House of Lords
House of Commons

Joint Committee on Human Rights

Children Bill

Nineteenth Report of Session 2003–04

HL Paper 161
HC 537

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Report, together with formal minutes, appendices and minutes of 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 Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm. A list of Reports of the Committee in the present Parliament is at the back of this volume.

Current Staff

The current staff of the Committee are: Paul Evans (Commons Clerk), Nicolas Besly (Lords Clerk), Murray Hunt (Legal Adviser), Róisín Pillay (Committee Specialist), Duma Langton (Committee Assistant) and Pam Morris (Committee Secretary).

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Summary

In this Report, the Committee considers the Children Bill as introduced to the House of Commons on 19 July 2004. It does so in the light of its earlier Report on the Bill as introduced to the House of Lords, the Government's responses to questions it raised in relation to that version, further oral evidence taken from the Minister for Children, Young People and the Family, the amendments made to the Bill by the House of Lords, and its two Reports made in 2003 on *The Case for a Children's Commissioner for England* and *The UN Convention on the Rights of the Child*.

Part 1: The Children's Commissioner

Part 1 of the Bill establishes the office of a Children's Commissioner for England. The Committee concludes that, with some relatively minor reservations, the Bill now provides a statutory basis for a genuinely independent, rights-based, strategically-focused commissioner for children and young people, and the framework for an office which can help achieve the aim of making the interests of the child a primary concern in the work of the agencies of the state. It warmly welcomes this initiative.

Parts 2 and 3: Children's Services

Parts 2 and 3 of the Bill aim to strengthen the legal framework for achieving better co-operation between agencies delivering children's services. The Committee welcomes these provisions as an advance in fulfilling the Government's important positive obligations under Articles 2, 3 and 8 of the ECHR to take steps to protect the lives of children, to protect them from inhuman and degrading treatment, and to protect their physical integrity, but has concerns about whether the duties are sufficiently robust to prevent future breaches of those positive obligations.

The Committee recommends that the duty on "partner agencies" to co-operate should be clarified to make quite explicit that it is an ongoing duty.

It recommends that the duty imposed on agencies to safeguard and promote the welfare of children should be strengthened to make it a direct rather than a procedural duty. It further recommends that this duty should be directly applied to private bodies providing services to children under contract to public authorities.

The Committee concludes that the exclusion of the immigration and asylum agencies from these duties and arrangements constitutes unjustifiable discrimination against some children on grounds of nationality.

The Committee examines the implication for the right of children to privacy of the provisions of the Bill relating to information sharing by agencies. It expresses a number of concerns about the compatibility of these provisions with Article 8 ECHR.

Clause 49: Reasonable Chastisement

The Committee considers clause 49 of the Bill, restricting the defence of reasonable chastisement, in the light of its conclusions and recommendations reached in its 2003 Report on the UK's implementation of the UN Convention on the Rights of the Child.

It concludes that, on balance, the amendment to the law is likely to be considered sufficient to satisfy the UK's obligations to comply with the judgment of the Court of Human Rights in *A v UK*. However, it also concludes that, although the continuing availability of the defence of reasonable chastisement does not give rise to any present incompatibility with Convention rights, there is a risk that it will in future be held to be incompatible with the ECHR.

It concludes that the continuing availability of the defence is incompatible with the UK's obligations under the Convention on the Rights of the Child, and under other international agreements.

It concludes that there is nothing in the UK's obligations under the ECHR which prevents it from achieving full compatibility with its obligations under the CRC and other international human rights treaties.

1 Introduction

1. The Children Bill is a Government Bill. It was introduced into the House of Lords on 3 March 2004. It received its Second Reading in that House on 30 March and its Third Reading on 15 July. We reported on our initial consideration of the Bill as introduced in May.[1]

2. Part 1 of the Bill (together with Schedule 1) establishes the office of Children's Commissioner. Originally the functions of this Commissioner extended to the UK, but were restricted by reference to the functions of the three statutory commissioners for children and young people already established in Northern Ireland, Scotland and Wales.[2] As amended by the House of Lords on report, the functions of the Commissioner extend only to England. We called in 2003 for the establishment of an independent human rights institution for children in England, and we examine these provisions in some detail.

3. Parts 2 and 3 of the Bill make provision for better integration and co-ordination for children's services in England and Wales, in particular giving effect to many of the recommendations of the Report of the Victoria Climbié Inquiry.[3] We consider the extent to which these provisions give full effect to the Government's obligations under Articles 2, 3 and 8 ECHR to take positive steps to protect children's lives, to protect them from inhuman and degrading treatment, and to protect their physical integrity.

4. Provisions are also made in Parts 2 and 3 relating to the acquisition, storage and sharing between different agencies of information relating to individual children. We examine the compatibility of these provisions with the right to privacy under Article 8 ECHR.

5. Part 4 transfers functions of the Children and Family Courts Advisory and Support Service to the National Assembly for Wales. These provisions do not raise any concerns relating to human rights.

6. Part 5 of the Bill includes a number of miscellaneous provisions. We consider particularly the new clause (clause 49), adopted by the House of Lords on report, which relates to the corporal punishment of children, a subject we previously examined in some detail before the new clause had been adopted.[4]

7. The Bill was substantially amended in the Lords. Our previous report raised questions in relation to the Bill as introduced to that House. This report considers the Bill as it was introduced into the House of Commons, where it had its First Reading on 19 July.[5] The Rt Hon Charles Clarke MP, Secretary of State for Education and Skills has made a statement of compatibility with Convention rights under s.19(1)(a) of the Human Rights Act 1998. Explanatory Notes to the amended Bill have been published (Bill 144-EN). They deal with

1 Twelfth Report, Session 2003–04, *Scrutiny of Bills: Fifth Progress Report*, HL Paper 93/HC 603, section 1.

2 Children's Commissioner for Wales, Commissioner for Children and Young People in Scotland, Northern Ireland Commissioner for Children and Young People.

3 Report of an Inquiry by Lord Laming, Cm 5730, Department of Health, January 2003.

4 Tenth Report, Session 2002–03, *The UN Convention on the Rights of the Child*, HL Paper 117/HC 81, paras. 94–111; Twelfth Report, Session 2003–04, op cit., paras. 1.32–1.35.

5 House of Commons Bill 144

what the Government regards as the Convention issues to which the Bill gives rise at paragraphs 232–238. The Bill was also accompanied, when introduced to the Lords, by the publication *Every Child Matters: Next Steps*.

8. As well as our previous report on this Bill, we published two Reports in Session 2002–03 relevant to our consideration of the Bill: our Ninth Report, *The Case for a Children's Commissioner for England*,[6] and our Tenth Report, *The UN Convention on the Rights of the Child*.[7] We indicated in our previous Report that in light of our extensive work on the subject matter of this Bill, we would go beyond an ordinary scrutiny report and consider the Bill in light of those earlier reports.

9. We took oral evidence from the three existing children's and young people's commissioners, for Wales, Scotland and Northern Ireland, on 20 April 2004.[8] We took further oral evidence from the Minister for Children, Young People and the Family on 23 June.[9] The Minister subsequently provided further written information clarifying aspects of her oral evidence.[10] We also questioned the Director of Public Prosecutions in oral evidence on the defence of reasonable chastisement on 19 May.[11] A substantial amount of written evidence submitted to us was printed with our Twelfth Report.[12]

10. In our previous Report we identified some key issues on which we wrote to the Government.[13] The Minister's response to those points is appended to this Report.[14]

6 Ninth Report, Session 2002–03, *The Case for a Children's Commissioner for England*, HL Paper 96/HC 666.

7 Tenth Report, Session 2002–03, op cit.

8 QQ 1–70.

9 QQ 71–145.

10 See Appendix 2

11 See Minutes of Evidence taken before the Committee on 19 May 2004, HL Paper 151/HC 619-i, QQ 1–11. The relevant extract is printed with this report as Appendix 5.

12 See Twelfth Report, op cit, Appendix 1.

13 See Twelfth Report, op cit, Appendix 1a.

14 See Appendix 1

2 Part 1: The Children's Commissioner

General functions

11. In our Report *The Case for a Children's Commissioner for England* we concluded that because the child population of England is over four times that of Northern Ireland, Scotland and Wales put together, a different approach and structure may be needed to the design of a children's commissioner for England. We recommended—

> … the establishment of a children's commissioner who would be a champion for the children of England, independent from but working closely with central government and other agencies. The commissioner would use the principles of the CRC as a guide and measure in considering delivery of services to children by government and public authorities, and would involve children as much as was appropriate in its work. The commissioner would pursue children's interests by promotion, advocacy and investigation. The commissioner would carefully select issues for investigation where it was felt these could make a difference to children, in partnership with NGOs, experts and service providers. The commissioner should not be empowered to investigate complaints from individual children but would be able to work with existing advice and assistance services maintained by other organisations to monitor policy implications of issues raised by children.[15]

12. Part 1 of the Children Bill provides for the establishment of a new Children's Commissioner,[16] whose general function is to promote and safeguard of the rights and interests of children in England.[17] **We warmly welcome the Government's decision to take action on this.** Included in what the Commissioner may do in the exercise of his or her general function are encouraging persons exercising functions affecting children to take account of their rights, views and interests, advising the Secretary of State on the rights, views and interests of children, and reviewing and reporting on the operation of complaints procedures relating to children and any other matter relating to children.[18] We expressed some concern in our previous report about the wording of these general functions. The detailed wording relating to these was amended in the House of Lords. As they now stand they are consonant with our recommendations made in our Report in 2003, but we have some continuing concerns about the detail of how it is proposed to enact them in statutory form.

13. In our previous Report we noted a number of the provisions of Part 1 and Schedule 1 raise a number of issues concerning the compatibility of the office which is proposed with the UK's obligations under the UN Convention on the Rights of the Child ("the CRC"). We discuss these issues below in the light of the Minister's written and oral evidence, and the changes made to the Bill in the House of Lords.

15 Ninth Report, Session 2002-03, op cit, para. 44.

16 Clause 1(1)

17 Clause 2(1)

18 Clause 2(2)

The UNCRC and the "five outcomes"

14. The scheme of Part 1 of the Bill originally gave the CRC the status of a permissible relevant consideration: something to which, under clause 2(7), the Commissioner might have regard in considering what constituted the interests of children. The CRC was only to "form the backdrop of the Commissioner's work *if he considers it appropriate*".[19] **The Bill was amended in Committee by the Lords to provide that the Commissioner *must* have regard to the Convention. We welcome this amendment.**[20] Baroness Ashton said that this change would mean that the CRC "sets the framework" within which the Commissioner will work.[21] We agree that the duty to have regard to the CRC should ensure that CRC standards provide the legal and ethical framework for the Commissioner's work. However, the Explanatory Notes to the Bill published on 20 July continue to describe the CRC as "a useful indicator of" the rights and interests of children. This seems to us a much weaker statement of intent, and one which reinforces our concerns about the blurring of the status of the Convention in the original version of the Bill by the reference to what have been called the "five outcomes".

15. When accepting the amendment, the Government continued to insist that the new Commissioner would also work within a framework constituted by the five aspects of children's well-being set out in what was then clause 2(3)(a)–(e), which are the five outcomes identified by children as being most important to them during the consultation carried out on the Green Paper *Every Child Matters*.[22] At report stage in the Lords on 17 June, against the wishes of the Government, clause 2 of the Bill was entirely replaced by a new version. That new version, amongst other significant changes, did not include reference to the "five outcomes". In her oral evidence, the Minister appeared to indicate that the government would seek to reverse this change.[23] We deal below with other changes to the wording of the clause, but first we consider the relationship between the CRC and the "five outcomes" which are currently not in the Bill.

16. In our report last year we did say that—

> The work of the commissioner should be grounded in the UN Convention on the Rights of the Child, but it is clear that those who advocate the establishment of this office want it to go wider than a purely rights-based approach, operating as a spur to better co-ordination of children's services and an advocate within Government of the child's viewpoint.[24]

but we were also clear that the office should be seen as an "independent human rights institution for children".[25] The Government, on the other hand, "strongly believe that the

19 Baroness Ashton, HL Deb., 30 March 2004, cols. 1302–3 (emphasis added).

20 Clause 1(8)

21 HL Deb., 4 May 2004, col. 1062.

22 Clause 2(3) of the Bill of the Bill as introduced said that the commissioner will be "concerned in particular" with—(a) physical and mental health; (b) protection from harm and neglect; (c) education and training; (d) the contribution made by them to society; (e) social and economic well-being.

23 Q 78

24 Ninth Report, Session 2002–03, op cit., para 45.

25 ibid, para 48.

views of children rather than the rights agenda should drive the commissioner's work".[26] In her written response the Minister argued that the "outcomes do not conflict with [children's] rights under the CRC, but should be seen as a practical complement to those rights".[27] We are not altogether persuaded by these claims. Indeed, we are disappointed by the tone of the Government's message that "rights-based" is a negative concept—we have stressed again and again in our reports that a culture of respect for human rights is one in which the emphasis is laid on the positive obligation on the State to advance the rights of those in its jurisdiction.[28] We were clear and consistent in our Report on the case for a commissioner that there was an argument for going beyond an ombudsman model which was based on the vindication of individuals' rights through a complaints system. However, there is a clear distinction between a rights-based Commissioner (which we support) and a complaints-based Commissioner (which we do *not* recommend). We did not argue that the rights-based focus should be superseded by some other focus—we recognised that the best way to improve children's services was to establish a rights-based commissioner who would be required to adopt a strategic approach.

17. When challenged in oral evidence about her belief that the inclusion of the "five outcomes" would ensure that the "views of children" rather than the "rights agenda" should drive the commissioner's work, the Minister responded—

> The Commissioner will be able within [the five] outcomes to pursue any issues that he/she thinks relevant to the interests of children and in response to the views expressed by children. So they do not constrain in any way, I think they give the right focus and the right status to the Commissioner.[29]

We asked if this did not imply that the CRC was a second-order priority for the Commissioner. The Minister responded—

> … we are not establishing a traditional rights based Commissioner … So it is not going to be a Commissioner whose main job is to police the individual rights of children that would be the framework in which the Commissioner will work.[30]

18. We do not think that "rights-based" means a focus on the individual rather than the group—there is nothing in the CRC, we believe, that demands that a focus on individual rights take precedence over those of vulnerable groups. However, the additional, strategic functions of improving co-ordination of children's services and advocating the views of children within government seem to us to be clearly provided for within clause 2.

19. We asked the Minister whether she could think of anything the Commissioner could not do under a duty exclusively to have regard to the Convention which he or she could do because of the duty to have regard to the "five outcomes".[31] She accepted that it is for independent commissioner's to choose how to discharge their functions. We cannot see

26 ibid at col. 1303

27 Appendix 1, q 1

28 See for example, Eleventh Report, Session 2003–04, *Commission for Equality and Human Rights: Structure, Functions and Powers*, HL Paper 78/HC 536, paras. 28–32.

29 Q 71

30 Q 72

31 Q 74

that there is anything in the CRC which would inhibit the Commissioner from addressing issues he or she considered a strategic priority.

20. On the one hand, we welcome the emphasis on the economic and social rights of the CRC that the five outcomes gives to the Commissioner's role.[32] It is these in particular which add to those rights which children already enjoy under the Human Rights Act. But on the other hand we consider that putting the five outcomes on the face of the Bill is a somewhat odd way to legislate, freezing in statute the results of a survey conducted at a particular historical moment. In order to overcome excessive particularity they are also, in our view, so vague and generalised that they add little or no definition to the role of the Commissioner. The Government are, rightly, proud that the outcomes have emerged from consultations with children (though they are not framed in language that children seem likely to have used themselves). We applaud that consultation. However, we are clear that a Commissioner with a duty to work within the framework of the CRC would have to have regard to the results of that consultation (and subsequent ones he or she undertook) under Article 12 CRC.

21. In the Lords, Baroness Ashton resisted the notion that the outcomes and the CRC were an "either/or" option, insisting that they could be "both/and".[33] If we were persuaded that there was any practical, rather than declaratory, benefit likely to accrue to children from the "both/and" option, we would be content to accept this view. But we have not been given any persuasive evidence of such benefit. In its absence, we consider that the confusion engendered by reincorporating in the Bill a duty to have regard both to the Convention and the five outcomes will risk downgrading the Convention from a framework to a background to the Commissioner's work, and the reference in paragraph 29 of the Explanatory Notes to the Convention as "a useful indicator" reinforces our concern. The intentions of clause 2(3) of the original Bill were benign—we fear that the unintended consequences could have been be malign. **We conclude that it is unnecessary for the five outcomes listed in clause 2(3) of the Bill as originally introduced to be reinstated. If the Government feels they must, they should be clearly placed within the context of the CRC.**

The Commissioner's mandate

22. We also expressed concern in our previous report about the terms of the Commissioner's mandate, and the extent to which it falls short of the Government's obligations under the CRC to establish independent national human rights institutions to promote and monitor the implementation of children's rights.[34]

32 They reflect for example: Articles 12, 13, 14, 15, 23, 29, 30, 40, and 42 (contribution to society); Articles 17, 23 and 28 (education and training); Articles 23, 24, 25, 33 and 40 (physical and mental health); Articles 6, 9, 16, 19, 20, 21, 22, 32, 33, 34, 35, 36, 37, 38 and 39 (protection from harm and neglect); and Articles 26, 27 and 31(social and economic well-being).

33 HL Deb., 17 June 2004, col. 896.

34 UN Committee on the Rights of the Child General Comment 2 (2002), The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child, 15 November 2002, explaining the scope of the obligation under Article 4 CRC to "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention."

23. In the Bill as originally introduced, the general function of the Commissioner set out in clause 2(1) was that of "promoting awareness of the views and interests of children in the UK". This appeared much weaker than a duty to promote, protect and monitor children's rights, or a mandate to ensure that legislation and practice is CRC-compliant. The vocabulary of "encouraging", "advising" and "considering or researching" used in clause 2(2) of the Bill as originally introduced also gave rise to concerns about the effectiveness of these duties.

24. The view of the existing Commissioners was that the language defining the new Commissioner's mandate was far too weak, and contrasted with the much more robust duties placed on the other Commissioners.[35] The Bill as introduced concentrated on the procedural aspects—that is promoting the views of and interests of children as something to be taken into account in the policy process. In her written response to our questions the Minister, in response to the question "Why is the Commissioner not placed under a duty to promote and safeguard the rights and interests of children?" responded—

> …we are determined that the primary focus of the Commissioner's work should be to ensure that the views and interests of children and young people are heard and that he learns from listening to them. He must be free to respond to what he is told by them.[36]

25. This does not seem to us a direct response to the question—it appears to us again to demonstrate an excessive, and in our view unfounded, anxiety about the notion of a "rights-based" commissioner. We see no reason why this appropriate duty to promote and safeguard the rights and interests of children cannot sit alongside a general function of promoting awareness of the views and interests of children.

26. The version of clause 2 adopted by the Lords on 17 June gives the Commissioner a general function of "promoting and safeguarding the rights and interests of children". **We broadly welcome this change. We recommend that the wording relating to the rights of children is retained, supplemented if need be by a general function relating to promoting awareness of the views and interests of children.** A compromise wording for clause 2(1) might be—

> The Children's Commissioner has, subject to the following provisions of this Part, the function of promoting and protecting the rights and interests of children.
>
> The Children's Commissioner must, in particular, promote awareness of the views and interests of children amongst persons exercising functions or engaged in activities affecting children.

The Commissioner's powers

27. In our letter to the Minister[37] we drew attention to what the existing Commissioners appeared to consider were significant omissions in the powers proposed to be given to the new office. We consider the Department's responses below.

35 Minutes of Evidence taken before the Committee on 20 April 2004, HL Paper 95/HC 537-i, QQ 26–29.

36 Appendix 1, q 3

37 See Twelfth Report, Session 2003-04, op cit, Appendix 1a.

Power to review law, policy or practice for CRC compatibility

28. The Minister's letter assured us that the Commissioner would have the power, but not a duty, to review legislation (including proposed legislation), policy and practice for compatibility with the CRC. We welcome this reassurance, but we still consider that a duty would make the Commissioner's functions more CRC-compliant, and would lend emphasis to the strategic approach that the Government's vision for the office places at its centre. We also hope that the Commissioner will be able to assist us in our scrutiny of proposed legislation.

Power to conduct investigations of its own initiative

29. We asked, in relation to the original form of the Bill, why the Commissioner would have no power to consider individual complaints even if satisfied that the case raises a question of principle or policy affecting a large number of children or is otherwise a matter of public importance. The memorandum from the Department told us that the Commissioner—

> …can consider individual complaints only in so far as this is necessary to inform himself of a wider problem affecting children. We expect that in practice many of the general issues he should properly consider and advise on will, in the first instance, be brought to his attention by one or more individual complaints. What the Commissioner cannot do is to take action on behalf of a child or seek redress for that child.
>
> The Government's interpretation of clause 2(6) is that a complaint of, for example, bullying by child X would allow the Commissioner to investigate whether bullying was a general problem and how it should be addressed; to that end, he may need to consider the facts of the case involved in the complaint. It would not, however, allow him to take the authorities of an institution to task for failing to protect child X as an individual in an isolated incident.
>
> The reason for this restriction is twofold. First, having open and accessible complaints procedures that work for children and young people is rightly the job of those providing services for, and otherwise dealing with, them. The Commissioner must not replace these as the place children turn to. The Commissioner should, however have a role in making recommendations on how these can work better. Second, the Commissioner must not end up as a further "court of appeal" where these processes are exhausted. If he were, given the size of the population, this would risk the Commissioner being inundated by casework, preventing him from concentrating on wider policy issues of relevance to children as a whole.[38]

30. However, **the Government introduced a new clause on report in the House of Lords giving the Commissioner power to conduct investigations on his own initiative. We welcome this positive response.**[39] He or she is required to consult with a Minister before deciding to do so. The Minister in oral evidence indicated that the Minister would have no

38 Appendix 1

39 Clause 4

power to veto a decision of the Commissioner to conduct such an inquiry.[40] We welcome this assurance.

31. There are conditions which are required to be met before the Commissioner can proceed with such an inquiry. These are that the case must raise "issues of public policy of relevance to other children",[41] and that it "would not duplicate work that is the function of another person".[42] The Minister also assured us that the Commissioner would be free to decide whether the conditions for beginning such an inquiry had been met—though a decision of the Commissioner could possibly be subject to judicial review.[43] We welcome the Minister's assurance.

32. However, there remain ambiguities. The new version of clause 2 adopted by the Lords on 17 June omits the provision barring the Commissioner from undertaking an investigation into the case of an individual child (clause 2(6) of the original Bill). In order to exercise the power granted by what is now clause 4 of the Bill to undertake inquiries on his or her own initiative, the Commissioner will need to develop some means of responding to individual complaints received from children in order to establish that the criterion of clause 4(1) has been met. The current architecture of the Bill, we consider, leaves it open to the Commissioner to decide how to do this, and to adopt a strategic approach. **We do not consider it would be helpful, or necessary to emphasise the strategic role of the Commissioner, to reinstate the words of clause 2(6) of the Bill as originally introduced.**

33. The Explanatory Notes to the Bill also provide a gloss to the interaction of clause 4 with clause 5, which gives power to the Secretary of State to direct the Commissioner to undertake an inquiry. They say about clause 4 that—

> The case concerned must raise issues of public policy that would be relevant to other children. This would for example mean that the Commissioner could hold an inquiry into the case of a child in a children's home or a residential school if the issues involved were relevant in general to children in such an establishment, but not if they were only relevant to children in that particular establishment … The aim of the inquiry must be to investigate the public policy issues arising from the case and make recommendations relating to them.[44]

In relation to clause 5, the Notes state—

> In contrast to the power under clause 4, the Commissioner could under this clause carry out an inquiry into a case which only has implications for a small group of children. So, for example, he could hold an inquiry into the case of a child in a children's home or a residential school if the issues involved were relevant in general to children in such an establishment, or if they were only relevant to children in that particular establishment.[45]

40 Q 85
41 Clause 4(1)
42 Clause 4(2)
43 Q 89
44 EN para. 34
45 EN para. 38

We refer later to our doubts whether the retained power of direction for the Secretary of State is appropriate. This interpretation of the terms of the legislation is certainly not apparent from a straightforward reading of the words on the page. We are not convinced that the distinction that the Explanatory Notes seek to make between the nature of inquiries under clause 4 and those under clause 5 is either necessary or workable.

