an exercise of administrative

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<sup>1</sup> See for example *Wieser and Bicos Beteiligungen v Austria* [2008] 46 EHRR 54.

<sup>2</sup> (1971) 1 EHRR 455.

<sup>3</sup> See *Human Rights Practice*, Simor & Emerson, para 6.074, but note in *Ruiz-Mateos v Spain* 1993, the majority of the ECtHR concluded that a specific legislative decree to expropriate the shares of a group of companies, which was subject to limited review by the Constitutional Court in Spain, engaged Article 6(1).

<sup>4</sup> [2007] ECHR 656.

discretion based on complex policy considerations and expert knowledge of the operation of the electricity trading and transmission arrangements.

15. We therefore take the view that to the extent that the modification of licences is determinative of civil rights and obligations there are safeguards in place and in any event Judicial Review is a sufficient mechanism for dealing with appeals.

## **CHAPTER 1: GENERAL CONSIDERATIONS**

16. This clause will not engage any Convention rights.

## **CHAPTER 2: CONTRACTS FOR DIFFERENCE**

### *Outline of provisions*

17. Contracts for difference are intended to provide developers of eligible low carbon generation with a long term contract (a “CfD”) that provides for a stable revenue stream enabling investment in low carbon. The allocation of contracts to such generators will mostly be effected by the operator of the national electricity transmission system (“the NSO”). This is currently National Grid Electricity Transmission PLC) who will allocate CfD contracts in line with agreed objectives set by Government and direct a CFD counterparty to enter into those contracts with generators. A CFD counterparty is a person (either a company or a public authority) who has been designated as such (following the giving of the person’s consent). The terms of the contract which a CFD counterparty is required to enter into following the direction of the NSO will be set out in regulations. In relation to early contracts this will include the price. In the longer term allocation and price will be determined by a competitive process. For important or more complex projects the Secretary of State may determine whether a generator should receive a CFD and on what terms and direct a CFD counterparty accordingly.
18. The payment mechanism in a CFD contract will work by setting a “strike price” which represents the level of support determined to be necessary to support a particular technology. The contracts will also refer to a reference price which is an expression of the average wholesale electricity price at a point in time. Generators will sell their generation into the market and, where the strike price is greater than the reference price, will be paid the difference between the strike price and a reference price by the CFD counterparty. The generator will have also received income from the sale of its electricity which it might expect to sell at a price in the region of the reference price and therefore receive total income at the level of the strike price.
19. When the reference price is above the strike price, payments will be made by the generator to the CFD counterparty. This clawback is aimed at ensuring that generators only receive the stable revenue they need. There will be variations on this “two-way” CFD model in order to support different types of generation whilst still retaining sensible incentives to generate.
20. Licensed electricity suppliers (including both persons who hold a licence to supply electricity in Great Britain and those holding a licence to do so in Northern Ireland) will be required to make payments to the CFD counterparty to fund the payments it is required to make. Payments will be made by all licensed electricity suppliers. However, where the CFD counterparty receives payments from generators it will pass those back to suppliers. Suppliers may also be required to fund the running costs of the CFD

counterparty. It is likely that suppliers will seek to pass their increased costs in funding the CFD scheme onto consumers of electricity.

21. We do not consider that any of the provisions insofar as they affect a CFD counterparty (who may be subject to significant regulatory controls as well as being subject to a power to make a transfer scheme) engage Convention rights. It is currently our intention to designate a government owned company as the CFD counterparty who, as an emanation of the State, cannot be a victim. Whilst a non government owned company could be designated, this can only take place with the consent of the person being designated. Accordingly its rights cannot be said to be infringed since it has consented to what might otherwise amount to infringements.

### ***Power to issue Contracts for Difference; power to make regulations about Contracts for Difference***

22. Clause 5 provides for a duty of the Secretary of State to make provision for electricity suppliers to make payments to a CFD counterparty in order to enable that counterparty to make payments due under CFD contracts. There is also a power to require electricity suppliers to pay the CFD counterparty to enable it to meet its costs, to enable other suppliers to cover losses caused by the default or insolvency of another supplier and to provide for a reserve.
23. The regulations can make provision about the enforcement of the obligations to make payments, including enforcement by the Authority under the powers it has in section 25 to 28 of the Electricity Act in relation to breaches of electricity licenses and other regulatory requirements imposed in law. Regulations may also make provision about appeals.

### ***Application of Article 1 of the First Protocol***

24. As with a number of other clauses in the Bill, these provisions mostly confer powers. Section 6 of the Human Rights Act 1998 prohibits public authorities from acting in a way which is incompatible with a Convention right. We note though that the existence of a duty to make provision requiring suppliers to make payments to a CFD counterparty must be exercised to achieve that result and must therefore be considered.
25. The imposition of a supplier obligation to make compulsory payments to a body designated by the State may be an interference with the possessions of such suppliers. The supplier obligation is also likely to amount to a tax or other contribution mentioned in the second paragraph of Article 1 of the First Protocol.
26. A CFD counterparty will be a public sector body (because of the controls that can be exercised over it) and our intention is in fact for the company to be owned by the Secretary of State. So a payment to it will be a payment to the State.
27. That a CFD counterparty will only be able to use the monies for purposes set out in the regulations strengthens such arguments. We therefore take the view that the measure amounts to taxation for the purposes of the ECHR.
28. Whilst the imposition of a tax or other compulsory contribution can amount an interference with possessions for the purposes of Article 1 of the First Protocol, tax, contributions and penalties are treated differently to other interferences because of the second paragraph in that Article. This says:

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

29. Where a measure amounts to taxation or other contribution member states have a wide margin of appreciation as was made clear in *National & Provincial Building Society and Others v. United Kingdom*:<sup>5</sup>

*It is recognised that a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation and the Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation.*

30. Notwithstanding that wide margin of appreciation we must consider whether the imposition of an obligation on electricity suppliers to make payments for the purpose of supporting low carbon generation is devoid of reasonable foundation. Measures that may be devoid of reasonable foundation would include those that impose an “individual and excessive burden” borne by the taxpayer (see *Heinrich v France*<sup>6</sup>) or where a tax is so harsh that it amounts to an arbitrary confiscation of assets or fundamentally interferes with the taxpayers financial position (see *Travers v Italy*<sup>7</sup>). We are convinced that neither will be the case with the supplier obligation. The obligation of an individual supplier will relate to the proportion of the market it has supplied in the period for which the obligation is due. The addition of the supplier obligation is likely to increase the costs for each supplier of their supply business, but they will not be prevented from passing such costs through to their customers and in circumstances where all suppliers are subject to the same obligation this might be thought likely.
31. It is appropriate for suppliers to bear the burden of the CFD scheme for two reasons. Firstly, they will benefit from access to the additional low carbon generation capacity which will arise because of the scheme (which they will be able to purchase). Secondly, within the electricity market they are the interface with retail consumers who will collectively benefit from the scheme and are the most efficient way of transferring the costs of the system to the users. Furthermore, this provision should not be read in isolation. Clause 7 enables a CFD counterparty to make payments to suppliers. It is intended that regulations will provide that payments received by a CFD counterparty under the contracts will be paid to suppliers. As such the combined effect of the supplier obligation, and the grant of payments under clause 7 may act as an effective hedge on wholesale electricity prices for a proportion of a suppliers supply. Finally, it is of note that suppliers will be consulted upon the regulations.
32. Accordingly whilst we consider that Article 1 of the First Protocol is engaged, and there is an interference with the property of licensed electricity suppliers, that interference is justified.

*Power to require information from national system operator and electricity suppliers*

33. Clause 9 enables regulations to make provision for information to be required from various persons including the national system operator and electricity suppliers. This is to enable information to be provided for the purpose of ensuring generally that a CFD

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<sup>5</sup> (1997) 25 EHRR 127.

<sup>6</sup> Application 13616/88, para 49.

<sup>7</sup> Decision of 16th January 1995, section 4.

scheme is running effectively, but will also be used specifically to enable payments to flow between generators, suppliers and the CFD counterparty effectively.

#### *Application of Article 8*

34. A requirement to provide information to the Secretary of State and others may engage Article 8 (right to respect for the home and correspondence).
35. Article 8 is a qualified right and we consider that in this case, an obligation to provide information will be capable of being justified and proportionate in accordance with the provisions of Article 8(2). We consider that the provision of information which it is envisaged will be required will be necessary in the interests of the economic well-being of the country, namely to ensure that the suppliers, generators who are party to a CFD and the CFD Counterparty are able to discharge their payment obligations and be sure that other parties are correctly discharging their obligations. There is some analogy to the case of *M.S. v. Sweden*<sup>8</sup> in which the medical records of an individual were obtained without the consent of that individual by the Social Insurance Office in the course of assessing the individual's entitlement to compensation. This was recognised as a legitimate aim by the court. Here information is being required to establish and confirm financial entitlements and liabilities of electricity suppliers and generators and the information sought will be decisive as to the allocation of sums raised by way of the supplier obligation. The obligations of suppliers will depend upon the amount of electricity supplied by suppliers. This will therefore need to be shared with the CFD counterparty. Information may also need to be shared with third parties, such as any settlement agent who will manage payments in the system. It is our intention to ensure that suitable controls are placed upon the use of such information in the regulations. It is unlikely that any of the information required will amount to personal data.

#### *Modification of transmission licences*

36. Clause 11 enables the Secretary of State to modify transmission, generation and distribution licences, the standard conditions of such licences and documents maintained in accordance with conditions of such licences.

#### *Application of Article 6*

37. For the reasons set out in paragraphs 10-15 we consider that the Secretary of State's power to modify licence conditions under this provision is consistent with Art. 6.

## **CHAPTER 3: CAPACITY MARKET**

### *Outline of provisions*

38. This chapter enables the Secretary of State to establish a capacity market in Great Britain ("GB"). This will involve the creation of a market for capacity in which a person, selected through a centrally run auction, can enter into a capacity agreement through which they will commit to make a certain amount of capacity available to the GB electricity market when required. A person who holds a capacity agreement (a "capacity provider") will be entitled to receive a capacity payment at a level which is determined through the capacity auction. The costs of the scheme will be borne by electricity suppliers. Capacity providers will be subject to certain obligations, including in particular an obligation to make a payment to suppliers in certain situations (a "capacity incentive").

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<sup>8</sup> (1999) 28 EHRR 313.

39. Clause 17 gives the Secretary of State the power to implement a capacity market through regulations (“electricity capacity regulations”). Electricity capacity regulations may, in particular, include provision about capacity agreements (clause 18), capacity auctions (clause 19), a settlement body (clause 20), other requirements of electricity licence holders and persons carrying out functions under the scheme (clause 22), information (clause 23), and enforcement and dispute resolution (clause 24).
40. Clause 25 gives the Secretary of State the power to make related provision through amendments to licence conditions and industry documents maintained under licences (referred to here as “codes”).
41. Clause 26 enables the Secretary of State to amend enactments for the purpose of, or in connection with, any provision made in relation to the capacity market.
42. Clause 28 specifies the procedure which must be followed when making any regulations in relation to the capacity market.

***Power to make regulations or amend supply licences to require suppliers to make capacity payments***

43. The Secretary of State can use the power in clause 17 to make electricity capacity regulations requiring that any electricity supplier must make payments (“capacity payments”) to a capacity provider or to an intermediary (a “settlement body”). The Secretary of State can also use the power in clause 20 to make regulations requiring electricity suppliers to make payments to a settlement body for certain ancillary purposes, such as contributing to the settlement body’s administrative costs. Alternatively, the Secretary of State can use the power in clause 25 to amend the licences of electricity suppliers, and any relevant codes, for these purposes.

*Application of Article 1 of the First Protocol*

44. We consider that the introduction of a requirement that suppliers bear the costs of the capacity market will be pursuant to the general interest and proportionate, and will therefore be justified. The creation of a capacity market is in the general public interest as, within the current electricity market framework, reliability of electricity supply is a public good. It is not currently possible for individual electricity users to choose to have their electricity supply disconnected (or provided at a lower quality) at times of high system stress. As a result, when such disconnection occurs it takes place on a non-discriminatory basis with implications for quality of life, economic activity, and potentially safety. In order to ensure that all electricity users continue to benefit from a secure electricity supply it is necessary to establish a system which ensures that there is sufficient electricity generation capacity to meet the needs of all electricity consumers.
45. Within this context, we consider that it would be proportionate for electricity suppliers to meet the costs of this system as suppliers may be able to pass these costs on to their customers, as the ultimate beneficiaries of the capacity market. Suppliers are also expected to benefit, following the introduction of a capacity market, from:
  - (a). less price fluctuation in the electricity wholesale market (the capacity market provides protection against the effects of intermittent generation capacity); and
  - (b). a reduction in the price of electricity in the electricity wholesale market (by increasing the amount of capacity which is available to generate electricity the capacity market is expected to increase competition in the electricity wholesale market).



46. In particular, as a result of the anticipated reduction in the price of electricity in the electricity wholesale market, the introduction of a requirement that suppliers bear the costs of the capacity market is not expected to result in an actual increase in the net cost to suppliers of supplying electricity to consumers in Great Britain.
47. We therefore consider that the powers contained within the clauses are capable of being exercised in a way which is compatible with the ECHR and that the clauses are in accordance with the provisions of Article 1 of the First Protocol.

*Application of Article 6*

48. For the reasons set out in paragraphs 14-15 above we consider that this provision is compliant with Art. 6.

***Power to amend the system operator's licence to confer functions on it***

49. The power in clause 25 enables the Secretary of State to amend the licence conditions and codes applicable to other holders of licences under the Electricity Act 1989 for any purpose related to provision that may be made by or under this Chapter. In particular the Secretary of State could use this power to amend the conditions of the electricity transmission licence to confer functions on the system operator (e.g. to run capacity auctions and issue capacity agreements, or to do so in a particular way: see for example the related provision in clauses 19 and 22).

*Application of Article 6*

50. For the reasons set out in paragraphs 10-15 above we consider that these provisions are capable of being exercised in a way that is compatible with Art. 6.

***Power to amend generation licences to require operators to participate in the capacity market***

51. Similarly, the power in clause 25 could be used by the Secretary of State to require a person who holds an electricity generation licence to participate in the capacity market, to participate in a particular way, or to comply with other restrictions when using generating plant (e.g. see the related provision in clauses 18 and 22).

