



House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill

**Fourteenth Report of Session
2009–10**

*Report, together with formal minutes and
written evidence*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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The current staff of the Committee are: Mark Egan (Commons Clerk), Chloe Mawson (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Assistant Legal Advisers), James Clarke (Senior Committee Assistant), John Porter (Committee Assistant), Joanna Griffin (Lords Committee Assistant) and Keith Pryke (Office Support Assistant).

Contacts

All correspondence should be addressed to The Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2467; the Committee's e-mail address is jchr@parliament.uk

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Summary

In this Report, we return to two issues raised in our autumn 2009 report on the Equality Bill: employment by organisations based on religion or belief and school admissions.

Employment by organisations based on religion or belief

The Bill as introduced (and as passed the Commons) permitted a requirement to be of a particular sex, sexual orientation, marital or partnership status or not to be transsexual to be applied to employment for the purposes of an organised religion, but only if it could be shown to be a proportionate means of complying with the doctrines of the religion. The Bill also included a definition of what constituted employment for the purposes of an organised religion. Both of these qualifications have been removed in the House of Lords and the Government has stated that it will not try to restore them when the Bill returns to the Commons. The original wording of the Bill would have ensured that statute law accurately reflected case law, in the light of the *Amicus* judgment. The Lords amendments run the risk of generating uncertainty about the law and may mean that this provision does not comply with the relevant EU directive.

We also note further issues concerning the School Standards and Framework Act 1998 and the Education and Inspections Act 2006 and question why sections 58 and 60 of the former Act are exempted from the Equality Bill.

School admissions

We do not find persuasive the argument that it is necessary to allow faith schools to discriminate in their admissions on grounds of religion and belief in order to avoid a breach of the parents' rights under Article 2 Protocol 1 of the European Convention. Another argument is that discrimination is necessary in order to maintain the distinctiveness of religious schools and so maintain the plurality of provision which, it is argued, is required by both Article 9 and Article 2 Protocol 1. This argument is weakened by evidence which suggests, in relation to Church of England schools, that plurality of provision has been preserved even where those schools do not have faith-based admissions criteria. It carries more weight in relation to other faith schools, however. In consequence, the exemption permitting faith schools to discriminate in their admissions on grounds of religion or belief may be overdrawn in this Bill.

Government Bills

Bills drawn to the special attention of each House

1 Equality Bill

Date first introduced to first House	24 April 2009
Date introduced to second House	3 December 2009
Current Bill Number	HL Bill 35
Previous Reports	26 th Report 2008-09

Background

1.1 This is a Government Bill which was first introduced in the House of Commons on 24 April 2009. It was carried over into the current parliamentary session and completed Commons consideration on 2 December 2009. The Leader of the House of Lords, Baroness Royall of Blaisdon, has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998. The Bill has recently been reported from Committee in the House of Lords and its Report stage is due to begin on 2 March.

1.2 We reported on the Bill in our 26th Report of the 2008-09 session.¹ We return in this report to two issues which we discussed in our previous report and in relation to which there have been significant subsequent developments.

Employment by organisations based on religion or belief

1.3 Schedule 9(2), which permits a requirement to be of a particular sex, sexual orientation, marital or partnership status or not to be transsexual to be applied to employment for the purposes of an organised religion, was amended at Committee stage in the House of Lords on 25 January. The Government has since announced that it does not intend to seek to reverse these amendments in the Commons. We welcomed the original wording of the Schedule in our earlier report because it clarified the law in this area.²

1.4 The effect of the amendments was a) to delete the express requirement in Schedule 9(2)(5) that the application of any such requirement must be shown to be a 'proportionate means of complying with the doctrines of the religion' and b) to delete the definition of what will constitute employment for the purposes of an organised religion set out in Schedule 9(2)(8).

1.5 These amendments appear to restore the wording used in Paragraph 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003, which made similar provision. Paragraph 7(3) was interpreted by Richards J in the *Amicus* case as compatible with the requirements of Article 4(2) of the Framework Equality Directive 78/2000/EC, but only on the basis that this exemption would be applied subject to a requirement of proportionality in order to conform to the requirements of the Directive.

¹ *Legislative Scrutiny: Equality Bill*, HL Paper 169, HC 736 (hereafter, *first Equality Bill report*).

² Paragraphs 164–76.

1.6 The removal of the express proportionality requirement in Schedule 9 (2)(5) does not remove the legal requirement recognised by Richards J that this exemption must be subject to the proportionality requirement, as the obligation to read this legislation in conformity with EU law remains.

1.7 However, the removal of the express requirement of proportionality, inserted by the Government to clarify the scope of this exemption, will have the effect of ensuring that the scope of the exemption set out in Schedule 9(2) will not be clearly defined on the face of the Bill. It runs the risk of generating legal uncertainty and misleading organisations who wish to make use of this exemption as to the true nature of the test to be applied in law, and the current wording may not be sufficiently clear and precise to satisfy the requirements of EU law.

1.8 The removal of the definition of employment for the purposes of organised religion either as originally set out in Schedule 9(2)(8) or as set out in a Government amendment defeated in Committee in the Lords again represents a loss of clarity from the face of the Bill.