34. The wording of clause 4(2) is also open to interpretation. It could appear to disbar the Commissioner from undertaking an inquiry which would duplicate work which was the function of another person, whether or not that person was actually doing the work on the case or issue of public policy with which the Commissioner was concerned.[46] We can envisage circumstances in which the Commissioner would decide to undertake an inquiry because no other responsible body was doing so. The extent of the Commissioner's discretion in interpreting clause 4(2) indicated by the Minister suggests that meeting this criterion should not form an unreasonable inhibition on the Commissioner's powers.

Power to require information to be provided

35. In response to our written inquiry about the absence of powers, in the Bill as originally introduced, for the Commissioner to compel information to be provided, other than as part of an inquiry, the Government's response was that "it would be inappropriate to give the Commissioner the full powers granted under clause 4(7) [of the Bill as introduced to the Lords] for all parts of his work".[47] No further justification for this opinion was offered.

36. The memorandum did go on to say that the Government was considering the case for the extension of some such powers to other aspects of the Commissioner's work, and a government amendment was tabled at report stage. **The new version of clause 2 adopted by the Lords on 17 June incorporated a provision (now clause 2(6)) identical to that proposed by the Government which requires any person discharging statutory functions to disclose such information as the Commissioner may "reasonably request". We welcome this provision**.

Power to intervene in litigation

37. The Government's memorandum stated that –

> In keeping with our aims for the role we think it is right that the Commissioner may not intervene in litigation on behalf of a child, even if he believes that the child's case has wider policy implications. We believe this is appropriate to the strategic role that we wish to give him. He may, however, appear as a witness if called to do so, and may provide general information to children about the legal system to children …[48]

46 See for example the Northern Ireland Human Rights Commission judicial review proceedings against the Secretary of State, challenging the decision of the Northern Ireland Office (NIO) to refuse the Commission access to Rathgael Juvenile Justice Centre. Lord Justice Weatherup granted leave for the Commission to judicially review the Secretary of State on two key points the second of which was that the NIO had wrongly assumed that the Commission's powers in this case may only be exercised where no other statutory provisions exist for the type of work proposed by the Commission.

47 Appendix 1, q 5

48 Appendix 1, q 2

In general we think the Government's position is sensible, so far as supporting individual cases is concerned. We drew much the same conclusions in relation to the proposed Commission for Equality and Human Rights in our recent Report.[49] A new provision relating to support for individual cases was inserted in the Bill as part of the new version of clause 2 adopted on 17 June. **Clause 2(7) of the Bill as it currently stands provides for the Commissioner to provide assistance to a child to bring legal proceedings in defined circumstances. We consider it would be better for the Commissioner to assist children to obtain such assistance from existing sources, and we recommend the deletion of this provision**.

38. However, by the same reasoning which applied to the proposed CEHR, we consider that the Commissioner should have the right to act as a friend of the court or intervene as a third party in legal proceedings.[50] The Minister anticipated[51] that the Commissioner would have the normal standing ("sufficient interest") to seek to apply for judicial review. In our report on the proposed CEHR, we discussed the issue of the "victim test" inhibiting the ability of that body to seek judicial review of the policies, actions or omissions of a public authority where these have resulted, or are likely to result, in a violation of Convention rights.[52] In her follow-up letter to her oral evidence,[53] the Minister confirmed that the same considerations apply to the Children's Commissioner in principle,[54] and this is a question to which we might revert when we come to consider the legislation establishing the CEHR.

Power to make recommendations

39. We raised with the Minister in writing the lack of an explicit power for the Commissioner to make recommendations arising from his work. The response was that there was nothing to prevent him or her from doing so. In oral evidence, however, she confirmed that there would be nothing that the Commissioner could do if such recommendations were disregarded, and that his power was one of "influence".[55] **We consider that this "power of influence" would be enhanced if the power to make recommendations were made explicit on the face of the Bill, and we recommend the inclusion of such a provision.**

Power to publish reports other than through the Secretary of State

40. In its memorandum the department stated—

> … the Commissioner may publish any reports on his own initiative, through such channels as he considers appropriate. Without dictating how he does his job, we think it likely that he will produce various ad hoc reports to publicise his findings or

49 Sixteenth Report, Session 2003–04, Commission for Equality and Human Rights: The Government's White Paper, HL Paper 156/HC 998.

50 Eleventh Report, Session 2003–04, op cit., paras. 77–80.

51 Q 99

52 Eleventh Report, Session 2003–04, op cit., paras. 81–92.

53 Appendix 2

54 In the matter of an application for Judicial Review by the Northern Ireland Commissioner for Children and Young People of the Decisions announced by the Minister of State for Criminal Justice, John Spellar on 10 May 2004 (judgment of Girvan J., 23 June 2004, in the High Court of Northern Ireland).

55 Q 98

> recommendations. He may also produce reports of inquiries that he chooses to hold under the new power that we are proposing to give him.[56]

We welcome this clarification. However, clause 3 of the Bill requires the Commissioner to report annually on the discharge of his functions and related matters. As is traditional, these reports are to be laid before Parliament by a Minister. When challenged on this requirement, Ministers in both the Commons and the Lords have relied on the argument that this is the way such matters are always dealt with in legislation.[57] In her letter following-up her oral evidence the Minister declared herself "… satisfied that the normal procedures are appropriate for a body such as the Children's Commissioner …".

41. This practice is certainly the usual formula. It is not, however, necessary. A number of non-ministerial bodies submit their reports directly to Parliament, and these are laid before each House in the names of their respective Clerks.[58] This is an issue of symbolic, rather than practical, significance. Nonetheless, we believe the time has come to shake off this residue of parliamentary deference to the executive. Independent watchdogs, such as the Commissioner should be seen to be, should not be allowed to be perceived as creatures of the Executive. The Minister appeared to accept this, provided there was no good reason for not doing so. **We recommend that the Commissioner be given the power to present reports directly to Parliament**.

Privilege of Commissioner's reports

42. A separate question arises in relation to the reports of the Commissioner which are not presented to Parliament, and therefore do not attract the protection of parliamentary privilege. The Bill provides for any statement made by the Children's Commissioner in a report published under Part 1 to have absolute privilege in any action for defamation. All other statements by the Children's Commissioner or a member of the Commissioner's staff have qualified privilege.

43. Absolute privilege provides a complete defence to an action for defamation, regardless of how flagrantly inaccurate or damaging the statement might be, or how recklessly or maliciously it was made. It is a defence which confers a blanket immunity, equivalent to an ouster of the courts' jurisdiction to entertain a defamation action. Qualified privilege also recognises the need for certain public office holders to receive frank and uninhibited communication of information from certain sources, but protects the publication of defamatory statements containing information and opinion that is in the public interest and for public benefit, provided that the publisher acts fairly and responsibly. The law relating to qualified privilege (both common law and statute law) therefore protects freedom of speech while providing an important incentive for the responsible exercise of the right to free expression.

44. The law of defamation protects an individual's right to reputation, which is within the scope of the right to respect for private life in Article 8 ECHR. It is also a civil right for the purposes of Article 6(1) ECHR, in respect of which an individual has a right of access to

56 Appendix 1

57 See for example Q 108

58 See, for example, paragraph 20 of Schedule 1 to the Political Parties, Elections and Referendums Act 2000.

court. Limitations of the right must therefore be proportionate if they are to be compatible with both Articles 6(1) and 8 ECHR. Absolute immunities from suit are increasingly difficult to justify under the Convention. Today absolute privilege is unlikely to be regarded as justifiable outside of the established categories of statements made in proceedings in court or proceedings in Parliament.

45. **We consider that conferring absolute privilege on all statements made by the Commissioner in his reports would give rise to a significant risk of incompatibility with Articles 6(1) and 8 ECHR, because it would be disproportionate to the legitimate aim of encouraging the free and frank disclosure of information to the Commissioner.** We note that the Government has agreed to consider whether the scope of the Commissioner's absolute privilege might be narrowed, and hope that it will be confined to annual reports to Parliament. At the same time, we would hope that consideration will be given to making similar amendments to the legislation governing the Scottish, Welsh and Northern Ireland Commissioners, so as to ensure compatibility with the Convention rights.

Independence

46. We expressed concern in our previous report that the new Commissioner would fall short of international best practice in the degree of his or her independence from the Secretary of State.[59] We consider some of these issues below.

Power of direction by Ministers

47. First, while the Commissioner's scope of action has been much enlarged by amendments which have been made, the Secretary of State still has the power to direct the Commissioner to carry out investigations under clause 5. The implications of this for his or her independence from Government have been much mitigated by the inclusion of powers for the Commissioner to conduct investigations on his or her own initiative. However, we still consider that it is inappropriate for an independent human rights institution to be subject to this power of direction in the exercise of such a key function. We also recognise that a power of direction goes hand-in-hand with the ability to provide sufficient resources for an investigation conducted at the Secretary of State's behest. Upon the assumption that the verbal change will not affect the availability of resources for the investigation, **we recommend that this power be amended to enable the Secretary of State to request the Commissioner to undertake such an inquiry and to make his request public. If the Commissioner declines to act on the request, he or she should be required to publish reasons for that decision.**

Term of appointment

48. Second, the Commissioner is appointed by the Secretary of State for a renewable term.[60] All of the existing Commissioners considered that the lack of independence from the Secretary of State, or the appearance of it in the case of the renewability of the appointment, could undermine the effectiveness of the new Commissioner in the discharge

59 See Twelfth Report, Session 2003–04, op cit., Appendix 1d evidence from ENOC.

60 Schedule 1, para 3.

of his or her functions.[61] **We recommend that the Commissioner's appointment should be non-renewable, and for a period of no fewer than five and no more than seven years.**

49. We regret that, once again, the establishment of the new office of Children's Commissioner represents a missed opportunity to clarify the status of independent watchdogs as a different class from the standard NDPB. We discussed this issue at some length in our recent report on the proposed Commission for Equality and Human Rights.[62] We consider that the status of the Commissioner should be reviewed when the legislation establishing the CEHR is being designed.[63]

Budget

50. Third, and most crucially, the Secretary of State sets the Commissioner's budget. Manipulation of the purse strings is the most powerful weapon in the hands of a Minister who wishes to trammel the independence of such an office. It will be critical that the Commissioner's budget is closely observed by a Committee of one or both Houses.

51. More generally, there is concern that the estimate of the Commissioner's annual budget given by the Government (£2.5 million)[64] looks very inadequate when set against those of the other UK Commissioners (£1.9 million (NI), £1.2 million (Scotland) and £1.3 million (Wales)). The Minister told us she intended to reflect, with her colleagues, on the adequacy of this sum.[65] We recognise that there is inevitably an element of guesstimating in calculating the budget of a new body, but we hope that, when she has concluded her reflections, the Minister will bring forward some well-supported arguments for the figure at which she arrives. We recommend that, in those deliberations, she gives careful attention to the case made out for a distinctive regional presence for the Commissioner in England.

Devolution

52. The Welsh Affairs Committee has expressed considerable disquiet about the overlap between the jurisdiction of the Commissioner proposed in this Bill and that of the Children's Commissioner for Wales. The other Commissioners expressed concerns when they appeared before us to give oral evidence.[66] They understandably emphasised the importance of ensuring that the arrangements are accessible and understandable from the perspective of a child.

53. In essence, the Welsh and other commissioners' remits are restricted to devolved matters. This meant that a child within one of the devolved jurisdictions would, under the original scheme of the Bill, have had to apply to a different commissioner for assistance with reserved matters. The nature of the assistance on offer will be different depending on the nature of the problem. The Minister defended this situation with the argument that this

61 QQ 45–57

62 See Eleventh Report, Session 2003–04, op cit.

63 Q 120

64 HL Bill 35-EN, para 197.

65 Q 111

66 QQ 63, 66 and 67.

Bill was not "a vehicle for revisiting the devolution settlement".[67] The Welsh Affairs Committee rejected this argument in a recent report, saying—

> The views of the National Assembly for Wales, the Welsh Assembly Government, the NGOs that work directly with children in Wales and the Commissioners for Wales, Scotland and Northern Ireland all concur that powers over non-devolved matters should be given to the Commissioners in Wales, Scotland and Northern Ireland. The Government has dug in its heels against that consensus. The Minister has hidden behind the false premise that the extension of the Commissioner's powers is a direct part of the devolution settlement. While it may appear to be a convenient defence it is misguided and puts into question the Minister's commitment to placing the needs of children over that of spurious bureaucratic expediency.[68]

We agree that it is an argument unlikely to carry much conviction with children who are seeking help with their problems. At report stage in the House of Lords, the Bill was amended to restrict the general functions of the Commissioner to children in England. This change, if it stands without further amendment, will provide each child in the UK with a single commissioner to whom they can turn for help. It will, however, give rise to a new set of anomalies. The Minister indicated at Third Reading in the House of Lords that the Government would be examining ways of addressing these anomalies through amendments in the House of Commons.

Relationship with the Commission for Equality and Human Rights

54. The Minister, in oral evidence, recognised that the relationship between the new office and the proposed Commission for Equality and Human Rights would have to be examined.[69] It is impossible in this Bill to anticipate such questions. However, we consider that it is highly likely that the conclusion will need to be drawn that the Children's Commissioner should be, *ex officio*, a part-time member of the CEHR.

A strategic, rights-based Commissioner for Children and Young People

55. We warmly welcome the proposal in Part 1 of the Children Bill to establish the office of Children's Commissioner. It has been much improved during its passage through the House of Lords. We have one general comment to make. As we noted in our report last year on the CRC, the legal definition of children as persons under the age of 18 does not correspond to the way we ordinarily use the term. **We recommend that the office be called the Commissioner for Children and Young People.**

56. We regret that in our report last year on the topic we seem to have given a hostage to fortune in appearing to endorse the idea that going beyond a "purely rights-based approach"[70] meant that we did not believe it necessary to ground the Commissioner's purpose firmly in the goals, guarantees and principles articulated in the Convention on the

67 Q 121

68 Welsh Affairs Committee, Fifth Report, Session 2003-04, *The Powers of the Children's Commissioner for Wales*, HC 538, para 77.

69 QQ 117–120.

70 Ninth Report, Session 2002–03, op cit, para 45.

Rights of the Child. We said in our report on the case for a children's commissioner for England—

> Children experience difficulties different from those of adults in benefiting from full enjoyment of their human rights. These difficulties involve systemic problems of philosophy, culture and understanding. They also derive from the lack of a rights-based approach to children, ignorance among children themselves that they are entitled to human rights protection and insufficient meaningful participation by children in decisions that affect them.[71]

57. We do not accept that there is a necessary conflict between a rights-based and a strategic approach to the improvement of the circumstances of children, particularly the most vulnerable. We believe that the Children's Commissioner should be seen as an independent human rights institution. The work of the Commissioner should be to help make a reality of the words of Article 3.1 of the CRC—

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Commissioner will make scant progress towards that goal unless he or she operates in a strategic way, mainstreaming awareness of the rights, views and interests of children through the whole of the public sector and beyond. And the Commissioner will have little hope of spreading the message if he or she fails to use the leverage provided by working through the many other bodies, institutions and officials who are, or are supposed to be, working towards this same goal.

58. **Taking the recommendations we have made above into account, Part 1 of the Bill provides a statutory framework which has a good chance of establishing an office which can help to achieve the aim of making the interests of the child a primary concern in the work of the agencies of the state. We believe Part 1 of the Bill as it stands, provides, for the most part, the basis for what can be seen as a genuinely independent children's commissioner.**

71 Ninth Report, Session 2002–03, op cit, para 42.

3 Parts 2 and 3: Children's Services

The strength of the new duties

59. Parts 2 and 3 of the Bill aim to strengthen the legal framework for achieving better co-operation between agencies delivering children's services, by providing for the better integration, planning, commissioning and delivery of such services.[72] This is a welcome aim from a human rights perspective, because it seeks to fulfil the important positive obligations owed to children under Articles 2, 3 and 8 ECHR, to take positive steps to protect their lives, to protect them from inhuman and degrading treatment, and to protect their physical integrity.

60. In *Z v UK*, for example, the UK was found to be in breach of Article 3 ECHR because there had been a failure of the system to protect the children concerned from serious, long-term neglect and abuse.[73] The Court held—

> The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.

61. The tragic recent cases of Victoria Climbié and Toni-Ann Byfield raise the same issue in the context of the right to life under Article 2. It is clear that lack of inter-agency co-operation and proper co-ordination of the various agencies with functions concerning children has been responsible for some serious cases in which the State has failed to protect children from risks to their lives or their physical integrity.

62. We therefore welcome the objective behind Parts 2 and 3 of the Bill as a recognition on the part of the Government that measures need to be taken to secure greater inter-agency co-operation. We are concerned, however, about whether the duties imposed by the provisions in Parts 2 and 3 of the Bill are sufficiently strong to give effect to the State's positive obligations under Articles 2, 3 and 8, or the duty on State agencies to promote and safeguard the welfare of children, as required by the CRC.

The duty to co-operate to improve well-being

63. Clause 7 of the Bill creates a statutory framework for local co-operation between local authorities, key partner agencies[74] and other relevant bodies, including the voluntary and community sector, who exercise functions or engage in activities in relation to children in

72 Part 2 deals with children's services in England. Part 3 makes identical provision for Wales with the necessary modifications. For ease of reference, this Report refers to the provisions in Part 2.

73 (2002) 34 EHRR 3, at paras 73–75.

74 The include the police authority and the chief officer of police; a local probation board; and a Strategic Health Authority and Primary Care Trust: clause 7(4).

the authority's area. The object is to improve the well-being of children in the area in relation to "the five outcomes".[75] The local authority itself is placed under a duty to make the arrangements to promote co-operation.[76] The partner agencies are placed under a duty to co-operate in the making of arrangements.[77] Both the local authority and the partner agencies are required to exercise their functions under this section having regard to any guidance given to them by the Secretary of State.[78]

64. We welcome the adoption of a measure designed to achieve greater co-operation between the various agencies who deal with children as an important step in fulfilling the UK's positive obligation towards children under Articles 2, 3 and 8 ECHR. The report of the inquiry by Lord Laming into the death of Victoria Climbié identified the lack of effective joint working and inter-agency co-operation as being amongst the factors responsible for Victoria Climbié's death. Clause 7 addresses that concern.

65. We do, however, have a minor concern that the wording of the duty on partner agencies to co-operate with local authorities is not sufficiently clearly worded to make absolutely clear the ongoing nature of the duty. The duty imposed on partner agencies by clause 7(5) is a duty to co-operate with the authority in the making of arrangements under this section. The primary duty on the authority itself is to make arrangements for the promotion of co-operation. The duty on partner agencies is therefore a duty to co-operate in the making of arrangements to promote co-operation. We are concerned that this is too weak a duty. We think that a straightforward duty to co-operate with the authority would be preferable.

66. The Government accepts that the duty on agencies providing services for children, to "co-operate in the making of arrangements", in clause 7(5) of the Bill is not intended to refer to a single event, but is intended to imply ongoing activity in both setting up *and sustaining* an organisational framework for integrated services.[79] The Minister, in her evidence before us, said that clause 7 should be read as providing an ongoing and continuous duty to co-operate between the different agencies.[80]

67. We welcome the Government's clarification of the intention behind the duty to co-operate in clause 7(5), but are concerned that leaving that intention to be inferred from the current language is not sufficient to achieve the important purpose of this provision. The recent work of the Audit Commission has demonstrated that there is a pervasive culture of minimal compliance in overworked local authorities.[81] The recent report by the CRE on the extent to which police authorities are complying with the new duties imposed by the Race Relations Amendment Act 2000 gives rise to the same concern.[82]

75 Clause 7(2)

76 Clause 7(1)

77 Clause 7(5)

78 Clause 7(8)

79 Appendix 1

80 QQ 124–125.

81 Audit Commission, *Human Rights: improving the delivery of public services*, 2003

82 *Formal Investigation of the Police Service in England and Wales—Interim Report*, June 2004, available from CRE website (www.cre.gov.uk)

68. **We recommend that the Government's intention that there should be an ongoing duty on partner agencies to co-operate should be made explicit on the face of the legislation, or, at the very least, in the Secretary of State's guidance issued under clause 7(8).**

The "safeguarding and promoting welfare" duty

69. Clause 8 of the Bill applies to specified bodies who have functions concerning children, and imposes a duty to make arrangements for ensuring that their functions are discharged having regard to the need to safeguard and promote the welfare of children.[83] This falls well short of a substantive duty to safeguard and promote the welfare of children.

70. First, it is a procedural duty only: it refers to the relevant authorities "having regard to the need to safeguard and promote the welfare of children" when discharging their functions. This is clearly inferior to a substantive duty which would require the authorities to safeguard and promote the welfare of children when carrying out their functions, or to carry out their functions in a way which safeguards and promotes the welfare of children. A substantive duty would require *outcomes* to be compatible with safeguarding the welfare of children, not merely *processes* to ensure that safeguarding the welfare of children is taken into account as a relevant consideration.

71. Second, the duty in clause 8 is not even a free-standing procedural duty to have regard to the need to safeguard and promote the welfare of children: it is a duty to "make arrangements" for ensuring that their functions are discharged having regard to that need. This looks more like a one-off duty to make arrangements than an on-going duty to have regard to the need to safeguard and promote the welfare of children. It is not clear, for example, whether, once such arrangements have been made, an arguable failure to have regard to the need to safeguard and promote the welfare of children when discharging a particular function could be legally challenged under clause 8 when such arrangements already exist.

72. The contrast between a strong substantive duty and a weak procedural one is demonstrated by comparing clause 8 with s. 6(1) of the Human Rights Act 1998. That provision requires public authorities to discharge all their functions in a way which is compatible with Convention rights. It does not merely require them to take account of those rights when performing their primary functions, nor merely to make arrangements to ensure that regard is had to Convention rights when discharging their functions.

73. We wrote to the Minister asking what justification there was for the weakness of the duty in clause 8.[84] The response was that the Government "does not want agencies' consideration of children's needs to compromise their ability meet their primary purpose".[85] The new duty imposed by clause 8 was not intended to become a primary function of agencies, nor to impose a new additional function on an agency. The Government's concern was that some agencies have responsibilities which may cause

83 Clause 8(2)(a)

84 See Twelfth Report, Session 2003–04, op cit., Appendix 1, Q 7.

85 Appendix 1

them, in an individual case, to take action (e.g. imprisoning offenders who have children) which could be regarded as contrary to promoting the welfare of a particular child.

74. In her evidence before us, however, the Minister said that the wording of the clause 8 duty should not be read as suggesting that the safety and welfare of children was of secondary importance: it was of paramount importance,[86] and clause 8 should not be read as subordinating the rights of the child to the primary functions of the various agencies but of elevating the rights of the child as being of primary importance.

75. We welcome the Minister's reassurance that the intention behind the wording of clause 8 is not to subordinate the welfare of the child to the agencies' other functions, but to elevate it to the status of a primary consideration. We consider that nothing less is required: in light of the UK's obligation under Article 3 CRC (in all actions concerning children the best interests of the child shall be a primary consideration), it could not be justifiable to create a legal framework in which the welfare of the child is relegated to a secondary status by being subordinated to agencies' other "primary" functions.

76. For the reasons we have set out above, the ordinary and natural meaning of the language of the clause is that it imposes only a weak procedural duty rather than a strong substantive one of the kind the Minister states is intended by the Government. The public, agencies and the courts should be able to ascertain from the face of the legislation exactly what is required by the duty, rather than have to consult Hansard to discover what the minister said to a parliamentary committee. We do not consider that this has been achieved with the present wording.

77. **We recommend that Clause 8 be amended so as to give effect to what the Minister clearly stated is the intention of the clause. In other words it should impose an express direct duty on children's services authorities and other key agencies to promote and safeguard the welfare of children, or explicitly require that the best interests of the child be treated as a primary consideration in the discharge of their functions**.

Private contractors exercising public functions

78. Clause 8(2)(b) of the Bill places a duty on the relevant public authorities to make arrangements to ensure that services provided by another person on their behalf (including private contractors) are provided having regard to the need to safeguard and promote children's welfare. The purpose of this provision is to make clear that the duty in clause 8(2)(a) continues to apply where the relevant body contracts out services.[87]

79. This contrasts with the approach of the Human Rights Act 1998, which directly imposes the duty to act compatibly with ECHR rights[88] on any body exercising functions of a public nature, which includes private contractors acting on behalf of a public authority.[89]

86 QQ 122–123.

87 EN para. 48

88 Under s. 6(1) Human Rights Act 1998.

89 Section 6(3)(b) of the Human Rights Act 1998 provides: "In this section 'public authority' includes - … (b) any person certain of whose functions are functions of a public nature."