*Application of Article 1 of the First Protocol*

52. We consider that this provision is capable of engaging Article 1 of the First Protocol, insofar as it amounts to a control on the use of property (i.e. a generating plant) but does not amount to a deprivation.
53. If required to participate in the capacity market, the owner of a generating station will continue to be entitled to sell its electricity to whoever it chooses (subject to regulatory requirements). In addition, however, the owner of the generating station will be entitled to receive capacity payments (and will be liable to pay a capacity incentive if it breaches the capacity agreement).
54. We consider that the introduction of a requirement that existing generating stations participate in the capacity market, a requirement to participate in a particular way, or other restrictions as to the use of their generating plant would be pursuant to the general interest and proportionate. As noted above, the creation of a capacity market is in the general public interest as, within the current electricity market framework, reliability of electricity supply is a public good. Such requirements may, in particular, be necessary in order to address the potential for market power to be abused by owners of existing generating stations. For instance, if such stations continued to operate in the energy

market without participating in the capacity market, they could withhold certain existing capacity from the auction in order to drive up prices within the auction. This would increase the costs of the capacity market without giving rise to additional benefits. Alternative ways of mitigating such abuse of market power include, in particular, restricting the price at which such stations can bid into the auction, requiring that a minimum amount of capacity be bid in, or imposing restrictions on the use of capacity which is not bid in to the auction.

55. We therefore consider that that the clauses, and the powers contained within them, are capable of being exercised in a way which is compatible with Article 1 of the First Protocol.

*Application of Article 6*

56. For the reasons set out in paragraphs 10-15 above we consider that this provision is consistent with Art, 6.

***Exercise of functions in relation to the capacity market by the system operator or a settlement body***

57. The Secretary of State can use the power in clause 17 to make electricity capacity regulations, or the power in clause 25 to amend licences, to confer various functions on the system operator, including the running of capacity auctions and the issuing of capacity agreements. Clause 18(4)(g) further confirms that the Secretary of State can use electricity capacity regulations to make provision about the person or body who is to administer the settlement of capacity payments or capacity penalties.
58. These clauses enable the Secretary of State to provide for the system operator to administer the capacity market. In particular, the Secretary of State may provide that the system operator must decide, on a case by case basis, whether a particular capacity provider is eligible to bid into a capacity auction, and whether they must pay a capacity incentive if they do not make capacity available.

*Application of Article 6*

59. We consider that a decision as to whether a capacity provider is liable to pay a capacity incentive in a particular case could, depending on how the incentive regime is designed, involve the determination of a person's civil obligations. It is less clear whether a decision as to a person's eligibility would involve the determination of a person's civil rights, although we think this unlikely.
60. We consider that a decision as to whether a capacity provider is liable to pay a capacity incentive in a particular case does not involve the determination of a criminal charge or the charging of a person with a criminal offence. We note that, when determining whether proceedings are criminal for the purposes of Article 6, it is necessary to consider three criteria, namely (a) the classification of the proceedings in domestic law, (b) the nature of the offence itself, and (c) the severity of the penalty which is imposed.<sup>9</sup> Each point will be considered in turn.
- (a). Failure to make capacity available in accordance with a capacity agreement will not give rise to a criminal offence in GB domestic law.
  - (b). The situations in which a capacity incentive will be payable are not in the nature of a criminal offence. A capacity incentive is payable only when a person holds a

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<sup>9</sup> Human Rights Law and Practice (3 ed.), "Article 6: Right to a fair trial", Brian Kelly, David Pievsky, Paola Uccellari and Tara Lyle, paragraph 4.6.13.

capacity agreement. If a capacity agreement is sold, the right to receive a capacity payment and any obligation to pay a capacity incentive (along with any other obligations associated with the capacity agreement) will pass to the new holder.

- (c). In relation to the severity of the penalty, the level of the capacity incentive payable by a capacity provider will depend on whether it is calculated by reference to the price in a reference market or is set administratively (i.e. by reference to the capacity payment received). In either case, as capacity incentives are paid to suppliers, the incentive is in effect a form of compensation for failing to deliver a product which the capacity provider had agreed to deliver. As a result of that failure suppliers can expect to pay a higher price when purchasing that commodity (i.e. electricity) in the GB electricity market. Whichever method is used to calculate the capacity incentive applicable, we consider any such capacity incentive to be proportionate. The Secretary of State will be bound by section 6 of the Human Rights Act 1998 when conferring functions on the system operator to take decisions about the eligibility of capacity providers and whether capacity penalties are payable in a particular case.
61. We consider that Judicial Review will be a sufficient appeal mechanism against any decision by the system operator as to whether a particular capacity provider is eligible to bid into a capacity auction, and whether they must pay a capacity incentive in a particular situation, for the reasons set out in paragraphs 14-15 above.
62. However, if, at that time, it appears necessary to the Secretary of State to provide for an alternative mechanism by which a decision by the system operator can be challenged by a person affected by it, clause 24 is sufficiently broad to enable him to make such provision. We therefore consider that these clauses, and the powers contained within them, are capable of being exercised in a way which is compatible with Article 6 of the ECHR.
63. We note that the Secretary of State could alternatively provide in regulations (see clause 18(4)(f)), or through amendments to an industry code (see clause 25), for a settlement body to administer the settlement of capacity payments or capacity penalties. The question of whether a settlement body would be acting as a public authority for the purposes of section 6 if it carried out those functions, and whether any such decisions would be susceptible to Judicial Review, is likely to depend on the particular functions conferred and the way in which they were conferred. In any event, however, we consider that the Secretary of State would be under an obligation to ensure that the exercise of any functions conferred on a settlement body were compliant with Article 6, and that the clauses (including in particular clause 24) are sufficiently broad to enable him to do so.

### ***Power to require provision of information***

#### *Outline of provisions*

64. Clause 23 clarifies that the Secretary of State can use electricity capacity regulations to require certain participants in the capacity market (including the system operator) to provide or publish information relating to the capacity market. In addition, clause 18(5) clarifies that regulations can require a person to satisfy the system operator as to certain matters (or to meet certain conditions) before they may enter a capacity auction or a capacity agreement.

### *Application of Article 8*

65. The exercise of these powers could engage the provisions of Article 8(1), which is capable of extending to a company's information in some contexts. However, Article 8 is a qualified right and we consider that in this case, the clause in question is justified and proportionate in accordance with the provisions of Article 8(2).
66. In general terms, we consider that the provision of this information is necessary in the interests of the economic well-being of the country, namely in order to ensure security of supply, as described above. In particular, we consider that the provision of such information is essential for:
  - (a) the day to day administration of the capacity market, such as to determine whether a person is eligible to participate in a capacity market and is complying with any obligations arising under that mechanism (to the extent that the Authority cannot use its powers under the Electricity Act 1989 to require this information);
  - (b) to enable the system operator and the Authority to advise the Secretary of State as to whether it is necessary to procure capacity through a capacity market and, if so, how much capacity is required; and
  - (c) overall monitoring of the capacity market, to ensure that the scheme continues to achieve the necessary objectives at a reasonable cost to consumers, and that any potential abuses of market power are being effectively managed.
67. We consider that the Secretary of State will be bound by section 6 of the Human Rights Act 1998 when making provisions relating to the provision of information, and will therefore be required to ensure that his power is used in a proportionate way.
68. In addition, we consider that the clause is sufficiently broad to enable the Secretary of State to ensure that there are sufficient controls on the use of information, by making provision in regulations requiring any person who receives such information to use it only in accordance with any requirements, and protect it in accordance with any safeguards, set out in the regulations.
69. We therefore consider that that these clauses, and the powers contained within them, are capable of being exercised in a way which is compatible with Article 8 of the ECHR.

### ***Requirement that a capacity provider satisfy the system operator as to certain matters, including through the inspection of premises to examine capacity***

70. As mentioned above, clause 18(5) clarifies that regulations can require a person to satisfy the system operator as to certain matters (or to meet certain conditions) before they may enter a capacity auction or a capacity agreement. Clause 18(6) confirms that the Secretary of State could, in particular, require that capacity providers allow the system operator to examine the relevant capacity in order to be satisfied as to certain of these matters. Clause 22(3)(d) further enables such powers to be used where a person has ceased to be a capacity provider (e.g. because they have assigned or traded their capacity agreement).

### *Application of Article 8*

71. The exercise of this power could engage the provisions of Article 8(1), which is capable of extending to business premises in some circumstances.<sup>10</sup> However, Article 8 is a qualified right and we consider that in this case, the clause in question is justified and proportionate in accordance with the provisions of Article 8(2). In general terms, we consider that such an inspection may be necessary in order to ensure the effective administration of the capacity market, by enabling the system operator to determine whether capacity is eligible to participate in the capacity market.
72. The regulations may provide that a person who does not comply with any requirements relating to inspection of capacity will not be eligible to participate in the capacity market.
73. The Secretary of State will be bound by section 6 of the Human Rights Act 1998 when making provisions relating to the conditions and matters which must be satisfied before a person is eligible to enter a capacity auction or a capacity agreement and will therefore be required to ensure, if he decides to include a requirement relating to the inspection of capacity, that this is proportionate.
74. We consider that it would be proportionate for the Secretary of State to make participation in the capacity market conditional on compliance with such an inspection requirement. In any event, we consider that the clause is sufficiently broad to enable the Secretary of State to make provision requiring the system operator to comply with certain procedural safeguards when carrying out any such inspections.
75. We therefore consider that that these clauses, and the powers contained within them, are capable of being exercised in a way which is compatible with Article 8 of the ECHR.

#### ***Extension of the Authority's enforcement regime***

76. Clauses 18(4)(h) and 24 enable the Secretary of State to include, in electricity capacity regulations, provision relating to the enforcement of a capacity agreement, and to provide for obligations under a capacity agreement to be enforceable by the Authority as if they were relevant requirements on a regulated person. Similarly, clause 26 enables the Secretary of State to amend sections 25 of and Schedule 6A to the Electricity Act 1989 for this purpose. In this way the Secretary of State can extend the Authority's enforcement powers to cover obligations imposed, by virtue of the regulations, to persons to whom the enforcement regime does not currently apply (e.g. because they do not hold an electricity generation licence).
77. The enforcement regime can be summarised as follows. The Authority can take enforcement action against regulated persons who breach a relevant requirement by imposing orders on them to secure compliance, and can impose financial penalties on them (sections 25 and 27A). Any person to whom an order or penalty relates may apply to court to challenge it (sections 27 and 27E).
78. In addition, where it appears to the Authority that a regulated person may be contravening an obligation to which the regime applies, the Authority can issue a notice requiring that person to provide it with certain documents or information (the Authority cannot require provision of information which a person could not be compelled to produce to the court (section 28(3)).

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<sup>10</sup> *Société Colas Est v France* (2004) 39 EHRR 17.

79. The Authority can apply to the court if the person fails to comply with the notice, in which case the person will be liable on summary conviction to a fine not exceeding level 5 on the standard scale (section 28(4)). Alternatively, the Authority can apply to the court if the person intentionally alters, suppresses or destroys any document or record required by the notice and they will be liable on summary conviction to a fine not exceeding the statutory maximum, or on conviction on indictment, to a fine (section 28(5)).

#### *Application of Article 6*

80. We consider that when the Authority takes enforcement action against a regulated person using powers under section 25 and 27A, this is likely to amount to the determination of civil obligations within the meaning of Article 6(1). However, we consider that if the Secretary of State were to use these powers to extend the regime to capacity providers, the protections set out in the Electricity Act (and described above) would ensure compliance with Article 6(1).
81. If the Secretary of State were also to use these powers to make provision for the Authority to apply to the Court in relation to breach of an information notice, as anticipated in section 28(6), we consider that it is likely that this would amount to a charge for a criminal offence within the meaning of Article 6(2) and (3)). We consider that the protections provided by way of ordinary criminal procedure (which would apply here) would ensure compliance with Article 6(2) and (3).

## **CHAPTER 4: CONFLICTS OF INTEREST AND CONTINGENCY ARRANGEMENTS**

### *Overview of provisions*

82. This Chapter makes provisions that could be used where a conflict of interest arises between the role of the system operator in administering Contracts for Difference and the Capacity Market, and its other business interests. The Secretary of State is given power to amend the system operator's transmission licence in order to separate or ringfence certain activities.
83. This Chapter also enables the Secretary of State, in certain circumstances, to transfer the system operator's functions of administering Contracts for Difference and the Capacity Market to an alternative delivery body.
84. In addition, this Chapter makes an amendment to Part 3 of the Energy Act 2004 to extend the special administration regime applicable to the system operator to take into account its EMR functions.

### *Modifications of transmission licences: business separation*

85. Clause 29 gives the Secretary of State power to amend the system operator's (that is, National Grid's) transmission licence to introduce business separation or ring-fencing measures. These may be needed because National Grid's role in administering Contracts for Difference and the Capacity Market may give rise to conflicts of interest between its system operator role and new functions, and its existing transmission and other businesses. National Grid as the System Operator could, for example, potentially exercise its new functions in a way which favours National Grid's other business interests in the electricity market. It may also receive commercially sensitive

information from generators which could give other parts of National Grid's business an unfair commercial advantage.

86. Clause 29(6) provides an indication of the type of business separation measures the Secretary of State might put in place including, for example, requiring functions to be carried out in a separate location or on separate IT systems. Clause 31(4) gives the Secretary of State power to make any consequential or transitional modifications of other electricity licences and codes which may be necessary as a result of making these changes to National Grid's transmission licence.
87. We consider that these provisions are compatible with the ECHR.

#### *Application of Article 6*

88. Business separation measures would be aimed at ring-fencing system operation, Contracts for Difference and Capacity Market functions (or some aspects of these functions) from National Grid's other business interests to deal with any conflicts of interest. Examples of the type of business separation or ring fencing measures we might wish to put in place include requiring functions to be carried out in a separate location or on separate IT systems, or potentially requiring certain activities to be carried out in a separate subsidiary.
89. Introducing business separation measures will involve making a public policy determination about the balance between ensuring the effective delivery of Contracts for Difference and the Capacity Market by making the best use of National Grid's expertise, and minimising scope for distortion of competition by National Grid having opportunities to exploit any conflicts of interest between its new functions and its existing business interests.
90. For the reasons set out in paragraphs 14-15 we consider that a suitable appeal mechanism is in place.
91. Article 6(1) is engaged in relation to the enforcement of any new licence conditions. Once any licence modifications have been made, the Authority will enforce them under the existing regime in the Electricity Act, which, as set out in paragraphs 77 and 79 above, includes power to impose orders to secure compliance and financial penalties<sup>11</sup> In terms of Article 6, the Electricity and Gas Acts give licensees the opportunity to apply to court to challenge any order made or penalty imposed by the Authority.<sup>12</sup> Moreover as a public authority, the Authority is bound by section 6 of the Human Rights Act to act compatibly with the ECHR.

#### ***Power to transfer EMR functions***

92. Clause 30 confers on the Secretary of State a power, exercisable by order, to transfer EMR delivery functions conferred by or under Chapters 2 or 3 of the Bill from the national system operator to the Secretary of State or to any other person or body he considers appropriate (with their consent).
93. The Secretary of State is also given the power to make consequential amendments to legislation, licences and codes and, by Schedule 2 to make transfer schemes, which would allow the Secretary of State to provide for property, rights and liabilities to be transferred to the new delivery body in order to give full effect to the transfer of the EMR delivery functions.

