MEMORANDUM FOR THE JOINT COMMITTEE ON HUMAN RIGHTS

Summary of the Bill

1. This Bill will complete the work started in the last Parliament to fully implement the recommendations in Sir Ian Wood's review into UK offshore oil and gas recovery and its regulation. Central to this was the establishment of a new arm's length regulatory body charged with effective stewardship and regulation of petroleum recovery. The Bill will formally establish the Oil and Gas Authority (OGA) as an independent regulator, which will take the form of a government company, and transfer regulatory powers and functions to it. It will also be provided with new powers, namely (1) access to meetings, (2) access to information and samples and (3) dispute resolution. There will also be provision for investigation and enforcement of breaches of terms of licences and statutory duties. This will ensure it has the powers it needs to become a robust, independent and effective regulator, and enable it to maximise the economic recovery of oil and gas from beneath UK waters.

2. The Bill will also set provisions relating to fees charged to the offshore oil and gas industry. This includes the validation of charges that have already been imposed on energy companies in circumstances where the necessary statutory authority to charge was not in place.

3. The Bill also makes provision, alongside other measures being taken by DECC and DCLG, for changes to the planning system to empower local authorities to have a greater say on new onshore wind development applications. In addition, it provides for the early closure of subsidy arrangements under the Renewables Obligation to new onshore wind developments in Great Britain.

ECHR issues raised by the Bill

4. We set out below the ECHR issues raised by the Bill, arranged by the various topics covered by the Bill.

Wood Review

Wood review provisions on access to meetings, information and samples and dispute resolution (clauses 15, 23(4), 26, 32(6) and 34)

Article engaged and potentially interfered with

5. The relevant provisions are:

    a. Article 8
    b. Article 1 of the First Protocol ("A1P1")

Engaged by which provisions of the Bill

6. In this section we consider the ECHR implications for the information (and in one instance, samples) acquisition powers of the OGA to be found in the draft clauses on:

    a. dispute resolution (clause 15);
    b. access to information and samples (clauses 23(4) and 26); and
    c. access to meetings (clauses 32(6) and 34).

7. **The dispute resolution** clauses allow relevant persons involved in disputes relating to either activities under licences or to the principal objective (the objective of maximising economic recovery of UK petroleum provided for in section 9A of the Petroleum Act 1998) to invite the OGA to mediate the dispute. The OGA may commence the process without such a request. It will undertake a triage process which will allow it to choose which disputes it will become involved with. Once the process has commenced (either through referral by a party or by the OGA commencing of its own volition) the OGA will have powers to acquire information (clause 15), require attendance by the parties at meetings and issue directions which will allow consideration of the dispute to be progressed. The recommendation of the OGA at the end of the process is non-binding on the parties.

8. The OGA may only disclose information acquired under these provisions in accordance with a statutory obligation or with the consent of the person from whom it was acquired or as part of the publication of a sanction on a person (clause 17) though it will have the power to publish its recommendations.

9. **The access to information and samples** clauses allow the OGA to require (by regulations) relevant persons to retain certain information and samples held by them. It does not extend to requiring them to acquire information or samples (clause 20). They also require licence holders to put in place a plan at the end of their involvement in a licence ensuring the preservation of certain information and samples acquired in the course of carrying out activities under the licence. Such a plan may be imposed on them by the OGA if agreement is not reached (clause 23). The final material requirement is that relevant persons and those subject to plans may be required to provide to the OGA information and samples which are relevant information and samples or are held under plans (clause 26).

10. Information and samples acquired under these clauses may be disclosed with the consent of the person who provided the information, when required by a statutory obligation, after the expiry of a confidentiality period to be set by regulations or as part of the publication of a sanction on a person (clause 27(5)). There are some other circumstances where the OGA can pass this information to persons carrying out geological research and those persons are not able to disclose the information in any wider circumstances than the OGA.

11. **The access to meeting** clauses require relevant persons, being those to whom the principal objective referred to above applies, to extend to the OGA an invitation to attend meetings at which matters relevant to the fulfilment of the principal objective or actions under offshore petroleum licences are being considered. This requirement extends to providing the OGA with such information as the other parties to the meetings get and with a summary of what was discussed if the OGA is not able to send a representative. The OGA will not have voting rights at these meetings, but will have the right to speak.

There is an exclusion for those aspects of the meetings covering legally privileged material.

12. The OGA may only disclose information acquired under these provisions with the consent of the person from whom it was acquired, in accordance with a statutory obligation or as part of the publication of sanctions issued against a person (clause 35).

