



House of Lords
House of Commons
Joint Committee on
Human Rights

The International Covenant on Economic, Social and Cultural Rights

**Twenty-first Report of Session
2003–04**



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*Report, together with formal minutes, minutes
of evidence and appendices*

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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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Summary

Economic, social and cultural rights are a core element of international human rights protection. This report considers aspects of the implementation of the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) in the UK. It takes as its starting point the Concluding Observations of the UN Committee on Economic Social and Cultural Rights (CESCR), on the UK's fourth report under the Covenant.

The ICESCR, as an international treaty, is binding on the UK in international law only. This report considers the UK system for the protection of economic, social and cultural rights in domestic law. Although the Covenant has a very limited impact in UK domestic law, many of the rights which the Covenant guarantees are protected in domestic legislation. However, where there are gaps in this legislative protection, the domestic legal system cannot always provide redress.

The report analyses the case for further legal effect to be given to the Covenant rights. We take it as our starting point that Parliament and Government must retain the primary responsibility for economic and social policy, but the report concludes that an acceptable model could be found for the incorporation of protection for economic, social and cultural rights into UK law and that the case for incorporating guarantees of the Covenant rights in domestic law, in a way that recognises the institutional limits of the courts' competence, merits further attention.

For the Covenant rights to be effective in practice, it is essential that they should be used as a framework for government policy development. The impact of new policies and legislative proposals on the Covenant rights and on the obligation to progressively realise those rights, should be assessed. The report proposes that Government, in co-operation with the new Commission for Equality and Human Rights (CEHR), should develop ways of measuring progress in achieving progressive realisation of key rights.

The report also considers the role of Parliament in the protection of economic, social and cultural rights, in scrutinising legislation for compatibility with the Covenant rights, and explores means of enhancing parliamentary scrutiny. The report proposes that the explanatory notes to relevant Bills should include a discussion of the compatibility of the Bill with the Covenant rights.

The new Commission for Equality and Human Rights will also have an important role in protection and promotion of the Covenant rights, in particular in education and information provision. A number of the functions envisaged for the CEHR in the white paper *Fairness for All*, including training, research, advice and inquiry, could be used by the new Commission to contribute to implementation of the Covenant rights.

The report considers the application of a rights-based approach to issues of poverty, homelessness and education. It also addresses the CESCR's concern about continuing discrimination faced by ethnic minorities and persons with disabilities in employment, housing and education, and urges the introduction of a single Equality Bill, to address these problems. Ratification of Protocol 12 to the ECHR, and acceptance of rights of individual

petition under relevant human rights treaties, would also strengthen protection against inequality.

The report also addresses protection of workplace rights, including the introduction of the national minimum wage, and restrictions on the right to strike, which the CESCR considered to be in breach of Article 8 of the Covenant. It also considers issues of family life rights raised by the CESCR, including domestic violence and the physical punishment of children.

Finally, the report deals with the process by which the UK reports on its compliance with the Covenant, to the UN Committee on Economic, Social and Cultural Rights. This process provides a valuable link between domestic policy and legal debates and the international system of human rights protection. In this regard the involvement of NGOs and civil society is important. The report suggests that the reporting process could be most effectively managed if responsibility for its co-ordination were transferred from the FCO to the DCA.

1 Introduction

1. This report addresses the obligations of the UK to protect economic, social and cultural rights under the UN treaty that guarantees them, the International Covenant on Economic Social and Cultural Rights (ICESCR). It takes as its starting point the comments of the UN Committee that oversees the treaty, following its most recent consideration, in 2003, of the UK's implementation of the treaty rights. Under our terms of reference we are required to consider "matters relating to human rights in the United Kingdom". We have consistently interpreted this mandate as extending beyond the rights given force in our domestic law by the Human Rights Act 1998, to include the international human rights instruments by which the UK has agreed to abide.

2. The United Nations International Covenant on Economic Social and Cultural Rights (ICESCR) is a core element of the UN system for human rights protection. It is one of the six main binding UN human rights Conventions (all of which the UK has signed and ratified).¹ The ICESCR gives the economic, social and cultural rights proclaimed in the Universal Declaration of Human Rights of 1948, binding legal force. The same is achieved for the civil and political rights in the Universal Declaration, by the International Covenant on Civil and Political Rights (ICCPR). Both Covenants were adopted in 1966 and entered into force in 1976, and have bound the UK in international law since that date.

Periodic Reports

3. In common with the other main UN human rights treaties, the ICESCR requires the State Parties to it, including the UK, to make Periodic Reports detailing their compliance with the human rights standards it protects. Periodic Reports are then examined by UN committees of independent experts appointed by the State Parties. After its initial examination, the Committee may seek clarification and supplementary information from the Government concerned. Most UN Committees are now willing to receive background submissions from non-governmental organisations and hold pre-sessional hearings to consult on matters to be raised with the Government. In formal public examination, the Committee's aim is to encourage dialogue with representatives of the State Party. Concluding observations and recommendations of the Committee, that are adopted in closed session, also reflect this approach. They provide a collective assessment of the Report, listing the positive achievements of Governments while listing principal subjects of concern and recommendations. The Committee will always seek to take into account country-specific factors and acknowledge difficulties that impede the full implementation of the Covenant.