1.9 In its reasoned opinion infringement No. 2006/2450, paragraphs 15-20, which is usually confidential but which has found its way into the public domain,³ the European Commission takes the view that Article 4(1) of the 2000/78/EC Directive:

Contains a strict test which must be satisfied if a difference of treatment is to be considered non-discriminatory: there must be a genuine and determining occupational requirement, the objective must be legitimate and the requirement proportionate. No elements of this test appear in Regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 ... [The] Commission maintains that the wording used in regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 is too broad, going beyond the definition of a genuine occupational requirement allowed under Article 4(1) of the Directive.

1.10 The Commission further stated that:

The wording of the 2003 Regulations contradicts the provision under Article 4(2) of the Directive which provides that permitted differences of treatment based on religion "should not justify discrimination on another ground".

This is not reflected in Schedule 9(2)(8) of the Equality Bill.

1.11 In the absence of any narrowing or clarification of either Schedule 9(2) or 9(3) we share the view of the European Commission that UK law does not comply with the Framework Equality Directive.

1.12 We note that further issues exist in respect of sections 58 and 60 of the School Standards and Framework Act 1998 (SSFA), which in reserving a certain proportion of posts in state-maintained or aided 'faith schools' for individuals who adhere to the religious beliefs and ethos of the school in question may be in breach of the Framework

3 <http://www.secularism.org.uk/uploads/ec-reasoned-opinion.pdf>

Equality Directive 2000/78/EC, on the basis that the reservation of such posts is not restricted to circumstances where it can be shown that a genuine, legitimate and justified occupational requirement to adhere to a particular religious belief can be said to exist.

1.13 It is also worth noting that the provisions of s. 37 of the Education and Inspections Act 2006, which repealed original s. 58(4) of the SSFA, have made it possible for all headships in faith schools to be designed as Reserved Teacher posts, except where the current incumbent objects. **Other provisions of Section 37 of the 2006 Act have also widened the ability to reserve certain posts filled by non-teaching staff. These provisions may constitute a breach of the principle of non-regression in EU law.**

1.14 We question why sections 58 and 60 of the School Standards and Framework Act 1998 are exempted from the Equality Bill.

School admissions

1.15 In our earlier report, we said that in our view the law's permission for publicly funded maintained schools to use faith-based admissions criteria amounts to differential treatment on grounds of religion in the sphere of education, which requires an objective and reasonable justification in order to be lawful under the Human Rights Act.⁴ We had corresponded with the Government and taken written evidence from faith schools themselves and other interested organisations, but we did not consider it appropriate for us to comment on the issue pending the judgment of the Supreme Court in the JFS case which might address this issue. In the event the decision of the Supreme Court in that case⁵ did not purport to determine the issue of whether faith-based admissions criteria are in breach of the right not to be discriminated against in the enjoyment of the right of access to education (Article 14 ECHR in conjunction with Article 2 Protocol 1) and we therefore return briefly to this question.

1.16 In correspondence with us the Government's principal justification for permitting faith schools to discriminate on grounds of religion or belief in their admissions policies is that it is necessary in order to protect the Article 2 Protocol 1 right of parents to access education for their children in accordance with their religious convictions:

As you know, Article 2 of the First Protocol ... protects parents' rights to access 'education and teaching in conformity with their own religious and philosophical convictions'. The government is of the view that the duality of provision within the maintained sector – faith and non-faith – in this country supports the Article 2 rights of all parents, whether they have a faith or not. Allowing faith schools to give priority to children of their faith over others further underpins the Article 2 right. Unless faith schools are allowed to prioritise applicants based on their faith, parents with religious convictions will find they are increasingly unable to access faith schools as places will, instead, be taken up by children who are not of that faith group.⁶

4 *First Equality Bill report*, paras 209-212.

5 [2009] UKSC 15.

6 Letter from the Secretary of State for Children, Schools and Families, 5 August 2007, written evidence, page 24.

1.17 To the extent that the Government is arguing that it is necessary to allow faith schools to discriminate in their admissions on grounds of religion and belief in order to avoid a breach of the parents' rights under Article 2 Protocol 1, we do not find the argument persuasive. Article 2 of the First Protocol to the ECHR does not give parents a right to a place for their child at a school of their faith.⁷ Article 2 of the First Protocol contains a right of access to such educational establishments as exist; it does not impose a duty on the State to establish faith schools. If no faith schools existed, Article 2 Protocol 1 could not be relied upon to require the State to establish them. It cannot be relied upon by Muslim parents, for example, to require the State to establish Muslim schools in areas where only schools of other faiths exist. The right in Article 2 Protocol 1 is a much weaker right to respect for parents' religious and philosophical convictions in the exercise of any functions which the State chooses to assume in relation to education and teaching. Avoiding breaches of parents' Article 2 Protocol 1 rights is therefore not a good justification for allowing faith schools to prioritise applicants for admission on the basis of their faith.

1.18 The Government's justification, however, may be that the purpose of the relevant part of Article 2 Protocol 1 is to ensure "a plurality of provision", in which a choice is available to parents and children. That plurality of provision – faith and non-faith schools – is only possible, in the Government's view, if faith schools are allowed to prioritise on the basis of their faith. The evidence we received from the faith school organisations all argues in favour of the exception on a very similar basis: that it is necessary in order to maintain the distinctiveness of religious schools and so maintain the plurality of provision which, it is argued, is required by both Article 9 ECHR and Article 2 Protocol 1.