Interference

13. All of these sets of clauses deal with information (and in relation to one aspect, samples) which could be a possession for the purposes of A1P1. The requirements to provide the OGA with information either in relation to meetings, disputes or more generally will give the OGA access to information in a way which might constitute an interference with those possessions. In addition, the requirement to retain information (see the access to information and samples provisions) either generally or under a plan could constitute an interference with possessions as it limits the relevant persons' ability to dispose of those possessions, whether for commercial gain or otherwise.

14. Insofar as these powers apply to information they are controls on the use of property and therefore of limited interference. However, the power to require relevant persons to send samples to the OGA may constitute a deprivation of property, rather than a control, as a sample cannot be copied and retained for use by its owner/holder. The obligation is limited to providing a portion of the sample taken, though, and not the whole sample.

15. The meetings covered by the access to meetings clauses are all meetings between two or more different companies, so although they may be working in partnership, the information acquired under the clauses dealing with access to meetings is only such that they would be prepared to share with others, in any event.

16. The provision of this information to the OGA may also amount to an interference with the relevant persons' rights to private life and correspondence, for the same reasons it might constitute an interference with property rights.

Justification (in relation to qualified rights)

17. The interference with A1P1 rights does not constitute a deprivation of property (except, possibly, in relation to samples), but a control on the use of possessions. The interference is therefore limited. The powers are limited so that they can only be exercised for the OGA's functions under an enactment or a licence. The Wood review highlighted these powers as necessary for ensuring that the regulator is sufficiently engaged in activities in UK waters that it is able to act as an effective steward of the UK's assets (access to meetings and information). It also highlighted the need for an informed and engaged regulator to use its knowledge of the industry to assist in unblocking disputes which threaten the recoverability of offshore oil and gas assets (dispute resolution). It warns that failure to do so gives rise to a significant risk that the UK will not be able to make best use of the oil and gas assets in our waters to the significant financial detriment of the UK. We are therefore of the view that any interference can be justified on the basis that the grounds set out above establish a clear public interest.

18. In relation to samples, these can only be obtained (by a person) pursuant to a licence. They are not possessions which are acquired independently of the oil and gas regime, but are integrally bound up with it. The power to acquire is also limited to acquiring a portion of the sample, not the whole of the sample. We are of the view that even if there is a deprivation it is of limited scope and is justified by the reasons set out above.

19. Interference with Article 8 rights can be justified on the basis of the economic well-being of the country. The arguments are the same as those set out above.

Investigation and enforcement of breaches of duty, etc. (Chapter 5 of Part 2)

Article engaged and potentially interfered with

20. The relevant provisions are:

    a. Article 6
    b. Article 8
    c. A1P1

Engaged by which provisions of the Bill

21. In this section, we consider the ECHR implications of the following powers of the OGA relating to the investigation and enforcement of breaches of terms of licences and statutory duties in Chapter 5 of Part 2:

    a. the power to determine whether or not there is a breach by giving a sanction notice under clause 37;
    b. the power to impose a requirement to take action to remedy a breach by giving a direction in an enforcement notice (see clause 38) and to impose a penalty in respect of a breach by giving a financial penalty notice (see clause 39), a revocation notice (see clause 42) or an operator removal notice (see clause 43);
    c. the power to compel the production of information for the purpose of investigating whether or not there is a breach by giving a notice under clause 52.

22. Clause 37 gives the OGA the power, by giving a sanction notice, to determine whether or not there has been a breach of the following (referred to as “primary duties”):

    a. a term of an “offshore” petroleum licence;

b. the existing duty to act in accordance with the strategy to maximise economic recovery of UK petroleum produced under section 9A of the Petroleum Act (the "MER UK strategy") in section 9C of the that Act;
c. the duties relating to OGA access to meetings, to the retention and provision of information and samples and to the OGA dispute-resolution function[1] (see paragraphs 6 to 12).

23. The Bill also gives the OGA the power to impose, and in clause 37 the power to determine whether or not there has been a breach of, the following "secondary duties" (which are duties imposed for the purpose of securing compliance with or investigating the "primary duties"):

a. the duty to comply with a requirement to take remedial action imposed by the OGA when a direction is given (see further below);
b. the duty on the holder of a petroleum licence to remove an operator when the OGA gives an operator removal notice as a penalty[2] ;
c. the duty to provide information to the OGA for the purpose of OGA investigation of breaches.