80. This is a question to which we have previously given very careful consideration. In our report *The Meaning of Public Authority under the Human Rights Act*,[90] we concluded that requiring public bodies to make contractual arrangements with private contractors to ensure the protection of human rights was less effective than imposing the duty to act compatibly directly on the private contractor where it is exercising public functions. We also concluded that there should always be direct accountability of the service provider for respecting the rights of the user of the services, in addition to the accountability of the public body. We were not convinced that reliance on the inclusion of contractual terms for human rights protection could provide fully comprehensive, consistent and equal human rights protection for the recipients of public services on an equal basis with statutory responsibility under section 6 of the Human Rights Act.

81. We therefore asked the Minister what the justification was for not imposing the duty in clause 8(2)(b) of the Bill directly on contractors.[91] The Minister's written response asserted that it would not be "appropriate" to bind private companies or voluntary organisations.[92] The only reason given for this assertion was that this is the better approach because the public body cannot delegate its functions and remains responsible for ensuring that the proper service is provided.

82. The Minister elaborated on this in her oral evidence.[93] She said that the reason for not imposing the duty directly on the contractor was that this would "muddle accountabilities", which would go against one of the central purposes of the Bill, namely to ensure that there is clear accountability among the professionals involved in a child's life as to who is responsible for that child—

> If an agency chooses to contract out, we do not want the agency to believe that in any way would remove them from their accountability for safeguarding the children and ensuring their well-being. … if the separate duty was pushed on to the contractor I think there would be room in that situation … for the agency to say 'Actually this was not my responsibility, it was the contractor's responsibility' and therefore you would lose some of the accountabilities that we are trying to really bolt down in this legislation.[94]

The Minister did not consider this approach to involve any lesser degree of protection than that provided by the approach adopted under the Human Rights Act.

83. We are not persuaded that imposing the duty directly on private contractors, *as well as* on public authorities, in any way detracts from the accountability of public authorities. On the contrary, we remain concerned about the deficit of accountability which arises when a service provider is not directly accountable to the user of their services, but only indirectly through the enforcement of contractual terms between it and the public authority. We remain of the view, expressed in our earlier report, that leaving the protection of rights to

90 Seventh Report, Session 2003–04, *The Meaning of Public Authority under the Human Rights Act*, HL Paper 39/HC 382.

91 See Twelfth Report, Session 2003–04, op cit., Appendix 1, Q 8.

92 Appendix 1

93 QQ 126–128.

94 Q 126

the process of contractual negotiation with private providers is less effective than imposing a duty directly on private providers where they are exercising a public function.

84. We would emphasise that imposing the duty on the public authority or the private provider are not alternatives: the duty can apply to both, and the public authority's responsibility will therefore be ongoing even where it has contracted out the provision of a service to a private body. This would provide the necessary incentive to the public authority to monitor and keep under review the adequacy of its contractual arrangements with private contractors to ensure that the duty is performed.

85. **We consider that there is no justification for adopting an approach to private contractors in the Children Bill which is inferior to that in the Human Rights Act. We recommend that the Bill should be amended in order to make clear that the duty to safeguard and promote the welfare of children applies to both public authorities and private contractors discharging their functions on the public authorities' behalf**.

Exclusion of immigration/asylum agencies

86. Immigration and asylum agencies, such as the Immigration Service, the National Asylum Support Service ("NASS"), and immigration removal centres, are excluded from the new duties imposed by Clauses 7 and 8 of the Bill, and from the new institutional arrangements for safeguarding children established by clause 10. They are not included in the list of "relevant partners" in clause 7(4) of the Bill, and therefore are not under the duty co-operate with children's services authorities in clause 7(5). They are not included either in the list of authorities in clause 8(1), and therefore are not under the duty to make arrangements to safeguard and promote children's welfare under clause 8(2). Nor are they included in the list of "Board partners" in clause 10(3), and therefore are not represented on Local Safeguarding Children Boards.

87. As a result of these omissions, the most important agencies providing services to a particularly vulnerable group of children[95] are not subjected to the new duties in the Bill designed to safeguard children's well-being, nor are they included in the institutional arrangements designed to achieve that purpose. In our previous report on the Bill, we indicated our preliminary concern that the omission of this particular group of children from the new provisions designed to fulfil the State's positive obligations to children under Articles 2, 3 and 8 ECHR amounted to unjustifiable discrimination in the enjoyment of Convention rights on grounds of nationality. We therefore asked the Minister what the justification is for excluding immigration/asylum agencies from the scope of the Bill.

88. The reason given for excluding these agencies from the clause 7 duty to co-operate with children's services authorities was that they do not fulfil the criteria required for partnership under clause 7, which are that the body concerned must be responsible for strategic decision-making and the commissioning of services at local level.[96] A similar

95 The UN Committee on the Rights of the Child, in its 2002 Concluding Observations on the United Kingdom (para. 47), raised a number of concerns about the treatment of such children, including concerns about detention, dispersal and access to health care and education: see our Tenth Report, Session 2002-03, *The UN Convention on the Rights of the Child*, HL Paper 117/HC 81, Annex 3.

96 See Appendix 1; Q 129.

reason appears to be relied on in relation to their exclusion from Local Safeguarding Children Boards, onto which the agencies could be co-opted pursuant to the discretionary power provided in the Bill. No further justification is offered, other than the Government's own stipulation of the requirement that the agencies be "local" not national.

89. We are not persuaded that the distinction between local and national agencies is a good reason for excluding immigration and asylum agencies from the duty to co-operate in clause 7 and the Boards established by clause 10. The positive obligation imposed by human rights law recognises no such distinction between types of agency which may need to co-operate in order to protect the rights and interests of children.

90. The Government's position also ignores one of the important lessons to be learned from the recent tragic death of Toni-Ann Byfield. The Report of the Birmingham Area Child Protection Committee into that case found that it "demonstrated the need to develop closer working relationships between local social care and health services and the national Immigration Service".[97] It concluded "there is a pressing need for a more proactive approach to the achievement of more effective practice and mutual understanding between local authority services and the Immigration Service if the future welfare of children in a similar position to Toni-Ann is to be assured". It recommended the development of closer working partnerships between the Immigration Service and social services departments and, in future, Local Safeguarding Children Boards.[98] The tragic consequences of the lack of co-ordination and co-operation in that case demonstrates the need for the immigration authorities to be brought within the scope of the duty to co-operate.

91. We also note that a recent research report by ECPAT UK, concluded that there is a problem identifying children who are being trafficked, and that "the issue of trafficking can only be dealt with from a multi-agency approach, incorporating police, immigration, social services and voluntary organisations".[99]

92. **We are not persuaded that there is a justification for excluding immigration and asylum agencies from the scope of the duty to co-operate in clause 7 or from automatic membership of Local Safeguarding Children Boards under clause 10. We consider that these omissions should be remedied in order to ensure equal treatment for asylum-seeking children**.

93. The Minister's reason for excluding immigration and asylum agencies from the clause 8 duty (to have regard to the need to safeguard and promote the welfare of children) is that such a duty may conflict with the need to maintain an effective immigration control.[100] The concern is that such a duty might "cut across" existing policies and procedures which may not appear to promote the welfare of children, such as decisions not to admit a family with children, or the detention of asylum-seeker families with children. She told us—

97 Birmingham Area Child Protection Committee, Chapter 8 Case Review, Toni-Ann Byfield (April 2004), para. 10.

98 "Recommendation 11: Closer partnership working between Immigration and Nationality Directorate and local authority Social Services Departments and future Local Safeguarding Children Boards at local level needs to be developed to ensure better dissemination of information on children seeking to enter the United Kingdom.

Recommendation 12: … Arrangements need to be developed whereby Immigration inform Social Services immediately if an immigration officer considers, or has reason to believe, a child to be at risk of harm."

99 *End Child Prostitution and Trafficking of Children for Sexual Purposes*, ECPAT UK, *Cause for Concern? London Social Services and Child Trafficking*

100 Appendix 1

> … the purpose of the Immigration Service is to ensure that we implement our immigration controls. That is its primary purpose. The belief in Government is that there will be confusion caused in pursuing that primary purpose if the duties in relation to children were also imposed on the Immigration Service. [101]

94. The Minister also told us that the Government was pursuing other ways of ensuring that in the implementation of immigration control regard is had to the well-being of children, and assured us that there are already sufficient safeguards in the system to ensure that children are protected. However, **we find it impossible to avoid the conclusion that the Government's position is that the welfare of asylum-seeking children is secondary to the need to maintain effective immigration control**.

95. We remind Parliament of the conclusion of the UN Committee on the Rights of the Child in 2002 that the UK's reservation to the CRC on immigration and citizenship is "against the object and purpose of the Convention". We remain of the view expressed in our earlier report on the CRC that the existence of the UK's reservation to the CRC concerning immigration and nationality appears to legitimise unequal treatment of these vulnerable children both by central government and local service providers.[102] **We recommended in that report that the Government demonstrate its commitment to the equal treatment of all children by withdrawing its reservation to the CRC relating to immigration and nationality. We are disappointed that not only has the Government failed to act on this recommendation, but it now seeks to rely on that reservation to justify further differential treatment of asylum-seeking children in new legislative measures.**

96. The UK's reservation to the CRC cannot, however, be relied on to justify differential treatment of asylum-seeking children in relation to their Convention rights. We are not persuaded that the Government has put forward any convincing justification for treating asylum-seeking children differently from UK national children in the Children Bill.

97. As people within the jurisdiction, asylum-seeking children are entitled to equal enjoyment of Convention rights unless there is a good reason for granting them only lesser protection.[103] The measures introduced in clauses 7, 8 and 10 of the Bill are designed to fulfil the State's positive obligation to protect children under Articles 2, 3 and 8 of the Convention. Asylum-seeking children are treated less favourably by the exclusion from the scope of the new measures of all the main agencies with which they come into contact and on which they rely for basic services. The only justification relied on by the Government is the need to maintain an effective immigration control. We do not accept that this consideration justifies the lower level of protection afforded to asylum-seeking children. **We conclude that the exclusion of immigration/asylum agencies from the scope of the new duties and arrangements is unjustifiable discrimination against such children on grounds of nationality.**

101 Q 129.

102 Tenth Report, Session 2002–03, op cit., para. 86.

103 Articles 1 and 14 ECHR

Information Sharing

98. Clause 9 of the Bill provides for the creation of databases containing information in respect of persons to whom arrangements under clauses 7 or 8 of the Bill, and s. 175 Education Act 2002,[104] relate.[105] The Secretary of State is given power either to require children's services authorities to establish and operate such databases[106] or to establish and operate one or more such databases him or herself, or make arrangements for doing so,[107] including by establishing a body corporate to establish and operate such databases.[108] Such databases may only include certain types of information in relation to persons on the database:[109]

- name, address and date of birth;
- identifying number;
- name and contact details of any person with parental responsibility for the child or who has care of the child at any time;
- details of any education being received by the child (including name and contact details of any educational institution being attended);
- name and contact details of any person providing primary medical services in relation to the child;
- name and contact details of any person providing to the child services of such description as the Secretary of State may by regulations specify;
- information as to the existence of any cause for concern in relation to the child;
- information of such other description as the Secretary of State may by regulations specify, but not including medical records or other personal records.

99. Clause 9(5) gives the Secretary of State power to make regulations to make provision in relation to the establishment and operation of any such databases, including (clause 9(6)):

- as to the information which may or must be contained in such database;[110]
- permitting or requiring specified persons or bodies to disclose information for inclusion in the database;[111]

104 Section 175 Education Act 2002 imposes a duty on LEAs and governing bodies of maintained schools to make arrangements for ensuring that their respective functions are exercised with a view to safeguarding and promoting the welfare of children.

105 Clause 23 confers a similar power on the National Assembly for Wales, subject to Assembly procedures.

106 Clause 9(1)(a)

107 Clause 9(1)(b)

108 Clause 9(2)

109 Clauses 9(3) and (4), introduced by the Government on Report.

110 Clause 9(6)(a) (subject to the limitation in clause 9(3)).

111 Clause 9(6)(b) and (c).The persons and bodies are specified in clauses 9(7) and (8).The Secretary of State is given power to add to the list of specified bodies by regulation: Clauses 9(7)(f) and 9(8)(e).

- permitting or requiring the disclosure of information included in such database;[112]
- permitting or requiring any person to be given access to such database to add to or read the information;[113]
- as to the conditions on which such access to the database may or must be given; [114]
- as to the length of time for which information may or must be retained;[115]
- as to proceedings for ensuring the accuracy of information included in any such database.[116]

The regulations may also provide that anything which may be done under the regulations permitting or requiring disclosure of information or access to the database may be done notwithstanding any rule of common law which prohibits or restricts the disclosure of information.[117]

100. The Secretary of State is given power to issue guidance and directions to any person or body establishing or operating such a database, who is under an obligation to have regard to such guidance.[118] Such guidance may include the giving of advice in relation to rights under the Data Protection Act 1998.[119]

The human rights implications of the information sharing provisions

101. It is an important part of the State's positive obligation to secure Convention rights to all those within its jurisdiction that its laws facilitate the sharing of information about individuals to the extent that this is necessary to protect their Convention rights (including where necessary against interference by other individuals). It is well established in the case-law of the Convention that children are in a vulnerable position and that the authorities are therefore under a duty to protect them against risks to their life and against exposure to cruel, inhuman or degrading treatment. A positive obligation to take preventive operational measures to avert such risks will arise in circumstances where the authorities knew *or ought to have known* of the existence of such real and immediate risks to the child. States are therefore at risk of being found to be in breach of their positive obligations to protect children where the relevant authorities ought to have known of the risks to the child and failed to take the necessary measures which might reasonably have been expected to avert that risk.

102. It follows that the positive obligations on the State to take active steps to protect the lives of children under Article 2 ECHR, and to protect them from inhuman and degrading

112 Clause 9(6)(d)
113 Clause 9(6)(e)
114 Clause 9(6)(f)
115 Clause 9(6)(g)
116 Clause 9(6)(h)
117 Clause 9(11)
118 Clause 9(13)
119 Clause 9(13)(e)

treatment under Article 3 or serious risks to their physical integrity under Article 8,[120] referred to above, may require, in certain circumstances, the sharing of information about the child, to the extent that it is necessary to provide the requisite protection for the rights at stake. *Some* provision in national law for information sharing concerning children and young people is therefore required by the positive obligations imposed by human rights law. We acknowledge that the Government is seeking in these provisions to discharge these positive obligations.

103. However, there is an important countervailing privacy interest at stake: the sharing of any personal information is an interference with Article 8 ECHR which requires justification. The European Court of Human Rights has consistently held that the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life.[121] Respecting the confidentiality of health data in particular has been held to be a vital principle, crucial not only to respect a patient's sense of privacy, but also to preserve his or her confidence in the medical profession and the health services. The Court has recognised that, without such protection, those in need of medical assistance may be deterred from revealing such personal information as may be necessary to receive appropriate treatment, and even from seeking such assistance in the first place. Article 8 therefore requires there to be appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the purpose of Article 8.

104. Children *prima facie* enjoy the benefit of the protection of the privacy of personal information in Article 8, even though obviously the younger or more vulnerable the child the weightier is likely to be the justification for any interference with that right under Article 8(2). The less vulnerable the child, and in particular the more mature they are, and the more sensitive the information, the more is likely to be required by way of justification for the interference.

105. The Explanatory Notes to the Bill as introduced acknowledged that the creation of databases containing personal details of all children may constitute an interference with Article 8 rights, but asserted that the interference is proportionate and justified under Article 8(2).[122] No reasoning was offered to elaborate on this single sentence assertion that the interference with Article 8 is proportionate. The Explanatory Notes claimed that clause 9 sets out "the principles that would govern information sharing using the information databases", and that the regulations will deal with "detailed operational requirements".[123] It appeared to the Committee that, in fact, clause 9 as originally introduced contained very few "principles" which would regulate the use of the proposed databases. The key questions which must be asked in order to assess for compatibility with Article 8 ECHR were left unanswered, to be dealt with in the regulations.

106. It was therefore impossible for the Committee to make any judgment about the proportionality of what will undoubtedly constitute an interference with Article 8 rights in

120 See *Z v UK* (2002) 34 EHRR 3

121 See for example *Z v Finland* (1998) 25 EHRR 371 at para. 95; *M.S. v Sweden* (1999) 28 EHRR 313 at para. 41; *R (Robertson) v City of Wakefield MC* [2002] 2 WLR 889 (disclosure of details on the electoral roll).

122 EN para. 209

123 EN para. 51

the absence of more detail about what is proposed. We therefore asked the Minister a number of detailed questions about how it was proposed that the broad power conferred on the Secretary of State would be exercised, and in particular what protections would be afforded for the Article 8 rights of the children included on the database.[124]

107. The Government accepted the need for there to be more detail on the face of the Bill and introduced a number of amendments in the House of Lords, setting out the main basic information to be held on the database in relation to each child, specifying the main persons or bodies required or permitted to supply information to the database and providing for the conditions under which access to the database will be granted to be set out in regulations rather than guidance.

108. **We welcome the Government's acceptance of the need for more detail on the face of the legislation and its willingness to introduce amendments responding to the concerns raised.** However, we continue to have a number of concerns about the compatibility of the proposed database with Article 8 ECHR.

The lack of detail in the Bill

109. We remain concerned about the lack of detail contained on the face of the Bill and the breadth of the regulation-making powers being conferred on the Secretary of State in a context involving serious interferences with Article 8 rights. The Government's explanation for not dealing with the details of the proposed databases in primary legislation is that it needs to retain flexibility to develop the databases in light of the experiences of the current pilot projects being carried out and technical advice which has been commissioned but not yet delivered.

110. In our reports we have repeatedly stressed the fundamental importance of the right to respect for private life in Article 8 ECHR. The creation of databases containing personal information and providing for its disclosure to third parties involve serious interferences with the right to respect for private life in Article 8 which must be strongly justified and accompanied by adequate procedural safeguards against arbitrariness. The trailblazer pilots, which are likely to be the main source of the evidence going to justification, are still in progress. Parliament is being asked to authorize in advance a major interference with Article 8 rights without the evidence demonstrating its necessity being available.

111. We have also repeatedly stressed the importance of the safeguards for Article 8 rights being contained in the primary legislation in order for it to be possible to say that the legislation is compatible with Convention rights. The fact that the regulations must be made by affirmative resolution procedure therefore does not fully meet our concern in this respect. Such instruments are unamendable.[125] Given the importance of the rights at stake, it is always preferable for the necessary procedural safeguards to be contained in primary legislation and subjected to full parliamentary scrutiny for compatibility with human rights.

124 See Twelfth Report, Session 2003–04, op cit., Appendix 1, QQ 10–12.

125 The House of Lords Delegated Powers and Regulatory Reform Committee expressed its concern about the broad delegation involved in the skeleton provisions of clauses 9, despite the importance and sensitivity of their subject-matter: Twelfth Report, Session 2003-04, op cit., para. 23.

The scope of the databases

112. The Government has made clear that the purpose of the databases is to provide a tool to help ensure that all children get all the services they need at the earliest stage possible. The databases are not to be confined to children who are considered to be in need, at risk, or otherwise vulnerable: it covers all children. The Government argues that universal coverage is necessary in order to achieve the aim of ensuring the welfare of all children, and that the interference with children's Article 8 rights is proportionate because there are limits on the type of information recorded and control over access to that information.

113. The question that must be addressed is whether such a general aim as improving the well-being and promoting the welfare of all children is capable of justifying such a serious interference with Article 8 rights. The death of Victoria Climbié, and the inadequacies of communication between state agencies exposed by the Laming inquiry, have generated a sense of outrage and a determination to prevent the same avoidable errors being repeated. Maintaining a child protection register, or even a register of children "in need" and therefore in receipt of Children Act assistance from the local authority, is a much more targeted measure aimed at protecting vulnerable children. But a universal database seems to us to be rather more difficult to justify in Article 8 terms. Adults are also the beneficiaries of universal services such as health care and other services, such as community care, for which they may be eligible in certain circumstances. It appears to us that the strict logic of the Government's position is that it would be a justifiable interference with adults' Article 8 rights to maintain a similar universal database of all adults in the UK in order to ensure that those amongst them who are or may be entitled to receive certain services from the state actually receive them. We are concerned that, if the justification for information-sharing about children is that it is always proportionate where the purpose is to identify children who need child welfare services, there is no meaningful content left to a child's Article 8 right to privacy and confidentiality in their personal information.

The nature of the information on the database

114. The Government accepts that no "case information" should be recorded on the databases. We welcome the Government's amendment of the Bill to make clear that regulations cannot provide for medical records or other personal records to be included on the database.[126] We also welcome the Government's acceptance that the database will operate in accordance with the Data Protection Act 1998, and its amendment of the Bill to provide for guidance to include advice about existing rights under the Data Protection Act.[127] However, the information which may be included on the database about a child goes beyond purely objective facts about a child, such as their name, address and date of birth. It includes information, such as contact details of persons providing services including health services, which may reveal very sensitive information about a child, such as the fact that a seventeen year old girl has been referred to family planning services. It also includes "the existence of any cause for concern" about a child, which is an extremely

126 Clause 9(4)(h), inserted by the House of Lords on third reading.

127 Clause 9(13)(e)

subjective and open-ended phrase which is almost bound to include very sensitive information about a child.

115. We welcome the fact that the Government accepts that this is a matter which must be dealt with carefully. It has promised to consult about the extent to which the inclusion of sensitive information about a child, or its disclosure, should be subject to the consent of the child or their parents, with a view to dealing with the matter in regulations.[128] We look forward to an opportunity to scrutinise a draft of those regulations. We remind the Government that Article 8 requires that there be adequate procedural safeguards regulating the disclosure of sensitive personal information, and these may require participation by the person who is the subject of the information in decisions concerning the inclusion and disclosure of certain types of information.

116. We also note that the information recorded will include the contact details of professionals involved with the child in the expectation that professionals will contact each other and share information about the child. In our view there will be a need for detailed guidance to professionals about the appropriate limits of information-sharing in order to ensure proper protection for children's Article 8 rights. We welcome the Government's acceptance of the need for comprehensive statutory guidance on information sharing, in response to an amendment proposed by the Earl of Northesk and supported by Lord Campbell of Alloway, a member of this Committee.[129] We trust that the Committee will be fully consulted on the draft of such guidance, given its important implications for Article 8 rights.

117. **We draw these matters to the attention of each House**.

128 HL Deb., 5 July 2004, col. 575.

129 Baroness Ashton, HL Deb., 15 July 2004, cols. 1431–1432.

4 Reasonable chastisement defence

Background

118. In our recent Report on *The UN Convention on the Rights of the Child*[130] we examined the case for retaining the defence of reasonable chastisement in UK law in light of the recent pronouncements of a number of significant international bodies charged with supervising and monitoring compliance with the UK's international human rights obligations.[131]

119. After taking evidence on the issue, and carefully considering the arguments for and against retaining the defence,[132] we concluded that—

> … the time has come for the Government to act upon the recommendations of the UN Committee on the Rights of the Child concerning the corporal punishment of children and the incompatibility of the defence of reasonable chastisement with its obligations under the Convention. We do not accept that the decision of the Government not to repeal or replace the defence of reasonable chastisement is compatible with its obligations under the Convention on the Rights of the Child.[133]

120. We repeated this concern in our report on our initial consideration of this Bill,[134] and also expressed our concern that the failure to remove the reasonable chastisement defence might put the UK in breach of Article 46 ECHR, which requires the UK to comply with the judgment of the European Court of Human Rights in *A v UK*, including by the adoption of general measures to prevent a repetition of the violation found in that case.

121. At report stage, the House of Lords amended the Bill to include a new clause restricting the availability of the reasonable chastisement defence but not abolishing it altogether.[135] It removes the availability of reasonable chastisement as a defence to the offences of wounding and causing grievous bodily harm,[136] assault occasioning actual bodily harm,[137] and cruelty to persons under sixteen. It leaves the defence available to a charge of common assault.

122. A new clause which would have abolished the defence altogether was also moved at report stage. Its effect would have been to make unlawful all use of physical force on children as a deliberate act of punishment, while broadly preserving the defence of what the Court of Human Rights has called "manhandling to rescue", in circumstances where

130 Tenth Report, Session 2002–03, op cit.

131 The European Court of Human Rights in *A v UK* (1999) 27 EHRR 611; the UN Committee on the Rights of the Child in its Concluding Observations on the UK, October 2002; the UN Committee on Economic, Social and Cultural Rights, May 2002; and the European Committee of Social Rights, 2001.

132 Tenth Report, Session 2002–03, op cit., paras. 94–111.

133 ibid., para. 111.