1.19 In her oral evidence to us, the Solicitor-General regarded it as "a principle" that, if we are going to have faith schools, they have to be entitled to protect their ethos by selecting pupils on the basis of their religion or belief if they see fit to do so.⁸ In our view, however, the "plurality of provision" justification raises an evidential question: what evidence is there that faith schools must be able to discriminate in their admissions in order to maintain their particular religious ethos? The Government acknowledges that not all faith schools give priority to children of their faith and that others reserve a proportion of places for children of other faiths or none.⁹ The examples it gives of such schools are mainly Church of England primary schools. The evidence received from the Church of England itself stressed that Church of England schools are committed to providing schools that are both distinctive and "inclusive", and stated that such schools "continue to be for those of no faith, those of other faiths and those of the Christian faith".¹⁰

1.20 The evidence therefore seems to suggest, in relation to Church of England schools, that the plurality of provision has been preserved even where those schools do not have faith-based admissions criteria. Church of England primary schools which do not have such faith-based admissions criteria, or which have reserved a proportion of their places for children of other faiths, are still Church of England schools. We think that this at least calls into question the cogency of the Government's justification for permitting Church of England schools to discriminate on the basis of religion in their admissions.

7 Belgian Linguistic Case (No. 2) (1968) 1 EHRR 252.

8 Vera Baird QC, oral evidence, 24 June 2009, Qs 97 and 101, *first Equality Bill report*.

9 Letter from the Secretary of State for Children, Schools and Families, 5 August 2007, written evidence, page 24; letter from Solicitor-General, 19 June 2009, Ev 67, *first Equality Bill Report*; Q42, *first Equality Bill report*.

10 *First Equality Bill report*, Ev 190

1.21 We accept, however, that the Government’s “preserving the plurality of provision” justification for allowing faith schools to prefer those of the same faith carries more weight in relation to other faith schools such as Jewish, Muslim, Hindu or Catholic schools, than in relation to Church of England faith schools. Whereas parents who wish their child to be educated in the established religion have a relatively large number of schools of that faith from which to choose, parents of other faiths are much less likely to have other such schools from which to choose. **In consequence, the exemption permitting faith schools to discriminate in their admissions on grounds of religion or belief may be overdrawn in this Bill.**

2 Digital Economy Bill

Date introduced to first House	19 November 2009
Date introduced to second House	
Current Bill Number	HL Bill 32
Previous Reports	5 th Report 2009-10

2.1 We publish with this report the Government's response to our report on the Digital Economy Bill, which we received under cover of a letter dated 25 February from Lord Mandelson, the Secretary of State for Business, Innovation and Skills.

Conclusions and recommendations

Employment by organisations based on religion or belief

1. In the absence of any narrowing or clarification of either Schedule 9(2) or 9(3) we share the view of the European Commission that UK law does not comply with the Framework Equality Directive. (Paragraph 1.11)
2. We note that further issues exist in respect of sections 58 and 60 of the School Standards and Framework Act 1998 (SSFA), which in reserving a certain proportion of posts in state-maintained or aided 'faith schools' for individuals who adhere to the religious beliefs and ethos of the school in question may be in breach of the Framework Equality Directive 200/78/EC, on the basis that the reservation of such posts is not restricted to circumstances where it can be shown that a genuine, legitimate and justified occupational requirement to adhere to a particular religious belief can be said to exist. (Paragraph 1.12)
3. Provisions of Section 37 of the 2006 [Education and Inspections] Act have also widened the ability to reserve certain posts filled by non-teaching staff. These provisions may constitute a breach of the principle of non-regression in EU law. (Paragraph 1.13)
4. We question why sections 58 and 60 of the School Standards and Framework Act 1998 are exempted from the Equality Bill. (Paragraph 1.14)

School admissions

5. The exemption permitting faith schools to discriminate in their admissions on grounds of religion or belief may be overdrawn in this Bill. (Paragraph 1.21)

Formal Minutes

Tuesday 2 March 2010

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	Dr Evan Harris MP
Lord Dubs	Fiona Mactaggart MP
Baroness Falkner of Margravine	Mr Virendra Sharma MP
Lord Morris of Handsworth	Mr Edward Timpson MP
The Earl of Onslow	

Draft Report (Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 2.1 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Fourteenth Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Lord Dubs make the Report to the House of Lords.

Written evidence was ordered to be reported to the House for printing with the Report.

[Adjourned till Tuesday 9 March at 1.30pm.]

List of written evidence

- 1 Letter and memorandum to the Chair of the Committee from Rt Hon Lord Mandelson, Secretary of State for Business, Innovation and Skills, dated 25 February 2010 p 14
- 2 Letter to the Chair of the Committee from Rt Hon Ed Balls MP, Secretary of State for Children, Schools and Families, dated 5 August 2007 p 23

Written evidence

Letter and memorandum to the Chair of the Committee from Rt Hon Lord Mandelson, Secretary of State for Business, Innovation and Skills, dated 25 February 2010

DIGITAL ECONOMY BILL

I am grateful for the Committee's Report (HC327) about the online infringement of copyright provisions of the Digital Economy Bill. Detailed responses to the Report's key recommendations are attached. In addition, the Government has tabled a number of amendments to the Bill, which address a number of issues raised both by the Report and in the Committee stage debate on the Bill. Nevertheless, I thought that it might be helpful if I highlighted our views on the four key issues raised by your report.

Copyright infringement reports

We welcome the Committee's recognition that it is unlikely that these proposals alone will lead to a significant risk of a breach of individual internet users' rights to respect for privacy, their right to freedom of expression or their right to respect for their property rights.