24. The Bill gives the OGA, once it has determined that there is a breach, the power to impose a requirement to take action to remedy the breach by giving a direction (clause 38(2)(c)(ii)) or to impose a penalty in respect of the breach. Requirements may be imposed in relation to rights under a licence, the use of a person's property or the provision of information. The penalties that may be imposed are a financial penalty (clause 39) of up to £1 million per breach[3], the revocation of a licence (clause 42) and the removal of a person as "operator" under a licence, to be enforced by the licence-holder (clause 43).

[1] This includes the power to determine whether or not there has been a breach of a duty imposed by the OGA itself in particular cases as well as duties imposed by the Bill and subordinate legislation made under the Bill.
[2] An "operator" under a petroleum licence is a person who is responsible for organising or supervising any of the operations of searching for, boring for, or getting UK petroleum in pursuance of the petroleum licence. See section 9I of the Petroleum Act 1998.
[3] The S of S has a power to increase this to up to £5 million per breach by secondary legislation.

25. Clause 52 gives the OGA, for the purpose of investigating whether or not there has been a breach, the power to compel the production of information. Such information may be used by the OGA to determine whether or not there has been a breach and to impose a penalty.

Interference

26. Power to determine whether or not there is a breach: Because the OGA's determination that there is a breach (whether of a "primary" or a "secondary" duty) could lead to the imposition of the penalty of licence revocation or operator removal, thereby affecting a person's right to engage in commercial activity, it is likely that such a determination will be a "determination of…civil rights and obligations" for the purposes of Article 6. We consider that the rights guaranteed by Article 6, such as the right to a "fair and public hearing" before an "independent and impartial tribunal" are secured by the provision in clause 45 of a right of appeal to the First-tier tribunal (the "Tribunal"). The Tribunal can cancel the OGA's determination that there has been a breach (and can cancel any penalty imposed consequent upon the determination of a breach). Accordingly, we do not consider that the power to determine whether or not there is a breach interferes with Article 6.

27. Power to impose a requirement to take action to remedy a breach and to impose a penalty in respect of a breach: The power to impose a requirement to take remedial action may be exercised in such a way so as to impose a duty on a person to deal with the person's rights under a licence, property or information in a particular way. The exercise of the power may therefore interfere with the right to the peaceful enjoyment of possessions protected by A1P1. Imposing a penalty such as a financial penalty, ordering operator removal (which would have the effect of bringing to an end any contract to act as operator) or revoking a licence may amount to a deprivation of possessions for the purposes of A1P1.

28. Power to compel the production of information: We consider that the power to compel the production of information may interfere with the "right to respect for…correspondence" guaranteed by Article 8.

Justification

29. Power to determine whether or not there is a breach: not applicable, as no interference.

30. Power to impose a requirement to take action to remedy a breach or to impose a penalty in respect of a breach: The power to impose requirements by giving directions is necessary to enable the OGA to secure compliance with the terms of a licence or a statutory duty, i.e., the "primary duties". It is clearly in the public interest to secure compliance with the terms of a licence and with the existing statutory duty to act in accordance with the MER UK strategy, which will assist the principal objective of maximising the economic recovery of UK petroleum. The justification advanced in paragraphs 6 to 18 for the imposition of duties relating to OGA access to meetings, to the retention and provision of information and samples and to the OGA dispute-resolution function, whose overarching purpose is to ensure that the UK makes best use of its petroleum assets, also justifies imposing requirements in order to secure compliance with those duties.

31. The power to impose financial penalties, revoke licences and remove operators under licences is also necessary to enable the OGA to secure compliance with the terms of a licence and the statutory duties referred to in the foregoing paragraph (and any "secondary" duties imposed for the purpose of securing compliance with or investigating the "primary" duties). The Wood review recommended a more gradated set of tools to be available to the OGA as regulator and, although there was no specific mention of financial penalties, the ability to impose such penalties will be an additional tool short of the existing remedy of licence revocation for the OGA in the enforcement of "offshore" petroleum licences. For the reasons given in the foregoing paragraph, it is clearly in the public interest to secure compliance with terms

of licences and the statutory duties referred to. It is thought that the threat of a financial penalty and, perhaps more significantly, particularly in the case of those industry players for whom a financial penalty of even the maximum of £1 million may be a relatively small sum, the threat of the ultimate sanction of licence revocation or operator removal will serve as a deterrent and assist compliance.

32. Licence revocation and operator removal, which amount to a deprivation of possessions without compensation, require particular consideration, since A1P1 permits this only in the public interest and subject to the conditions provided for by law and by the general principles of international law. Whilst this generally requires payment of compensation, we consider that there is a regulatory sphere in which the state is entitled to act where compensation need not be paid if this is justifiable, in circumstances such as a serious one-off breach of a term of an offshore licence or of a statutory duty or persistent less serious breaches.