134 Twelfth Report, Session 2003–04, op cit., paras. 1.32–1.34.

135 New clause 49. The amendment was carried by 226 votes to 91.

136 Under ss. 18 and 20 Offences against the Person Act 1861 ("OAPA 1861") (new clause 49(2)(a)).

137 Under s. 47 OAPA 1861 (new clause 49(2)(b)).

the use of physical force is necessary to protect a child in immediate danger or where their actions might put another in danger. This was defeated.[138]

123. We now consider whether the new clause in the Bill satisfies the relevant human rights obligations by which the UK is bound. We recognize that this is an issue which arouses strong feelings, and that reasonable people disagree as to whether, as a matter of political judgment, it is right or wise to use the criminal law to prohibit the smacking of children. Our task, however, is to examine carefully and dispassionately the content of the international human rights obligations which bind the UK and to advise Parliament as to whether a proposal to legislate in a particular way, or a failure to legislate, is compatible with those legal obligations. We therefore confine ourselves strictly to a consideration of the relevant human rights obligations which are engaged by the new clause restricting the scope of the reasonable chastisement defence.

124. The human rights compatibility issues which arise are:

a) whether the new clause satisfies the UK's obligations to comply with the judgment of the European Court of Human Rights in *A v UK*;

b) whether the new clause gives rise to any new risk of incompatibility with the European Convention on Human Rights;

c) whether the new clause satisfies the UK's obligations under the Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights, and the European Social Charter;

d) whether there is any conflict between the UK's obligations under the ECHR on the one hand and the CRC, ICESCR and the European Social Charter on the other.

Compliance with the judgment in *A v UK*

125. In *A v UK* the European Court of Human Rights held that the UK was in breach of Article 3 ECHR because its law failed to provide adequate protection to the applicant in that case against treatment or punishment contrary to Article 3, by permitting a defence of reasonable chastisement in the circumstances of the case.

126. The applicant was a child who, at the age of nine, had been hit by his stepfather with a garden cane on more than one occasion. The child had been found to have a number of linear bruises on the back of his legs, some of them fresh, some several days old. The child's brother told the school that his brother was being hit with a stick by his stepfather. The head teacher told social services, who contacted the police. The stepfather was arrested and charged with assault occasioning actual bodily harm.[139]

127. At his trial the stepfather did not dispute that he had caned the child on a number of occasions, but he relied on the defence of reasonable chastisement, arguing that caning had been necessary and reasonable because the applicant was a difficult boy who did not respond to parental or school discipline. The judge directed the jury that it is a perfectly

138 The amendment was defeated by 250 votes to 75.

139 Under s. 47 OAPA 1861.

good defence that the alleged assault was merely the correcting of a child by its parent provided that the correction be moderate in its manner, the instrument and the quantity of it, and that it was for the prosecution to prove that it was not lawful correction. The jury found the stepfather not guilty of assault occasioning actual bodily harm.

128. The child complained to the European Court of Human Rights on three grounds:

i) that the State had failed to protect him from inhuman and degrading treatment by his step-father in violation of Article 3 ECHR;

ii) that the failure to protect him was in breach of his right to physical integrity guaranteed by Article 8 ECHR; and

iii) that the domestic law on assault discriminated against children, in violation of Article 14 in conjunction with Articles 3 and 8.

129. The Court considered whether, in all the circumstances of the case, the ill-treatment of the child attained the minimum level of severity necessary to fall within the scope of Article 3. It found that hitting a nine year old child with a garden cane on more than one occasion and with sufficient force to leave bruises was sufficient to reach the level of severity prohibited by Article 3.[140] It also held that, under Articles 1 and 3 ECHR, children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.[141] In light of the acquittal of the stepfather, despite the fact that he had subjected the child to treatment of sufficient severity to fall within the scope of Article 3, the Court held that UK law, by providing a defence of reasonable chastisement in the circumstances of the case, did not provide adequate protection to the child against treatment or punishment contrary to Article 3, and that there had therefore been a violation of that Article.

130. The applicant invited the Court also to rule on the merits of his Article 8 complaint, which he argued was necessary in order to provide guidance for the Government and protection for children against all forms of deliberate violence.[142] However, the Court declined to do so, holding that having found a violation of Article 3 it was not necessary to examine whether the inadequacy of legal protection was also in breach of Article 8.[143] The complaint of discrimination contrary to Article 14, in conjunction with Articles 3 and 8, was not pursued by the applicant.

131. The UK Government accepted before the Court that there had been a violation of Article 3. It accepted that the law did not provide adequate protection to children against inhuman and degrading treatment and should be amended.[144]

132. The Committee of Ministers of the Council of Europe is responsible for supervising the implementation of judgments by the European Court of Human Rights. The Government has sought to persuade the Committee of Ministers that legislative reform of

140 ibid., para. 21.
141 ibid., para. 22.
142 ibid., para. 27.
143 ibid., para. 28.
144 ibid., para. 24.

the law on reasonable chastisement is no longer necessary in light of the guidance given by the Court of Appeal about the scope of that defence following the decision in *A v UK*.[145] The Committee of Ministers, however, at its February 2003 meeting, indicated that several Delegations and the Secretariat were of the view that legislative changes would be needed in order to comply with the judgment in *A*, and asked to be kept informed of any new development, in particular as regards legislative change. The Committee of Ministers has yet to decide whether the UK has complied with the judgment in *A* to its satisfaction.

133. The question which now arises is whether the amendment of the law of reasonable chastisement by new clause 49 of the Children Bill is sufficient to satisfy the obligation on the UK[146] to comply with the judgment in *A v UK*. The obligation to comply with the judgment includes an obligation to adopt general measures which would prevent a repetition of the violation found by the Court. At the very least this means that the measures introduced would prevent a future violation on identical facts. More generally, it is also very likely to mean that the measures must ensure that the defence of reasonable chastisement will never be available as a defence to offences concerning treatment or punishment which crossed the minimum severity threshold of Article 3.

134. There is no doubt that the restriction of the scope of the reasonable chastisement defence by the new clause 49 would prevent an acquittal in the future on identical facts to those in *A v UK*: by virtue of clause 49(2)(b), the defence of reasonable chastisement would not be available to a defendant charged with causing actual bodily harm under s. 47 Offences Against the Person Act 1861. It therefore seems to us to be likely that the new clause will be considered by the Committee of Ministers to satisfy the obligation to adopt general measures which will prevent a future repetition of the specific violation found by the Court in *A*.

135. Whether the effect of the new clause is that the defence of reasonable chastisement will never be available as a defence to offences concerning treatment or punishment which is contrary to Article 3, however, is not apparent from the face of the clause itself. The defence remains available in relation to common assault. On current prosecution practice, it appears that common assault is normally charged when injuries amount to no more than grazes, minor bruising, reddening of the skin, scratches, superficial cuts, or a black eye.[147] In our view it cannot be assumed that such injuries are necessarily below the minimum level of severity required for Article 3 to apply. Indeed, we think that the deliberate infliction of such injuries on a child is very likely to be considered inhuman or degrading treatment or punishment contrary to Article 3. Without more, therefore, the new clause itself would not necessarily be sufficient to satisfy the Committee of Ministers that English law now provides children with adequate protection against treatment or punishment which is contrary to Article 3.

136. However, the Attorney General informed the House of Lords that the DPP intends to make certain changes to the charging standard which will have the effect that where serious aggravating features exist, such as the vulnerability of the victim, cases in which the level of

145 *R v H* [2001] EWCA Crim 1024.

146 Under Article 46 ECHR.

147 Lord Goldsmith, HL Deb., 5 July 2004, col. 563.

injuries would usually lead to a charge of common assault could more appropriately be charged as actual bodily harm. The effect will be that where a child has been assaulted by an adult, leaving grazes, scratches, abrasions, minor bruising, swelling, superficial cuts or a black eye, the offence charged will in future usually be assault occasioning actual bodily harm rather than common assault. This will bring the distinction between common assault and other more serious offences more closely into line with the distinction between treatment which crosses the Article 3 threshold and that which does not. If the proposed change is implemented as indicated by the Attorney General, it is likely that in all cases concerning treatment which crosses the Article 3 threshold a more serious offence than common assault will be charged, with the result that the reasonable chastisement defence will not be available in relation to such treatment.

137. Whether the combination of the new clause 49 and the promised change in the DPP's charging standard will satisfy the Committee of Ministers that UK law now provides sufficient protection for children against treatment in breach of Article 3 is impossible to predict with certainty. The Committee of Ministers will have to decide whether the law now provides the "effective deterrence" required by the Court in light of the new clause 49 and the new charging standard. The degree of uncertainty created by the new charging standard, for example over whether reddening of the skin will be charged as a common assault or an assault occasioning actual bodily harm, will be relevant to that question. Until the new charging standard is published it is difficult for us to form a final view about whether the law now complies with the judgment in *A v UK*. However, on the assumption that the proposed changes to the CPS charging standards are implemented, so that assaults on a child causing grazes, scratches, abrasions, minor bruising, swelling, superficial cuts, more than transitory reddening of the skin or a black eye will normally be charged as assault occasioning actual bodily harm rather than common assault, **we conclude that the combination of the new clause and the new charging standard may well be considered sufficient to satisfy the UK's obligation to comply with the judgment of the European Court of Human Rights in *A v UK*, because it makes the defence unavailable in relation to treatment or punishment which is contrary to Article 3**.

Compatibility with Convention Rights

138. A separate question which arises is whether the new clause gives rise to any risk of a fresh finding of incompatibility with any Convention rights. The new clause preserves the defence of reasonable chastisement in relation to the offence of common assault. It therefore does not prohibit all corporal punishment of children. Physical rebukes to children are still capable of being lawfully made and may provide a defence to a charge of common assault. The question is whether, even assuming that the new clause complies with the judgment in *A v UK*, there is nevertheless a risk of a fresh finding of incompatibility with the Convention.

139. It is clear that corporal punishment of children is not *per se* a violation of Article 3 ECHR as it is currently interpreted. In *Costello-Roberts v UK*, for example, the Court found that the punishment of a seven year old consisting of three smacks on the buttocks, through shorts, with a soft-soled shoe causing no visible injury did not attain the minimum

level of severity to amount to a violation of Article 3.[148] The Court in *A v UK* examined the circumstances of the case in some detail in order to determine whether the level of severity of the punishment of the child was sufficient to constitute inhuman or degrading treatment. That would not have been necessary if corporal punishment amounted to a breach of Article 3 *per se*. The Commission in *A* made this explicit: having found that English law failed to provide the child with adequate and effective protection against corporal punishment which in the circumstances was degrading within the meaning of Article 3, it said that it—

> … would emphasise that this finding does not mean that Article 3 is to be interpreted as imposing an obligation on States to protect, through their criminal law, against any form of physical rebuke, however mild, by a parent of a child.[149]

140. The question remains whether the continued availability of the defence of reasonable chastisement in relation to common assault might be incompatible with Article 8 even if not incompatible with Article 3 as presently interpreted, because it provides inadequate legal protection for children's physical integrity. There is a clear precedent for a finding of a breach of Article 8 where the criminal law does not include an offence which is necessary in order to protect vulnerable people against exploitation: in *X and Y v The Netherlands*, the Court held that there had been a violation of the right to physical and moral integrity under Article 8 because the criminal law failed to provide adequate protection for mentally handicapped people against sexual abuse.[150] However, in the context of corporal punishment of children, the Court has expressly left open the question whether disciplinary measures which did not breach Article 3 could nevertheless breach Article 8.[151]

141. The trend in other international monitoring bodies, including the Committee on the Rights of the Child, is increasingly to emphasise the human dignity of the child as the foundational value in the protection of children's rights, and to recognize a child's right to physical integrity. These developments, which we consider further below, are likely increasingly to influence the Court of Human Rights in its interpretation of Convention standards in cases concerning children. The Court is increasingly referring to the CRC in the course of its judgments in such cases: in *Sahin v Germany*, for example, the Court recently said "the human rights of children and the standards to which all governments must aspire in realizing these rights for all children are set out in the Convention on the Rights of the Child".[152] Although the Court has yet to address the gaps between the ECHR's protection for the rights of children and that provided by the CRC, **we think it is likely, given the near-universal acceptance of the standards contained in the CRC, that the Court will begin to close the gaps in protection by interpreting Convention standards in light of the CRC, and that, eventually, the continued availability of the defence of reasonable chastisement may be held to be incompatible with Convention rights**.

148 (1995) 19 EHRR 112.

149 *A v UK*, Commission Opinion, para. 55, (1999) 27 EHRR 611 at 624.Only one member of the Commission, Mr. J. Loucaides, was of the view that corporal punishment of children, regardless of the degree of its severity or of the injuries caused, is by its very nature inhuman and degrading treatment: see his Concurring Opinion, ibid. at 627–628.

150 (1986) 8 EHRR 235.One member of the Commission in *A v UK* would have preferred to deal with that case under Article 8 rather than Article 3: see Concurring Opinion of Mr. E.A. Alkema (1999) 27 EHRR 611 at 628–629.

151 See for example *Costello-Roberts*, above. In *A v UK*, the Court, having found a violation of Article 3, found it unnecessary to examine whether the inadequacy of the legal protection provided to the child also breached his right to respect for his private life under Article 8.

152 Application 30943/96, July 2003, at paras 39–41, 64.

142. We noted above that the claim of discrimination in the enjoyment of rights was not pursued in *A v UK*. However, as we commented in our report on the CRC, there is no defence in UK law that a "reasonable" degree of physical assault on adults is permissible.[153] Article 2 CRC requires States to "take all appropriate measures to ensure that the child is protected against all forms of discrimination". In maintaining this distinction between the protection offered to children and adults by the law on assault, the UK position clearly requires justification. Such justification needs to be made in the context of the clear presumption that children, who are more vulnerable to violence for the most part than adults, would generally be assumed to deserve greater, rather than lesser protection from assault. As we said in another Report last year, in important respects children are not as equal as adults.[154] Children are vulnerable to exploitation and oppression in ways that adults are not. They need protection, including from themselves, but it is certainly not self-evident that such protection requires them to be deprived of the protection that the law offers to everyone else. We therefore think it is likely that in a future case before the European Court of Human Rights, the UK will be required under Article 14 ECHR to justify the less favourable treatment of children under the law of common assault.

143. **We conclude that, on the current state of Convention law, there is no present incompatibility between UK law, as amended by the new clause 49, and Convention rights. We consider that, in light of recent developments in the interpretation of other international instruments by the relevant monitoring bodies, and the increasing tendency of the Court of Human Rights to look to the CRC as a source of standards concerning children, there is a risk that in a future case the European Court of Human Rights will find that the continued availability of the reasonable chastisement defence to the offence of common assault is in breach of a child's right to dignity and personal integrity under Article 3, their right to physical integrity under Article 8, and/or their right not to be discriminated against compared to adults in relation to their enjoyment of those rights on grounds of their age. No such incompatibility exists at present, however**.

Compatibility with the UN Convention on the Rights of the Child

144. When we concluded in our Report on the UN Convention on the Rights of the Child that retaining the defence of reasonable chastisement was incompatible with the UK's international obligations, we did so on the basis that the CRC, and in particular Article 19, requires the UK to prohibit all physical punishment of children in the family.

145. In the course of the Lords debate on new clause 49, however, it was argued on behalf of those supporting the amendment that the new clause meets the UK's obligations under the CRC, which does not go so far as to require states to introduce legislation "criminalizing" all parental smacking of children.[155]

146. This is an argument that we did not expressly consider at the time of our earlier Report. In view of the obvious importance of this matter, we have revisited the assumption

153 Tenth Report, Session 2002–03, op cit., para 96.

154 Ninth Report, Session 2002–03, op cit., para 42.

155 HL Deb., 5 July 2004, cols. 527–528.

made in our earlier Report, by going back to reconsider all of the relevant materials in order properly to advise Parliament whether the new clause 49 satisfies the UK's obligations under the CRC, or falls short of fulfilling those obligations.

The relevant provisions of the CRC

147. The two most relevant provisions of the CRC are Articles 19 and 37(a).

148. Article 19 CRC contains the obligation to take measures to protect children from all forms of physical or mental violence. It provides, so far as relevant:

> 19. 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
>
> 19.2 Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment, described heretofore, and, as appropriate, for judicial involvement.

149. Article 37 contains the equivalent of Article 3 ECHR:

> 37. States Parties shall ensure that:
>
> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Interpretation of the CRC in Reports of the Committee on the Rights of the Child

150. The UN Committee on the Rights of the Child was established under Article 43 CRC "for the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention". States Parties submit to the Committee "reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights".[156] The Committee considers such reports from states and itself reports to the General Assembly, through the Economic and Social Council.[157] The Committee may make suggestions and general recommendations to States Parties in its reports.[158]

151. The Committee on the Rights of the Child has consistently stated that the CRC requires prohibition of all corporal punishment of children, including in the home. In its February 1995 Concluding Observations on the United Kingdom, the Committee observed—

156 United Nations Convention on the Rights of the Child, Article 44(1).

157 ibid., Article 44(5).

158 ibid., Article 45(d).

> 16. The Committee is disturbed about the reports it has received on the physical and sexual abuse of children. In this connection, the Committee is worried about the national legal provisions dealing with reasonable chastisement within the family. The imprecise nature of the expression of reasonable chastisement as contained in these legal provisions may pave the way for it to be interpreted in a subjective and arbitrary manner. Thus, the Committee is concerned that legislative and other measures relating to the physical integrity of children do not appear to be compatible with the provisions and principles of the Convention, including those of its articles 3, 19 and 37. …
>
> 31. The Committee is also of the opinion that additional efforts are required to overcome the problem of violence in society. The Committee recommends that physical punishment of children in families be prohibited in the light of the provisions set out in articles 3 and 19 of the Convention. In connection with the child's right to physical integrity, as recognized by the Convention, namely in its articles 19, 28, 29 and 37, and in the light of the best interests of the child, the Committee suggests that the State Party consider the possibility of undertaking additional education campaigns. Such measures would help to change societal attitudes towards the use of physical punishment in the family and foster the acceptance of the legal prohibition of the physical punishment of children.[159]

152. In its October 2002 Concluding Observations on the UK, the Committee on the Rights of the Child made further comment and recommendations about corporal punishment of children within the family. It said:

> 35. … In light of its previous recommendation (ibid. [1995 Observations], para. 31), the Committee deeply regrets that the State Party persists in retaining the defence of 'reasonable chastisement' and has taken no significant action toward prohibiting all corporal punishment of children in the family.
>
> The Committee is of the opinion that governmental proposals to limit rather than to remove the 'reasonable chastisement' defence do not comply with the principles and provisions of the Convention and the aforementioned recommendations, particularly since they constitute a serious violation of the dignity of the child. Moreover they suggest that some forms of corporal punishment are acceptable and therefore undermine educational measures to promote positive and non-violent discipline.
>
> 36. The Committee recommends that the State Party:
>
> a) with urgency adopt legislation throughout the State Party to remove the 'reasonable chastisement' defence and prohibit all corporal punishment in the family and in any other contexts not covered by existing legislation;
>
> b) promote positive, participatory and non-violent forms of discipline and respect for children's equal right to human dignity and physical integrity, engaging with children and parents and all those who work with and for them, and carry out public education programmes on the negative consequences of corporal punishment.

153. The argument of the proponents of the new clause 49 is that there is no incompatibility with Article 19 CRC because it deliberately leaves a wide area of

159 Concluding Observations of the Committee on the Rights of the Child: United Kingdom, February 1995 printed in our Tenth Report, Session 2002–03, op cit., Annex 6.

discretionary judgment to the state to choose the appropriate means of providing protection against violence, not only through legislation but also through administrative, social and educational measures. It is therefore open to a state to use a combination of legislative and other means such as public education campaigns to provide the necessary protection for children. Neither Article 19 nor Article 37(a) impose an obligation to pass legislation criminalizing all parental hitting of children, including even "disciplinary acts of battery that cause no mental or physical harm".

Conclusion on compatibility with the CRC

154. We have given this argument very careful consideration. We accept that there is nothing on the face of the CRC which requires states to ban corporal punishment in the family. We also accept that Article 19 on its face leaves a degree of discretion to states to decide what type of measures, or combination of measures, to adopt in order to protect children from violence.

155. However, we find it impossible to avoid the conclusion that the interpretation of Article 19 by the Committee on the Rights of the Child is unequivocal: corporal punishment is a serious violation of both the dignity and the physical integrity of the child and the "appropriate" measures which States are required to take in order to protect children from all forms of physical or mental violence include *both* legislative measures prohibiting all corporal punishment within the family *and* public education programmes. We consider this to be clear from:

a) para. 31 of the 1995 Concluding Observations on the UK which envisages educational measures *in addition to* a legal prohibition of physical punishment in families ("such measures would help to … foster the acceptance of the legal prohibition of the physical punishment of children");

b) paras 35 and 36 of the 2002 Concluding Observations on the UK, which show the Committee to consider legal prohibition and educational measures to be complementary (anything less than removal of the reasonable chastisement defence will "suggest that some forms of corporal punishment are acceptable and therefore undermine educational measures to promote positive and non-violent discipline").

156. We do not think that the very clearly expressed views of the Committee on the Rights of the Child can be ignored. As the only body charged with monitoring compliance with the obligations undertaken by States in the CRC, its interpretations of the nature and extent of those obligations are authoritative. In our view, the Committee has consistently made clear that corporal punishment of children is a serious violation of the child's right to dignity and physical integrity, and that states must both introduce a legislative prohibition of such punishment at the same time as measures for educating the public about the negative consequences of corporal punishment. In the light of this, we do not consider that there is any room for discretion as to the means of implementing Article 19 CRC as interpreted by the Committee on the Rights of the Child: it requires the reasonable chastisement defence to be abolished altogether.

ICESCR and European Social Charter

157. We also note that the Committee's consistent recommendation that corporal punishment of children be prohibited has influenced the monitoring bodies of other human rights treaties by which the UK is bound.

158. The UN Committee on Economic, Social and Cultural Rights has interpreted the International Covenant on Economic, Social and Cultural Rights as imposing the same obligation to prohibit physical punishment of children in families. In its Concluding Observations on the UK of May 2002, it commented—

> 36. Given the principle of the dignity of the individual, which provides the foundation for international human rights law (see paragraph 41 of the Committee's General Comment No. 13) and in the light of article 10.1 and 10.3 of the Covenant, the Committee recommends that the physical punishment of children in families be prohibited, in line with the recommendations of the Committee on the Rights of the Child (see paragraph 31 of the 1995 concluding observations of that Committee).

159. The European Committee of Social Rights, which monitors compliance with the European Social Charter, has also interpreted the relevant provision[160] of that instrument as requiring a prohibition of physical punishment of children, in light of the position under the CRC. In its most recent Conclusions on the UK's compliance with the relevant provision of the Charter, the Committee

> … notes that not all forms of corporal punishment are prohibited within the family. The Committee refers to its general observations on Article 17 in the General Introduction and decides to defer its conclusion on this point pending more information from the British Government on the situation and on its intentions in this regard.[161]

160. In the "General Observations" referred to in its Conclusions on the UK, the Committee stated that, whereas it had not previously criticised any Contracting Party for not clearly prohibiting corporal punishment of children, it had now re-examined the implementation of Article 17 of the European Social Charter in the light of national legislation and international conventions.[162] After reviewing those developments, it said:

> The Committee attaches great importance to the protection of children against any form of violence, ill-treatment or abuse, whether physical or mental. Like the European Court of Human Rights it emphasises the fact that children are particularly vulnerable and considers that one of the main objectives of Article 17 is to provide adequate protection for children in this respect … The Committee does not find it acceptable that a society which prohibits any form of physical violence between adults would accept that adults subject children to physical violence. The Committee does not consider that there can be any educational value in corporal punishment of children that cannot otherwise be achieved. Moreover, in a field where the available statistics show a constant increase in the number of cases of ill-treatment of children reported to the police and prosecutors, it is evidence that additional measures to come

160 Article 17 European Social Charter. The full text of the European Social Charter can be found at http://conventions.coe.int/Treaty/en/Treaties/html/035.htm

161 European Committee of Social Rights, Conclusions XV-2 (United Kingdom) (2001).

162 ibid., Conclusions XV-2, Volume 1, General Introduction (2001).

> to terms with this problem are necessary … For these reasons, the Committee considers that Article 17 requires a prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere. It furthermore considers that any other form of degrading punishment or treatment of children must be prohibited in legislation and combined with adequate sanctions in penal or civil law.

161. **We conclude that, although clause 49 achieves a greater degree of compatibility with the UK's obligations under the CRC by restricting the scope of the reasonable chastisement defence, by preserving it as a defence to common assault it does not achieve full compatibility with the UK's obligations under the CRC as interpreted by the UN Committee on the Rights of the Child, or under the ICESCR, as interpreted by the Committee on Economic, Social and Cultural Rights, or under the European Social Charter, as interpreted by the European Committee of Social Rights**.