The Committee asked for a further explanation of why we think our proposals are proportionate. In essence this is due to two factors. The first factor is the harm suffered from online copyright infringement by those industries that rely on copyright to get a return on the investment of developing, producing and marketing innovative content; we set out further details of this in our attached response below. The second factor is the difficulties that copyright owners face in using the legal mechanisms available to act against online infringement of copyright, particularly when it is on a mass scale as with peer-to-peer file-sharing. Those difficulties centre around the fact that a substantial harm is done by millions of small infringements in the aggregate but the legal mechanisms available mean that separate action must be taken against individual infringers. Copyright owners cannot take action against every individual infringement so a way is needed to identify those responsible for the most serious infringements against whom the cost of legal action is likely to be justified by the harm done by those infringements. The proposals in clauses 4-8 of the Bill will help copyright owners to take action against individuals in relation to infringements causing serious harm in a way that they simply cannot now.

Technical measures

The Government hopes and expects that the initial obligations will produce a significant reduction in online infringement of copyright. However, in the event that this is not sufficient technical measures could be applied – this may include bandwidth shaping or temporary suspension. The Government has not suggested that technical measures should include permanent suspension. Indeed, as was mentioned in the Committee stage debate

on technical measures, the dictionary definition of “suspension” is “an interruption or temporary revocation”.

The amendments which we have tabled to clause 11 for Report give effect to the Government’s graduated approach by providing that technical measures may not be introduced until at least 12 months after the introduction of the initial measures. In addition, we have tabled amendments that provide that the Secretary of State will have to take account of not only any reports produced by Ofcom on the introduction of technical measures but also any progress reports produced by Ofcom about online infringement of copyright. We have already made an amendment to ensure that technical measures under clause 11 can only be introduced in relation to those subscribers who are to be placed on a copyright infringement list under clause 5. Finally, we have tabled amendments for Report regarding appeals against technical measures; this is dealt with further below.

Right to a fair hearing

The Committee suggested that there should be greater clarity about the rights of appeal. The Bill provides for rights of appeal by subscribers to an independent body and, as regards technical measures, a further right of appeal from that body to a First-Tier Tribunal. The amendments which the Government has tabled for Report in relation to the subscribers’ right to appeal under the initial and technical obligations provide clarity on the grounds of appeal, what is expected of copyright owners and ISPs by way of proving the existence of an infringement and its connection with a particular subscriber account and what the appeals body can do when an appeal is successful. They also require the technical obligations code to provide that a technical measure is not taken against a subscriber until the appeals process is exhausted and for costs of a successful appeal to be recoverable by the subscriber.

Reserve powers

The Government is clear that the power to amend the Copyright, Designs and Patents Act 1988 would only be used if considered necessary to address problems around online infringement of copyright. If we are to protect copyright we need to deal with nascent and emerging types of copyright infringement in an effective and timely way. And we remain firmly of the view that this power is a crucial tool to provide future proofing in an area of emerging technology. We agree with the Committee that there is a delicate balance to be struck between the right to freedom of expression and the property rights of copyright holders. But we believe that the amendments we have made and the further amendments tabled further narrow its scope and enhance the information that will be available to the Secretary of State and to Parliament in considering any orders made under this provision.

The Government believes that the super-affirmative procedure will provide the opportunity for adequate parliamentary scrutiny, including of human rights issues. The procedure provides that the Secretary of State must have regard to resolutions of either House of Parliament and recommendations of a committee of either House of Parliament charged with reporting on the draft order. This will allow the House to make clear its views on any orders, including any concerns relating to human rights issues. I would also like to offer the Committee an assurance that the explanatory document which must be submitted

to Parliament together with the draft of any order will include an assessment of the Government's view of the compatibility of the proposals with human rights obligations.

The Committee asked about which Committees should consider any relevant proposal. That is a matter for the House but the Government would have no objection to the Committee considering any orders made. Should the Joint Committee on Human Rights consider any proposal made under this provision, the Government would consider very carefully any negative recommendation made, given its commitment to human rights.

I hope that you find this letter and the attachment helpful.

ANNEX: MEMORANDUM

DIGITAL ECONOMY BILL: GOVERNMENT RESPONSE TO JOINT COMMITTEE ON HUMAN RIGHTS (HL Paper 44; HC327)

Below is the Government's detailed response to the Committee's recommendations.

Copyright infringement reports (Clauses 4-8)

2. We consider that despite the lack of information on the face of the Bill, it is unlikely that the operation of these proposals alone will lead to a significant risk of a breach of individual internet users' right to respect for privacy, their right to freedom of expression or their right to respect for their property rights (Articles 8, 10, Article 1, Protocol 1 ECHR). The limited impact on these rights by the operation of the copyright infringement reporting mechanism proposed is likely to be justifiable.

However, in the light of the concerns raised by internet users and human rights organisations, we recommend that the Government provide a further explanation of its views on why these proposals are proportionate, including by outlining the harm currently suffered by individual copyright holders and the wider public interest in promoting creativity, and why that harm cannot be appropriately addressed by existing civil and criminal penalties for copyright infringement. (Paragraph 1.23)

Online copyright infringement is estimated by the creative industries to cost them in the region of £230 m per year. In addition to the losses incurred because of lost sales, this extensive infringement acts as a significant dampener on the ability of the creative industries to build new, commercial, online models due to their inability to compete with "free". This is a threat to the ability of an important part of the UK economy to modernise and develop to take advantage of the significant opportunities offered by the digital age.