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<sup>11</sup> Sections 25 and 27A Electricity Act.

<sup>12</sup> Sections 27 and 27E Electricity Act.

## ***ECHR compatibility***

### *Application of Article 1 of the First Protocol*

94. The Department does not consider that the types of legal functions which will be conferred on the system operator by legislation or licence conditions can be considered to be possessions for the purposes of Article 1 of the First Protocol. The system operator has no legal right to be given the EMR delivery functions, and can have no legitimate expectation that, once the functions have been conferred on it, it will continue to have those functions – especially in the context of legislation which contains a power to transfer the functions to another body.
95. However, it is possible that the system operator may have acquired property rights as part of the exercise of its legal functions. For example, the system operator may have acquired intellectual property – particularly copyright or database rights – that the Secretary of State may wish to transfer to the new delivery body. In that situation, the exercise of the power to make transfer schemes to transfer those rights (if it were used) may have the potential to interfere with the right to the peaceful enjoyment of any possession that has been created.
96. The Department does not consider that the powers would have to be used in such a way as to expropriate property. It may be sufficient for the Department simply to create licences to use the intellectual property, with the system operator retaining ownership of (and the ability to exploit) such intellectual property. The Department has already agreed with the system operator that the Secretary of State will be entitled to take a free licence in respect of any intellectual property developed under the electricity market reform programme. That arrangement has been set out in a memorandum of understanding between the Department and the system operator and reflects the fact that the Secretary of State will have reimbursed, or provided for the reimbursement of, the system operator in respect of the costs of creating or obtaining the intellectual property in question.
97. The powers make specific provision requiring the Secretary of State to pay such amounts of compensation as the Secretary of State considers appropriate to any person whose interests are adversely affected by a transfer scheme. It is not obvious that the payment of compensation will always be appropriate, but this provides an important safeguard.
98. The transfer scheme powers also enable the transfer of rights and liabilities arising under or in connection with a contract of employment, i.e. the transfer of staff. The Department does not consider that the power could, in that respect, be used incompatibly with the Convention rights. Staff would be protected by the Transfer of Undertakings (Protection of Employment) Regulations 2006; under those regulations employees could not be forced to change employer, but they could transfer if they wished. Their employment rights would be unaffected by any transfer they chose to make, and the regulations provide for compensation in the event that they chose not to be transferred.
99. It is very unlikely that the Secretary of State would need to use the power to make a transfer of any entire business using the powers. It is also difficult to envisage any transfer under the powers being made of land, because the EMR functions are unlikely to be significant enough to justify being operated from independent premises and there would be no obvious reason to transfer any land at the same time as functions and other property.



100. On this basis, we consider that the provisions of this Chapter are compatible with Article 1 of the First Protocol.

#### *Application of Article 6*

101. For the reasons set out in paragraphs 10-12 above we do not consider that a transfer of functions order or a transfer scheme engage Art. 6.

102. The consequential amendments that may be made to licences, codes, etc., may engage Article 6 (as the modifications may be determinative of the licensee's rights and obligations under the licence, and these are rights of a private and economic nature), but we consider that such modifications will be compatible with it for the reasons described in paragraphs 14 to 15 above.

#### *Energy administration orders*

103. Under the special administration regime introduced by the Energy Act 2004, the Secretary of State (or the Authority with the Secretary of State's consent) can apply to the court for an energy administration order, which may be granted where the company meets the statutory tests for insolvency. In these circumstances, the court would appoint an energy administrator, whose statutory objective would be to ensure "that the company's system is and continues to be maintained and developed as an efficient and economic system". The energy administrator is required to do this by (if possible) managing the company as a going concern.

104. Clause 32 amends the special administration regime to provide that, where an energy administration order has been made in respect of the company upon which the EMR delivery functions have been conferred (the system operator), then the administrator has an additional objective of ensuring that the EMR functions are, and continue to be, performed in an efficient and effective manner. In a situation where this objective could not be secured in way which is consistent with the primary objective referred to in paragraph 103, the new objective would be subordinate to the primary objective of maintaining and developing an efficient and economic system.

105. The additional duty simply enhances an existing regime which is compatible with the HRA, and the department considers that it therefore raises no issues.

## **CHAPTER 5: INVESTMENT CONTRACTS**

### *Overview of provisions*

106. This Chapter with its associated Schedule makes provision to address the investment hiatus which may result from the length of time that it will take to commission and construct electricity generating facilities that are needed and the length of time it will take to implement the enduring regime relating to CfDs. It is intended to enable the Secretary of State to fund and administer early CfDs (referred to as an 'investment contracts' in the Bill) that he enters into with developers before the main CfD regime is established.

107. The broad structure of the Schedule is that, firstly, it defines the nature of an "investment contract" – basically, a contract for difference between the Secretary of State and an electricity generator that relates to low carbon electricity generation and which has been laid before Parliament with a statement covering the matters in paragraph 1(6). The Schedule then goes on to provide a number of powers in relation to investment contracts which, for example, permit them to be funded from general

taxation or by imposing a levy on suppliers and permit the rights and liabilities under them to be transferred from the Secretary of State to a CFD counterparty (with associated power to funds that body and exercise controls over it).

### ***ECHR compatibility***

#### *Application of Articles 6, 8 and Article 1 of the First Protocol*

108. Chapter 5 does not in our view raise any additional issues regarding Articles 6 and 8 of the ECHR or Article 1 of the First Protocol, beyond those analysed above as respects Chapter 2 of Part 1.
109. Specifically, there are analogous powers to make regulations to require information (see Part 2 of Schedule 3) which in our view can be exercised compatibly with Article 8 (as per paragraphs 22 and 23 above). The same goes for the powers to make licence modification in Part 3 of the Schedule which are modelled on clause 16, and therefore the reasoning in paragraph 37 about compatibility with Article 6 is equally applicable in the case of these powers to make licence modifications here. There are similarly powers to make regulations imposing a levy on suppliers to fund payments to generators under investment contracts as well as to require a CFD counterparty to make payments to suppliers (see Part 2 of Schedule 3). We consider the provisions here compatible with Article 1 of the First Protocol again for similar reasons to those given for the analogous powers found in clauses 5 and 7 of the Bill (see paragraphs 22-32 above). Specifically, we believe that in relation to the application of Article 1 of the First Protocol in the present case, the UK government has a wide margin of appreciation. Furthermore, a control of the use of property resulting from the regulations will be (in our view) justifiable and proportionate given, for example, the underlying public interest aims here of ensuring security of supply and promoting low carbon electricity generation in order to protect the environment. In addition, suppliers will be able to pass costs onto consumers and our policy is that the Secretary of State will not enter into investment contracts unless he is satisfied that they present value for money.

## **CHAPTER 6: ACCESS TO MARKETS ETC**

### ***Outline of provisions***

110. Clause 34 confers a power on the Secretary of State to modify generation and supply licences issued under section 6 of the Electricity Act 1989 and codes and agreements under those licences. The power may only be exercised for the purpose of promoting liquidity in the wholesale electricity market in Great Britain or facilitating participation in that market. The promotion of liquidity in the wholesale electricity market and the facilitation of participation in that market are intended to improve competition and efficiency in the market generally, with a view to reducing costs to consumers. This is also intended to support the Electricity Market Reform measures in the Bill, particularly the contracts for difference mechanism where improved liquidity is considered essential to ensure credible and robust reference prices. Improved liquidity and the reduction of barriers to market entry will also improve the competitiveness and efficiency of the markets supported by the EMR mechanisms.
111. Clause 34(3) provides an indication of the type of licence modifications that the Secretary of State might make under clause 34. These include modifications which require a generator or supplier to sell or purchase electricity on particular terms or only

in certain ways (such as through an electricity exchange), or which might limit the range of people to whom electricity could be sold or from whom it could be purchased. Such modifications may also impose obligations in relation to the disclosure or publication of information (for example, trading prices).

112. Clause 35 similarly confers a power on the Secretary of State to modify supply licences issued under section 6(1)(d) of the Electricity Act 1989 together with codes and agreements under those licences. This power may only be exercised for the purpose of facilitating investment in electricity generation by promoting the availability of arrangements for the sale of electricity generated. This power is intended to facilitate investment in electricity generation by promoting the availability of arrangements for the sale of electricity generated, such as the long-term contracts for the sale and purchase of electricity that certain developers rely upon in order to underwrite their investments in new generating capacity (known as “Power Purchase Agreements” or “PPAs”). Such measures are also intended to support the contracts for difference mechanism. A generator which holds a contract for difference will still need to sell its power (either under a PPA or into the wholesale market) and there is a concern that there may be investment hiatus while market participants adapt to the new CfD regime. The exercise of the power in clause 35 would be intended to promote the availability of arrangements for the sale of electricity by such generators (such as PPAs), thereby encouraging new investment.
113. Clause 35(3) provides that licence modifications made under clause 35 may impose obligations in relation to arrangements for the purchase of electricity including, in particular, obligations requiring a supplier to purchase electricity on particular terms or in a particular way (such as by participating in an auction).
114. Under clause 36(3), the Secretary of State has the power to make consequential or transitional modifications to other licences and codes which may be necessary as a result of making changes to generation and supply licences under each of clauses 34 and 35.

### ***ECHR compatibility***

#### *Application of Article 6*

115. For the reasons set out in paragraphs 10-15 above, we consider that these provisions are capable of being exercised in a way which is compatible with Article 6.

## **CHAPTER 7: RENEWABLES OBLIGATION TRANSITION**

### ***Outline of provisions***

116. This chapter gives the Secretary of State powers to transition from the renewables obligation to a certificate purchase scheme.
117. The renewables obligation is currently established using powers under s.32 to 32M Electricity Act 1989. Under the renewables obligation, licensed electricity suppliers are required to submit renewables obligation certificates to the Authority or pay a buy-out price. Suppliers purchase the certificates they need from generators. Generators are issued the certificates by the Authority in respect of the renewable electricity that they

generate. Separate powers for the renewables obligation in Northern Ireland are contained in Part VII of the Energy (Northern Ireland) Order 2003 (as amended).

118. It is intended to close the renewables obligation scheme to new entrants from 1 April 2017. But the scheme will continue to operate for those within it. It is intended that from 1 April 2027, those still in the renewables obligation scheme will be transitioned to a certificate purchase scheme, because the renewables obligation scheme would face practical difficulties if it continued to operate with a closed and ever decreasing set of generating stations.
119. Clause 37 provides powers to establish the certificate purchase scheme. In the new scheme, the Authority would issue GB certificates to generators in respect of renewable electricity. An obligation to purchase the GB certificates at a fixed price would be imposed on the Authority or on the Secretary of State or on a CFD counterparty (if it consents). In NI, the Northern Ireland Authority for Utility Regulation (“the Northern Ireland authority”) would issue NI certificates and the obligation to purchase the NI certificates would be imposed on the Northern Ireland authority or on a CFD counterparty (if it consents). The clause also provides powers to impose a levy on electricity suppliers which would be used to fund the cost of purchasing the certificates. The levy would be administered by the Authority or by the Secretary of State or by a CFD counterparty (if it consents) or in the case of NI, administered by the Authority, the Department of Enterprise, Trade and Investment (“DETI”) or a CFD counterparty (if it consents).

### ***ECHR Compliance***

#### ***Imposition of the levy***

##### *Application of Article 1 of the First Protocol*

120. The Secretary of State’s power to impose a levy on electricity supplies made by electricity suppliers engages the right of those suppliers to peaceful enjoyment of possessions under Article 1 of the First Protocol.
121. The right in Article 1 of the First Protocol is a qualified one, and in particular by virtue of the second paragraph of that Article, it does not impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. The levy will constitute a tax, which is an area where the State enjoys particularly wide powers (see in particular paragraph 29 above); however, a fair balance must be struck between the general interest and the rights of the individual. The purpose of this levy is to raise funds in connection with the generation of electricity from renewable sources. The generation of renewable electricity serves an important general interest, since it has the potential to reduce carbon emissions and also to contribute to the UK’s security of supply by enabling a diverse range of technologies and sources of energy to be used the UK’s energy mix.
122. The levy will replace the renewables obligation currently falling on electricity suppliers, and the purpose of the levy is specified in new section 32P(1) as being in connection with the provision of payments to the bodies required to purchase the GB and NI certificates. The order which sets the detailed provisions for the levy (which must of course themselves be compatible with the ECHR) is likely to set a rate based on the amount of electricity supplied; furthermore, electricity suppliers and their consumers should benefit from the availability of renewable technologies. We therefore

consider that a levy for the purposes of providing renewable electricity generation is justifiable and proportionate.

123. The Secretary of State will have the power (under new sections 32P(3) and (4)) to set different rates or amounts of levy in different cases, or to exempt certain types of supplies from the levy. As the levy engages rights under Article 1 of the First Protocol, if it were to be used to distinguish between certain types of supplier or classes of consumer, it might also engage the prohibition on discrimination under Article 14 ECHR. Under Article 14, a difference in treatment may be justified if it serves a legitimate aim and there is a reasonable relationship of proportionality between that aim and the means employed. The order, and therefore any differences in the rates or amounts charged or any exemptions which they provide for, must of course be compatible with the ECHR.

### ***Enforcement of the levy***

#### *Application of Article 6*

124. Enforcement of the levy against an electricity supplier may be a determination of the supplier's civil rights and obligations under Article 6(1) of the ECHR. Consequently, the supplier would be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. New s.32P(6)(k) provides power to make provision for reviews and appeals, which should satisfy this requirement.

#### ***Transition to GB and NI certificates***

125. Once accredited, the Renewables Obligation Order 2009 generally provides for generating stations to receive renewables obligation certificates for 20 years, or up to 2037, whichever is the earlier, in respect of the renewable electricity that they generate. The transition from the renewables obligation scheme to the certificate purchase scheme is expected to take place in 2027. It will result in generators receiving GB or NI certificates in place of renewables obligation certificates.

#### *Application of Article 1 of the First Protocol*

126. It is arguable whether Article 1 of the First Protocol is engaged by the transition to GB or NI certificates. Article 1 of the First Protocol protects a right to existing i.e. vested possessions but not a right to receive possessions in the future<sup>13</sup>. Future renewables obligation certificates, which will be granted in relation to electricity which has not yet been generated, are akin to future income, which is only a possession for Article 1 of the First Protocol purposes once it has been earned, or an enforceable claim to it exists.<sup>14</sup>
127. Even if Article 1 of the First Protocol is engaged, the interference can be justified in that it is: (i) in accordance with the law; (ii) in the public interest i.e. it pursues a legitimate objective and (iii) proportionate.
128. In order for the interference to be in accordance with the law, there must be: (a) a legal basis for the interference in domestic law; and (b) the relevant provisions of domestic law must be sufficiently certain and provide adequate safeguards against arbitrary abuses. There will be a clear legal basis for the interference through the provisions of this Chapter and the underlying Order. With regard to certainty the case law of the

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<sup>13</sup> *Marckx v Belgium* (1979) EHRR 330.