Whether there is any conflict between the UK's international obligations

162. During the debate on the reasonable chastisement amendment in the House of Lords, two human rights arguments were made in support of restricting the scope of the reasonable chastisement defence rather than abolishing it altogether:

i) that legal certainty requires a partial rather than a total repeal of the defence; and

ii) that a complete ban on corporal punishment within the family would constitute a disproportionate interference with family life.

163. We accept the possibility that international obligations may conflict and that, as a matter of Convention law, if there is a conflict between ECHR obligations and other subsequently assumed international human rights obligations the ECHR obligations prevail.[163] We have therefore considered whether there is any conflict between the UK's obligation to secure protection for Convention rights and its obligations under the CRC, ICESCR and European Social Charter which would prevent it from implementing the recommendation of the Committee on the Rights of the Child.

Legal certainty

164. Proponents of the new clause argued that considerations of legal certainty militated in favour of a partial repeal of the reasonable chastisement defence rather than a complete repeal. A total prohibition of corporal punishment, it was argued, would give rise to unacceptable uncertainty because the question of where to draw the line between "light smacking" that ought not to be criminalized and more heavy-handed smacking which should be criminal would be left to the discretion of the prosecuting authorities. This would lead to unacceptable uncertainty about the scope and definition of the law. By contrast, it was argued, the partial repeal of the reasonable chastisement defence provided

163 See *Matthews v UK* (1999) 28 EHRR 361 at paras 31–35 (the obligation to "secure" Convention rights in Article 1 ECHR means that states are responsible under the Convention for the consequences for Convention rights of international treaties into which it subsequently enters).

greater legal certainty by clarifying that parents would only be liable to prosecution if they caused their child "harm".

165. Legal certainty is clearly required by human rights law. Under the ECHR, interferences with liberty under Article 5 must always be "lawful", which means having a legal basis which is sufficiently accessible, precise and foreseeable, such as to enable individuals to foresee the consequences of their action. Similarly, interferences with the right to respect for home and family life must be "in accordance with the law" under Article 8(2), which incorporates the same requirements of foreseeability and accessibility. The guiding principle is that individuals must be able to regulate their conduct with a reasonable degree of certainty as to the legal consequences of acting one way rather than another.

166. We have considered this argument carefully but **we are not persuaded either that a complete prohibition of corporal punishment fails to provide a reasonable degree of legal certainty, or that new clause 49 provides any greater degree of legal certainty**.

167. There is general agreement that the present law is unsatisfactory because it leads to too much uncertainty about what exactly constitutes "reasonable chastisement". In our view the new clause perpetuates this uncertainty, because it requires proof of harm and there is a great deal of uncertainty about what degree of harm is required. For example, will hitting resulting in a reddening of the skin be charged as common assault or actual bodily harm, and for how long need it subsist in order for it to cross the necessary threshold?[164]

168. We consider that a total prohibition of corporal punishment provides a greater degree of legal certainty than either the present law or the new clause restricting the scope of the reasonable chastisement defence. Complete repeal sends a very clear message that any parent who smacks their child is liable to prosecution. Whether they will in fact be prosecuted will of course depend on how the DPP exercises his prosecutorial discretion in such cases. We do not consider the mere existence of this discretion to be incompatible with the requirements of legal certainty. A degree of prosecutorial discretion is inevitable in relation to all criminal offences. The enforcement of the law of assault between adults already requires prosecutorial discretion to be exercised in individual cases. If this is compatible with the requirements of legal certainty (and there is no suggestion that it suffers from a lack of legal certainty), we find it difficult to see why applying the same law as between adults and children is any less legally certain. We also note that significant changes to the charging standard by the DPP, which has the effect of making certain categories of case more serious than before, is not regarded by the proponents of the new clause as contrary to the requirements of legal certainty, despite the fact that these changes will be brought about not by Parliament making a policy choice but by an exercise of prosecutorial policy-making.

169. **We therefore do not agree that abolishing the defence of reasonable chastisement offends the principle of legal certainty.** We are not persuaded that abolishing the defence leaves the scope and definition of the law to the discretion of the prosecuting authorities. The scope of the law will be clear: all physical assaults by one person on another will be

164 See Lord Goldsmith, HL Deb., 5 July 2004, col. 563.

treated equally, and will be liable to prosecution taking account of the circumstances of each individual case. The prosecutor will not be left to define the law, any more than he is left to define the law of assault as it applies between adults. This will involve the ordinary exercise of prosecutorial discretion.[165] As the DPP said in evidence, "the reality is that, just as most minor assaults against adults are not prosecuted, I suspect most minor assaults against children would not be either." Technically, any adult who taps another adult on the shoulder without that person's consent is liable to prosecution for assault. We are not aware of any practice on the part of the CPS of bringing inappropriate prosecutions for technical assault between adults, or of any single instance of such a prosecution. The application of a criminal law which is very broad in scope is properly regulated through the exercise of prosecutorial discretion. The same would be true of the application of the same law if its protection were extended to children within the family.

170. We also agree with the view of the European Committee of Social Rights, in its General Observations referred to above, that a complete prohibition achieves greater legal certainty than a partial prohibition—

> To prohibit any form of corporal punishment of children is an important measure for the education of the population in this respect in that it gives a clear message about what society considers to be acceptable. It is a measure that avoids discussions and concerns as to where the borderline would be between what might be acceptable corporal punishment and what is not.

171. **There is in our view no reason rooted in considerations of legal certainty which should prevent implementation of the recommendation of the Committee on the Rights of the Child that the reasonable chastisement defence be abolished**.

Interference with family life

172. Article 8 ECHR guarantees respect for private and family life, and requires interferences to be justified by a pressing social need. The argument by proponents of the new clause is that abolishing the defence of reasonable chastisement altogether will lead to disproportionate interference with family life.

173. This question has already been answered by the European Commission of Human Rights, in *Seven Individuals v Sweden*.[166] Sweden amended its criminal law so as to make the law of assault which applies between adults apply to children also. This extension of the law of assault was challenged by parents who claimed that the scope of the criminal law of assault failed to respect their right to respect for private and family life. The Commission rejected the complaint as manifestly ill-founded and therefore inadmissible. It held—

> … the applicants have not shown that the provisions of Swedish law criminalizing the assault of children are unusual or in any way draconian. The fact that no distinction is made between the treatment of children by their parents and the same treatment applied to an adult stranger cannot, in the Commission's opinion, constitute an

165 The Director of Public Prosecutions was quoted in *The Times* on 12 July 2004 as saying "Prosecutors have to make these decisions every day; if someone assaults you, they have to decide whether to charge a common assault, if there is no injury, or a more serious assault." In our view exactly the same can be said of the decision whether to charge for common assault or not to charge at all.

166 (1982) 29 DR 104 (E Comm).

> 'interference' with respect for the applicant's private and family lives since the consequences of an assault are equated in both cases.
>
> Nor does the mere fact that legislation, or the state of the law, intervenes to regulate something which pertains to family life constitute a breach of Article 8(1) unless the intervention in question violates the applicants' right to respect for their family life. The Commission finds that the scope of the Swedish law of assault and molestation is a normal measure for the control of violence and that its extension to apply to the ordinary physical chastisement of children by their parents is intended to protect potentially weak and vulnerable members of society.[167]

174. Although this is a relatively old inadmissibility decision of the Commission, and therefore by no means entirely disposes of the question, we think it likely that the Court of Human Rights would today reach the same conclusion in any similar Article 8 challenge to a law which removed the defence of reasonable chastisement. Since 1982 when this case was decided, the Convention on the Rights of the Child has been adopted and almost universally accepted, and, for the reasons given above, we consider that the Court of Human Rights would be influenced by the content of the Convention's protections for children, and the Committee's interpretation of those provisions.

175. **There is therefore in our view no reason rooted in considerations of disproportionate interference with family life which should prevent implementation of the recommendation of the Committee on the Rights of the Child that the reasonable chastisement defence be abolished**.

Conclusion

176. **We have considered whether there is any conflict between the UK's obligations under the CRC, ICESCR and European Social Charter on the one hand and its obligations under the ECHR on the other which would prevent it from complying with the recommendation of the CRC Committee with regard to the corporal punishment of children. We conclude that there is not**.

177. **We therefore recommend that Clause 49 of the Bill be amended as follows:**

Replace subsection (1) with the following new subsection—

'(1) Reasonable chastisement is not a defence to any charge involving battery of a child.'.

Leave out subsection (2).

In subsection (3), leave out the words 'causing actual bodily harm to the child'.

Leave out subsection (4).

167 ibid., at p. 114.

Formal Minutes

Wednesday 8 September 2004

Members Present:

Jean Corston MP, in the Chair

Lord Bowness	Mr Kevin McNamara MP
Lord Campbell of Alloway[1]	Mr Richard Shepherd MP
Lord Judd	Mr Paul Stinchcombe MP
Lord Lester of Herne Hill	
Lord Plant of Highfield	

The Committee deliberated.

* * * * *

Draft Report [Children Bill], proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 20 read and agreed to.

Question put, That paragraph 21 stand part of the report.

The Committee divided:

Content, 5	Not Content, 2
Jean Corston MP	Lord Campbell of Alloway
Lord Judd	Lord Lester of Herne Hill
Mr Kevin McNamara MP	
Lord Plant of Highfield	
Mr Paul Stinchcombe MP	

Paragraphs 22 to 140 read and agreed to.

Paragraph 141 read as follows:

"141. The trend in other international monitoring bodies, including the Committee on the Rights of the Child, is increasingly to emphasise the human dignity of the child as the foundational value in the protection of children's rights, and to recognize a child's right to physical integrity. These developments, which we consider further below, are likely

1 See Appendix 6

increasingly to influence the Court of Human Rights in its interpretation of Convention standards in cases concerning children. The Court is increasingly referring to the CRC in the course of its judgments in such cases: in Sahin v Germany, for example, the Court recently said "the human rights of children and the standards to which all governments must aspire in realizing these rights for all children are set out in the Convention on the Rights of the Child". Although the Court has yet to address the gaps between the ECHR's protection for the rights of children and that provided by the CRC, **we think it is likely, given the near-universal acceptance of the standards contained in the CRC, that the Court will begin to close the gaps in protection by interpreting Convention standards in light of the CRC, and that, eventually, the continued availability of the defence of reasonable chastisement may be held to be incompatible with Convention rights**.".

Amendment proposed, in line 1, to leave out from "The" to the end of the paragraph and insert, "European Court of Human Rights increasingly makes reference to the CRC in its interpretation of Convention standards in cases concerning children. **We believe, for the reasons set-out below, that the new clause 49 complies with the CRC, and therefore that the European Court of Human Rights would find that English law and practice meet the standards of the ECHR read alone and together with the CRC.**"—(*Lord Lester of Herne Hill.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 2	Not Content, 5
Lord Lester of Herne Hill	Jean Corston MP
Lord Plant of Highfield	Lord Campbell of Alloway
	Lord Judd
	Mr Kevin McNamara MP
	Mr Paul Stinchcombe MP

Paragraph 141 agreed to.

Motion made, and Question put, to leave out paragraph 142 and insert the following paragraphs in its place:

"142. Article 2 CRC requires States to, "take all appropriate measures to ensure that the child is protected against all forms of discrimination". Proponents of a ban on light smacking by parents have construed this Article to mean that there must be no distinction in the law on assault between children and adults. We are not persuaded by this argument. The principle of equal protection under the law is a vital constitutional principle, but it is not a mechanistic principle requiring literal equality in all circumstances. A difference in treatment may be justified by a difference in context. A parent disciplining a child cannot be equated with one adult hitting another adult. It is universally accepted that parents are responsible for disciplinary action in relation to their children as part of their child-rearing obligations, whereas adults do not have the same responsibilities towards each other. We

do not consider that the new clause 49 creates or perpetuates discrimination between children and adults.

142A. We note that even the proponents of an absolute ban do not seek to prosecute parents who smack their children without causing physical, emotional or psychological harm. However, we agree with the Attorney General that to leave fundamental policy decisions to the prosecutor is to breach the principle of legal certainty anchored both in international human rights law and the common law." —(*Lord Lester of Herne Hill.*)

The Committee divided:

Content, 2	Not Content, 5
Lord Lester of Herne Hill	Jean Corston MP
Lord Plant of Highfield	Lord Campbell of Alloway
	Lord Judd
	Mr Kevin McNamara MP
	Mr Paul Stinchcombe MP

Paragraph 142 agreed to.

Paragraph 143 read as follows:

143. **We conclude that, on the current state of Convention law, there is no present incompatibility between UK law, as amended by the new clause 49, and Convention rights. We consider that, in light of recent developments in the interpretation of other international instruments by the relevant monitoring bodies, and the increasing tendency of the Court of Human Rights to look to the CRC as a source of standards concerning children, there is a risk that in a future case the European Court of Human Rights will find that the continued availability of the reasonable chastisement defence to the offence of common assault is in breach of a child's right to dignity and personal integrity under Article 3, their right to physical integrity under Article 8, and/or their right not to be discriminated against compared to adults in relation to their enjoyment of those rights on grounds of their age. No such incompatibility exists at present, however**.

Amendment proposed, in line 3, to leave out from "Convention rights." to the end of the paragraph.—(*Lord Campbell of Alloway*.)

Question put, That the Amendment be made.

The Committee divided:

Content, 3	Not Content, 4
Lord Campbell of Alloway	Jean Corston MP
Lord Lester of Herne Hill	Lord Judd
Lord Plant of Highfield	Mr Kevin McNamara MP
	Mr Paul Stinchcombe MP

Another Amendment proposed, in line 11, to leave out the words "No such incompatibility exists at present, however.".—(*Lord Judd.*)

The Committee divided:

Content, 3	Not Content, 5
Lord Judd	Jean Corston MP
Mr Kevin McNamara MP	Lord Campbell of Alloway
Lord Plant of Highfield	Lord Lester of Herne Hill
	Mr Richard Shepherd MP
	Mr Paul Stinchcombe MP

Paragraph 143 agreed to.

Paragraphs 144 to 152 read and agreed to.

Motion made, and Question put, to leave out paragraphs 153 to 156 and insert the following paragraphs in their place:

"153. In our view, it is essential to have regard to the object and purpose of Article 19 CRC and to the language in which the relevant provisions are expressed. Its preamble emphasises that "the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community." It recognizes that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding." It notes that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".

154. Article 2.2 requires the States Parties to take all appropriate measures to ensure that "the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians or family members." In General Comment No.5 (2003),[1] the Rights of the Child Committee

1 General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44), 27 November 2003, CRC/GC/2003/5, (in relation to Article 2 CRC)

emphasised that "the application of the non-discrimination principle of equal access to rights does not mean identical treatment." Article 3 makes the best interests of the child the primary consideration.

155. Article 5 obliges the States Parties to respect "the responsibilities, rights and duties of parents … to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention".

156. The provisions dealing with child violence are contained in Article 19 and Article 37. Article 19.1 requires States Parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. The Rights of the Child Committee has not yet published General Comments which read and give effect to this text.

156A. However, in our view, the reference to "appropriate legislative, administrative, social and educational measures" indicates that the State has a wide area of discretion in deciding the choice of means appropriate to ensure effective child protection against violence. Legislative measures are not the only measures which may be chosen. This is also made clear in Article 19.2 which refers to effective procedures for the establishment of social programmes. As regards the meaning of "violence" in Article 19.1, and "child maltreatment" in Article 19.2, neither the object and purpose nor the language of those provisions suggests that mild parental smacking is to be regarded as a form of "physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse". Plainly, mild parental smacking does not constitute "torture or other cruel, inhuman or degrading treatment or punishment" within the meaning of Article 37 (a) CRC. To suggest otherwise would be to weaken the pressing need, in this country and across the world, to take effective action against the serious social evils of violence and child maltreatment, which are an affront to human dignity. It would also fail to respect what Article 5 CRC describes as the "responsibilities, rights and duties of parents".

156B. Read literally, the observations of the Rights of the Child Committee, set out above, appear to suggest that only an absolute ban on smacking, however trivial and transitory the harm to the child, will comply with the requirements of Article 19.1. Again read literally, the Committee's approach appears to make no allowance for the wide area of discretionary judgment left to States Parties as to the choice of means of achieving the aims of the CRC. The Committee acknowledges[2] that it "cannot prescribe in detail the measures which each or every State Party will find appropriate to ensure effective implementation of the Convention." The very diversity of the legal and social cultures of the countries of origin of the members of the Committee[3] suggests that the Committee does not seek to impose a rigid template upon the States Parties, requiring loving and caring parents to be criminalised when they smack their children in a way that does not cause harm. The views

2 ibid., para. 26.

3 Saudi Arabia, Qatar, Kenya, Thailand, Italy, The Netherlands, Algeria, Egypt, Tunisia, Germany, Republic of Korea, Argentina, Paraguay, Burkina Faso, Brazil, Norway, Jamaica and Serbia and Montenegro.

expressed by the body charged with examining the progress made by the States Parties in achieving the realisation of the obligations undertaken in the CRC are to be treated with great respect. However, the Rights of the Child Committee is not a judicial body, and its observations do not constitute the equivalent of a binding legal judgment from the European Court of Human Rights. Nor, as we have observed, has the Committee published General Comments on the scope and effect of Article 19 and Article 37.

156C. It is unclear whether the Committee consider that the international standards contained in the CRC require States to compel parents to risk the infliction of criminal sanctions for mild smacking in a disciplinary context. If this is so, we respectfully disagree with the proposition that such an absolutist position is required by the CRC or any other international human rights instrument. In our view, such an approach would lack a sense of proportion. If, on the other hand, the Committee consider that mild smacking should be criminalised but prosecuted only at the prosecutor's unfettered discretion, then, like the Attorney General, we would regard such an approach as being in breach of the principle of legal certainty, which is an important general principle of international human rights law. In short, it would seem that the Committee's approach is not based upon a true reading to the CRC.

156D. We venture to express our hope that the Rights of the Child Committee might develop its thinking further in the light of the parliamentary debates on the Children Bill and of this report. There are important issues of legal and social policy at stake that do not, in our view, lend themselves to uniform solutions in all States Parties. In any event, we consider the Bill as amended, together with the revised charging standards, and what Article 19.1 describes as "appropriate administrative, social and educational measures", to be fully compatible with the obligations undertaken by the United Kingdom under the CRC.

156E. We note that, on 12 February 2003, the UN Secretary General appointed Paulo Sergio Pinheiro of Brazil as the independent expert to lead a global study on violence against children. The purpose of the study, which will be guided by the CRC, is to provide an in-depth picture of the prevalence, nature and causes of violence against children, and to make recommendations for consideration by Member States, the UN system and civil society for appropriate action, including effective remedies and preventive and rehabilitative measures at the national and international levels. We look forward to studying the outcome of this study, and hope that this report will be taken into account." —(*Lord Lester of Herne Hill.*)

The Committee divided:

Content, 3	Not Content, 5
Lord Lester of Herne Hill	Jean Corston MP
Lord Plant of Highfield	Lord Campbell of Alloway
Mr Richard Shepherd MP	Lord Judd
	Mr Kevin McNamara MP
	Mr Paul Stinchcombe MP

Paragraph 153 to 156 agreed to.

Motion made, and Question put, to leave out paragraphs 157 to 161 and insert the following paragraph in their place:

"153. We note that the ICESCR and the European Social Charter also state that violence against children must be legislated against. For the reasons given above, the Committee is of the view that the new clause 49 is compatible both with the ICESCR and with the European Social Charter."—(*Lord Lester of Herne Hill.*)

The Committee divided:

Content, 2	Not Content, 4
Lord Lester of Herne Hill	Jean Corston MP
Lord Plant of Highfield	Lord Judd
	Mr Kevin McNamara MP
	Mr Paul Stinchcombe MP

Paragraphs 157 to 163 read and agreed to.

Motion made, and Question put, to leave out paragraphs 164 to 171 and insert the following paragraph in their place:

"164. **We agree with the Attorney General that the new clause 49 complies with the requirement of legal certainty, and that the criminalisation of all assaults upon children by adults, leaving the decision whether to prosecute parents to the discretion of the Director of the Public Prosecutions, would not fulfil the requirement of legal certainty."**—(*Lord Lester of Herne Hill.*)

The Committee divided:

Content, 2	Not Content, 4
Lord Lester of Herne Hill	Jean Corston MP
Lord Plant of Highfield	Lord Judd
	Mr Kevin McNamara MP
	Mr Paul Stinchcombe MP

Paragraph 164 read and agreed to.

A paragraph—(*Lord Judd*)—brought up and read as follows:

"It can equally be argued that considerations of legal certainty militate in favour of a total repeal of the reasonable chastisement defence. A total prohibition of corporal punishment would be legally clear and there would be legal certainty in that smacking of a child would be unlawful. Parents would not have to form an opinion as to what is "light smacking" and

what is more heavy handed smacking. Such a distinction is, in our view, subjective and focuses on the intentions of the accused with, inevitably, different results in difference cases. This, we would argue, results in legal uncertainty. A complete ban is precise, clear and the consequences of its breach are foreseeable."

Question put, That the paragraph be read a second time.

The Committee divided:

Content, 3	Not Content, 4
Lord Judd	Jean Corston MP
Mr Kevin McNamara MP	Lord Lester of Herne Hill
Mr Paul Stinchcombe MP	Lord Plant of Highfield
	Mr Richard Shepherd MP

Paragraphs 165 to 171 read and agreed to.

Motion made, and Question put, to leave out paragraphs 172 to 176 and insert the following paragraph in their place:

"172. **We conclude that the new clause 49 meets the UK's obligations under the ECHR, the CRC, the ICESCR and the European Social Charter.**"—(*Lord Lester of Herne Hill.*)

The Committee divided:

Content, 2	Not Content, 4
Lord Lester of Herne Hill	Jean Corston MP
Lord Plant of Highfield	Lord Judd
	Mr Kevin McNamara MP
	Mr Paul Stinchcombe MP

A paragraph—(*Lord Judd*)—brought up and read as follows:

"**We therefore recommend that clause 49 of the Bill be amended as follows:**

Replace subsection (1) with the following new subsection—

'(1) Reasonable chastisement is not a defence to any charge involving battery of a child.'.

Leave out subsection (2).

In subsection (3), leave out the words 'causing actual bodily harm to the child'.

Leave out subsection (4).".

Question put, That the paragraph be read a second time.

The Committee divided:

Content, 4	Not Content, 3
Jean Corston MP	Lord Lester of Herne Hill
Lord Judd	Lord Plant of Highfield
Mr Kevin McNamara MP	Mr Richard Shepherd MP
Mr Paul Stinchcombe MP	

Paragraph added (now paragraph 177).

Summary read as follows:

"In this Report, the Committee considers the Children Bill as introduced to the House of Commons on 19 July 2004. It does so in the light of its earlier Report on the Bill as introduced to the House of Lords, the Government's responses to questions it raised in relation to that version, further oral evidence taken from the Minister for Children, Young People and the Family, the amendments made to the Bill by the House of Lords, and its two Reports made in 2003 on The Case for a Children's Commissioner for England and The UN Convention on the Rights of the Child.

Part 1 of the Bill establishes the office of a Children's Commissioner for England. The Committee concludes that, with some relatively minor reservations, the Bill now provides a statutory basis for a genuinely independent, rights-based, strategically-focused commissioner for children and young people, and the framework for an office which can help achieve the aim of making the interests of the child a primary concern in the work of the agencies of the state. It warmly welcomes this initiative.

Parts 2 and 3 of the Bill aim to strengthen the legal framework for achieving better co-operation between agencies delivering children's services. The Committee welcomes these provisions as an advance in fulfilling the Government's important positive obligations under Articles 2, 3 and 8 of the ECHR to take steps to protect the lives of children, to protect them from inhuman and degrading treatment, and to protect their physical integrity, but has concerns about whether the duties are sufficiently robust to prevent future breaches of those positive obligations.

The Committee recommends that the duty on "partner agencies" to co-operate should be clarified to make quite explicit that it is an ongoing duty.

It recommends that the duty imposed on agencies to safeguard and promote the welfare of children should be strengthened to make it a direct rather than a procedural duty. It further recommends that this duty should be directly applied to private bodies providing services to children under contract to public authorities.

The Committee concludes that the exclusion of the immigration and asylum agencies from these duties and arrangements constitutes unjustifiable discrimination against some children on grounds of nationality.

The Committee examines the implication for the right of children to privacy of the provisions of the Bill relating to information sharing by agencies. It expresses a number of concerns about the compatibility of these provisions with Article 8 ECHR.