Estimates vary, but industry has estimated as many as 6.5m people regularly infringe copyright by filesharing online. Because of the nature of the infringement it is currently impossible for copyright owners to identify those who are infringing their copyright without going to court to get an order to require an ISP to release their name and address. Additionally, they can do so only in regard to a specific individual infringement, rather than focusing their efforts on serious infringers of copyright. This is a costly and time

consuming process for the copyright owner and they therefore only do this where they are considering taking legal action against the infringer.

However, research indicates that many of those who infringe online do so because they don't appreciate that it is unlawful or because they don't know how to get access to the material lawfully. The copyright infringement report process established by the Bill will enable subscribers to be sent information which will make it clear to them that their infringement can be detected, that infringement of copyright online is unlawful, where to find legal online sources of content and how to protect their internet accounts to prevent others infringing copyright online over their connection but without their consent. This will introduce a simple, non-confrontational and relatively low cost way of educating the majority of infringers and hopefully changing attitudes and behaviour. As the Committee's report rightly notes, all this would be done without a significant risk of a breach of individual internet users' rights to respect for privacy, their right to freedom of expression or their right to respect for their property rights.

There is considerable evidence from surveys which indicates that people do react positively to notification letters of this type and change their behaviour. Across a range of surveys, typically between 30 and 70% of people surveyed say they would cease any unlawful filesharing activity if they were receiving such letters. A 2009 industry survey of unlawful filesharers indicated that 30% of respondents would stop such activities in response to a single letter with no sanctions implied. There is also some real world evidence to support this – one ISP which sent notification letters to subscribers found some 70% did not re-appear as copyright infringers within 6 months of the first alleged infringement.¹¹

As noted in our letter to the Committee, the proposals in clauses 4-8 of the Bill will help copyright owners to take action against individuals in relation to infringements causing serious harm in a way that they simply cannot now. They will provide a way to identify those responsible for the most serious infringements against whom the cost of legal action is likely to be justified by the harm done by those infringements.

The Committee's report also questions the time limits within which infringement reports might be received to contribute to the copyright infringement list. We have proposed amendments for Report stage effectively limiting this to a twelve month period. The report further queried the rights of the individual to appeal against inclusion on a copyright infringement list; again, we have proposed amendments to this effect.

Finally, we would also like to reassure the Committee on the question of the minimum threshold for any copyright infringement list. We cannot see any reason for the threshold to be set at one; the system is designed with regard to multiple infringements, and would be inefficient for all parties with regard to individual infringements.

Technical measures (Clauses 9-16)

4. The lack of detail in relation to the technical measures proposals – and in particular in relation to the scope of technical measures the criteria for their imposition and the

¹¹ IPOS 2006 survey; Harris Survey (2009) commissioned by the BPI; THUS response to the BERR P2P 2008 consultation.

enforcement process – has made our assessment of the compatibility of these proposals with the human rights obligations of the United Kingdom extremely difficult. As we have explained in the past, flexibility is not an appropriate reason for defining a power which engages individual rights without adequate precision to allow for proper parliamentary scrutiny of its proportionality. (Paragraph 1.28)

With regard to the Committee's recommendations 3 and 4, we remain of the view that the detail of any technical obligations and the criteria on which they are to be applied can only be considered if and when a decision is taken to introduce such obligations at all. Whilst the legislation does provide a list of illustrative measures we are clear that those are simply the options that seem likely to work at this time. Technology moves fast and by the time we might be considering technical obligations it is quite possible that there may be tools available that we simply don't know of now and conversely those that might be effective today may not be tomorrow.

We accept the Committee's recommendation that legislation must be sufficiently clear to allow proper Parliamentary scrutiny. It remains our intention to provide such clarity. To this end we have proposed amendments at Report Stage, to the process by which any order to introduce technical obligations may be made. Under our new proposals no technical measures can be introduced within a year of the initial obligations code coming into force. In addition the Secretary of State will have to take into account an assessment from Ofcom on whether technical obligations should be introduced and if so, what sort of technical measure, and any reports that Ofcom has produced under clause 9 on the progress of the initial measures.

The Committee also expressed a concern that there is no time limit on potential temporary suspension. I should make it clear that the Government has no intention of cutting anyone off the internet permanently.

Indeed, as was mentioned in the Committee stage debate on technical measures, the dictionary definition of "suspension" is "an interruption or temporary revocation". Furthermore, as the committee recognises, there is also no restriction on a subscriber who is subject to a technical measure taking an account with another internet subscriber. Thus although it is in principle possible for the Secretary of State to require long term suspension it would in practice result in subscribers moving to other ISPs.

This might not undermine the effectiveness of the measure (changing ISP is not without cost and difficulty, especially if you are part way through a contract) since people are unlikely to want to have to change ISPs regularly, but it would mean that no-one would be forced to be without an internet connection for an extended period of time. Under his duty in the Human Rights Act, the Secretary of State will need to be satisfied that any criteria set out in an order imposing technical measures are proportionate. And as we note below, the code governing technical measures would be scrutinised for proportionality before it could be implemented.

5. We reiterate our invitation to the Government to provide fuller justification for its proposals. (Paragraph 1.38)

In our response to your recommendation (2) above, we expanded on our case for the initial obligations proposed in the Bill. In relation to the justification for technical measures, we

have said that we hope and expect that the initial obligations will lead to a significant drop in online copyright infringement. If that does not happen and the widespread and substantial harm to the creative industries continues then it will be important to take some steps to resolve the problem. Our proposals with regard to technical measures are intended to prevent or reduce infringement by limiting internet access where a subscriber's account is associated with significant and repeated infringements, despite all efforts to reduce this by other means.