33. The Bill secures that the issue of proportionality must be considered in a number of ways when a requirement or penalty is imposed. As a public authority within the meaning of the Human Rights Act 1998, the OGA is under a duty in section 6(1) of that Act not to act incompatibly with a Convention right when doing so. The OGA will therefore be under a duty to consider proportionality issues when imposing a requirement or penalty. Further, because there is a right of appeal to the Tribunal on the grounds that a requirement or penalty imposed is unreasonable or is not within the OGA's powers, the issue of proportionality may be considered by the Tribunal on an appeal, which can cancel any requirement imposed by the OGA, cancel or reduce the financial penalty or cancel licence revocation or operator removal (see clause 47).

We consider that, to the extent that any requirement imposed by the OGA interferes with the right to the peaceful interference with possessions, the interference is capable of being justified in the public interest for the economic

well-being of the country. We consider that the deprivation of property occasioned by the imposition of a financial penalty is capable of being justified on those grounds. We also consider that there are circumstances in which licence revocation or operator removal without compensation will also be capable of being justified on those grounds.

34. Power to compel the production of information: The power is necessary to enable the OGA to investigate whether or not there is a breach of a term of a licence or a statutory duty. It is clearly in the public interest for the OGA to be able to do so. The Bill limits the power to require information to be produced in three ways. First, the power is available only in respect of information held by, or in the control of, persons alleged to be in breach. Second, the power may be exercised only for the purposes of an investigation by the OGA. Third, the Bill provides that the OGA cannot require information that is subject to legal professional privilege to be produced. Accordingly, we consider that any interference with Article 8 rights is capable of being justified.

Assessed to be compatible with the ECHR

35. Yes, in all cases.

Offshore Oil and Gas Fees (Clause 58)

Article engaged and potentially interfered with

36. The relevant provisions are:

    a. A1P1
    b. Article 6

Engaged by which provisions of the Bill

37. The retrospective legislation would extinguish the right of companies which have been charged fees for which there was no statutory authority to bring restitution claims. This potentially engages both Article 1, Protocol 1 and Article 6 of the ECHR.

Interference

38. These clauses ensure that any fees or charges made to the offshore oil and gas industry are considered to have been lawfully made, whether or not the requisite statutory authority was in place at the point those fees or charges were made. This has the effect that any members of the industry affected have no reasonable prospect of successfully bringing a claim for repayment of such fees or charges. This raises the question of whether A1P1 is engaged in depriving members of industry of the opportunity to successfully bring a claim.

39. The European Court of Human Rights (the "Court") has suggested that a legal claim will not constitute a possession, and so A1P1 will not be engaged, if the claim is not sufficiently established.[4]

40. In this case, we have notified industry of the error and to date no proceedings have been brought. It would therefore be very difficult for any potential claimants to argue that they would have an expectation that a claim would be determined in their favour. We therefore consider that there are strong arguments that there are not any claims in existence which could be considered possessions for the purpose of A1P1.

41. The effect of legislating retrospectively in this way will be to thwart the chances of any person affected successfully bringing a claim for restitution. There is therefore a question as to whether Article 6 is engaged in denying members of the industry access to a fair and public hearing to determine any claims for restitution.

Justification

42. If this interpretation of the application of A1P1 is wrong and the right to bring a claim in the future is a possession, the Court has found that there is no absolute prohibition on legislating retrospectively to extinguish a claim. The legislature has a margin of appreciation; however, given the potential for

[4] *The National & Provincial Building Society & Others v UK* (1998) 25 EHRR 127, para 69

unfairness, there must be a compelling justification for retrospective legislation in the public interest, and any measures must strike a “fair balance” between the public interest and the protection of individual fundamental rights.

43. In this case, the persons affected will have received a service for which they have been – and expected to be - charged, which is necessary to facilitate the carrying on of the business, and there would have been a real cost to the Secretary of State in carrying out the function. Further, there is a public interest in ensuring that, in line with the ‘polluter pays’ principle, the cost of carrying out this function is borne by the businesses which have benefited, rather than being a burden on the public purse. There is also no excessive burden on industry, given the real cost of the functions performed.

44. Therefore, even if a potential claim is found to be a possession, there is compelling justification for legislating retrospectively, and to do so would be a proportionate means of avoiding the cost to the public purse of claims for restitution and for avoiding the uncertainty and costs of litigation.