The Committee considers clause 49 of the Bill, restricting the defence of reasonable chastisement, in the light of its conclusions and recommendations reached in its 2003 Report on the UK's implementation of the UN Convention on the Rights of the Child.

It concludes that, on balance, the amendment to the law is likely to be considered sufficient to satisfy the UK's obligations to comply with the judgment of the Court of Human Rights in *A v UK*. However, it also concludes that, although the continuing availability of the defence of reasonable chastisement does not give rise to any present incompatibility with Convention rights, there is a risk that it will in future be held to be incompatible with the ECHR.

It concludes that the continuing availability of the defence is incompatible with the UK's obligations under the Convention on the Rights of the Child, and under other international agreements.

It concludes that there is nothing in the UK's obligations under the ECHR which prevents it from achieving full compatibility with its obligations under the CRC and other international human rights treaties.".

Amendment proposed, in line 3 of the ninth paragraph, to leave out from "*A v UK*." to the end of the Summary and add the following new paragraph:

"The effect of the amendment passed by the House of Lords, in removing the defence of reasonable chastisement for any abusive punishment of children without also outlawing reasonable parental discipline, together with the new charging standards to be issued by the Director of Public Prosecutions to prosecutors, make English law compatible with the United Kingdom's obligations under the European Convention on Human Rights and the Convention on the Rights of the Child. The alternative amendment, supported by the 'Children are Unbeatable Alliance'—a coalition of NGOs dedicated to the welfare of children—but rejected by the House of Lords, is not required to meet international human rights law.".—(*Lord Lester of Herne Hill.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 2	Not Content, 5
Lord Lester of Herne Hill	Jean Corston MP
Lord Plant of Highfield	Lord Judd
	Mr Kevin McNamara MP
	Mr Richard Shepherd MP
	Mr Paul Stinchcombe MP

Summary agreed to.

Motion made, and Question proposed, That the Report be the Nineteenth Report of the Committee to each House.—(*The Chairman.*)

Amendment proposed, after first "Report" to insert, ", with the exception of paragraphs 118 to 177,".—(*Mr Richard Shepherd.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 2	Not Content, 5
Lord Lester of Herne Hill	Jean Corston MP
Mr Richard Shepherd MP	Lord Judd
	Mr Kevin McNamara MP
	Lord Plant of Highfield
	Mr Paul Stinchcombe MP

Main Question put.

The Committee divided:

Content, 6	Not Content, 1
Jean Corston MP	Mr Richard Shepherd MP
Lord Judd	
Lord Lester of Herne Hill	
Mr Kevin McNamara MP	
Lord Plant of Highfield	
Mr Paul Stinchcombe MP	

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

Ordered, That certain papers be appended to the Report.

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

[Adjourned till Wednesday 20 October at a quarter past Four o'clock.

Appendices

1. Letter and memorandum from Rt Hon Margaret Hodge MBE MP, Minister for Children, Young People and Families, Department for Education and Skills

Thank you for your letter of the 12 May setting out questions that the Joint Committee on Human Rights has raised in connection to the Children Bill. I apologise for the delay in responding, but I wanted to be able to give a full response to reflect our deliberations on the issues raised during the Bill's Lords Committee stage, which concluded on 27 May. I have now also been able to see the content of the Committee's twelfth report, which was published on 20 May.

I attach a document that sets out our response to your questions in some detail. I hope the Committee will be reassured, in particular where we are willing to amend the Bill at a later stage to deal with some of the points raised. We have of course already agreed to strengthen the Commissioner's remit to ensure that the UNCRC has to underpin the decisions the Commissioner will take as to their work.

I would first like to make it clear that, since its ratification in 1991, the Government has always recognised the UN Convention on the Rights of the Child (UNCRC) as the international benchmark of children's rights, which should be reflected in all legislation unless there are specific, and stated reasons to do otherwise. In practice, virtually all the provisions of the UNCRC—with the exception of those regarding which the UK has entered a specific reservation—have already been implemented under statute or common law. In a number of cases, for example in the field of education, the UK provisions go further than the UN Convention requires.

GOVERNMENT RESPONSE TO QUESTIONS IN THE CHAIR'S LETTER OF 12 MAY 2004

PART 1 AND SCHEDULE 1: THE CHILDREN'S COMMISSIONER

(A) USE OF THE CRC AS A FRAMEWORK

Question 1: In light of the above, and in particular the important evidence of the existing Commissioners speaking with the benefit of their practical experience, what are the reasons for not making the CRC the overarching framework for the Children's Commissioner?

The Government's aims in drawing up the provision for a Children's Commissioner in England have been as set out in the Green Paper *Every Child Matters*. We want a post driven by the views and interests of children and young people, able to take a strategic look at how outcomes are being achieved across the country. We want the Commissioner to be independent, able to comment and make recommendations to the wide range of people and bodies that have an influence on children's lives. We do not want the Commissioner to duplicate or lessen the responsibilities those people and bodies have to children and young people. The Commissioner must not become a "last court of appeal" or otherwise get bogged down in individual cases. This latter point is a particular risk given the much larger number of children with whom the Commissioner will be dealing in comparison to the devolved Commissioners. To create a post directly equivalent to those in the devolved administrations, based around taking on individual cases and policing individual rights would I believe, dilute its effectiveness. It is my understanding from

reading the debates that many pressing us to give the Commissioner greater power share this view.

It is our wish to make children and young people's views the focus of the Commissioner's strategic overview, and avoid the role being that of taking forward a necessarily limited string of individual cases, that led us to define the role as we have. The definition of well-being in clause 2(3) of the Children Bill, is drawn from the five "outcomes" children themselves had identified as being helpful to their interests and welfare. They were the result of a wide-ranging consultation by the Children and Young People's Unit between November 2001 and February 2002. Over 2,500 children and young people contributed to the consultation and they were asked to comment on key aspects of their lives that were important to them.

The outcomes do not conflict with their rights under the CRC, but should be seen as the practical complement to those rights. As you acknowledge, in accepting amendment 39 to the Bill, we have recognised the need to ensure that the Commissioner uses the Convention in deciding what constitutes the interests of children (in other words, in reaching decisions on what issues he should address and recommendations he should make). In our view this places the CRC in its proper place, incontrovertibly framing the work of the Commissioner.

The opinions and experience of the other Commissioners in the United Kingdom have been helpful in informing both our initial proposals for the Commissioner and the changes we propose to make that I have set out below. However, as I have already noted, we have deliberately chosen to go down another route partly because we want the Commissioner to play a more strategic role in England and partly because we believe that the differing scale of the task argues for a slightly different approach.

Question 2: What is the outcome of the Government's reconsideration of that decision? In particular, how will the outcomes listed in clause 2(3) relate to the proposed duty to have regard to the CRC?

Reflecting the arguments set out above, we do not believe that changing "may" to "must" in clause 2(7) necessitates any further changes to the Commissioner's remit. We agreed to the change for the sake of clarity and to ensure that everyone, including the Commissioner himself, was in no doubt about the importance of taking into account the UNCRC and using it to inform his understanding of what constitutes children's interests. This had always been our intention.

(B) TERMS OF THE COMMISSIONER'S MANDATE

General Comments

The Government is of the view that it is establishing an independent body in accordance with the recommendation of the UN Committee in the context of Article 4. The Commissioner will be independent from Government interference, subject only to the normal safeguards proper to a public appointment to avoid misuse of public money and the continuance in post of a person unsuitable for the position of high trust in which they have been placed.

Question 3: Why is the Commissioner not placed under a duty to promote and safeguard the rights and interests of children and young people?

As set out above, we are determined that the primary focus of the Commissioner's work should be to ensure that the views and interests of children and young people are heard

and that he learns from listening to them. He must be free to respond to what he is told by them. In practice, when translating those views into action and recommendations, he has to have regard to the rights of children and young people as set out in the Convention.

Question 4: Why is the Commissioner not placed under a duty to keep under review existing law, policy and practice to ensure compliance with the UNCRC?

The Commissioner will be able to review and assess the effect of legislation on children under clause 2(2)(b) and advise the Government accordingly. We certainly envisage that he will use this opportunity. We do not, however, consider that this should be a specific duty, but should remain an option the value of which he can assess when planning his workload.

When assessing law, policy and practice, as the Commissioner will have to have regard to the CRC in deciding whether that practice is in the interests of children, in practice this entails considering how far it complies with the CRC.

(c) THE COMMISSIONER'S POWERS

Question 5: What is the justification for not giving the Commissioner each of the powers [listed below]?

We consider that in practice the Commissioner will have most of the powers described, and that it would be inappropriate, in the context of the strategic role we want for him, to specify other powers or functions. The powers quoted by the Committee are:

Power to review law, policy or practice for CRC compatibility

As stated in the response to question 4 above, the Commissioner can already advise the Secretary of State of the desirability of a change in existing or proposed legislation. Where policy or practice not constrained by legislation is concerned, under his existing powers he recommends changes on the part of Government or the organisation concerned.

Power to conduct investigations on his own initiative

Clause 2(2) does allow him to conduct such investigations into general issues concerning children, provided that they do not concern the case of an individual child. While we still consider that the Commissioner should not ordinarily be taking on individual cases we do see how the current formulation could be seen to fetter the independence of the Commissioner. With this in mind the Government plan to table an amendment at Report Stage to allow the Commissioner discretion to conduct an inquiry into an individual case which raises a wider public policy significance and does not duplicate or cut across any existing investigation. In doing so the Commissioner would be able to use powers equivalent to those already set out in clause 4.

Power to require information to be provided, other than part of an inquiry directed by the Secretary of State under clause 4(7)

We consider that it would be inappropriate to give the Commissioner the full powers granted under 4(7) for all parts of his work. However, in addition to the extension of the Commissioner's powers set out above, we are also considering whether there is an amendment that could be made within clause 2 to give the Commissioner a proportionate power to get information needed for the discharge of his clause 2 functions.

Power to investigate individual complaints

The Commissioner can only hold an inquiry into individual cases when directed to by the Secretary of State or when he decides to hold an inquiry into an individual case that has wider implications. Other than that, he can consider individual complaints only in so far as this is necessary to inform himself of a wider problem affecting children. We expect that in practice many of the general issues he should properly consider and advise on will, in the first instance, be brought to his attention by one or more individual complaints. What the Commissioner cannot do is to take action on behalf of a child or seek redress for that child.

The Government's interpretation of clause 2(6) is that a complaint of, for example, bullying by child X would allow the Commissioner to investigate whether bullying was a general problem and how it should be addressed; to that end, he may need to consider the facts of the case involved in the complaint. It would not, however, allow him to take the authorities of an institution to task for failing to protect child X as an individual in an isolated incident.

The reason for this restriction is twofold. First, having open and accessible complaints procedures that work for children and young is rightly the job of those providing services for, and otherwise dealing with, them. The Commissioner must not replace these as the place children turn to. The Commissioner should, however have a role in making recommendations on how these can work better. Second, the Commissioner must not end up as a further "court of appeal" where these processes are exhausted. If he were, given the size of the population, this would risk the Commissioner being inundated by casework, preventing him from concentrating on wider policy issues of relevance to children as a whole.

Power to intervene in litigation

In keeping with our aims for the role we think it is right that the Commissioner may not intervene in litigation on behalf of a child, even if he believes that the child's case has wider policy implications. We believe this is appropriate to the strategic role that we wish to give him. He may however appear as a witness if called to do so, and may provide general information to children about the legal system and their rights therein.

Power to make recommendations

There is nothing in the Bill to prevent him from doing this, either in his annual report, the report of an inquiry, or at any time during the year on an ad hoc basis. Indeed, we would expect him to do this as a matter of course.

Power to publish reports other than through the Secretary of State

The Commissioner does have this power, with the following additions. In the Bill, we are saying that he must submit an annual report to the Secretary of State each year, which the Secretary of State must lay before Parliament and which the Commissioner must then publish—the Secretary of State has no power to amend this annual report. Secondly, when directed to hold an inquiry by the Secretary of State he must submit the report to the Secretary of State for publication—but the Secretary of State may only amend the report in so far as this is necessary to protect a child's identity.

However, other than these additions, the Commissioner may publish any reports on his own initiative, through such channels as he considers appropriate. Without dictating how he does his job, we think it likely that he will produce various ad hoc reports to publicise

his findings or recommendations. He may also produce reports of inquiries that he chooses to hold under the new power that we are proposing to give him.

PART 2: CHILDREN'S SERVICES

Question 7: In the light of these considerations, what is the justification for the wording of the duties in clauses 6 and 7?

Clauses 6 and 7 complement each other, specifically around promoting the well-being and safeguarding the welfare of children. Taken together, the two clauses will mean that all those agencies listed will be mindful of the need to safeguard children and promote their welfare, and must work together in order to do so. Clause 6 sets out the outcomes for children, which effectively define children's well-being, one of which is to be protected from harm and neglect.

With regard to the duties in clause 6, co-operation—with reciprocal responsibility—among the key partners that provide services for children, provides the enabling framework for the integration of services. Effective co-operation is a pre-requisite for co-ordination and integration, and is therefore the starting point for building the arrangements between partners. This directly addresses the structural weaknesses and fragmentation identified by the Laming Inquiry. In using the term making the co-operation arrangements we are not suggesting that this will be a single event. The term implies ongoing activity by the children's services authority and its key partner agencies in setting up and sustaining an organisational framework within which genuinely integrated work with children and young people may develop.

Co-operation at a strategic level will lead to co-ordination and integration at delivery level. The focus on outcomes ensures the new arrangements will focus on delivering improved services for children consistent with what the CRC requires. They will form the criteria against which the co-operation arrangements will be assessed and inspected. They are also the outcomes identified by children and young people themselves.

The duty at clause 7 is for agencies to have regard to the need to safeguard and promote the welfare of children. Its purpose is to ensure that all relevant services take account of the needs of children in exercising their normal functions. The aim of the duty is to:

- raise the priority given to safeguarding children in these organisations and encourage them to incorporate this duty in their objectives and priorities. The duty is not intended to become a primary function of agencies;

- ensure agencies give appropriate priority to their responsibilities towards the children in their care, or with whom they have contact;

- encourage agencies to share early concerns about safety and welfare of children and to ensure preventative action before a crisis develops.

It does not impose a new additional function on an agency.

Each of the agencies listed at 7(1)that will fall under the duty has its own particular statutory functions, all of which have a distinct purpose and provide an important benefit to society. We do not want agencies' consideration of children's needs to compromise their ability to meet their primary purpose.

Some agencies have responsibilities which may cause them, in an individual case, to take action which could be regarded as contrary to promoting the welfare of a particular child. For example, as upholders of law and order, police officers have to investigate and arrest

people for committing crimes, who are otherwise loving parents. If found guilty by a court of law and given a prison sentence, the prison service would then have to imprison the parent, perhaps in a prison many miles away from his or her children. This might be inconsistent with safeguarding and promoting the welfare of a particular child, but would be wholly consistent with the criminal justice system's duty to investigate, charge, try, sentence and punish those who commit crimes and otherwise operate outside of the law.

We need to be very careful to ensure that we do not compromise agencies' ability to perform all their primary functions, whilst at the same time making sure that they take account of the safeguarding needs of the children with whom they come into contact. We think we have achieved this with clause 7.

Question 8: What is the justification for not imposing the duty in clause 7(2)(b) of the Bill directly on the contractor?

We have not imposed the clause 7 duties directly on contractors who provide services on behalf of the agencies listed at clause 7. Clause 7 is about placing duties on public bodies that have statutory functions in relation to children. We do not think it would be appropriate to use it to bind private companies who can enter into private agreements with individuals. Nor do we feel it would be appropriate to bind voluntary organisations.

Instead we have said that the listed agencies will be responsible for ensuring that contractors providing services on their behalf have regard to the need to safeguard children. We think this is the better approach as, even if a service is contracted out, it remains the responsibility of the contracting body to ensure the service is provided appropriately. This is because an agency does not delegate its functions; it can only delegate the activities that fulfil them.

In terms of organisations working with children of refugees and asylum seekers, we have not specifically mentioned any organisations that work to support vulnerable groups. In the main these groups or organisations will be voluntary organisations and it was viewed as inappropriate to place the voluntary sector under these duties. However, where they provide services under contract with an agency mentioned in Clause 7(1), it is envisaged that the responsibility for meeting the duty will remain with the main agency; but that the contract may include terms and conditions that can be monitored and evaluated in terms of meeting the duty.

The duty will be enforced through the inspection and performance management systems. The inspectorate of individual agencies will take into account legislation that places a duty upon that agency and therefore the inspections will include an assessment on whether or not they are fulfilling that duty properly.

Question 9: What is the justification for excluding the children of refugees/asylum seekers from the scope of the arrangements envisaged in Part 2 of the Bill?

The children of asylum seekers and refugees are not excluded under the Part 2 arrangements. The arrangements under clauses 6 (co-operation to improve well-being), 7 (arrangements to safeguard and promote welfare) and 9–12 (Local Safeguarding Children Boards) of the Children Bill are intended to cover all children. This includes those seeking asylum or refugees, when they come into contact with the agencies involved in the arrangements or more generally through the focus of the clause 6 co-operation arrangements on all children.

Question 10: Will consideration be given to including NASS and the IS in those lists, to ensure that children in immigration detention centres are covered, and also those dealt with at port of entry?

The following covers each of the relevant clauses separately, clarifying our reasons for not including the Immigration Service (IS) and NASS in each of the proposed arrangements.

Clause 6 is about co-operation to improve well-being. The arrangements under this clause have been designed with the intention of ensuring that the bodies with responsibility for strategic decision making and the commissioning of services at a local level are covered. The IS and NASS do not fulfil the criteria required for partnership under this duty and to include them would be inconsistent with the design of the co-operation arrangements, confusing their focus. However, the IS and NASS will still work closely with all agencies involved with children and young people, where appropriate.

Clause 7 imposes a duty on the agencies listed at 7(1) to have regard to the need to safeguard and promote welfare of children in exercising their normal functions. The purpose of this is to ensure that agencies recognise and take into account the safeguarding needs of children while carrying out their day-to-day business.

The Immigration and Nationality Directorate, which includes both NASS and the IS, takes its responsibilities towards children very seriously and fully appreciates the importance of identifying vulnerable children. For this reason the Government has carefully considered the arguments for being listed under clause 7. However, we are concerned that this duty could cut across many existing policies and procedures which may not appear to promote the welfare of children, for example, the decision not to admit a particular child or family with children to the UK, or the detention of families with children who seek asylum. It could also lead to the Immigration system being exploited in a way not originally intended by those seeking to secure admission to, and residence in, the UK. The need for a specific duty has to be balanced against the need to maintain an effective immigration control.

Detention is an unfortunate but necessary element of our immigration control procedures. In the overwhelming majority of cases those families with children that are detained have had their applications to remain in the UK refused and have removal directions in place. Children are therefore only detained in these circumstances for the shortest possible time, and usually for no more than a few days. The IS have recently introduced enhanced arrangements for the rigorous and frequent review of family detention and put in place a system of regular Ministerial authorisation for the detention of children beyond 28 days. The IS does not detain unaccompanied children except for no longer than overnight in exceptional circumstances where there are concerns for the child's welfare.

The concern of NASS and the IS towards children in its care, though, can be viewed through the actions they have taken in accordance with the spirit of the duty. Both NASS and the IS have well established working arrangements with local authorities and other agencies so that concerns are swiftly dealt with.

Over the last few years, the IS has significantly improved its policies and procedures concerning children. While the IS has traditionally worked in partnership with local authorities and the police to ensure that any concerns about a child are acted upon, it has been working to improve these good working relations with local authorities and other agencies in a number of ways. These include: the establishment of a single point of contact for all local authorities and social workers who want to clarify the immigration status of a child and promoting awareness of this contact point amongst social workers; issuing new instructions to caseworkers to ensure that the necessary steps are taken to engage social services at an early stage in any case involving a child where there is cause for concern; the

development of Best Practice guidance to raise awareness among Immigration Officers about vulnerable children and how to deal with them; and establishing a range of measures for working with social services in relation to unaccompanied asylum-seeking children, including teams of social workers based at ports of entry.

I thought it would also be worth clarifying that unaccompanied asylum seeking children are not supported by NASS. They are supported by local authorities under the Children Act 1989. Such children are directly referred to local authorities by the IS:

- Clauses 9–12 deal with the arrangements relating to the Local Safeguarding Children Boards. The purpose of these Boards will be to co-ordinate and ensure the effectiveness of the safeguarding work carried out by the Board partners (i.e. those agencies listed at 9(3)) Other agencies can be invited to join the Boards as non-core members.

- While both NASS and the IS recognise the importance of Local Safeguarding Children Boards, and will be fully involved in the Board where appropriate, we do not think it is necessary or suitable for either the IS or the NASS to be required to be represented as core members on all LSCBs. This is because immigration issues tend to be geographically focused. It would therefore be better for these organisations to be invited to join the LSCBs as members in areas where such issues are important and relevant rather than being required to sit on every Board in the country.

Clauses 8 and 23: Information Sharing: General

The Committee may be aware that Baroness Ashton wrote to Peers on 29 April enclosing a policy statement on the regulations and statutory guidance to be made under Clause 8 of the Bill. The statement has been published on the DfES website. Development of the regulations and guidance will be informed by the experience of the ten local authority Trailblazers who are each receiving up to £1million to develop and pilot information sharing systems. They will also be informed by the outcome of an independent technical study we have commissioned and which is due to report in July.

Baroness Ashton's letter also said that, mindful of the points made by the Delegated Powers and Regulatory Reform Committee, and in Second Reading debate in the House of Lords we would be prepared to give further consideration to the measures on Clause 8. In particular we are considering carefully whether to:

— set out on the face of the Bill a list of the main basic information to be held on each child;

— set out on the face of the Bill a list of statutory bodies and other bodies which will be required or permitted to supply information to the database;

— limit the sub-delegation powers of the Secretary of State in sub-section (6) of Clause 8; and

— provide for the conditions under which access to the database will be granted to be set out in Regulations rather than guidance.

Baroness Ashton reiterated these commitments in the course of the Committee stage debate and said that Government amendments would be tabled for Report. The Committee has asked some specific questions, which are addressed in detail below.

Question 10. In the light of the serious interference with Article 8 rights which is envisaged, what is the justification for not dealing with the details of the proposed database in primary legislation?

We need the flexibility in framing Clause 8 for the Secretary of State to subject much of the detail to regulations and guidance, as development of the databases will be informed by the experiences of the Trailblazer pilot local authorities and by the independent technical advice we have commissioned.

But as outlined above we do recognise that there should be more detail on the face of the Bill and for this reason will be bringing forward the amendments already referred to.

Question 11. Is the Government prepared to include in Clause 8 provision covering each of the matters above?

It might be helpful if I set out in relation to each of the detailed questions posed by the Committee how we intend to deal with them in the regulations, directions and guidance.

What precisely is the purpose of keeping the information in the proposed databases?

We have seen all too often how the failure to share information has been a factor in terrible outcomes for children. Lord Laming's report into the tragic case of Victoria Climbié made quite clear that failure to communicate was at the heart of the way services failed her so badly.

These provisions to establish and operate databases do not represent the totality of the Government's drive to improve information sharing. Much of what needs to be done does not require new legislation, so is not reflected in this Bill. Government and all the agencies involved in providing services to children and young people need to work together to improve the professional practice that is sharing information. This means improving the children's workforce, addressing organisational barriers to information sharing and making sure that all practitioners understand what good information sharing practice is.

The information sharing databases are simply to provide a tool to help make sure that all children get all the services they need at the earliest stage possible. It can be time-consuming and difficult for practitioners even to find out who else is dealing with a particular child. There needs to be a record for every child, so that practitioners can check the child is receiving basic services and can see who is providing other services. The aim is for databases to support a shift towards prevention and early action, by facilitating discussion of concerns before crisis point is reached.

Whose personal information will be able to be included on the database?

There will be a basic dataset of non-sensitive personal information about all children. This includes: name; date of birth; address; a unique identifying number; name and contact details of the person with parental responsibility or day to day care for the child; educational setting; GP practice details and health visitor if there is one working with the child—though inclusion of health visitors is subject to discussions about their new titles. These details will now be prescribed on the face of the Bill as a result of amendments tabled for Report in the House of Lords.

Apart from parental or day to day carer information, which is needed to help identify the child, there will be no information about other people.

What kind of information will be included on the database?

In addition to the basic data as described above, contact details of practitioners providing a specialised service to a child will be included and practitioners will be able to record the fact that they have a concern about the child (but no details about the concern).

What is included in "information as to services provided to" a child in clause 8(5)(a)? Is this confined to specialist services provided to particularly vulnerable children, such as special educational need provision or psychiatric intervention, or does it include ordinary services such as health and education?