In the 2009 BPI industry survey of unlawful file-sharers mentioned in our response to (2), further responses indicated that adding the potential for a sanction in the case of continued infringement may result in a reduction of 60 -70% of such activity.

We believe that the process we are putting in place in the Bill, with repeated warnings to those whose accounts are associated with multiple infringements, coupled with advice on how to ensure that internet connections are not subject to abuse, will give subscribers a reasonable opportunity to ensure that copyright infringement on their account is stopped. If this does not happen it is reasonable to take further action to prevent or reduce such infringement.

We are providing subscribers with a right to appeal at any stage of the process. At appeal the onus will be on the copyright owners and ISPs to prove that an infringement did take place and that it was associated with the relevant account. Furthermore, if the subscriber can show that they did not carry out the infringement, and that they took reasonable steps to prevent others from using their account to infringe then the appeals body will uphold the appeal. Any technical penalties will be designed to make it impossible, or more difficult to infringe copyright and we will expect Ofcom, in any reports under clause 10 – and the Government and Parliament, in considering any order under clause 11 - to look at the extent to which any proposed technical measure will have unintended consequences in case these might make it disproportionate.

We have further introduced an amendment to allow the appeals body to require the measure not to be taken or substitute another technical measure if there are exceptional circumstances that justify it.

7. There are a number of issues which could helpfully be clarified; some on the face of the Bill, in order to reduce the risk that these proposals could operate in a manner which may be incompatible with the Convention. We recommend that the Minister clarify:

a) the precise intended impact of these proposals on individual accounts, including (i) whether technical measures may include indefinite suspension of an account and whether any service limitations imposed will be for a specified time-frame and/or renewable; and (ii) any potential impact the imposition of technical measures may have on the ability of a user to secure an alternative service; (Paragraph 1.40)

b) the minimum criteria which would be required to be satisfied before the imposition of technical measures. The Government has indicated that technical measures will follow the issue of copyright infringement notices. It would be helpful if the Government could clarify whether (i) the imposition of technical measures will be

subject only to the initial assessment of the copyright holder that it appeared that the individual service user had breached his or her copyright; and (ii) if so, would the same standard of evidence and proof be required for the imposition of technical measures as would be required for the issue of copyright infringement reports? (Paragraph 1.40)

In relation to (7a), please see our answer to the Committee's recommendation (3) above. The Bill does not explicitly rule out indefinite suspension but we do not believe it would be a useful or practical option for the reasons set out above. The Bill does not place any restriction on a subscriber in relation to securing an alternative service.

In relation to b) we have now tabled amendments which make it clear that the imposition of technical measures can only be applied to some or all of the subscribers who meet the criteria to be on the copyright infringement lists – i.e. those who have passed the threshold set out in the code (most likely to be based on the number of CIRs received over a period of time). The standard of evidence expected in the first instance will, therefore, be the same as that required for a CIR, but in respect of multiple CIRs. As mentioned above, the subscriber will have the right to appeal at any time, and at such an appeal the copyright owner and ISP will have an obligation to prove the copyright infringement and its association with the particular subscriber account.

8. We recommend that the Bill be amended to make it clear that technical measures may only be introduced after an assessment by OFCOM of the necessity and proportionality of these new measures taking into account the impact of the initial obligations code. In so far as it is possible, we recommend that the Bill should be amended to provide additional details on the minimum criteria for the imposition of technical measures including the standard of proof which must be applied; the “trigger” for the imposition of such measures; and any relevant defences for service users who have taken all reasonable measures to protect their service from unauthorised use, and who have not knowingly facilitated the use of their service for the purposes of infringing copyright. (Paragraph 1.41)

We agree that Ofcom's assessment is crucial to the decision to proceed with technical measures, if needed. In Committee we made clear our intention – delivered by our proposed amendments – that technical obligations should not be introduced until a minimum period of 12 months from the coming into effect of the initial obligations code. The Government also agrees that the Secretary of State should take into account an assessment by Ofcom under clause 10 and any reports produced under clause 9. The Secretary of State's consideration of Ofcom's assessments under clause 10 will cover the necessity and proportionality of these new measures.

On defences and levels of proof, please see our answers to the Committee's recommendation 5 and 7. We have tabled amendments which make it clear that at appeal the starting point is that the copyright infringement and its association with a particular subscriber account will have to be proved. If the subscriber can demonstrate that they did not carry out the infringement, and that they took reasonable steps to prevent other people from infringing copyright on their account then the appeal will be upheld.