<sup>14</sup> See note 5 above.

ECtHR recognises that in order to keep pace with changing conditions, legal powers must sometimes be granted with a sufficient level of flexibility. Further, the use of the power is subject to consultation and would be amenable to judicial review which will be capable of providing a sufficient means of redress against arbitrary abuses.

129. The interference is in the public interest and pursues a legitimate objective of addressing the increasing uncertainty and instability in the value of the renewables obligation certificates that is likely to arise once the closed pool of generating stations in the renewables obligation scheme starts to shrink (as more and more stations reach the end of their 20 year support period and leave the scheme). Therefore, we expect the certificate purchase scheme will be perceived as more attractive by most generators than the renewables obligation scheme.
130. The legitimate objective being pursued is proportionate in that we intend to set the redemption value of a GB and NI certificate at the same level as the long term value of a renewables obligation certificate. We also intend to delay the transition until 2027, by which time large numbers of generating stations will have reached the end of their 20 years support under the renewables obligation.
131. Therefore, we consider that the transition to the certificate purchase scheme can be done in compliance with Article 1 of the First Protocol.

#### ***Restrictions on the transfer of certificates***

132. New s.32U(7) provides a power to restrict the transfer of the ownership of a GB or NI certificate. The intention is that GB and NI certificates should be tradable, but if necessary to prevent fraud and other crime, restrictions may be imposed on their transfer.

#### ***Application of Article 1 of the First Protocol***

133. As this clause imposes a restriction on the use of property, Article 1 of the First Protocol is engaged. The interference can be justified in that it would be: (i) in accordance with the law; (ii) in the public interest i.e. it pursues a legitimate objective and (iii) proportionate.
134. The powers are capable of being exercised so that the interference is in the public interest and pursues a legitimate objective of preventing crime and protecting the rights of the legitimate owners of the certificates. The interference, if the powers are exercised as we expect them to be, will be proportionate. The restrictions placed on transfer may be procedural. For example, requiring certain evidence before a change in the registered holder is recorded, such as proof of identity. Or the restrictions may relate to the type of person that can be registered as the holder, and the information they must provide. For example, allowing only generators or persons licensed under the Electricity Act (or equivalent legislation in other Member States) to be registered holders. We would not envisage imposing restrictions on certificates that had already been issued before the restrictions came into force.
135. Therefore, we consider the power to impose restrictions on the transfer of ownership of GB or NI certificates can be exercised in compliance with Article 1 of the First Protocol.

#### ***Measures where certificate wrongly issued***

136. New s.32U(8) provides a power to specify circumstances in which the Authority or the Northern Ireland authority may revoke a GB or NI certificate.

### *Application of Article 1 of the First Protocol*

137. We consider that the exercise of the power would engage Article 1 of the First Protocol, but could be exercised compatibly with it.
138. We consider that a fixed price certificate could constitute a possession, and so the revocation of a certificate, after it has been issued, would amount to the interference with enjoyment of property. Certificates would have a conditional nature from the outset, being subject to rules providing that they could be revoked in specified circumstances (essentially where they had been wrongly issued so that the generator was never truly entitled to them), and so would be a feature of, or limitation on, the right of the holder of the certificate from the time the certificate was issued.
139. This degree of interference will be justified and proportionate, and any revocation of a certificate would be in accordance with the provisions of the order made under the new s.32U.
140. This power follows the precedent of the power in s.32C(7) of the Electricity Act 1989 which allows the Secretary of State to specify in a renewables obligation order the circumstances in which the Authority may revoke a renewables obligation certificate before its production. As in the Orders made under that power, the specified circumstances in which a certificate could be revoked are likely to be limited to circumstances in which the certificate was wrongly issued. The reasons for a certificate being wrongly issued are usually due to errors or other inaccuracies on the part of the generator in the information they submit to the Authority when they claim a certificate, or a failure by the generator to provide all of the information required in respect of the electricity for which they have claimed a certificate.
141. The interference is in the public interest and pursues a legitimate objective of preventing a person from retaining an item of value (a certificate) which should not have been issued. If the certificate is still held by the person to whom it was issued, it is a certificate to which they were never entitled. If the certificate has been transferred to another person, then the risk of revocation can be factored into the commercial arrangements between the transferor and transferee. No one other than the Authority, the Northern Ireland authority or the Secretary of State or a CFD counterparty (if they consent) will be under any statutory duty to purchase or obtain a certificate.
142. Therefore, we consider the power to specify circumstances in which the Authority or the Northern Ireland authority may revoke a certificate can be exercised in compliance with Article 1 of the First Protocol.

### *Application of Article 6*

143. A decision to revoke a GB or NI certificate could be challenged by way of judicial review. The decision in *Tsfayo v UK*, on the sufficiency of judicial review as a remedy, is distinguishable, since decisions as to whether a certificate should or should not have been issued may require significant technical expertise, concerning methods of generation, monitoring and fuel types. Some decisions as to whether a certificate should or should not have been issued may depend on a simple question of fact, such as whether the required information was provided to the Authority by a particular deadline, but such decisions are unlikely to require the exercise of a high degree of judgment.

### ***Measures where certificate wrongly issued cannot be revoked***

144. New s.32U(10) and (11) provides a power to require payment from the person to whom a GB or NI certificate was issued, if it is too late to revoke the certificate (because it has been redeemed) and if the Authority or Northern Ireland authority is unable to withhold the issue of an equivalent certificate (for example, because the generating station is no longer generating from eligible renewable sources, or was never generating from eligible renewable sources).

*Application of Article 1 of the First Protocol*

145. A requirement to pay a sum of money may engage Article 1 of the First Protocol.
146. The interference is in the public interest and pursues a legitimate objective of recouping the value of a certificate to which a person was not entitled. If a certificate has been wrongly issued, the person to whom the certificate was issued will have received something of value, which they should not have received. If it is no longer possible to revoke the certificate because it has been redeemed, and it is not possible to withhold an equivalent certificate from that person, then a power to require payment will enable the value of the wrongly issued certificate to be recouped from the person to whom the certificate was issued.
147. The interference will be proportionate because the amount of the payment required is equal to the amount that was paid out by the Authority, the Northern Ireland authority the Secretary of State or a CFD counterparty when they redeemed the certificate. The payment requirement can only be imposed when the options of revoking the certificate or withholding an equivalent certificate are no longer available.
148. Therefore we consider that the power to impose a payment requirement on a person to whom a certificate was wrongly issued can be exercised in compliance with Article 1 of the First Protocol.

*Application of Article 6*

149. A decision by the Authority or Northern Ireland authority to require a payment from the person to whom a certificate was wrongly issued may constitute a determination of the civil rights of that person for the purposes of Article 6. If this is correct, that person would have the right for the matter to be determined at a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The Secretary of State has the power under new s.32U(11) to make provision for appeals. We consider that the power to make a certificate purchase order can be used to establish an appeals mechanism which would be consistent with any Article 6 rights of the person required to make a payment in respect of a wrongly issued certificate.

***Information in relation to the levy***

150. New s.32P(6)(g) and (h) enable a certificate purchase order to make provision about the provision of information, including its provision to third parties in specified circumstances and about the audit of information (including by a third party).

*Application of Article 8*

151. The information which may be required by an order made under these sections is likely to be used to ensure that the Secretary of State can calculate the rate of the levy, and that the administrator of the levy (which is either the Authority, the Northern Ireland authority, the Secretary of State, DETI or a CFD counterparty) can determine how much levy each supplier owes in a particular period. The levy can only be imposed on suppliers of electricity. The requirement to provide this information might be capable of



interfering with the Article 8 rights of electricity suppliers, and the protection provided by Article 8 is capable of extending to a company's information in some contexts.

152. Article 8 is a qualified right and the provisions of Article 8(2) provide scope for justifying infringements of Article 8(1). If the Secretary of State does not have this information, the levy rate could be less than is required to fund the obligation to purchase certificates (so that the deficit has to be made up by the taxpayer), or alternatively could lead to overcharging of suppliers. Consequently, this information power is likely to fall within the terms of Article 8(2) as being in the interests of protecting the rights and freedoms of others and the economic well-being of the country.

#### ***Information in relation to redeeming certificates***

153. New s.32O(4) provides a power for the purchasing body (which will be the Authority, the Northern Ireland authority, the Secretary of State or a CFD counterparty) to require a person presenting a GB or NI certificate to provide such information or documentation as the purchasing body may reasonably need for the purpose of carrying out its functions under a certificate purchase order.
154. The person presenting a certificate for redemption could be the generator to whom the certificate was issued, or it could be any other person to whom the generator had transferred the certificate. No one will be under an obligation to present a certificate for redemption.
155. The information which may be required using this power is likely to be used to ensure that the person presenting the certificate is the owner of the certificate, to enable the redemption payment to be made for the certificate (this may require details of bank accounts and bank charges) and to enable the certificate to be transferred from the person presenting it to the purchasing body.

#### ***Application of Article 8***

156. Requirements to provide information might engage Article 8, which is capable of extending to a company's information in some contexts. Article 8 is a qualified right and the provisions of Article 8(2) provide scope for justifying infringements of Article 8(1). If the purchasing body is unable to obtain the information it reasonably needs for the purpose of carrying out its functions, then it will not be able to ensure that it redeems certificates correctly and effectively. Consequently, this information power is likely to fall within the terms of Article 8(2) as being in the interests of protecting the rights and freedoms of others, the prevention of crime and the economic well-being of the country. We therefore consider that any interference will be proportionate in these circumstances.

#### ***Information in relation to issuing certificates***

157. New s.32X(1) enables a certificate purchase order to provide for the Authority or the Northern Ireland authority to require a person to provide them with information which in that Authority's opinion is relevant to the question of whether a GB or NI certificate is, or was or will in future be, required to be issued to that person.
158. GB or NI certificates can only be issued to electricity generators, or to agents acting on behalf of generators. So this information requirement could apply to renewable electricity generators, and to those planning to generate renewable electricity and claim certificates in the future and to those who have generated and claimed certificates in the past.

159. The information which may be required using this power is likely to be used to ensure that the person requesting a certificate is entitled to it, or to check that a person who has received a certificate was entitled to it. It is also likely to be used to where changes are made or are proposed to be made to a generating station that has received certificates in the past, to check whether the changes will affect the stations entitlement to receive certificates in the future.

*Application of Article 8*

160. Requirements to provide information could engage Article 8, which is capable of extending to a company's information in some contexts. The provisions of Article 8(2) provide scope for justifying infringements of Article 8(1). If the Authority is unable to obtain the information it needs to establish whether a certificate should be issued, or has correctly been issued, then generators may get certificates to which they are not entitled, or might not be issued with the certificates to which they are entitled. The cost of redeeming certificates to which generators were not entitled will fall on suppliers through the levy, and is likely to be passed on to consumers. Consequently, this information power is likely to fall within the terms of Article 8(2) as being in the interests of protecting the rights and freedoms of others, the prevention of crime and the economic well-being of the country. We therefore consider that any interference will be proportionate in these circumstances.

*Information in relation to biomass*

161. New s.32X(3) will enable a certificate purchase order to require operators of generating stations using biomass as a fuel to provide specified information or information of a specified nature to the Authority or the Northern Ireland authority. The information provided will include details as to the types of biomass used, the quantities used, and its origin. The overall objective of collecting the information is to enable an assessment to be made of the environmental impact of the growing and processing of biomass. New s.32X(4) enables the Authority and the Northern Ireland authority to publish a report containing information obtained by virtue of s.32X(3). The information is being published because there is a public interest in the public knowing what measures generating stations using biomass (who are supported under the scheme) have in place for ensuring that the biomass they use as a fuel source is grown and processed in an environmentally sustainable way.

*Application of Article 8*

162. It is possible that some of the information that operators will have to provide constitutes commercially confidential information, which may be protected under Article 8.<sup>15</sup> However, the provisions of Article 8(2) provide scope for justifying infringements of Article 8(1). In general terms, information is required in relation to biomass in order to pursue an important public interest, namely to enable the assessment of the environmental impact resulting from the production of biomass which is used as a fuel in a generating station. That is likely to fall within the terms of Article 8(2), as being for the economic well-being of the country, or for the protection of the rights and freedom of others.

*Application of Article 1 of the First Protocol*

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<sup>15</sup> *R (Veolia ES Nottinghamshire Ltd) v Nottinghamshire County Council* [2010] EWCA Civ 1214.

163. In the case of *R (Veolia ES Nottinghamshire Ltd) v Nottinghamshire County Council*<sup>16</sup> the Court of Appeal found that valuable commercially confidential information is also capable of constituting a possession for the purposes of Article 1 of the First Protocol and that publication of that information by the state could constitute an interference with rights under Article 1 of the First Protocol. However, in this case we consider that the interference that may be caused by the publication of information in relation to biomass is justified and proportionate in the public interest, for the reasons outlined in paragraphs 161 and 162 above.

***Measures where biomass information not provided***

164. New sections 32X(3)(d) and (e) provide that a certificate purchase order may either:
- (a). authorise or require the Authority or Northern Ireland authority to postpone the issue of certificates to a generator who has failed to provide the authority with specified information relating to the use of biomass; until such times as the information is provided or;
  - (b). authorise or require the Authority or Northern Ireland authority to: (i) refuse to issue certificates to a generator who fails to provide the information or (ii) alternatively refuse to issue certificates to a generator until the failure to provide the information is remedied within a prescribed period.
165. A generator is not entitled to a certificate unless they meet all the requirements of the legislation. Where they have failed to provide the specified information relating to the use of biomass, the generator will have failed to comply with all the requirements of the legislation. If provision is made using the powers set out above, the generator will not be entitled to a certificate unless the information is provided in time.

***Application of Article 1 of the First Protocol***

166. We consider it is unlikely that Article 1 of the First Protocol is engaged, as the generator will have no right to a certificate unless the information is provided within the prescribed deadline.
167. Even if Article 1 of the First Protocol is engaged, any interference caused by provision made under s.32X(3)(d) would be in accordance with the law, clear and accessible on the face of the legislation. The power to postpone the issue of certificates until the information is provided pursues a legitimate objective by ensuring that the authorities and the public are informed as to the effect on the environment of producing biomass. It is also proportionate in that the generator will be issued with the certificate to which he is entitled when the specified information is provided.
168. Similarly, any interference caused by provision made under s.32X(3)(e) would be in accordance with the law, clear and accessible and would pursue a legitimate objective. We envisage that the order would give generators a clear opportunity to remedy their breach within a reasonable timescale. In our view this would satisfy the proportionality requirements of Article 1 of the First Protocol.