The policy statement states that regulations will provide that where a practitioner or agency is providing specialist services to a child over and above the basic services (i.e. basic GP and education), the database:

- will contain, in addition to the basic details, the contact details for that practitioner or agency, in the case of a statutory service;

- will permit the inclusion, in addition to the basic details, the contact details for that practitioner or agency, in the case of a non-statutory service.

The regulations will therefore provide for the recording of contact details of special educational provision or psychiatric intervention. It would also provide for contact details of services such as speech and language therapy. The database will not record the precise nature of the service provided. It will simply record that a particular service provider is supporting the child. The databases are not intended to be focused primarily on those children who require protection from harm but on children's needs, i.e. those large numbers of children who require a specialist services at some point. This is because we want to ensure that all children access services to which they are entitled and because we want to shift the focus to prevention.

We recognised that the phrase "information as to services provided" may give the impression that case details could be recorded which we do not want, so the government amendment proposed will make clear that it is simply contact details of practitioners providing such services which will be included.

What is meant by the broad phrase "information as to activities carried out in relation to" a child in clause 8(5)(a)?

Similarly the phrase "information as to activities carried out" may give the impression that case details could be recorded which we do not want, so the government amendment proposed will make clear that it is simply contact details of practitioners delivering such activities which will be included.

The wording here was in any case intended merely as a reinforcement as "services" might not encompass every way in which practitioners interact with a child—the police for instance.

What is meant by "any cause for concern" in relation to a child in clause 8(5)(b)?

A key objective of the databases will be to help support the shift to prevention and earlier intervention by children's services working together to improve outcomes for children. Recording concerns on the databases is simply a way in which one practitioner can signal to others that they have a concern about a child. There will be a clear expectation that any practitioner recording a concern will also do something about it, which may among other things usually involve talking to another practitioner. If other practitioners subsequently

have reason to be concerned about the same child, they can quickly see who else they should be talking to. Such discussions will enable practitioners to form an accurate early judgement on how to work together to respond most effectively with the child's needs.

It is not our intention to constrain the recording of concerns only to circumstances where there is a risk of significant harm to the child. We want to make sure that practitioners can communicate effectively, where possible, to address a child's need well before crisis point is reached.

The recording of the existence of a concern is an issue on which the Government will need to convey its intentions clearly. The decision about whether or not a concern exists and should be recorded remains ultimately one for professional judgement, but we must set the context for practitioners. We are looking carefully at the different approaches currently being taken by the Trailblazer pilots and will consider them along with comments made in the House of Lords in determining how we progress.

How is it proposed to confine the recording of a cause for concern to the mere existence of such a cause for concern rather than its nature?

Regulations will specify that only the contact details of the practitioner registering the concern will be held on the database. If another practitioner sees that a concern has been logged they will have to talk to the person who has raised the concern.

In what circumstances may or must information be disclosed to those compiling the database? What will be the written criteria determining when such a disclosure is permitted or required?

We have now agreed that agencies which are required or permitted to supply data to populate the database will be named on the face of the Bill. These will be:

- Primary Care Trusts, Local Education Authorities and Connexions must provide such data as they hold on any child that is covered by the basic information specified for the databases

- Other bodies are required or permitted to supply data on request in order to fill in gaps in the basic data. It is intended that the bodies to be covered by this regulation will include:

Required to supply data if requested:

- All bodies bound by the duty of co-operation to improve well-being (Clause 6) and the duty to safeguard and promote welfare (Clause 7) and the section 175 of the Education Act 2002 duty, to which Clause 8 is linked:

    - Local authorities;

    - Police authorities and chief officers of police;

    - Local probation boards;

    - Strategic Health Authorities;

    - Learning and Skills Council;

    - NHS trusts;

- NHS foundation trusts;
- Youth offending teams;
- Governors of prisons and secure training centres (or, in the case of contracted out prison or secure training centre, its director);
- Governing bodies of maintained schools
- Governing bodies of institutions in the further education sector

- Registered independent schools.

Permitted to supply data:

- The Inland Revenue for relevant data from Child Benefit and Child Tax Credit records;
- The Secretary of State (for example for relevant data from DWP benefits records).
- Registered childminders and day care providers ;
- Registered Social Landlords;
- Voluntary organisations working with children.

In what circumstances may or must information on the database be disclosed onwards? What will be the criteria?

Regulations to be made under subsection (4)(c) of Clause 8 will allow the Secretary of State to specify circumstances in which information must or may be taken from the database and disclosed. This enables sharing of information from the database about the recording of specialist services and concerns mentioned above.

To whom will such disclosure be made?

A practical example may be useful here to show how we envisage the database enabling effective sharing of information to facilitate communication to meet a child's needs.

> An example might be where a health worker had a concern about a child. They would take any appropriate action in their own area of practice, but would also readily be able to see which other practitioners were involved with that child. In one place they would be able to find out the details of a social worker involved with the child or to discover that a housing officer had recorded a concern. They could then quickly discuss with those other practitioners to identify the child's overall needs and how best to meet them. The database role here would simply be to supply the health worker with other practitioners' contact details. It is a tool to enable practitioners to work together.

Who will be given access to the database?

The Government is clear that access to the database should be restricted to designated individuals who are professionals delivering statutory or non-statutory services to children and who have direct contact with children, or who have responsibility for managing the

database system itself. The regulations will define which types of practitioner in which services may be given access, and on what conditions.

What will be the criteria for determining the level of access to the database?

The policy statement says that regulations will require a protocol to be put in place at a local level between heads of agencies involved. This will give an appropriate person responsibility for deciding whether:

- any particular practitioner should be given access. In this they should have regard to the degree that the practitioner provides specialist services or whether the practitioner's job has some particular element of providing for a child's well being or welfare. For instance, they might judge that all GPs, social workers and educational psychologists should be granted access and also headteachers and heads of year in schools, but that other teachers in schools should not normally have access. It is envisaged that other practitioners who may have concerns would be able to do this through the agency of those with access;

- access to any practitioner or group of practitioners should be given to information at the basic dataset level only, at the basic dataset level and the recording of specialist services only, or in addition to the recording of a concern level. We are aware of the issues relating to the recording of sensitive services and are looking carefully at the approaches being taken by the Trailblazer areas to inform the regulations and guidance on access restrictions on sensitive services.

What sorts of conditions will it be possible to impose on access to the database, or the use of information on the database?

There will be no blanket access to the databases. It is the intention that it will be given only to those named individuals who need access in order to do their job and they will only be able to access information on children known to them. Individuals will need to meet minimum requirements before being granted access. These include: Criminal Records Bureau clearance; signing a relevant practitioner-level protocol; and undertaking training on safe and secure use of the system, including compliance with the Data Protection Act, the Human Rights Act and, where relevant, the Caldicott Principles.

Practitioners will be required to comply with the DPA and the Human Rights Act in using the database and the information it contains. As mentioned above, training on these issues will be a requirement for access.

How long will data on the database be retained?

The Data Protection Act says that records should be kept for no longer than is necessary for its intended purposes. This is not an easy issue; one of the main purposes of the database is to ensure that practitioners are aware of the complete picture of the needs of children they are working with. In order to comply with the fifth DP principle information needs to be retained as long as necessary for that purpose. It may well be appropriate to be able for some time to see that a practitioner had in the past been involved with—or had a concern about—a child. In contrast, if a practitioner had indicated a concern but subsequently decided that it was groundless, that should be removed straightaway from the record. We are working closely with the Trailblazer pilot authorities on this subject and, in the light of their experiences on retention of information in the pilots currently under way, will be considering how that needs to be covered in guidance and directions.

To whom is it proposed to delegate the Secretary of State's discretion as to what may or must be done under the regulations (clause 8(6))? Will that person be regarded as a functional public authority for the purposes of the Human Rights Act 1998?

In response to the concerns expressed by the Delegated Powers and Regulatory Reform Committee and in debate in the House of Lords that the current sub-delegation provision at subsection (6) is too widely-drawn, Baroness Ashton has offered a commitment that we will bring forward a Government amendment at Report stage to ensure that decisions about permitting or requiring disclosure of information cannot be sub-delegated, but that only decisions about granting access to individuals would be sub-delegated. The Human Rights Act defines a public authority in this context as "any person certain of whose functions are functions of a public nature", and we think it likely that the actions would be so characterised.

What is the proposed relationship between this legislation and the Data Protection principles in the Data Protection Act?

We expect the databases to comply fully with the DPA, and do not want to make any special arrangements under data protection for them

Question 12. Will the databases be confined to those who are considered to be vulnerable or at risk?

The intention is that all children will included on the database. In relation to the information sharing provisions in Clause 8, we recognise that the creation of databases containing basic information about all children may constitute an interference with the Article 8 right to respect for privacy. Any interference with the right under Article 8 must be fully justified. We consider our proposals to be proportionate and justified.

The right is not absolute. Disclosing confidential information to protect the welfare of a child could cause considerable disruption to a person's private or family life. This may however be justified by article 8(2) if it is necessary to prevent crime or to protect the health and welfare of a child. The key factor is proportionality: is the proposed disclosure a proportionate response to the need to protect the welfare of the child? The amount of confidential information disclosed and the number of people whom it is disclosed should be no more than is strictly necessary to meet the public interest in protecting the health and welfare of the child. The more sensitive the information the greater the child-focused need must be to justify disclosure. That is why we are proposing that the type and amount of information on the databases will be stringently restricted with no case information recorded, and that practitioner access will be similarly controlled with access being granted to those who only need it because of their involvement with a particular child.

It may be argued that confining the creation of databases to include those who are vulnerable or at risk can be justified as a proportionate interference under Article 8, but that the inclusion of all children on a database cannot.

We have considered the case of *Margareta and Roger Anderson v Sweden* where the courts concluded that the measures taken by the Swedish government were disproportionate because (amongst other reasons) the reasons for interference with the right to respect for family life were of a general nature and did not specifically address the aims pursed. So we want to be satisfied that the measures proposed are specifically targeted at the legitimate aims pursued rather than being catch-all measures.

For this reason we think a universal database is justified in order to enable any particular presenting child to be correctly identified and for practitioners to have access to other

practitioners' contact details, but that the entry of case details on such a universal database would not be a proportionate response for the pursuit of the legitimate aim.

We believe there are compelling reasons why universal coverage is needed in order to achieve the Government's policy objective of safeguarding the welfare of all children:

— Unless data is held about every child service providers cannot be certain that they will identify any particular child or be able to make services available to them;

— The need to ensure that all children receive the universal services—education and primary health care—to which they are entitled.

— It is essential to support early and speedy intervention where necessary. This is key to the policy imperative to move from a reactive to a preventative approach and to embed specialised interventions in universal services;

— About one third of children require specialist services of some sort during their childhood. In order to better safeguard and promote the welfare of children who do need additional support and identify them early we need the universal approach. We don't know or can't readily predict who they may be so we need to ensure that all children are captured rather than limit the database to those whose needs are already identified to make sure that none slip through the net;

— Practitioners need information about the more specialist services that a child is receiving so that they have a full picture of the child's needs and circumstances and can communicate effectively with other service providers.;

— Universal data, suitably anonymised, will enable Local Authorities to plan for service delivery, in line with their statutory responsibilities, more efficiently and effectively;

— Having all children on a local database reduces the profile, and thus the risk of stigmatisation, of those children receiving specialist services; and

— Identifying children who move between authorities will be much easier and this will help to ensure continuity of take-up of universal services and, where appropriate, more specialist intervention.

I trust that the Committee will find this response helpful and be reassured that in considering our approach to information sharing databases we have fully taken account of compliance with Article 8 of the ECHR.

Question 13: What is the justification for not including in the Bill a short provision abolishing the common law defence of reasonable chastisement, in the interests both of legal certainty and of complying with the Strasbourg judgment in A v UK?"

The Government made clear the main purposes of the Children Bill in *Every Child Matters: Next Steps*. These objectives did not encompass altering the relationship between parent and child, or between parents and the state. The Government recognises the importance of supportive discipline within families, and does not want to undermine that. The Government is determined to put an end to criminal violence and abuse against children. That issue should not be confused with the right of parents to discipline their children.

The Government does not accept that it is necessary to abolish the defence of reasonable chastisement in order to comply with the judgment in *A v UK*. Although in that case the European Court of Human Rights found that there had been a breach of Article 3 of the

Convention (which prohibits degrading treatment), the Court also stated that Article 3 should not "be interpreted as imposing an obligation on states to protect, through their criminal law, against any form of physical rebuke, however mild, by a parent of a child".

Following *A v UK*, the application of the defence of lawful chastisement was considered again in 2001 by our own Court of Appeal in *R v H*. The trial judge had expressed concerns that the common law did not allow the jury to be adequately directed in a manner that would provide adequate protection for a child's Article 3 rights. The Court of Appeal accepted the Crown's submissions that an expanded direction on what is reasonable and moderate chastisement, following the principles set out by the European Court in *A v UK*, would balance the interests of both the defendant and the child. The executive should not lightly interfere with the discretion of the courts in striking such a balance.

The Convention also safeguards the right, in its Article 8, to respect for private and family life. Although Article 8 also provides that such privacy can be over-ridden in order to protect people and their freedoms, the Government must consider carefully the implications of extending the reach of the law into people's lives.

The straightforward abolition of the defence of reasonable chastisement would technically render any parent who smacked their child liable to prosecution. It is argued that, because the prosecution of any such offence would depend in part upon the test of the public interest, trivial or vexatious prosecutions would be sifted out and not proceeded with. The Government is not convinced that this reasoning would offer sufficient reassurance to parents; we note the recent comments to the Committee by the Director of Public Prosecutions, to the effect that he could not devise guidance to prosecutors that ruled out all possibility of prosecution in any given set of circumstances.

The Committee will be aware of the debate on this subject at Lords Committee stage, in which Baroness Ashton made clear that the Government would require any amendment to be both understood and workable. On this basis, the Government continues to be prepared to offer serious consideration to any amendment to the Children Bill that would not outlaw smacking of children by their parents.

9 June 2004

2. Further letter from Rt Hon Margaret Hodge MBE MP, Minister for Children, Young People and Families, Department for Education and Skills

When I gave evidence about the Children Bill before the JCHR on 23 June I promised to write to the Committee about three matters raised by members of the Committee. I should also like to clarify one of my responses to other questions to avoid any possible misunderstanding. I shall refer to the question numbers in the transcript of the session.

In question 99, Lord Lester of Herne Hill asked whether in certain cases the Children's Commissioner would have the standing to bring a judicial review. The Government view is that the Commissioner may, by virtue of paragraph 2(1) of Schedule 1 to the Children Bill, do anything which appears to him to be necessary or expedient for the purpose of, or in connection with, the exercise of his functions. Therefore In determining whether he could bring judicial review proceedings in a particular case, the Commissioner would need to decide that to do so satisfied that test.

Of course whether the Commissioner would be allowed to proceed with such an action would depend on the court's finding that he had a sufficiency of interest in the subject-matter of the judicial review. While it is quite possible to imagine that they would so find,

given that the 'victim' test under the Human Rights Act is more restricted that the 'sufficient interest' test in judicial review proceedings generally it is likely that the Commissioner would find it more difficult to bring human rights cases.

Lord Lester also queried whether it was right that any report from the Commissioner should enjoy absolute privilege. This matter was, of course, further discussed on 15 July in the House of Lords during the Children Bill Third Reading debate on the basis of an amendment tabled by Lord Lester, and as he will know from that discussion we are considering very carefully whether a change to the existing provision is desirable.

My colleague Baroness Ashton announced in the House of Lords that the Government would consider the matter further in the context of the Department of Constitutional Affairs' consultation exercise on effective inquiries, which is due to finish at the end of this month. I know that the JCHR will understand that it would not be helpful for me now to seek to prejudge those conclusions.

In questions 104 and 105 Baroness Prashar asked why the Commissioner did not report to Parliament direct, rather than through the Secretary of State. Later, in question 108, you mentioned the Electoral Commission and the National Audit Office as examples of organisations that did report direct to Parliament. I undertook to consider the matter further, which I have now done.

I examined the reporting arrangements for a variety of public bodies. While the Electoral Commission and the National Audit Office do both report to Parliament direct, most other bodies do not—including OFSTED, the Independent Police Complaints Commissioner or the Commissioner for Racial Equality which all have a remit of at least equal sensitivity to that of the Children's Commissioner and which require a high measure of visible independence from possible Government interference. I have also considered the position of the other UK Children's Commissioners, who gave evidence to the JCHR not long before I did. Only the Scottish Commissioner reports direct to Parliament alone; the others have also to report to their First Minister. I noted that they told the JCHR on 20 April that they did not find it inhibiting to be accountable to a Minister.

I am, therefore, satisfied that the normal procedures are appropriate for a body such as the Children's Commissioner to be established as Non-Departmental Public Bodies and to report to Parliament through the Secretary of State. I see no reason why this should compromise the Commissioner's independence. I will, however, consider very carefully whether additional safeguards could be provided to ensure that the Secretary of State is not able unduly to delay the laying of a report before Parliament.

Finally, I should like briefly to comment on one of my responses, to ensure that there is no misunderstanding.

In my replies to questions 76 and 77 I referred to the incorporation of the UNCRO. Having now been able to consider those replies, I thought I should take this opportunity to clarify what I meant. By virtue of clause 2(8) the Commissioner must have regard to the UNCRC in considering, for the purposes of his function under clause 2, what constitutes the rights and interests of children. This is clearly an incorporation of the UNCRC within one of the functions of the Commissioner, but it does not amount to incorporation of the UNCRC into English law in the sense of giving an individual child the right to bring court proceedings based on an alleged breach of a Convention right. The reference in the Bill to the UNCRC is, as a result of clause 2(9), a reference to the Convention subject to the United Kingdom's reservations, objections and interpretative declarations.

I hope that this additional information and further clarifications have been helpful. I should like to take this opportunity once again to thank the Committee for inviting me to give evidence, and for its members' constructive questions. I look forward to debating these issues further with some of them in the Commons after the recess.

23 July 2004

3. Memorandum from Children are unbeatable! Alliance

RESTRICTION OF "REASONABLE CHASTISEMENT" DEFENCE

The aim of the Children are unbeatable! Alliance, which now includes among its supporters more than 400 organisations and projects, many parliamentarians and other prominent individuals, is equal protection for children under the law. We are confident that the New Clause tabled in the House of Lords would achieve that, while providing reasonable reassurance to parents that they can use physical actions to protect children and others and property and prevent the commission of a crime.

We are also satisfied that, with appropriate guidance, this law reform will not lead to inappropriate prosecutions or other formal interventions that are not in the best interests of children.

We note that the Director of Public Prosecutions (DPP), in his evidence to the Committee, reasonably noted that his office would not issue guidance "which would absolve all minor acts of battery against children from criminal prosecution". He noted that most minor assaults of adults are not prosecuted, and suspected that such prosecutions for minor assaults on children would be very rare. He emphasised correctly the much greater vulnerability of children and that there could be special circumstances—disability being one of them—in which prosecution could be in the public interest. This could not be ruled out by guidance which left no discretion.

We note that the Association of Chief Police Officers has issued a statement confirming their belief that children should receive protection of the criminal law and calling for clear guidance.

The DPP referred to the possibility of abolishing the use of the defence in relation to all offences except common assault. We hope that the Joint Committee will agree that such a limited change to the law would not meet the UK's human rights obligations, and would send a very confusing and potentially dangerous message to parents and the public. It would highlight, rather than diminish, the lack of equal protection for children under the law.

When the Department of Health consulted on law reform, this was one of the proposals in the Department's consultation document, *Protecting children, supporting parents* (2000). The document quoted the "Offences Against the Person Charging Standard", agreed by the police and the Crown Prosecution Service, which states that common assault will be the appropriate charge "where injuries amount to no more than the following: grazes, scratches, abrasions, minor bruising and swellings, reddening of the skin, superficial cuts or a black eye". This is still the applicable Standard.

To retain the defence in cases of common assault would imply that such injuries can be justified as lawful punishment.

The Joint Committee should note that the Department of Health consultation document published the results of a government-commissioned poll revealing that over 95 per cent

of the public rejected punishment which left "a red mark" or "a bruise" lasting a few days. The report concluded: "Nearly all respondents considered punishment that leaves a red mark or bruising to be unreasonable (96% and over 99% respectively)."

We hope that the Joint Committee will re-emphasise its recommendation that retention of the "reasonable chastisement" defence is incompatible with the UK's human rights obligations and that the Children Bill presents an obvious opportunity for law reform to remedy this breach.

27 May 2004

4. Memorandum from Allan Levy QC and Peter Newell

Allan Levy QC specialises in child law and human rights law and represented "A" before the European Court of Human Rights in the case of "A v UK". Peter Newell is the Coordinator of the "Children are unbeatable! "Alliance

"Reasonable punishment" new clause — now clause 49 of the Children Bill

1. In our (Children are unbeatable! Alliance) submission to the Joint Committee dated May 27, we referred to the proposal to abolish the use of the defence of lawful punishment in relation to the more serious offences of violence, leaving it intact in relation to common assault. We argued that such a limited change in the law would not meet the UK's human rights obligations. This proposal, which originated from the Attorney General and was referred to by the Director of Public Prosecutions in his evidence to the Joint Committee, now forms part of the Children Bill (clause 49).

2. The purpose of this additional submission is to re-emphasise that allowing parents to continue to use the defence in relation to a charge of common assault, as clause 49 does, cannot meet the UK's obligations under international human rights instruments including the UN Convention on the Rights of the Child (see articles 19 and 37(a)), the International Covenant on Civil and Political Rights (see articles 7, 24 and 26) and the European Social Charter (see article 17).

3. In practice, clause 49 will change little. It should be noted that over recent months, Ministers have repeatedly assured Peers that: "The kind of punishment that results in injury is clearly not reasonable chastisement and as such is already against the law" (eg, Baroness Ashton, House of Lords, 20 May 2004, col. 910). Certainly, it is inconceivable that any court would accept the use of the defence nowadays in relation to offences of wounding or grievous bodily harm and most unlikely that any court would accept use of the defence in relation to offences of actual bodily harm or of cruelty (the latter is not normally used in cases of physical assault).

4. Media coverage since the House of Lords debate and vote on July 5 has already effectively demonstrated the confusion that would be caused by the partial removal of the defence, and has also underlined that the basic message transmitted by the change is "carry on smacking".

5. The current Charging Standard for offences against the person states that common assault will be the appropriate charge "where injuries amount to no more than the following: grazes, scratches, abrasions, minor bruising and swellings, reddening of the skin, superficial cuts or a black eye". During the July 5 debate the Attorney General informed the House of changes to the Standard which he had been advised the Director of Public Prosecutions intended to make: "The revised Charging Standard will include guidance that where serious aggravating features exist, cases in which the level of injuries

would usually lead to a charge of common assault, could more appropriately be charged as actual bodily harm. Such serious aggravating features would include the vulnerability of the victim, such as when they are a child assaulted by an adult. The effect of that pending change is that even minor assaults by a parent on a child, where grazes, scratches, abrasions, minor bruising, swelling, superficial cuts or a black eye are caused, will normally be charged as assault occasioning actual bodily harm". He added that "reddening of the skin where it is merely transitory will usually still be charged as common assault. That is because the definition of 'actual bodily harm' requires the injury to be more than transient. Where the reddening subsists for hours or days, that may suggest a charge of actual bodily harm".

6. One of the arguments raised in support of clause 49 in the House of Lords was the need to provide parents with sufficient legal certainty about what is and is not permissible. The above explanation by the Attorney General can hardly be described as adding to legal certainty. The other new clause tabled and debated in the House of Lords provided that battery of a child could no longer be justified as lawful punishment. It also provided appropriate reassurances confirming parents' rights to use reasonable force to protect their child and others and property and to prevent the commission of a crime, etc. This clause placed child victims of battery in the same position as adult victims of battery. So parents would be faced with the same legal certainty about the legality of their actions as any other person contemplating battery of another. Nobody has suggested that there is inadequate legal certainty in the law on offences against the person as it applies to assaults between adults. As the DPP made clear in his evidence to the Joint Committee, prosecutions for minor assaults on adults are very rare and he suspected that prosecutions for minor assaults of children would also be—although they could not be ruled out given the greater vulnerability of children. The DPP also referred to the *de minimis* principle.

7. It is plain that there is no additional legal uncertainty introduced by removing the defence of lawful punishment from offences of battery. On the other hand, clause 49 coupled with the proposed change in the Charging Standard outlined by the Attorney General appears to increase legal uncertainty considerably.