Right to a fair hearing (Article 6 ECHR)

9. We accept that there is no clear answer to whether the decisions taken during the process of issuing copyright infringement reports and infringement lists involve the determination of any individuals' civil rights and that it is unlikely that Article 6 ECHR is engaged. However in the light of the acceptance by the EU that a fair process is necessary for regulation of individual service users' access to the internet we consider that statutory provision for a right to appeal to an independent body against inclusion on any infringement list at this stage would lead to a fairer procedure and so be a human rights enhancing measure. (Paragraph 1.44)

The amendments the Government has tabled for Report provide further clarity in relation to the subscribers' right to appeal under the initial and technical obligations - the grounds on which they can appeal, what is expected of copyright owners and ISPs by way of proving the existence of an infringement and what the appeals body can do when an appeal is successful. In particular, we are proposing amendments to provide the following protections:

- Clarification of possible grounds for appeal.
- An explicit requirement that at appeal the onus will be on the copyright owner to prove an infringement occurred and on the copyright owner and ISP to prove that it was properly associated with the subscriber's account.
- A provision that if an appeal is on the ground that there was no infringement of copyright or that it was not right to associate this with the subscriber's account and the appeals body is satisfied that the subscriber did not carry out the infringement, it should uphold the appeal if satisfied that the infringing act was not done by the subscriber and that the subscriber has taken reasonable steps to prevent others using his account to infringe copyright.
- Provision that the appeals body may use its discretion not to uphold the imposition of a technical measure, or may impose an alternative measure, in the light of the particular circumstances of a particular case or user.
- Following the report from the Committee, provision that a subscriber who successfully appeals may recover the costs of the appeal.

11. Without a clear picture of the criteria for the imposition of technical measures, it is difficult to reach a final conclusion on the fairness of the substantive decision making process for the imposition of technical measures and its compatibility with Article 6 ECHR and the common law. We recommend that at a minimum, the Government must be required to confirm that the First Tier Tribunal will be able to consider whether an infringement of copyright has occurred and any defence that no infringement of a copyright holders' rights has been committed or knowingly permitted by the account holder. Further information about the quality of evidence to be provided and the standard of proof to be applied should be provided, ideally on the face of the Bill, and at a minimum by the Minister during the course of debates on these provisions. In addition, we recommend, for the avoidance of doubt, that the Bill require that the technical obligations code must provide for any appeal rights to

suspend the application of technical measures and for costs of any successful appeal to be recoverable by any successful applicant. (Paragraph 1.50)

We appreciate the importance of this issue and believe that the amendments to the appeals provisions of the Bill described above that we have tabled for Report meet the concerns of the Committee. Our amendments also require the technical obligations code to provide that a technical measure is not taken against a subscriber until the appeals process is exhausted and for costs of a successful appeal to be recoverable by the subscriber.

Reserve powers (Clause 17)

12. In the light of the breadth of this proposed reserve power and the need for a delicate balance to be struck between the right to freedom of expression and the property rights of copyright holders in any changes to copyright law, we are concerned that Clause 17, as amended, remains overly broad. (Paragraph 1.55)

13. We welcome the Government's decision to introduce the use of the super-affirmative procedure. However, we recommend that:

a) The Minister should explain why parliamentary scrutiny of any relevant human rights issues will be adequate without any power for Members of either House to propose amendments to the draft order. (Paragraph 1.56)

b) Any explanatory memorandum accompanying an order made under Clause 17 should include an assessment of the Government's view on the compatibility of the proposals with the human rights obligations of the United Kingdom, including the European Convention on Human Rights. (Paragraph 1.56)

c) The Government should be required to clarify which Committees it would consider 'charged' to report on any relevant proposal, other than the Joint Committee on Statutory Instruments (JCSI). We are not required to report on any secondary legislation other than remedial orders laid under the Human Rights Act 1998, but we do report from time to time on proposals in secondary legislation which we consider raise particular human rights concerns. We would be grateful if the Government would explain how a negative recommendation from our Committee or its successors would affect the Government's approach to an order. (Paragraph 1.56)

Breadth of the power

The Government remains firmly of the view that there is a need for this power. It is, in our judgement, the most effective and proportionate way to ensure that we do not have to continually react to crises but can consider and act within specified limits if Parliament agrees and depending on the results of consultation. While the power is necessarily flexible in order to function as intended and allow future unknown challenges to be addressed, the safeguards surrounding its use, and the wording of the clause itself, limit its application to a specific focus.

For example, the power cannot be used to create or amend criminal offences. Due to the way the Copyright Designs and Patent Act is structured, this means that no changes can be made to the definition of an infringing act, i.e. what is lawful and reasonable now, will remain so in the future. Furthermore, the power can only be used to address ‘on-line infringement of copyright’ as explicitly stated in the clause. This again targets the allowable uses of the power at just those issues it is intended to address. The power cannot be used to make arbitrary changes to copyright law for other purposes.

Nevertheless, we have proposed an amendment which makes clear that the scope of the clause is limited to Chapter 6 of Part 1 of the Copyright Act, which deals with “Remedies for Infringement”. This makes clear that the clause can only be used to change civil enforcement measures (the power cannot be used to create or modify a criminal offence, already an important and proper restriction), not the definition of what constitutes copyright infringement.

Super affirmative procedure

As detailed in the amended clause, super affirmative procedure introduces a number of safeguards to the exercise of the power. One of these is that a draft order cannot continue through parliament if a relevant Committee of either House recommends that it does not. This means that if, for example, the Joint Committee on Human Rights recommended against any planned use of the power, no further progress could be made unless the recommendation of the Committee is overturned by resolution of the whole House. Given the support shown by all parliamentarians for Human Rights considerations, this in effect provides a very powerful safeguard against misuse.

It is best practice that any legislative proposal with Human Rights implications should be accompanied by an assessment of those implications when introduced to parliament. It would certainly be the Government’s intention to provide for such an assessment to accompany any order made under this power if there are any Human Rights implications to the content of that order.