**CHAPTER 8: EMISSIONS PERFORMANCE STANDARD**

***Outline of proposals***

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<sup>16</sup> *ibid.*

169. Chapter 8 makes provision for an emissions performance standard (“EPS”) that will apply to certain installations which emit carbon dioxide (CO<sub>2</sub>) in connection with the generation of electricity. The relevant installations will be required to emit no more than a certain quantity of CO<sub>2</sub> in each calendar year of their operation (the “emissions limit”). The emissions limit of each relevant installation will depend on its size and type, and be calculated according to rules set out in the Bill and secondary legislation.
170. The main focus of the clauses and the EPS regime is on certain electricity generating stations and on carbon capture and storage installations (“CCS plant”) which is associated with them. The key features of these generating stations are (i) that they have received development consent after the entry into force of the EPS clauses; (ii) that they are to be fuelled by fossil fuel (i.e. coal, oil, natural gas etc. and fuel products derived from them); and (iii) that they have a generating capacity of more than 50 megawatts; As a matter of fact, no CCS plant that could be associated with such a generating station currently exists, or is expected to be built before the EPS regime enters into force.

### ***ECHR compatibility***

171. Clause 38 contains the main operative provision, imposing the emissions limit on relevant electricity generating stations with provision for a number of subsidiary concepts relevant to the eventual scope of the EPS regime to be more precisely defined in regulations. If the class of relevant electricity generating stations were to include any stations already existing or under construction, Article 1 of the First Protocol might be engaged. However, since it will not affect any plant already operating, under construction or having received development consent at the time it is enacted, we do not believe that it engages any Convention rights.<sup>17</sup>
172. The EPS clauses do not provide the Secretary of State with the power to alter the limits imposed under the EPS by secondary legislation, and it is not intended that they should be so altered. With a view to providing as much assurance to investors as possible that the EPS regime under which new plant begin operating is the one which will remain applicable for most, if not all of their operational life (at least if they are consented in the foreseeable future), clause 38(2) will provide that the emissions limit for each plant as determined under the clauses will apply to it until 2045.
173. Clause 38(6)(b), with Schedule 4, makes provision for the EPS regime to apply to additional cases and with modifications. The only case in which power is given to apply the emissions limit in any form to existing plant under these provisions is in the case where an existing coal-fired plant replaces its main boiler (or one of its main boilers). Whilst in a theoretical sense the potential application of the EPS in these cases could be regarded as an interference with Article 1 of the First Protocol rights, in practice the operator’s ability to carry out such a replacement would in any event be contingent on securing provision under applicable environmental permitting rules and (in almost all cases) development consent. The relevant regulation making powers are subject to consultation requirements. In our view any interference would be justified on the grounds that it is possible for an operator, by installing a new main boiler, to extend the life of an generating station to a degree that is equivalent to actually building

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<sup>17</sup> Article 1 of the First Protocol relates only to existing possessions (including development consent, which may form a component part of the property to which it relates), and the possibility of acquiring a property right or possession in the future is not protected. See in particular paragraph 126 above.

a new plant, and proportionate in that provision is made to enable the emissions limit to be applied only to that part of a plant which is renovated in this way.

174. Clause 40, with Schedule 5 makes provision for the appropriate national authority to make regulations for the monitoring and enforcement of compliance with the EPS regime. Because the emissions that are subject to the emissions limit are all subject to monitoring under the EU Emissions Trading Scheme for greenhouse gas emissions, the reporting of relevant emissions should be taken care of by relevant installations' compliance with the EU ETS. It is expected that the enforcement mechanisms will be similarly based around those for the EU ETS or pollution control legislation administered by the same enforcement bodies). Any regulations made under clause 40 are likely to afford a person the opportunity to make representations before an enforcement order is made by an enforcement body. In addition, the regulations will ensure that there is a separate right of appeal which is designed to ensure that a person's rights and obligations are fairly determined. Provision such as these will ensure that there is no real prospect of an infringement of Article 6.

## **CHAPTER 9: MISCELLANEOUS**

### *Outline of the provisions*

175. This Chapter sets out certain miscellaneous provisions relating to Part 1 of the Bill. We do not consider that these provisions give rise to any human rights issues, however we think it worthwhile highlighting the provision in clause 43.

### *ECHR Compatibility*

176. Clause 43 gives the Secretary of State the power to make provision in regulations made under Chapters 2 or 3 of the Bill which would limit the liability of the national system operator to pay damages if a civil claim was brought against it in respect of its role (or individual elements of its role) as the delivery body for the Contracts for Difference and Capacity Market schemes. Any limitation of liability in damages made pursuant to this power could extend to the acts and omissions of the national system operator, its directors, employees, officers or agents.
177. We do not consider that Article 1 of the First Protocol would be engaged by Clause 43 in respect of a future civil claim in damages against the national system operator on the grounds that a claim of that sort could not amount to a "possession". Although a claim may constitute a possession if it is sufficiently established to be enforceable (such as a claim for damages in negligence), Article 1 of the First Protocol relates only to "existing possessions", therefore the possibility of acquiring a possession in the future is unlikely to constitute a property right within the ambit of Article 1 of the First Protocol. In the present case, until the EMR functions are conferred on the national system operator pursuant to Chapters 2 and 3, no claim arising from the performance of those functions could arise. Clause 43 effectively means that any limitation on liability in damages would be imposed at the time the relevant functions are conferred, which will necessarily be before a claim arising from the performance of those functions could arise. We therefore consider that the imposition of a "liability shield" could not amount to a deprivation of possessions within the ambit of A1P1 as there could be no claim in existence at the time that the limitation on liability is imposed.
178. We also consider that the imposition of a "liability shield" pursuant to Clause 43 would be compatible with Article 6(1) as the exercise of this power would not constitute an

attempt to “oust” the jurisdiction of the court. Where a person has a civil claim against the national system operator arising from the performance of its EMR functions, action could still be brought against the national system operator in the courts. It is only one type of remedy that would be restricted in the event that such a claim is successful: the national system operator would not be liable in damages, but it could still be subject to an injunction or a declaration. We are therefore of the view that the limitation of the national system operator’s liability in damages is compatible with the right of access to court conferred by Article 6(1) as the ability to institute civil proceedings remains unaffected.

179. Finally, this clause also expressly provides that the Secretary of State may not exercise this power in a way which would limit the liability of the national system operator where the act or omission giving rise to the liability would be unlawful by virtue of section 6(1) of the Human Rights Act 1998. As a result, where a person is able to establish a claim in damages against the national system operator on the grounds that, while performing its role as EMR delivery body, it has acted in way which is incompatible with the Convention rights, the national system operator would remain liable in damages.
180. For these reasons, we consider that this power can only be exercised in a way which is compatible with the Human Rights Act 1998.

## **PART 2: NUCLEAR REGULATION**

### *Outline of the provisions*

181. Historically, the regulation of the civil nuclear industry in Great Britain has been carried out by the Health and Safety Executive (“the HSE”). The HSE was established by the Health and Safety at Work etc Act 1974 (“HSWA”) which provides it with a broad set of statutory purposes related to regulating health and safety risks in or arising from the workplace. The functions of the HSE, also set out in HSWA, are to be exercised for those purposes. The HSE may appoint inspectors to carry into effect provisions of HSWA and other legislation (including certain provisions of the Nuclear Installations Act 1965) and those inspectors have potentially wide ranging powers including entry and inspection. Both inspectors and the HSE also have powers to require information from persons. This regime is supported by a network of criminal offences. The HSE also has powers to charge fees and otherwise recover the costs it incurs in carrying out its functions. Failure to comply with many of the provisions of the regulatory regime in HSWA is a criminal offence.
182. The Bill will create a new statutory corporation, to be known as the Office for Nuclear Regulation (“the ONR”), which will replace the HSE as the regulator of the civil nuclear industry in Great Britain (in relation to nuclear safety, conventional health and safety on nuclear sites and the safety of radioactive material transport by road, rail and inland waterway), and will carry out functions in relation to nuclear security and safeguards in the UK. An interim ONR was set up in April 2011 to regulate the civil nuclear industry, although it was only established as a non-statutory agency of the HSE without full legal personality. The Bill adopts a similar model to that adopted in HSWA in relation to the HSE, in that it provides the new statutory-based ONR with a broad set of statutory purposes. As with the HSE, the ONR will exercise its functions for its purposes. The ONR will also have the power to appoint inspectors to assist in carrying into effect the relevant statutory provisions and these inspectors will have

access to powers almost identical to those of HSE inspectors. The inspection regime will also be supported by a network of criminal offences in the same way as the HSE regime. The ONR will also have the power to charge fees in accordance with regulations made by the Secretary of State and will also have a cost recovery power under section 24A of the Nuclear Installations Act 1965.

183. The significance of the areas of work covered by the ONR is relevant to the consideration of the proportionality of its powers and those of its inspectors. The purposes of the ONR will cover:

- **Nuclear safety** – this is about regulating those safety aspects of nuclear sites and nuclear installations that are peculiar to nuclear sites because of either the nature of the nuclear materials on the site, or the nuclear-related activities carried out on the site. For example, ensuring the safety of nuclear power stations, reprocessing facilities, radioactive waste storage facilities etc, and protecting of workers from the risks associated with exposure to ionising radiation. The materials regulated by the nuclear safety regime possess physical and chemical properties which mean that they have the potential to be extremely hazardous to human health if they are not tightly controlled. The potential consequences of failure or breach of the nuclear safety regime, and the escape of radioactive materials into the uncontrolled human and/or natural environments, are potentially extremely serious.
- **Conventional health and safety on nuclear sites** – this is about regulating those risks to health and safety that are not necessarily specific to the nuclear sites or installations, but arise in many workplaces of a similar size and complexity. This is nonetheless a significant matter because (a) it relates to the protection of persons from serious injury or death; and (b) although a hazard may be conventional in nature (for example, a trip hazard), the potential consequences of a conventional hazard occurring on a nuclear site could be significantly worse than those which might be expected on a non-nuclear site.
- **Nuclear security** – this is about protecting nuclear sites, nuclear material, sensitive nuclear information, and nuclear material in transit. Specifically, this purpose is about preventing or minimising interference, theft, attack and/or sabotage. The consequences of failure or breach of the nuclear security regime are again potentially extremely serious.
- **Nuclear safeguards** – this is a system which has its basis in international law and is designed to give confidence that the UK is abiding by its international treaty undertakings not to divert civil nuclear material to weapons use. Nuclear safeguards are a crucial part of the global nuclear non-proliferation regime. Although predominantly relating to international obligations, some safeguards obligations arise out of domestic undertakings.
- **Transport of radioactive material** – this is about ensuring the safety and security of radioactive material (including nuclear material) that is in transport so that it does not escape and present risks to the human or natural environments.

#### *ECHR Compatibility*

184. We consider that this Part of the Bill, and the exercise of the powers contained in it by the ONR or its inspectors, could engage three provisions of the ECHR; namely Article 6 (the right to a fair trial) and Article 8 (the right to respect for private and family life)

of the ECHR, and Article 1 of the First Protocol to the ECHR (the right to peaceful enjoyment of possessions). However, for the reasons set out below, we consider that the provisions of this Part of the Bill are compatible with the ECHR.

185. In particular we are conscious that as a public authority section 6 of the Human Rights Act 1998 would compel the ONR to act in a manner consistent with the ECHR.

*Power to obtain information*

186. Clause 76 would provide the ONR with powers to obtain any information which it needs for the performance of its functions. Failure to comply with a request for information would be an offence. In most instances where information is required to demonstrate compliance with the regulatory regime the ONR's inspectors will exercise their powers to acquire information (see paragraphs 242-246 below). However, the ONR itself will need to acquire information in certain circumstances. The HSE only routinely uses its powers to acquire information (see HSWA, s.27 and the Atomic Energy Act 1946, s.4<sup>18</sup>) to acquire information relating to safeguards matters. This is likely to continue.

*Application of Article 8*

187. The power to require the production of information could engage Article 8, in its application both to persons and corporate entities. As set out above, the ONR's power under clause 76 of the Bill is most likely to be used by the ONR for the acquisition of safeguards information in which case this power is necessary in order to ensure that the UK and the UK nuclear industry complies with its international and domestic obligations as regards the provision of safeguards information.
188. This information is requested on a monthly, quarterly and annual basis. Although these returns are relatively frequent, the requirements have been in place for many years and have not proved invasive or overly burdensome on industry. It is unlikely that any future requirements on returns will become overly burdensome as the impact on industry is a significant consideration when the content of returns is reviewed. Any impact on rights protected by Article 8 is therefore likely to be limited.
189. The acquisition and provision of this information supports (amongst other obligations) the international nuclear non-proliferation regime under the Treaty on the Non-Proliferation of Nuclear Weapons and the UK's obligations under the Treaty on the establishing the European Atomic Energy Community. It therefore represents an important aspect of the UK's national security regime, and any interference with ECHR rights would be justified on this basis. In addition to this, compliance with these international and European safeguards regimes is a fundamental requirement for any trade or undertaking participating in the civil nuclear field in the UK, and so compliance with these obligations might also be justified on the basis of the wider economic well-being of the country.
190. In addition, Schedule 9 sets out provision relating to the disclosure of information obtained by the ONR and this will provide some protection to those who disclose that information to the ONR.
191. HSE very rarely exercises its powers to acquire information in respect of non-safeguards information and that is expected to continue. Even where the power is exercised in respect of non safeguards information it can still only be exercised for the

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<sup>18</sup> This is a power of the Secretary of State exercised by the interim ONR under an agency agreement.



ONR's purposes so any interference will be limited and proportionate to the aims pursued.

### ***Information and articles held by HMRC***

192. Clause 78 confers powers on officers of the Revenue and Customs to seize imported articles or substances and detain them for three days for the purposes of facilitating ONR or its inspectors to carry out their functions. This reflects an existing power in HSWA, s.25A.

### ***Application of Article 1 of the First Protocol***

193. The detention of property is capable of engaging rights under Article 1 of the First Protocol. This right may be interfered with in the public interest and proportionate. It is strongly in the public interest that officers of the Revenue and Customs are able to assist the ONR with its functions by holding articles and substances at borders pending ONR inspection. This will assist the regulatory regime in making sure that matters of relevance to the ONR do not come into or leave the UK without consideration of the ONR.
194. This power only allows articles and substances to be detained until ONR inspectors can inspect it and in any event they cannot be detained for longer than three days so any interference will be limited. Given the importance of being able to ensure that articles and substances of interest to the ONR can be detained pending ONR investigation and the possible consequences both to UK safety and security and international safety and security, we consider that this power is proportionate.
195. This also replicates powers already in existence in HSWA, providing further confidence that they will be exercised in a manner compliant with Convention rights.