45. In relation to Article 6, the Court has found that there is no absolute prohibition on introducing retrospective provision to extinguish claims, but again, to justify interference, there must be compelling public interest reasons for doing so in pursuit of a legitimate aim. There must also be a reasonable relationship of proportionality between the means employed and the aim. In assessing whether any interference is justified, the Court will have regard to where the public interest lies, the effect on those whose rights are being altered, and the method and timing of implementation.

46. In this case, it is significant that there have been no issued claims, and industry is aware of the error. This therefore does not amount to a legislative interference in a pending claim that is intended to affect the outcome of litigation and so there would be good grounds for arguing that Article 6 is not engaged at all.

47. Even if Article 6 is engaged, we consider that similar public interest arguments apply as for A1P1: there is a public interest in ensuring that those who benefit from the functions performed bear the costs and there is a public interest in avoiding the uncertainties and costs of litigation and of putting the fee powers on a more certain legal footing. Regarding the effect and the timing, again, this proposal would not affect any existing claims (where the Court applies the greatest possible degree of circumspection). Rather, any potential claimants know that it is the Government's intention to change the law to regularise the situation before any claims are brought.

48. We therefore also consider that there is no unlawful interference under Article 6.

Onshore wind planning (clause 59)

49. We do not believe that the onshore wind clauses included in the Bill will potentially interfere with Convention rights and in particular article 1 of protocol 1. There are three categories of person that need to be considered here: (1) those with existing consents; (2) those with existing applications which have not yet been decided; and (3) future potential applicants.

50. For the first category, the commencement of the Bill will be accompanied by savings provisions, such that existing consents under section 36 of the Electricity Act will continue to have effect, and the Act's provisions will continue to apply to them.

51. For the second category, again savings provisions will be made and applications for consents existing at that time will remain valid under the Act and the decision will be taken by the Secretary of State under the Act. Thereafter, if a consent is granted, the applicant will be put in the same position as a person in the first category.

52. Potential applicants in the third category are not directly affected by the provision, since currently applications are made under the Planning Act 2008 consenting regime rather than the Electricity Act (the existing applications were made prior to the transition to the Planning Act regime). DECC is also planning to lay Orders after recess which will have the effect of amending the Planning Act 2008 to remove the need for onshore wind farms to have a consent under that Act, and create an exemption from the requirement for a consent under the Electricity Act (that Order will be replaced by the current Bill provision on commencement). The combined effect of this is that applicants will need to apply instead for planning permission for onshore wind farms under the Town and Country Planning Act 1990. Since this will automatically apply and applications for consent will remain possible, there is therefore no control on the use of property. That regime is, in addition, compliant with Article 6.

Onshore wind – subsidies (clause 60)

Article engaged and potentially interfered with

53. The relevant provision is:
    a. A1P1

Engaged by which provisions of the Bill

54. The provision closing the Renewables Obligation to new onshore wind a year earlier than previously legislated for may interfere with possessions in the form of investments made by persons who have invested on the basis of the current closure date.

55. The provision also entails a possibility of retrospective application: depending on Royal Assent, the early closure provisions may have to apply retrospectively in order to close the RO to new onshore wind with effect from 1 April 2016.

Interference

56. It is arguable that the early closure of the RO to new onshore wind may amount to an interference with the use of property, because investors may have spent money in the expectation of a return on a project which is no longer viable as a result of the early closure or because the provisions take away the opportunity of a future additional income stream under the RO. However, the provisions do not as such prevent onshore windfarms from being developed without the support of the RO scheme and in the case of *Solar Century*[5] (now subject to an appeal) the High Court decided that there was no legitimate expectation that the RO would remain open until 2017 for large solar farms because the Levy Control Framework represented a systemic risk that investors accepted when seeking to accredit under the RO.

Justification

57. If the provision on early closure of the RO to new onshore wind were considered to be an interference, we consider that such interference is justified by the public interest in managing the deployment of renewable energy in line with public spending priorities and the policy choices of the Government as confirmed by the legislature.

58. The provision is capable of implementation in a way which is compatible with A1P1 because it allows for the possibility of grace periods, as appropriate in the context of the proportionality of the measure. We are in the process of engaging with industry and other stakeholders to gather further evidence to aid this assessment. This will enable a fair balance to be struck between the legitimate aim of closing the RO early to manage the deployment of new onshore wind and the property rights of investors who may be adversely affected. This is supported by the fact that (1) there is an existing provision in the Electricity Act 1989 – at section 32LA – which confers a power on the Secretary of State to close the RO, and (2) read with section 32K(1)(b) on transitional provisions and savings this power allows for detailed closure provision. We consider that it follows that provision to the same effect in the Energy Bill is also compatible with A1P1.

[5] [2014] EWHC 3677 (Admin)