Given the freedom of Committees of both Houses to consider statutory instruments if they raise concerns in their particular areas of practice, we do not consider it is appropriate for the Government to say which Committees would consider themselves ‘charged’ to report on a draft order made under this power. If a draft order made under this power had Human Rights implications of any sort, then it would certainly seem that the Joint Committee on Human Rights could consider itself charged to report on the order. As such a negative recommendation would have the effect detailed above, and stop the progress of the order unless subsequently overturned by the whole House.

Letter to the Chair of the Committee from Rt Hon Ed Balls MP, Secretary of State for Children, Schools and Families, dated 5 August 2007

Thank for your letter of 26 July, which raised a number of questions in relation to Equality Act guidance to schools and faith school admissions. I will respond to each of your questions in turn.

Equality Act Guidance to Schools

We carefully considered the guidance made available to schools on the Equality Act Part 2 and consulted with a variety of stakeholders prior to publication to ensure that it struck the right balance. As you pointed out in your letter, we have made reference to not over-riding the rights of non-discrimination under the Human Rights Act in respect of school transport since this was an area of particular concern throughout the passage of the Bill, and we also covered school duties under the Human Rights Act with regard to school uniform issues. We did not give a blanket assurance with regard to all of the exceptions, as was suggested in the letter from Harriet Harman in January 2006. However, we are currently in the process of reconsidering guidance for schools in respect of equality legislation and will use this as an opportunity to make any necessary changes.

Faith Schools which do not give priority for admission to children of their faith

While the Department does not routinely collect data on the type of oversubscription criteria adopted by schools, we do not know that not all schools with a religious character give priority in admissions to children of their faith. Others reserve a proportion of places for children of other faiths or no faith.

A number of faith schools, particularly voluntary controlled faith schools, adopt criteria that give no priority based on faith. For example, Hertfordshire voluntary controlled primary schools adopt the same admission criteria as the county's community schools. A number of voluntary aided schools, where the governing body is admissions authority, such as Christ Church CE VA Primary School in North Somerset, also adopt criteria which have no reference at all to faith.

Other faith schools include criteria which ensure that children of other faiths or no faiths obtain places in the school. Most of North Somerset's VA Church of England primary schools, for example, give priority to local children above faith applicants.

Whether the plurality of provision in the maintained sector would be undermined if faith schools were not permitted to give priority to faith applicants

As you know, Article 2 of the First Protocol to the Human Rights Act protects parents' rights to access 'education and teaching in conformity with their own religious and philosophical convictions'.

The government is of the view that the duality of provision within the maintained sector – faith and non-faith – in this country supports the Article 2 rights of the parents, whether they have a faith or not. Allowing faith schools to give priority to children of their faith over others further underpins the Article 2 right. Unless faith schools are allowed to prioritise applicants based on their faith, parents with religious convictions will find they are increasingly unable to access faith schools as places will, instead, be taken up by children who are not of that faith group.

However, that is not to say that we do not welcome the moves of both the Catholic and Anglican Churches to open up more places in new faith schools to non-faith applicants, as this can help the broader community to access a wider choice of good quality schools.

Rather, we accept that a balance needs to be struck which allows both the wider community to access the full range of quality school places in their area and protects the rights of parents to access schools where the ethos conforms with their own religious and philosophical beliefs.

How often is the statutory power to direct used by local authorities?

We do not collect data on how often local authorities use their powers of direction to admit pupils under sections 96 and 97 of the Schools Standards and Framework Act 1998. However, we are aware that they do frequently use these powers as, prior to the enactment of the Education and Inspections Act 2006, admission authorities could appeal against such directions to the Secretary of State. The Education and Inspections Act now requires the Schools Adjudicator to consider such appeals. The Act also gives local authorities new, fast-track powers, to direct foundation and voluntary aided schools to admit looked after children. We have anecdotal evidence of local authorities' use of these powers through local authority officials contacting my officials to discuss them.

What measures do we take to ensure that faith based criteria do not discriminate directly or indirectly on racial grounds?

The School Admissions Code makes clear “the Race Relations Act 1976 makes it unlawful for admission authorities to discriminate against applicants on the basis of race, colour, nationality or ethnic origin. That Act, as amended by the Race Relations (Amendment) Act 2000, imposes on public bodies, including local authorities and schools, a duty to promote racial equality”.

The Code also requires faith schools to have regard to the advice of their faith organisations in setting admission arrangements and this is an important regulating process that will help to ensure that schools do not adopt unfair or unlawful practices.

Any admissions arrangements, faith or otherwise, which do unlawfully discriminate are subject to the remedies available under the Race Relations Act 1976 (RRA). For example, on a formal complaint, the Commission for Racial Equality (CRE) could take enforcement action if it found there to be race discrimination and once the CRE is wound up in September the Commission for Equality and Human Rights (CEHR) will assume this responsibility.

However, there are other safeguards built into the system. Admission authorities are also required, by law, to consult locally on their admission arrangements on an annual basis. Once arrangements have been finalised (or ‘determined’) the local authority, admissions forum, other schools and parents have a statutory right of objection. Any of these could lodge objections arguing that arrangements were racially discriminatory. If the Adjudicator were to find this to be the case, he would amend the arrangements to remove the discriminatory provisions and his decision would be binding. Of course, any of these consultees could also complain directly to the CEHR which could also take compliance action.

Finally, I could also exercise powers of intervention under provision in sections 496 and 497 of the Education Act 1996 if, following a complaint, I was to find that an admission authority had acted either unreasonably or unlawfully.

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