### ***Inquiries***

196. Clause 64 allows the ONR, with the consent of the Secretary of State, to carry out an inquiry into any matter that it considers necessary or desirable for carrying out its statutory purposes. The Secretary of State may make regulations setting out the procedure for an inquiry and confer on the person holding the inquiry (and anyone assisting him) powers of entry and inspection, and powers relating to the giving of evidence etc – see subsection (5). This provision of the Bill effectively replicates the position as regards the HSE's powers under HSWA, s.14(4).

### ***Application of Article 8***

197. This power is only an enabling power, but regulations made under it may grant powers which engage ECHR rights, including rights under Article 8. Any regulations made by the Secretary of State will themselves have to be compatible with ECHR rights. These powers will be necessary to ensure that an inquiry can be properly conducted and can obtain the information it needs to come to a suitable conclusion. Given the significance of the sort of event that would trigger an ONR inquiry there is a strong public interest in ensuring that such an inquiry is suitably equipped to come to appropriate conclusions. We therefore consider that these powers are justified in the interests of national security, public safety and the protection of public health.
198. In addition, there are existing examples of inquiry rules (including those pursuant to HSWA, and the Inquiries Act 2005) that are considered to be compliant with the ECHR and which would be likely to serve as a guide to the Secretary of State in the event of the exercise of this regulation-making power. Therefore, we do not consider that the

powers here give rise to particular human rights issues of concern, since the powers will be exercised in a way that is compatible with ECHR rights.

### *Charging and cost recovery*

199. The ONR will be able to charge for three different aspects of its work. Firstly it will be able to charge members of the regulated community for the services it provides them. Under this power ONR will be able to recover costs in specific circumstances from the holders of nuclear site licences and those who have applied for such site licences under the Nuclear Installations Act 1965, s.24A. In addition the Secretary of State will be able to make new regulations permitting the recovery of fees in connection with the performance by or on behalf of the ONR of functions conferred on the ONR:
- by or under the Bill;
  - by or under any other “relevant statutory provisions” (as defined in the Bill);
  - under section 80 of the Anti-Terrorism, Crime and Security Act 2001;
  - by or under the Regulatory Reform (Fire Safety) Order 2005 or the Fire (Scotland) Act 2005.
200. This regulation-making power follows the model that already exists in section 43 of HSWA. It will remain the case that fees cannot be recovered from employees, persons seeking employment or persons who are training for, or seeking training for, employment. It will also remain the case that fees can only be charged to cover the costs incurred in the exercise of the functions carried out.
201. The second power is in clause 65 and provides that where the ONR carries out an inquiry (see clause 64) it may require such persons as it considers appropriate to make payments to it in order to cover the cost of the inquiry.
202. The final power is that ONR may charge where it provides services and facilities to or carries out functions on behalf of third parties, to recover the costs of providing the relevant services or facilities or carrying out those functions from the relevant third party. It may also recover the costs of complying with the duty in clause 68 (Provision of information and advice to relevant authorities) from relevant authorities. We do not consider that this power engages rights under the ECHR because there is no obligation upon the recipients of the service to use it. They are entitled to seek services and facilities from elsewhere.

### *Application of Article 1 of the First Protocol*

203. We consider that both the first and second powers are capable of engaging Article 1 of the First Protocol. This is qualified and does not prevent a state enforcing such laws as it deems necessary to control the use of property in the general interest, provided that a fair balance is struck between the general interest and the rights of the individual.
204. On the first power, both the power in the 1965 Act and the power to charge under regulations can only be exercised within the scope of ONR’s purposes. We consider that there is a significant public interest in ensuring the safety and security of the matters covered by ONR’s purposes and ensuring that the regulator has sufficient resources is an important aspect of that. For example, in relation to the exercise of the power under the 1965 Act, the expenses are incurred to ensure that nuclear installations are operated safely and in the course of ensuring that the regulated community comply with their nuclear safety obligations.

205. In addition, both powers can only be exercised to cover the costs to ONR associated with the exercise of the function in question. It is therefore likely that the cost will be proportionate to the benefit received by the payer. Independent verification of this should be obtainable through scrutiny of the ONR's accounts which are submitted to the Comptroller and the Auditor General and a statement on which is published and laid before Parliament (see Schedule 7, paragraphs 21 and 25).
206. Furthermore in relation to costs recovered under fees regulations it will be for the Secretary of State to determine in those regulations what may be charged or how the charge may be calculated. This independent intervention provides a further safeguard against an incompatible exercise of powers and any such regulations will themselves need to be compatible with Convention rights.
207. It is also relevant to note that all of these powers currently exist and are not being materially amended. We consider that this provides confidence that the powers will continue to be exercised in a manner compatible with Convention rights.
208. The second power allows ONR to fund an inquiry. Given the circumstances in which an inquiry would be set up, ie a significant event in relation to the UK nuclear industry, it is highly likely that it will be in the public interest for such an inquiry to be set up and suitably funded.
209. Independent scrutiny of any decision to require payment is provided in the form of a requirement for Secretary of State consent (see clause 65(6)). The ONR's power to recover funds is also limited to the costs it incurs in relation to the inquiry in question, so should therefore be proportionate.

***Inspectors' powers: general considerations***

210. Schedule 8 sets out the powers that inspectors appointed by the ONR may have. These powers are extensive and potentially engage several Convention rights. Further detail is set out with individual consideration below, however there are certain safeguards of general application which are detailed here.
211. An inspector may only exercise those powers which are conferred on him by his instrument of appointment and may only exercise those powers in relation to the functions also set out in that instrument. Inspectors will only be appointed and only be conferred powers where the ONR considers that they are suitably qualified to exercise those powers (see Schedule 8, paragraph 1(2)).
212. The nuclear regulations in respect of which ONR inspectors may exercise these powers may be expanded in the future under the Secretary of State's regulation-making power in clause 54 of the Bill. However, such regulations may only be made in areas covered by the purposes of the ONR, which are set out in detail at paragraph 183 above.<sup>19</sup> Therefore, there is a limit to the circumstances in which ONR inspectors may be able to exercise these powers in the future and every expansion of those circumstances will be the result of further legislation which will itself need to be scrutinised in terms of its human rights content. In addition, nuclear regulations are not capable of creating new

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<sup>19</sup> Although nuclear regulations may not make provision in the field of conventional health and safety, such provision might still be made under HSWA, s.15 and enforced by ONR inspectors.

enforcement powers or new purposes<sup>20</sup> for the ONR; regulations may only provide for new circumstances in which existing powers might be exercised (for existing purposes).

213. ONR inspectors will fall within the requirements of section 67(9) of the Police and Criminal Evidence Act 1984 and as such to the extent that they are investigating criminal offences will be required to have regard to the Codes of Practice in the exercise of their powers.
214. There are safeguards in place to ensure that the exercise of these powers (in the circumstances set out above) will be proportionate. The ONR will be able to provide internal guidance to inspectors on the enforcement of the relevant statutory provisions and the circumstances in which their powers may be exercised. Although this will not be a statutory requirement, guidance (where it is produced) should provide that inspectors' powers will only be exercisable in a manner that is wholly compliant and in accordance with ECHR rights.
215. These powers are limited to being exercisable in support of the relevant statutory provisions (as defined in clause 61). As has been set out above, the significance of these purposes and the consequences of the failure of the ONR in respect of its purposes could be extremely serious, and this is relevant when considering the proportionality of such powers.
216. Finally, all of these powers already exist under HSWA and are currently available to HSE inspectors. We consider that the Bill does not confer on ONR inspectors any powers that are not already in existence by virtue of HSWA. In addition, most of the circumstances in which those powers may be exercised are already prescribed for under HSWA (and associated legislation), though we consider that some aspects of safeguards and some more limited aspects of nuclear security do not fall within the HSE's existing purposes.

***Inspectors' powers: power to serve improvement and prohibition notices (schedule 8, paragraphs 3 and 4)***

217. ONR inspectors may be given the power to issue notices to persons who they believe have contravened the regulatory regime, requiring them to remedy the alleged breach within a specified time period (improvement notices). Where such a breach could give rise to a risk of serious personal injury they may have the power to issue a notice requiring the activity to cease (prohibition notices). These powers do not extend to the exercise of functions for the security or safeguards purposes.

*Application of Article 6*

218. The issuing of such notices is subject to appeal to an employment tribunal. As this is an independent tribunal which will make the final determination of rights and obligations in respect of the subject matter of the notice we consider that this power will be subject to safeguards which will ensure that it is exercised in a manner that is compliant with Article 6 of the ECHR.

*Application of Article 1 of the First Protocol*

219. To the extent that such notices affect the way a person may use their property they are capable of engaging Article 1 of the First Protocol. Such notices could not remove

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<sup>20</sup> There is limited provision for changing the purposes in secondary legislation. Clause 50(3) allows the modification of the definition of "nuclear material" and clause 51 allows the Secretary of State to include certain matters relating to national security within the concept of "sensitive nuclear information".

property from a person so their impact on the property owner will be limited. Such notices will also only be issuable where there is a contravention (in the opinion of the inspector) of one of the relevant provisions. This provides further confidence that the circumstances in which such notices could be issued are limited. We consider that the power to issue these notices is necessary in the interests of national security, public safety and the protection of public health.

220. Given the purpose of the regulatory regime and the consequences of failure of that regime it also means that the issuing of such notices is likely to be proportionate.

***Inspectors' powers: power to enter and inspect premises (schedule 8, paragraph 8)***

221. ONR inspectors may be given the power to enter any premises which they have reason to believe is necessary for the purposes of carrying out their functions. This power may only be exercised at a reasonable time, unless the situation is dangerous or delay would be prejudicial to the ONR's nuclear security purposes. Additional protection is provided where the power is to be exercised in relation to domestic premises. In these circumstances a warrant must be issued by a Justice of the Peace, unless in the inspector's opinion the circumstances are dangerous in which case the power conferred by the Inspector's instrument of appointment will be sufficient.
222. The power of entry does not extend to a power to use particular force to procure entry, though an inspector may take with him a constable where he has concerns about being prevented from carrying out his functions.

*Application of Article 8*

223. We consider that this power is capable of engaging rights protected by Article 8. The power will be used by ONR inspectors to ensure that they can access such areas as they need to check that the regulatory regime is being complied with. Such a power is necessary as without it there may be aspects of the regulatory regime that ONR cannot ensure are being carried out properly. Given the potential repercussions associated with a breach of the regulatory regime enforced by the ONR (see in particular paragraph 183 above) we consider that this power is necessary and may be justified in the interests of national security, public safety and the protection of public health..
224. In addition, Article 8 rights may legitimately be interfered with for the purposes of preventing disorder or crime, and it is an established legal principle that entry into property for the purposes of ensuring that regulatory requirements are complied with is a legitimate basis for interference with the rights guaranteed by Article 8<sup>21</sup>. Breach of the regulatory regime set out in the Bill is a criminal offence, and therefore we believe that ONR inspectors' powers to enter property can be justified on this basis.
225. There are various procedural safeguards in place as detailed in paragraphs 210-216 above. In addition to these ONR inspectors will not have powers to search individuals, except where such a search is offered by the individual on a voluntary basis. In those circumstances, ONR inspectors would have to follow the provisions of PACE Code B that are relevant to voluntary searches.
226. In addition to those set out above, there are further safeguards in place for the exercise of these powers of entry in relation to domestic premises. Inspectors' powers are predominantly aimed at businesses activity in the civil nuclear industry and will therefore normally be exercising powers of entry in relation to non-domestic, business

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<sup>21</sup> See *Camenzind v Switzerland* (1998) 28 EHRR 458.

premises. Nonetheless, ONR inspectors' powers of entry are capable of being exercised in relation to domestic premises (as defined in paragraph 8(5)), for example where nuclear information is being held in domestic premises and the ONR inspector needs to enter the property in order to assess nuclear safety, security and safeguards implications. However, the exercise of powers in these circumstances will be very much outside the normal course of the regulation of the civil nuclear industry, and consequently will be extremely rare.

227. Unlike business premises ONR inspectors will not have a power to enter domestic premises by virtue of their instruments of appointment. Entry to such premises will have to be with the consent of a person present or subject to a warrant granted by a Justice of the Peace, unless the situation is dangerous.

***Inspectors' powers: power to deal with imminent dangers (schedule 8, paragraph 10)***

228. ONR inspectors will have certain powers in relation to things that they reasonably consider give rise to imminent danger of serious personal injury. In these circumstances, an inspector will be able to seize the article or substance which presents the threat, and render it harmless or reduce the risk of harm from it. Other articles or substances may also be seized for the purpose of removing or reducing the risk of harm.

*Application of Article 1 of the First Protocol*

229. We consider that these powers are capable of engaging Article 1 of the First Protocol. However, given the necessity of dealing with serious threats to personal safety we consider that this power is necessary.
230. There are limits on the exercise of this power which will ensure that it is exercised compatibly with Convention rights. The nature of this power is that it can only be used where a suitably authorised ONR inspector considers that there is a threat of imminent danger of serious personal injury. In addition, where possible a sample must be taken of the substance before it is rendered harmless. In any event as soon as practicable after these powers are exercised the inspector must sign a report on the exercise of the powers and leave it with the owner of the premises or another responsible person. We therefore consider that any interference is justified in the public interest.
231. Given the potential threat represented by the sorts of materials regulated by the ONR and the limited breadth of the power we consider that any interference would be proportionate.

***Inspectors' powers: powers exercisable in relation to particular articles or substances (paragraphs 11 and 12)***

232. ONR inspectors will have certain powers to take possession of articles or substances and dismantle or test them. This includes, where necessary, the power to destroy them in the course of carrying out tests.

*Application of Article 1 of the First Protocol*

233. Such interference with articles or substances is capable of engaging Article 1 of the First Protocol where it restricts the use to which the article or substance can be put or causes it to be damaged or destroyed. These powers to take possession and to test items are a necessary part of the regulatory regime and, as well as extending to small discrete devices, might extend to the testing of larger items or even complete installations. The testing of the reactor core of a nuclear power station, for example, would be an essential part of the regulatory regime that would be covered by this power.

234. Where the interference is restricting the item's use for the period of testing the interference will be limited (depending upon the time period) and clearly in the public interest given the potential risks associated with breach of the regulatory regime. The dismantling (or destruction) of an article or substance is a more significant interference with property. Both of these powers are limited and safeguards are put in place on the face of the Bill. Neither power may be exercised unless there is a threat to some matter falling within the nuclear security purposes or there is a threat to health and safety. Where possible the inspector must first take a sample of the substance and there are provisions requiring the notification of relevant persons. In the case of the power to test there is also provision requiring the presence of a person with responsibilities in respect of the thing being tested. Specific provision is also made to ensure that the ONR inspector is not allowed to damage the property in the course of testing unless it is necessary. We consider that given the potential consequences associated with breach of the regulatory regime this sort of interference is in the public interest and proportionate.