Clause 49 and execution of A v UK judgment

8. The case of *A v UK* ([1998] 2 FLR 959;(1999) 27 EHRR 61) originated in a judgment of an English court ten years ago, in 1994. In that case, a stepfather used the defence of lawful punishment in relation to a charge of "actual bodily harm", having admitted beating his stepson with a garden cane causing bruising. The Court judgment found the punishment breached Article 3 of the ECHR and that the UK was responsible because domestic law—the defence of "reasonable chastisement"—failed to provide adequate protection including "effective deterrence".

9. Removing use of the defence in cases of "actual bodily harm"—the charge used in the case of "A"—and leaving it intact in relation to charges of common assault, as clause 49 does, does not provide the "effective deterrence" required to execute the judgment. From the Attorney General's summary of the revision of the Charging Standard it appears uncertain whether cases involving bruising will be charged as common assault (defence still applicable) or actual bodily harm (no defence available); in any case the Charging Standard is not part of the law and does not fetter the ultimate discretion of a prosecutor to apply the tests in the Code.

10. Clause 49 sends a clear message to parents that it is lawful to go on hitting children; it sends a confusing message about how and how hard children can lawfully be hit. These messages certainly do not add up to "effective deterrence". The media have reflected and added to the confusion in their coverage of the implications of clause 49. The clause

enables, if not encourages, parents to find ways of hitting their children that leave no or little mark, although the risk of serious injury may be as great or greater than hitting in a way which leaves marks. It leaves the problem of "risk of injury" untouched: parents who shake children or hit them on the head may not cause any bruise or other injury—but they are risking serious injury.

CLAUSE 49 AND THE DEVELOPING JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

11. The European Court refers to the European Convention as a "living instrument", whose interpretation develops with time and changes in attitudes and practice. It is quite clear that in 2004, clause 49 would not be found to provide adequate protection for children. Eleven years ago, in the case of *Costello-Roberts v UK*, the Court found that the corporal punishment of a boy, hit three times with a soft-soled shoe on his clothed buttocks leaving no mark or bruising was "at or near the borderline" of breaching Article 3 (*Costello-Roberts v UK* (1995) 19 EHRR 112, ECrtHR). Six years ago, the European Court in its "*A v UK*" judgment referred to Article 19 of the UN Convention on the Rights of the Child (UNCRC) which requires protection from "all forms of physical or mental violence". Last year, the Court stated that: "The human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention on the Rights of the Child." (*Sahin v Germany*, [2003] 2 FLR 671, at 680, paragraph 39, ECrtHR, Grand Chamber).

CLAUSE 49 AND THE UN CONVENTION ON THE RIGHTS OF THE CHILD

12. Because of its almost universal ratification by 191 states, the UNCRC has acquired the status of customary international law. The Committee on the Rights of the Child, highest authority for interpretation of the Convention, has consistently held that the Convention requires prohibition of all corporal punishment, however light. It has confirmed this in concluding observations to more than 120 states in all continents, in its General Comment No. 1 on "The aims of education" (HRI/GEN/l/Rev.5, April 2001) and in the conclusions of its day of General Discussion on violence against children in the family and in schools, held in 2001, when it stated: "The Committee urges States Parties to enact or repeal, as a matter of urgency, their legislation in order to prohibit all forms of violence, however light, within the family and in schools, including as a form of discipline, as required by the provisions of the Convention and in particular articles 19, 28 and 37(a) and taking into account articles 2, 3, 6 and 12 as well as 4, 5, 9, 18, 24, 27, 29 and 39." (CRC/C/l 11, para. 715, September 2001)

13. When the Committee examined the UK's second periodic report in 2002, it concluded: "The Committee is of the opinion that governmental proposals to limit rather than to remove the 'reasonable chastisement' defence do not comply with the principles and provisions of the Convention and the aforementioned recommendations, particularly since they constitute a serious violation of the dignity of the child ... Moreover, they suggest that some forms of corporal punishment are acceptable and therefore undermine educational measures to promote positive and non-violent discipline." (CRC/C/15/Add.188, 4 October 2002)

14. It could hardly be clearer that clause 49 is not in compliance with the UNCRC.

OTHER HUMAN RIGHTS TREATY BODIES

15. The Committee on Economic, Social and Cultural Rights also called for prohibition of all corporal punishment in the family when it examined the UK's fourth periodic report under the International Covenant on Economic, Social and Cultural Rights in 2002 (E/C.12/l/Add.79, 17 May 2002). Earlier this year, a third treaty body, the Committee against

Torture, added its voice to the Committee on the Rights of the Child in calling for prohibition of corporal punishment in the family, when it examined New Zealand's third periodic report under the Convention against torture, etc (CAT/C/CR132/4, 19 May 2004).

THE UNIVERSAL DECLARATION AND INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: THE PRINCIPLE OF EQUAL PROTECTION UNDER THE LAW

16. It should be emphasised in addition that both the Universal Declaration of Human Rights (article 7) and the International Covenant on Civil and Political Rights (article 26) guarantee "everyone's" right to equal protection under the law.

EUROPEAN SOCIAL CHARTER AND EUROPEAN COMMITTEE OF SOCIAL RIGHTS

17. The European Committee of Social Rights, in a 2001 general observation, stated that article 17 of the European Social Charter "requires a prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere. [The Committee] furthermore considers that any other form of degrading punishment or treatment of children must be prohibited in legislation and combined with adequate sanctions in penal or civil law." (ECSR, Conclusions XV 2, Volume 1, General Introduction, 2001)

18. The observation notes that "The Committee does not find it acceptable that a society which prohibits any form of physical violence between adults would accept that adults subject children to physical violence."

19. Since issuing the observation, the Committee has been systematically reviewing the legal status of corporal punishment in the 45 member-states of the Council of Europe. Since February 2003 it has told five countries—Poland, France, Slovak Republic, Romania and Slovenia—that they are not in conformity because all corporal punishment, including in the family, is not effectively prohibited (in June 2004 a law prohibiting all corporal punishment passed both chambers of the Romanian Parliament; it will come into force in January 2005). In its Conclusions on the UK's most recent report on implementation of article 17, the Committee notes that "not all forms of corporal punishment are prohibited within the family. The Committee refers to its general observations on Article 17 in the General Introduction and decides to defer its conclusion on this point pending more information from the British Government on the situation and on its intentions in this regard ..."

20. Collective complaints have been made under the Social Charter against five other countries on the grounds that they have not effectively prohibited all corporal punishment in the family (Ireland, Greece, Italy, Belgium and Portugal; complaints nos. 17–21/2003; details at http://www.coe.int/T/E/Human_Rights/Esc/5_Collective_complaints). These were declared admissible in December 2003 (as yet, only 13 of the 45 member states of the Council of Europe, not including the UK, have accepted the collective complaints procedure).

PARLIAMENTARY ASSEMBLY OF COUNCIL OF EUROPE RECOMMENDATION

21. The Parliamentary Assembly of the Council of Europe adopted a detailed recommendation on 24 June 2004, with overwhelming support, calling for a "coordinated and concerted campaign in all the member states for the total abolition of corporal punishment of children" (Recommendation 1666/2004). The recommendation "notes the success of the Council of Europe in abolishing the death penalty and the Assembly now calls on it to make Europe, as soon as possible, a corporal punishment-free zone for children".

22. The Parliamentary Assembly notes the established human rights standards in the Convention on the Rights of the Child and the European Social Charter which require prohibition of all corporal punishment: "The Assembly considers that any corporal punishment of children is in breach of their fundamental rights to human dignity and physical integrity. The fact that such corporal punishment is still lawful in certain member states violates their equally fundamental right to the same legal protection as adults. Striking a human being is prohibited in European society and children are human beings. The social and legal acceptance of corporal punishment of children must be ended".

23. It should be noted that at least 12 member states of the Council of Europe have prohibited all corporal punishment. In these countries any defences justifying some level of violent punishment by parents have been repealed, so that the law on assault applies equally to punitive assaults of children. Many of these countries have gone on to insert an explicit prohibition of corporal punishment in their civil law. For example: in Sweden the criminal law provision excusing parents who caused minor injuries through physical punishment was removed in 1957. Sweden went on to add an explicit prohibition of all corporal punishment to its Parenthood and Guardianship Code in 1979; in 1969 in Finland the criminal law on assault was amended to remove a provision stating that a petty assault was not punishable if committed by parents or others exercising their lawful right to chastise a child (Finland went on to explicitly prohibit corporal punishment in its Child Custody and Rights of Access Act 1983); in Norway, a similar provision was removed from the criminal code in 1972 (explicit prohibition followed in 1987).

CONCLUSION

24. It seems extraordinary that any serious commentator could suggest that clause 49 satisfies our human rights obligations under international and European human rights instruments.

25. We hope that the Joint Committee will re-emphasise its recommendation that retention of the "reasonable chastisement" defence is incompatible with the UK's human rights obligations and that the Children Bill presents an obvious opportunity for law reform to remedy this breach and to provide children with equal protection under the law on assault.

14 July 2004

5. Extract from Minutes of evidence taken before the Committee on 19 May 2004

Witnesses: Mr Ken Macdonald QC, Director of Public Prosecutions and Head of the Crown Prosecution Service, Mr Philip Geering, Director of Policy, and Mr Chris Newell, Director of Casework, Crown Prosecution Service, examined.

Q1 Chairman: *Mr Macdonald, welcome. I am pleased to see that you are accompanied by Mr Philip Geering who is the Director of Policy at the CPS and Chris Newell who is the Director of Casework at the CPS. Thank you for coming to appear before the Joint Committee on Human Rights today as part of several of our inquiries: first of all in relation to the defence of "reasonable chastisement", where we are currently looking at issues in relation to the Children Bill; deaths in custody, which is one of the inquiries we are currently conducting; and also the Committee's response to the Home Office consultation on counter terrorism powers, particularly in relation to difficulties encountered in prosecuting such cases. If I may start with the issue of the possible abolition of the defence of reasonable chastisement, you must be aware that this is likely to surface in connection*

with the Children Bill which is currently going through Parliament and, as I have just said, we ourselves will be reporting on this Bill in the near future. We would be very interested to know from your perspective, from a prosecuting perspective, what difficulties there might be if the current defence of reasonable chastisement were to be abolished. I focus particularly on problems in relation to the evidential test and the public interest test because I think the last thing most people would want would be a situation where adults were going to be prosecuted for mild smacking of their children.

Mr Macdonald: I have seen a proposed amendment which I think was drafted by Peter Carter which abolishes the defence of reasonable chastisement and, quite clearly, this outlaws batteries and assaults in all but very exceptional circumstances—to prevent crime, for safety reasons and so on and so forth. My view is that that amendment criminalises all batteries against children except those which are excluded within the terms of the amendment. What we are being asked to say is whether if that were the situation we would develop a policy which meant that adults who simply smacked children in the way that you describe would not be prosecuted. Our response is that Parliament needs to frame its legislation to achieve the result it wants to achieve and it needs to understand that if it approves that amendment it will be criminalising battery against children, that will be the reality. We have some difficulty with Parliament expecting us to determine through our Code for Crown Prosecutors what public policy ought to be. We think the legislation should be sufficiently certain. The reality is that we would have to have some sort of policy about this but I think it would be inconceivable for us to draft a policy that would be so wide as to say that minor assaults on children would never be prosecuted because there clearly could be circumstances where they would be. One might posit an example of a child who was mentally handicapped or a child who was subjected to sexual abuse or other forms of assault. So we would not and could not draft guidance which would absolve all minor acts of battery against children from criminal prosecution. That said, the reality is that, just as most minor assaults against adults are not prosecuted, I suspect most minor assaults against children would not be either, although it is not an entirely accurate analogy because children are much more vulnerable than adults so the fact that adults are not regularly prosecuted for minor assaults where the victim is an adult does not mean there would not be prosecution more frequently when the victim is a child. So far as the tests are concerned removing the defence of reasonable chastisement clearly means that the evidential test can be passed more easily because one of the things Crown prosecutors have to factor in when considering whether the evidential test is met is possible defences and how compelling they are likely to be. If that defence goes, then the evidential test so far as minor assaults is concerned might be passed more easily and prosecution in appropriate circumstances could be more likely. So far as the public interest test is concerned, I think we are hesitant about a proposal which would invite us to say that the public interest test can do this job for Parliament rather than Parliament doing the job itself. One solution to this, of course, would be to abolish the defence of reasonable chastisement in all offences except common assaults. That is a possibility and that would have the merit, it seems to us, of the legislation being more certain. I do not want to repeat myself but I think we are a little uneasy at the idea that Parliament can fudge this issue and expect us to sort it out.

Q2 Chairman: *What you are saying is if there is to be some public interest test, it is for Parliament to determine what the parameters of it are?*

Mr Macdonald: It is for Parliament to determine whether minor slaps to children are criminal assaults or not. That is the bottom line and if the Peter Carter amendment is adopted it does that; it says that even minor assaults against children—although we can allow for de minimus smacking—are criminal acts by that amendment. We cannot say now before the legislation is even passed that we would never prosecute those kind of assaults.

There clearly would be circumstances in which we would although, as I said earlier, they would probably be very rare.

Q3 Chairman: *You seem to be saying that assaults on adults can be dealt with in terms of severity because, as you said, there are many occasions when an adult would effectively assault another and it would not result in a prosecution and it is possible for the CPS to deal with those kind of issues but not to deal with them when they relate to children because children are more likely to be smacked. Is that what you are saying?*

Mr Macdonald: No, you can have a situation where one adult smacks another and there is clearly no public interest in prosecution, there is no injury, the person who is slapped is not really bothered about it, and there is no public interest in taking a case like that through the courts. That might often be the case with children but it equally might not be because children are much more vulnerable and there are all sorts of situations in which children who are smacked might be damaged by it (psychologically if not physically) and there might be cases of that sort where Crown prosecutors will say, "This was just a smack but I am going to prosecute because there is public interest in prosecuting." What I am saying to you is that we could not devise a policy which would mean that minor slaps were never prosecuted; we simply could not do it.

Q4 Lord Lester of Herne Hill: *As I understand what you are saying, Mr Macdonald, what you are saying is if the amendments were made more sophisticated in the way that you have suggested, and in fairness it was available for common assaults, that in your view would achieve reasonable legal certainty and in terms of policy it would go a long way to meet the objectives of Mr Carter?*

Mr Macdonald: That is right. Can I explain why I say that? So far as we have been able to discover through a trawl, in the year ending May 2003, there were nine cases of assault on children in which the defence of reasonable chastisement was raised and there were four acquittals. These are cases where the violence was, in our view, strong enough to require a prosecution, in some cases quite bad violence. If a Crown prosecutor was looking at a minor slap or smack of the sort we are talking about and there was available to the defendant the defence of reasonable chastisement, because it was permitted still by the amendment, the chance of that case being prosecuted once that defence had been factored in would be very, very low indeed because the overwhelming likelihood is in the light of that defence and in the light of the minor nature of the assault there would an acquittal, so you would not get past the evidential test because there would be no realistic prospect of conviction. If you take away reasonable chastisement there is a slightly stronger bias in favour of prosecution or a slightly stronger likelihood that the evidential test is passed.

Q5 Lord Campbell of Alloway: *Mr Macdonald, you are saying, are you not really, that you retain the discretion that you always had in all cases on a de minimus affair? That is a question of discretion and that must always remain with the prosecuting authorities; it always has done.*

Mr Macdonald: Yes.

Q6 Lord Campbell of Alloway: *But if you retain that discretion there is no reasonable cause to do away with what they call reasonable chastisement?*

Mr Macdonald: That is a matter for Parliament; it is not a matter for us.

Q7 Lord Campbell of Alloway: *And that is for Parliament to decide.*

Mr Macdonald: I am being asked what I think the effect would be in terms of prosecution practice if the defence were abolished. I am not expressing any view about whether it should be or not.

Q8 Chairman: *Do you find the least bit persuasive the Scottish Parliament solution which I gather specifies particular implements or body parts or age thresholds in determining these issues?*

Mr Macdonald: We already have guidance from the Court of Appeal in the case of H about the circumstances in which reasonable chastisement could work. I think it is a mistake to be overly prescriptive actually. It is quite difficult to think of circumstances in which a weapon is used against a child and the appropriate offence would be common assault. I suppose you could strike a child with a weapon and cause no injury at all, but I think all of our experiences would be that where an adult uses a weapon against a child that is conduct which most people believe should be criminal under all circumstances.

Q9 Chairman: *How do you define a weapon?*

Mr Macdonald: I am thinking in terms of a piece of wood or a bar and that it is a matter for people's judgment, it is a matter for Parliament's judgment as to whether it wants to criminalise that.

Q10 Lord Judd: *I always say at this point I am not a lawyer, I am just a layman who looks to the law for protection and the rest. If the law is to work well does it not necessitate that there is a culture which the law is supporting, and whether or not appropriate wording was found in whatever form, if it were envisaged that in certain circumstances parents could slap a child, this sends a confusing message to the public? It is not saying that slapping or hitting children is wrong; it is saying there are certain circumstances in which it is permissible. Does that not, whatever the wording, make your task more difficult because of the knock on effects?*

Mr Macdonald: I think there are always uncertainties. Except in the most open and shut cases, whenever you try to apply the code test, the public interest test, there are often considerations and arguments on both sides. I really cannot express an opinion here about what I think Parliament should do. All I can say to you is that although I suspect prosecutions would be very rare, if the question is: could you issue guidance saying slaps are not to be prosecuted? the answer is we could not do that. Indeed, it would be fairly meaningless guidance and difficult for prosecutors individually to interpret exactly what was meant by it because it would have of course subsidiary questions.

Q11 Chairman: *It might be helpful if for those of us who are not lawyers you could clarify the difference between common assault and battery.*

Mr Macdonald: Assault is putting someone in fear of violence; battery is actually causing them violence. The technical legal definition of a common assault if it is battery is the laying of hands on someone without leaving an injury, so it is an application of force. Assault does not have to be an application of force; assault can simply be a threat of force. I hope that is clear.

* * * * *

6. Note from Lord Campbell of Alloway

Unfortunately I will have to leave the meeting this afternoon before the vote on the whole of the report is taken. For the reasons I have explained to the Committee, I wish to record that I would have felt obliged to vote against the whole of the report, had I been present.

8 September 2004

Witnesses

Reports from the Joint Committee on Human Rights since 2001

The following reports have been produced

Session 2003–04

First Report	Deaths in Custody: Interim Report	HL Paper 12/HC 134
Second Report	The Government's Response to the Committee's Ninth Report of Session 2002-03 on the Case for a Children's Commissioner for England	HL Paper 13/HC 135
Third Report	Scrutiny of Bills: Progress Report	HL Paper 23/HC 252
Fourth Report	Scrutiny of Bills: Second Progress Report	HL Paper 34/HC 303
Fifth Report	Asylum and Immigration (Treatment of Claimants, etc.) Bill	HL Paper 35/HC 304
Sixth Report	Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4	HL Paper 38/HC 381
Seventh Report	The Meaning of Public Authority under the Human Rights Act	HL Paper 39/HC 382
Eighth Report	Scrutiny of Bills: Third Progress Report	HL Paper 49/HC 427
Ninth Report	Naval Discipline Act 1957 (Remedial) Order 2004	HL Paper 59/HC 477
Tenth Report	Scrutiny of Bills: Fourth Progress Report	HL Paper 64/HC 503
Eleventh Report	Commission for Equality and Human Rights Structure, Functions and Powers	HL Paper 78/HC 536
Twelfth Report	Scrutiny of Bills: Fifth Progress Report	HL Paper 93/HC 603
Thirteenth Report	Scrutiny of Bills: Sixth Progress Report	HL Paper 102/HC 640
Fourteenth Report	Asylum & Immigration (Treatment of Claimants, etc.) Bill: New Clauses	HL Paper 130/HC 828
Fifteenth Report	Civil Partnership Bill	HL Paper 136/HC 885
Sixteenth Report	Commission for Equality and Human Rights: The Government's White Paper	HL Paper 156/HC 998
Seventeenth Report	Scrutiny of Bills: Seventh Progress Report	HL Paper 157/HC 999

Eighteenth Report	Review of Counter-terrorism Powers	HL Paper 158/HC 713

Session 2002–03

First Report	Scrutiny of Bills: Progress Report	HL Paper 24/HC 191
Second Report	Criminal Justice Bill	HL Paper 40/HC 374
Third Report	Scrutiny of Bills: Further Progress Report	HL Paper 41/HC 375
Fourth Report	Scrutiny of Bills: Further Progress Report	HL Paper 50/HC 397
Fifth Report	Continuance in force of sections 21 to 23 of the Anti-terrorism, Crime and Security Act 2001	HL Paper 59/HC 462
Sixth Report	The Case for a Human Rights Commission: Volume I Report	HL Paper 67-I HC 489-I
Seventh Report	Scrutiny of Bills: Further Progress Report	HL Paper 74/HC 547
Eighth Report	Scrutiny of Bills: Further Progress Report	HL Paper 90/HC 634
Ninth Report	The Case for a Children's Commissioner for England	HL Paper 96/HC 666
Tenth Report	United Nations Convention on the Rights of the Child	HL Paper 117/HC 81
Eleventh Report	Criminal Justice Bill: Further Report	HL Paper 118/HC 724
Twelfth Report	Scrutiny of Bills: Further Progress Report	HL Paper 119/HC 765
Thirteenth Report	Anti-social Behaviour Bill	HL Paper 120/HC 766
Fourteenth Report	Work of the Northern Ireland Human Rights Commission	HL Paper 132/HC 142
Fifteenth Report	Scrutiny of Bills and Draft Bills: Further Progress Report	HL Paper 149/HC 1005
Sixteenth Report	Draft Voluntary Code of Practice on Retention of Communications Data under Part 11 of the Anti-terrorism, Crime and Security Act 2001	HL Paper 181/HC 1272
Seventeenth Report	Scrutiny of Bills: Final Progress Report	HL Paper 186/HC 1278
Eighteenth Report	The Government's Response to the Committee's Tenth Report of Session 2002-03 on the UN Convention on the Rights of the Child	HL Paper 187/HC 1279
Nineteenth Report	Draft Gender Recognition Bill Vol I: Report	HL Paper 188-I/HC 1276-I

Nineteenth Report	Draft Gender Recognition Bill Vol II: Evidence	HL Paper 188-II/HC 1276-II

Session 2001–02

First Report	Homelessness Bill	HL Paper 30/HC 314
Second Report	Anti-terrorism, Crime and Security Bill	HL Paper37/HC 372
Third Report	Proceeds of Crime Bill	HL Paper 43/HC 405
Fourth Report	Sex Discrimination (Election Candidates) Bill	HL Paper 44/HC 406
Fifth Report	Anti-terrorism, Crime and Security Bill: Further Report	HL Paper 51/HC 420
Sixth Report	The Mental Health Act 1983 (Remedial) Order 2001	HL Paper 57/HC 472
Seventh Report	Making of Remedial Orders	HL Paper 58/HC 473
Eighth Report	Tobacco Advertising and Promotion Bill	HL Paper 59/HC 474
Ninth Report	Scrutiny of Bills: Progress Report	HL Paper 60/HC475
Tenth Report	Animal Health Bill	HL Paper 67/HC 542
Eleventh Report	Proceeds of Crime: Further Report	HL Paper 75/HC 596
Twelfth Report	Employment Bill	HL Paper 85/HC 645
Thirteenth Report	Police Reform Bill	HL Paper 86/HC 646
Fourteenth Report	Scrutiny of Bills: Private Members' Bills and Private Bills	HL Paper 93/HC 674
Fifteenth Report	Police Reform Bill: Further Report	HL Paper 98/HC 706
Sixteenth Report	Scrutiny of Bills: Further Progress Report	HL Paper 113/ HC 805
Seventeenth Report	Nationality, Immigration and Asylum Bill	HL Paper 132/ HC 961
Eighteenth Report	Scrutiny of Bills: Further Progress Report	HL Paper 133/ HC 962
Nineteenth Report	Draft Communications Bill	HL Paper 149 HC 1102

Twentieth Report	Draft Extradition Bill	HL Paper 158/ HC 1140
Twenty-first Report	Scrutiny of Bills: Further Progress Report	HL Paper 159/ HC 1141
Twenty-second Report	The Case for a Human Rights Commission	HL Paper 160/ HC 1142
Twenty-third Report	Nationality, Immigration and Asylum Bill: Further Report	HL Paper 176/ HC 1255
Twenty-fourth Report	Adoption and children Bill: As amended by the House of Lords on Report	HL Paper 177/ HC 979
Twenty-fifth Report	Draft Mental Health Bill	HL Paper 181/ HC 1294
Twenty-sixth Report	Scrutiny of Bills: Final Progress Report	HL Paper 182/ HC 1295