***Inspectors' powers: power to take samples, measurements and recordings (schedule 8, paragraph 13)***

235. ONR inspectors will have the power to carry out an examination or investigation necessary for carrying out the matters specified in their instruments of appointment, and in doing so will be entitled to take measurements and photographs, and make recordings.

*Application of Article 1 of the First Protocol*

236. We do not think that the taking of measurements and recordings gives rise to a risk of infringement of any rights under the ECHR, beyond those that are infringed by an ONR inspector gaining access to the premises (see paragraphs 221 to 227).

237. There may be implications for Article 1 of the First Protocol as regards an inspector's power to take samples, although any infringement arising from the taking of samples would be extremely limited as the nature of sampling is that the quantity of any substance removed is extremely limited.

238. The power to take samples is necessary to allow ONR inspectors to ensure that items can be identified and without such a power the regulatory regime would be incomplete. For example, ONR inspectors will need to be able to test substances that are found in the course of a regulatory investigation in order to identify whether they present a threat in themselves or their presence may be indicative of other problems with a nuclear installation. Given the very limited nature of any interference and the potential consequences associated with breach of the regulatory regime we consider that any interference will be in the public interest and proportionate.

***Inspectors' powers: power to direct that premises are left undisturbed (schedule 8, paragraph 14)***

239. This power allows ONR inspectors to direct that certain premises, or any article or substance in them, must be left undisturbed for as long as reasonably necessary for the purposes of investigating or examining those premises or articles.

*Application of Article 1 of the First Protocol*

240. We consider that as this power may prohibit individuals (or businesses) from interacting with, and benefiting from the use of, their possessions it is capable of infringing the rights set out in Article 1 of the First Protocol of the ECHR. This power is needed to ensure that, where necessary, certain physical circumstances can be

properly preserved pending, and during the course of, a full regulatory investigation. Such an investigation may be required to determine whether the regulatory regime is being complied with, whether a criminal offence is being committed, or whether a set of circumstances exists that presents a threat to, for example, security or human health (e.g. the unauthorised transmission of sensitive nuclear information or the possible leaking of radiation from a container).

241. This may only be exercised for so long as is reasonably necessary to allow the inspector to carry out an examination. Given the very limited nature of any interference and the the potential consequences associated with breach of the regulatory regime we consider that this sort of interference is in the public interest and proportionate.

***Inspectors' powers: power to question individuals and require production of information and documents (schedule 8, paragraphs 15 and 16)***

242. These powers enable ONR inspectors to require any person to provide information or documents or answer questions the inspector thinks necessary and fit for the purposes of carrying out an investigation or examination. The inspector may also require the person questioned to sign a declaration of truth of the answers given. Such information may include commercially sensitive information or trade secrets. They also allow an inspector to require the production of information and documents which he needs to see for the purposes of his investigation.

*Application of Article 8*

243. We consider that the power to require information from persons is capable of engaging Article 8 of the ECHR. Such a power is important as questioning persons is likely to be the best way of obtaining information which might indicate whether the regulatory regime is being complied with or breached. It will only extend to commercially sensitive information where that is required by the inspector for the purposes of an investigation. In addition Schedule 9 sets out limits on the ability of ONR inspectors to disclose information (supported by a criminal offence) which will provide protection to those providing information to them.
244. Such a power is necessary for the regulator to be able to investigate circumstances and potential breaches of the regime and given the potential consequences of breach of the regulatory regime, we consider that any interference with this right would be justified in the public interest on the basis of national security, public safety, the protection of public health and the prevention of disorder or crime. We also consider that any interference will be proportionate.

*Application of Article 6*

245. The use of evidence obtained under compulsion is also capable of interfering with Article 6 of the ECHR. Sub-paragraph 15(4) ensures that all evidence obtained in pursuance of the power to require persons to answer questions cannot be used in criminal proceedings against that individual or their spouse or civil partner. This should ensure that there will not be any breach of Article 6 in the use of evidence acquired through the exercise of this power.
246. There is also specific provision protecting information or documents which are subject to legal professional privilege (see paragraph 22).

***Onus of proving limits of what is practicable etc (schedule 10, paragraph 11)***



247. Schedule 10 contains various provisions relating to offences and paragraph 11 provides for a reverse burden of proof. Where regulations are made under Part 2 of the Bill creating offences consisting of either a failure to comply with a duty or requirement to do something or a failure to use the best means of doing something, then the regulations may place the onus on the defendant to prove that: (i) it was not practicable (or reasonably practicable) to do more than was in fact done to satisfy the duty or requirement; or (ii) there was no better practicable means than was used to satisfy the duty or requirement.

#### *Application of Article 6*

248. Any regulations providing for a reverse burden of proof potentially engage Article 6(2) of the ECHR on the basis that they will interfere with the ECHR right that everyone charged with a criminal offence should be presumed innocent until proved guilty according to law.
249. However, a reverse burden of proof provision is not necessarily incompatible with the presumption of innocence. It will be for the ONR in the first place to show the failure to meet the standards of the regulatory regime before it will be for the defendant to demonstrate the use or practicability of compliance in those circumstances. It will therefore be for the ONR in the first place to establish proof.
250. Under these circumstances it is reasonable to impose a burden on the defendant because that person will be in a significantly better position to show what was practicable than the ONR will be to show what was not practicable. The reverse burden therefore goes no further than is necessary.
251. The provisions of the Bill are regulatory and its purposes include securing the health, safety and welfare of persons at nuclear sites as well as protecting those off nuclear sites from events that take place on them. The reversal of the burden of proof takes into account the fact that those having a duty or requirement have chosen to operate in this sphere of regulated activity and they must be taken to have accepted the regulatory controls going with it. Given the significance of these concerns the imposition of a burden of proof on the defendant of the nature set out above is proportionate.

#### *Transfer schemes – staff*

252. Schedule 11, Part 2, gives the Secretary of the State the power to make provision by order for the transfer of relevant staff from HSE to the statutory ONR. Relevant staff are those who are assigned to work in the interim ONR. The Schedule itself does not engage any ECHR rights directly; however, an order made under the Schedule may engage Article 6 and Article 8 and Article 1 of the First Protocol. The Secretary of State would have to comply with the HRA when making an order under this Schedule and in particular ensure that any interference with the rights in Article 8 and Article 1 of the First Protocol was both in the public interest and proportionate.
253. Provisions of this nature are also very common and the Secretary of State will have many precedents to choose from, which gives confidence that the power can be exercised in a manner that does not infringe Convention rights.

#### *Transfer schemes – property*

254. Schedule 11 Part 3 gives the Secretary of the State the power to, by order, make provision for the transfer of property from HSE, or the Secretary of State, to the statutory ONR. The Schedule itself does not engage any ECHR rights directly; however, an order made under the Schedule may have the potential to engage Article 6

and Article 1 of the First Protocol (although it is accepted that this is unlikely given that all property transferred under this provision will be held by a public body in the first instance). Nonetheless, the Secretary of State would have to comply with the HRA when making an order under this Schedule which could engage ECHR rights, and, in particular, ensure that any interference with Article 1 of the First Protocol was both in the public interest and proportionate. In addition, the Secretary of State will be required to consult persons likely to be affected by a proposed transfer scheme before making an order under the Schedule.

255. Provisions of this nature are also very common and the Secretary of State will have many precedents to choose from, which gives confidence that the power can be exercised in a manner that does not infringe Convention rights.

### **PART 3: GOVERNMENT PIPE-LINE AND STORAGE SYSTEM**

#### ***Outline of proposals***

256. The government pipe-line and storage system (“GPSS”) consists of around 2,500 kilometres of underground cross-country pipelines of differing diameters, together with storage depots, associated pumping stations, receipt and delivery facilities and other ancillary equipment. The GPSS receives, stores, transports and delivers light oil petroleum products for military and civil users. In peacetime the military use amounts to only around 10% of the current throughput and 60% of the storage capacity of the GPSS. It distributes 40% of aviation fuel within the United Kingdom.
257. The powers under which the GPSS was constructed and under which rights were acquired in relation to it were many and various. Elements of the GPSS were constructed on or under what was, and in some cases remains, publicly owned or acquired land. Much of the GPSS, however, was constructed on or under private land. Some of these elements were constructed under statutory powers. Others were built by agreement with the landowner at the time.
258. The precise nature of the interest or rights enjoyed by the Secretary of State in or over private land on or under which the GPSS is constructed and, in particular, whether they are transferrable will depend upon the relevant statutory power or the terms of each agreement. However, as regards the majority of the GPSS, the interest or rights enjoyed by the Secretary of State are broadly similar and consist of non-transferrable rights (to use, maintain, remove or replace the GPSS, to inspect or survey the GPSS or affected land, to restore the land and to enter the land).
259. This Part of the Bill makes provision to consolidate and standardise the Secretary of State’s rights, and to allow the Secretary of State to sell, lease or transfer the GPSS and his rights in relation to it. These provisions are intended to enable a future disposal of the GPSS.

#### ***ECHR Compatibility***

260. Clauses 98, 99, 100, 102, 103 and 105 engage Article 1 of the First Protocol to the ECHR but are compatible with it.
261. Clauses 97, 101, 104, 106, 107 and 108 and Schedule 13 do not give rise to any human rights issues.

#### ***Application of Article 1 of the First Protocol***

262. Clause 98 (rights in relation to the government pipe-line and storage system) provides that the Secretary of State may maintain and use the GPSS, or any part of it, for any purpose for which it is suitable. It also provides that the Secretary of State may inspect or survey the GPSS or any land on or under which it is situated and may remove, replace or renew the GPSS or any part of it. If the GPSS, or any part of it, is removed or abandoned, he may restore the land.
263. Clause 99 (rights of entry) provides that for the purpose of exercising a right to maintain and use etc. the GPSS, the Secretary of State may enter any land on or under which the GPSS is situated or any land held with that land (“the system land”). Subsections (3) and (4) provide that if the owner or occupier of the system land is entitled to exercise a right to pass over other land (“the access land”), the Secretary of State may exercise a corresponding right of access over the access land for the purpose of accessing the system land.
264. In the majority of cases, the creation of these ‘new’ rights by clauses 98 and 99 will not amount to an interference with the property rights of affected landowners in Article 1 of the First Protocol terms because, prior to their creation, the Secretary of State already enjoyed equivalent, or more extensive rights. Clearly any interference when the Secretary of State’s original rights were imposed or acquired would have been justified as having a legitimate aim (national security) and with a fair balance struck and the interference being proportionate given that the affected landowners at the time were appropriately compensated on the basis that the imposition or acquisition was permanent. In practical terms, the new rights will, in most cases, not go beyond the rights that were by agreement or otherwise already being enjoyed by the Secretary of State.
265. The Secretary of State is likely to already enjoy more extensive rights to those created by clauses 98 and 99 in two respects.
266. The first is in respect of the sterilisation of land immediately above and around the pipeline. The effect of section 12(6) of the Requisitioned Land and War Works Act 1948 (c. 17) and section 15 of the Land Powers (Defence) Act 1958 (c. 30) is to sterilise the land immediately above and around the GPSS by prohibiting any construction above or around it. It is important to note that relevant landowners at the time were compensated on this basis when these rights were acquired. The new rights will not sterilise the land immediately above and around the GPSS in this way.
267. The second respect in which the Secretary of State is likely to already enjoy more extensive rights to those created by clauses 98 and 99 concerns rights of entry. Section 15 of the Requisitioned Land and War Works Act 1948 provides that any person authorised by the Secretary of State may enter upon any land for the purpose of exercising certain rights in respect of government oil pipe-lines and accessory works. Section 15 of the Land Powers (Defence) Act 1958 provides that any person authorised by the Secretary of State may enter upon any land for the purpose of exercising certain rights in respect of a wayleave order authorising the laying etc. of an oil pipe-line. The right created by clause 99 is considerably more restricted both in the land to which it applies and because of the safeguards included in clause 99 and 100 (warrants for the purposes of section 102). In particular, the rights of entry, expressly, do not include a right to enter dwellings and, except in an emergency, may only be exercised at a reasonable time and with the consent of the occupier or under the authority of a warrant. Whilst clause 100(4) provides that it is an offence for a person intentionally to obstruct the exercise of a warrant, such liability, and the appropriate penalty (not

exceeding level 3 on the standard scale), would be determined by an Article 6 compliant process. The creation of an offence of obstructing the exercise of a warrant is a necessary and proportionate measure to ensure that, where entry is not by agreement, warrants authorising the exercise of rights necessary to operate the GPSS are enforceable.

268. It is considered that, where the Secretary of State already enjoys equivalent or more extensive rights, the creation of these new rights would not, in principle, amount to a 'fresh' interference with the property rights of those landowners through whose land the GPSS passes. The Secretary of State's original rights were imposed or acquired some time ago and the relevant landowners at the time were appropriately compensated on the basis that those rights were permanent. The Secretary of State's original rights continue to subsist.
269. The creation of these new rights may, however, amount to an interference with the right protected by Article 1 of the First Protocol where the Secretary of State does not already enjoy equivalent rights. This situation may occur in two circumstances.
270. The first is where, in certain circumstances, non-registration of the Secretary of State's original rights and subsequent sale of the affected land has resulted in the new owner taking the land free of the Secretary of State's original rights. However, it is important to note that in these circumstances the interference may only be technical and that any loss to the economic value of the affected land may be minimal. All landowners under or over whose land the GPSS runs will have practical notice of its existence because it consists of a substantial pipeline with associated works and even where it runs under the ground, for safety reasons, its location is marked with identification posts.
271. The second is where, either by mistake or as a result of mapping technology changes, the original Secretary of State's rights were not acquired in respect of the land actually affected by the GPSS ('land A') but were recorded against other nearby land ('land B'). Land A would be affected by the creation of the new rights under clauses 98 and 99 but would not already be subject to equivalent rights of the Secretary of State. Land B, in contrast, would not be affected by the creation of the new rights under clauses 98 and 99 but would already be subject to equivalent rights of the Secretary of State. However, it may well be that land A is owned by the same person as land B and, if so, there is likely to be no net interference with that landowner's right protected by Article 1 of the First Protocol.
272. The creation of new rights in these circumstances would not amount to a deprivation of possession under the second rule (see above) but might possibly affect the peaceful enjoyment of property under the first rule and, in particular the creation of a right of entry, might amount to a control of the use under the third rule. In this way, the creation of new rights could constitute a 'fresh' interference with affected landowner's right protected by Article 1 of the First Protocol.
273. The Secretary of State does not, in most circumstances, already enjoy the right to transfer his rights in respect of the GPSS and therefore he does not already enjoy an equivalent right to that provided for in clause 103 (right to transfer the government pipe-line and storage system). Clause 103 provides that the Secretary of State may sell, lease or transfer the GPSS or any part of it and transfer any right or liability relating to the system or any part of it, subject to such conditions, if any, as he considers appropriate. However, it is not considered that the creation of the right to transfer GPSS rights itself amounts to an interference with the rights protected by Article 1 of the First

Protocol. In practical terms, it would be likely to make no difference to an affected landowner whether the Secretary of State or any other person owns and uses the GPSS on or under his land and enjoys the benefit of certain rights in respect of it. For example, there is no suggestion that a commercial operator would need to enter land any more frequently to maintain and use etc. the GPSS than the Secretary of State currently enters land. It is difficult to see that the creation of the right to transfer rights alone would lead to a further loss to the economic value of the affected land. *Sporrong*<sup>22</sup>, the leading Strasbourg authority on Article 1 of the First Protocol, makes clear that in deciding whether there has been an interference with Article 1 rights, the court will look behind the appearances and investigate the realities of the situation complained of and whether there is an interference with the substance of the property.

274. If, the creation of new rights by clauses 98, 99, and 103 does constitute an interference in Article 1 of the First Protocol terms (see paragraphs 269-272, above), it is considered that the interference would be justified as having a legitimate aim which is in the public or general interest. The aim behind the creation of the rights is that there should be a complete set of rights in respect of the GPSS necessary to maintain and use an asset in which there continues to be a defence interest. The aim behind those rights being transferrable is that, whilst taking any necessary measures to protect any ongoing defence interest in it, an asset which may not be necessary to remain in public ownership should be capable of being sold or leased, potentially raising funds to assist with national debt reduction. *James and Others v. The United Kingdom* (1986)<sup>23</sup> provides that the taking of property effected in pursuance of legitimate social and economic or other policies may be 'in the public interest', even if the community at large has no direct use or enjoyment of the property taken. It is considered that, so far as the creation of new rights might constitute an interference, the interference is necessary to achieve these legitimate aims.
275. Because the creation of these new rights may, in some circumstances, amount to an interference with the right protected by Article 1 of the First Protocol, clause 102 (compensation) provides that the Secretary of State must pay compensation to a person who proves that the value of an interest in land to which he is entitled is depreciated by the creation of rights: to maintain and use etc. the GPSS; of entry; and, to transfer the GPSS. Subsection (3) provides that the amount of compensation will be equal to the amount of the depreciation. Subsection (5) provides that the Upper Tribunal (or in Scotland, the Lands Tribunal for Scotland) will determine any question as to a person's entitlement to compensation or the amount of any such compensation.
276. Whilst such an interference would not amount to the deprivation of property, it is noted that the taking of property in the public interest without the payment of compensation would be treated as justifiable only in exceptional circumstances. Indeed, the presence or absence of compensation is an important element in deciding whether, in authorising the interference in the general interest, the balance struck by the State is fair. It is considered that the payment of compensation in respect of any depreciation in value of land caused by the creation of rights would mean that, so far as the creation of those rights might constitute an interference, the interference would be proportionate to the aim.

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<sup>22</sup> *Sporrong and Lönnroth v Sweden* [1983] 5 EHRR 35.

<sup>23</sup> Application no. 8793/79.

277. The actual exercise of the newly created rights under clause 98 and 99 may also lead to loss by damage to, or disturbance in the enjoyment of, land or property. Clearly, any such damage or disturbance could amount to an interference in Article 1 of the First Protocol terms. In this way, the creation of the rights could be said to give rise to future interferences with Article 1 rights.
278. It is for this reason that clause 102(4) (compensation) provides that if a person proves loss by reason of damage to, or disturbance in the enjoyment of, any land or certain property as a result of the exercise of any right conferred by clause 98 (rights in relation to the government pipe-line and storage system) or 99 (right of entry), the person who exercised the right must pay compensation in respect of that loss. Subsection (5) provides that the Upper Tribunal (or in Scotland, the Lands Tribunal for Scotland) will determine any question as to a person's entitlement to compensation or the amount of any such compensation.
279. Therefore, the position will remain as at present under section 13(6) of the Requisitioned Land and War Works Act 1948 and section 18(3) of the Land Powers (Defence) Act 1958 that where a landowner suffers loss as a result of the exercise of rights in relation to the GPSS, he will be entitled to compensation.
280. On the same basis as above, it is considered that any interference in Article 1 of the First Protocol rights as a result of the exercise of the rights created by clause 98 and 99 is in the general interest and proportionate to the legitimate aim pursued.

#### **PART 4: STRATEGY AND POLICY STATEMENT**

281. Part 4 does not give rise to any human rights issues. The powers enable the Secretary of State to designate a Strategy and Policy Statement setting out strategic priorities in formulating energy policy for Great Britain, the policy outcomes to be achieved by the Secretary of State and Ofgem in implementing that policy and the roles and responsibilities of persons involved. These provisions confer powers and do not in themselves interfere with human rights. However, in accordance with section 6 of the Human Rights Act 1998, the Secretary of State will consider whether the strategic priorities and particular policy outcomes raise any human rights issues when preparing any future Statement.

#### **PART 5: MISCELLANEOUS**

##### **CONSUMER REDRESS**

###### *Outline of the provisions*

282. The Authority is responsible for enforcing the requirements imposed on those engaged in activities regulated by the Gas Act 1986 and the Electricity Act 1989. For example, energy suppliers must have a licence to supply electricity. In the case of an electricity supplier, the Electricity Act 1989 imposes "relevant requirements" and "relevant conditions" which the supplier must comply with whilst supplying electricity. The Authority enforces the obligations imposed on a regulated person (such as suppliers) using existing powers in the Gas Act 1986 and the Electricity Act 1989. Clause 117 and Schedule 14 adds to the Authority's existing enforcement powers under the Gas Act 1986 and the Electricity Act 1989.

283. By virtue of clause 117 and Schedule 14, the Authority will be able to make a consumer redress order if a regulated person has contravened a relevant requirement or condition of its licence and that contravention has caused loss or damage to a consumer. A consumer redress order might order a regulated person to pay affected consumers compensation for the loss or damage which the contravention has caused.
284. It is important to note that it is an existing function of the Authority to enforce the relevant requirements imposed on a regulated person under the Gas Act 1986 and the Electricity Act 1989. Therefore, although it is a precondition of the exercise of the power to make a consumer redress order that a regulated person must have contravened a “relevant requirement”, the Authority will not be looking to make such a determination *for the purpose* of making a consumer redress order.

#### *ECHR Compatibility*

285. A determination that a regulated person has contravened a “relevant requirement” will be a determination made as part of the Authority fulfilling its existing enforcement functions under the relevant Acts. It is not, therefore, a determination made by virtue of the powers in clause 117 and Schedule 14 and therefore is not examined here. Article 6 is, however, probably engaged by clause 117 and Schedule 14 as a result of the Authority determining that a “regulated person” should compensate one or more of its consumers for the losses it has caused to them for this seems to amount to a determination of the regulated person’s civil rights and obligations.
286. The provisions of the Convention which are therefore probably engaged by clause 117 and Schedule 14 are Article 6 and Article 1 of the First Protocol. In respect of both of these we believe that the relevant provisions in clause 117 and Schedule 14 are compatible with the Convention.
287. In relation to Article 6, for the reasons stated in paragraph 10, it is possible that the Authority’s determination that a regulated person should pay compensation to an affected consumer probably constitutes a determination of a regulated person’s civil rights and obligations.
288. As a public authority, the Authority is bound by the Human Rights Act 1998 to act in a way which is compatible with the Convention and therefore will be mindful to ensure that a determination it makes takes into account relevant human rights considerations. Quite apart from the legal duty on the Authority to act compatibly with any Convention rights which are engaged, Article 6 compliance can be demonstrated by reference to (a) the ability of a regulated person to apply to a court to challenge the Authority’s determination that it should pay compensation to one or more of its consumers<sup>24</sup>; and (b) the procedural requirements on the Authority to give prior notice of its intention to enforce a relevant condition or requirement and to also give a regulated person an opportunity to make representations or objections before reaching a decision<sup>25</sup>. With these substantive and procedural safeguards we believe clause 117 and Schedule 14 are compatible with Article 6.
289. The power to include provision in a consumer redress order requiring a regulated person to pay an affected consumer compensation might be argued to engage Article 1 of the First Protocol. It might be said that ordering a “regulated person” to pay

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<sup>24</sup> See Schedule 14 and the new section 30M to be inserted into the Gas Act 1986 and the new section 27M to be inserted into the Electricity Act 1989.

<sup>25</sup> See Schedule 14 and the requirements in the new sections 30G and 30H of the Gas Act 1986 and similarly in new section 27G and 27H of the Electricity Act 1989.

compensation to another constitutes interference with that person's right to the peaceful enjoyment of his property, namely money.

290. The right to property in Article 1 of the First Protocol is not an absolute right but a qualified one. On the assumption that Article 1 of the First Protocol is engaged, we believe that the deprivation of property which may result by virtue of a consumer redress order requiring a person to pay compensation is something which is in the public interest.
291. A provision in a consumer redress order which requires a regulated person to compensate a consumer for the loss or damage which it has caused that person seeks to ensure that a "wrongdoer" is required to remedy the consequences of its contravention and does no more than reflect an outcome which an affected consumer might seek in a private law action. In our view it is clearly in the public interest to ensure that those who cause loss or damage to others are required to remedy that loss or damage. The Authority's ability to make a consumer redress order is governed by the law which will be made by virtue of the provisions in Schedule 14 and therefore we feel that the consumer redress provisions in the Bill are also compatible with Article 1 of the First Protocol.

## **OFFSHORE TRANSMISSION**

### ***Outline of the provisions***

292. Under section 4(1)(b) of the Electricity Act 1989 it is a criminal offence for a person to participate in the transmission of electricity for the purpose of supply to any premises without a licence. Clause 118 inserts a new subsection (3AA) into section 4 of the Electricity Act 1989 which amends the meaning of "participation in the transmission of electricity" to exclude a person who participates in offshore transmission (in certain circumstances) during a commissioning period.

### ***ECHR Compatibility***

293. In the Government's view the clause potentially engages Article 7(1) of the ECHR. Article 7(1) requires that an offence must be clearly defined in law and prohibits the retrospective criminalisation of acts or omissions. The former requirement is satisfied when an individual can know from the wording of the relevant provision what action or omissions will make him liable for the offence (*Kokkinakis v Greece*<sup>26</sup>).
294. The parameters of the exclusion the clause creates are sufficiently clear for a person without a transmission licence to be able to work out which actions will allow him to benefit from the exclusion and which will mean that he is participating in the transmission of electricity and hence potentially liable for the offence under s.4(1)(b) (where such transmission is for the purpose of supply to any premises). The conditions for the exclusion to apply are set out in subsections (2) to (5) of new section 6F of the clause, subsections (5) – (8) set out relevant clarifications and definitions. New section 6G of the clause defines the period for which the exception applies as described in section 6F(3).
295. New section 6G(3) provides a power for the Secretary of State to reduce the period of time for which the exclusion can apply by 6 months. New section 6G(5) prevents a reduction made using this power from applying in respect of offshore transmission

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<sup>26</sup> (1993) 17 EHRR 397.



projects that have already qualified into a tender exercise on or before the day when the order making such changes comes into force. The factual circumstances that the project has been qualified into a tender exercise is the third condition for the exclusion to apply, and in practice is likely to be one of the first conditions satisfied. Therefore new section 6G(5) ensures that once developers have satisfied this condition, the maximum period for which they can benefit from the exclusion will not be altered by an order made under s.6G(3). This means that that on qualification into a tender exercise, (i) a developer will know the period of time for which the exemption may apply and (ii) this period cannot subsequently be reduced with retrospective effect.

296. The Secretary of State will, as a public authority, have a duty under section 6 of the HRA 1998 to act compatibly with the ECHR in making any order under section 6G(3). Moreover, the clause allows for the significant safeguard that any orders made under new section 6G(3) will (by virtue of section 106(2)) of the EA 1989) be subject to Parliamentary scrutiny (in accordance with the negative resolution procedure).

## **NUCLEAR DECOMMISSIONING COSTS**

### *Outline of provision*

297. The Energy Act 2008 contains existing powers in section 45(8) and (9) and section 49(3) and (4) enabling the Secretary of State to recover from the operator the costs incurred by him in considering a funded decommissioning programme or a proposal to modify a funded decommissioning programme.
298. The above powers will be extended by clause 119. Under the new provisions the Secretary of State will be able to recover from the operator the costs as set out below.
- (a). the costs of considering any proposal for a funded decommissioning programme (before its submission to the Secretary of State for approval) (clause 119(2));
  - (b). currently under section 46(3A), the Secretary of State may enter into an agreement limiting the extent to which he may modify a funded decommissioning programme. New section 46(3H) will enable the Secretary of State to recover the costs incurred in considering any such an agreement or any proposal to amend any such agreement;
  - (c). subsection (4) extends the existing power under section 49(3) and (4) of the Energy Act 2008. This provision currently enables the Secretary of State to recover the costs incurred in considering a proposal to modify a funded decommissioning programme. The provision enables the Secretary of State to recover the costs incurred, for example, in considering a draft of a proposal which the operator may wish to discuss before formally submitting it;
  - (d). subsection (5) enables the Secretary of State to recover the costs incurred by him in relation to the consideration of an agreement (or an amendment to such agreement) for the disposal of relevant hazardous material which he may enter into with another party.
299. The Secretary of State also has the power, in each of the above provisions to make regulations for determining the level of fees which can be charged.

*Application of article 1 of the First Protocol*

300. In our view clause 119(2) to (5) are capable of engaging Article 1 of the First Protocol. The right to property under Article 1 of the First Protocol is qualified and by virtue of the second paragraph of Article 1 which makes it clear that the first paragraph of Article 1 does not prevent a state enforcing such laws as it deems necessary to control the use of property in the general interest.
301. A fair balance must be struck between the general interest and the rights of the individual. We are content that recovering these expenses from those operators who wish to construct nuclear power stations and wish to enter into agreements with the Secretary of State for the safe disposal of their hazardous nuclear waste is proportionate. The costs are incurred to ensure that operators of nuclear installations enter into robust arrangements to ensure that there is sufficient financing in place to decommission their nuclear stations and to safely dispose of the waste at the end of the station's life such that there is no financial burden placed on the taxpayer.
302. There is also a clear legal basis for the recovery of these costs.
303. In light of the above we are content that the powers in clause 119 do not of themselves give rise to any specific human rights issues. Further regulations made by the Secretary of State under which the fees charged are to be determined would have to comply with the Human Rights Act 1998 and in particular, ensure that any interference with the rights within Article 1 was in the public interest and proportionate.