4. While the requirement upon the State party to draw up and submit a Periodic Report for public examination is an important aspect of the monitoring and enforcement regime for the UN system, the process also creates an opportunity for Government to undertake a regular cross-departmental audit of human rights protection and engage in dialogue with

¹ The International Covenant on Economic Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention Against Torture; The International Convention on the Elimination of All forms of Racial Discrimination; The Convention on the Elimination of all forms of Discrimination Against Women; the Convention on the Rights of the Child.

stakeholders from domestic community associations and user groups to global NGOs and international experts. International reporting reinforces the message concerning the universal and indivisible quality of human rights protection and offer an open and transparent focus for accountability.

Work of the JCHR

5. The consideration of the Periodic Reports on human rights treaties by the United Nations is an important means of ensuring accountability against the human rights standards which the government has undertaken to protect. For this accountability to be most effective, the scrutiny of compliance with the treaty rights should involve Parliament, and this parliamentary scrutiny should also open up the process to wider public debate. It is in order to provide a role for Parliament in the implementation of the UK's international human rights obligations that the JCHR has decided to examine the concluding observations from each of the UN Committees on the UK's Periodic Reports.

6. As the first step in this programme of work we published, in June 2003, a report on the UN Convention on the Rights of the Child² which examined the concluding observations of the UN Committee on the Rights of the Child in respect of the UK, and made a series of recommendations for enhanced protection of children's human rights in UK law and practice. This present report applies the same scrutiny to the concluding observations of the UN Committee on Economic, Social and Cultural Rights.

7. Compliance with the ICESCR is an aspect of the UK's international human rights obligations which has received scant scrutiny at a domestic level. The international obligations imposed under the Covenant, and the examination of the implementation of these obligations in the 5-yearly reviews by the UN Committee, have generated little domestic discussion, in contrast with the lively and informed debate in relation to civil and political rights. It is our intention to encourage a wider awareness and public discussion on the implications of economic, social and cultural rights guarantees, under the Covenant and other international treaties,³ and the implications of these rights for UK law and policy. We hope our comments will also make a contribution to the ongoing dialogue between the treaty bodies and the UK, on implementation of the UN human rights treaties.

The Covenant

8. The rights that the ICESCR ("the Covenant") protects are—

- equality between men and women (Article 3);
- the right to work (Article 6);
- the right to fair conditions of employment (Article 7);
- the right to form and join trade unions (Article 8);

² Tenth Report, Session 2002–2003, *The UN Convention on the Rights of the Child*, HL Paper 117, HC 81

³ Including the European Social Charter of 1961, and the International Labour Organisation Conventions

- the right to social security (Article 9);
- the right to protection of the family (Article 10);
- the right to an adequate standard of living (including the right to food, clothing and housing) (Article 11);
- the right to health (Article 12);
- the right to education (Article 13);
- the right to culture (Article 15).

9. The Covenant rights are to be guaranteed in accordance with the principle of non-discrimination (Article 2.2) and with the principle of progressive realisation (Article 2.1). The text of the Covenant rights is annexed to this report. Although there is no body of jurisprudence to determine the scope of the Covenant rights,⁴ the authoritative “general comments” of the CESCR⁵ give guidance as to the principles of application, content and limits of many of the Covenant rights. In the absence of a right of individual petition under the ICESCR, the sole supervision mechanism is therefore the reporting process by which, under Article 16 ICESCR, States Parties are required to submit Periodic Reports every five years detailing their compliance with the Covenant.

10. The UK’s obligations under the Covenant should also be considered in light of the other international agreements for the protection of economic, social and cultural rights, to which the UK is a party. The European Social Charter 1961, the Council of Europe treaty which complements the civil and political rights guarantees of the European Convention on Human Rights, sets out a detailed catalogue of economic and social rights.⁶ The Revised European Social Charter, which contains an expanded catalogue of the rights in the 1961 treaty, has not as yet been ratified by the UK;⁷ neither has the UK accepted the Charter’s collective complaints mechanism, which enables trade unions, employers’ organisations and NGOs to bring cases for determination by the European Committee of Social Rights.⁸ The UK is also party to a number of international treaties which guarantee specific aspects of economic and social rights. The treaties of the International Labour Organisation⁹ provide protection in relation to workplace and trade union rights. The UN Convention on

4 There is no right of individual or collective complaint under the ICESCR. An optional protocol which would allow for individual complaints to be brought to the CESCR is currently under negotiation. Report of the Working Group on the Draft Optional Protocol: E/CN4/2004/44.

5 Compiled in HRI/GEN/1/Rev.7

6 The European Social Charter 1961 allows State Parties to agree to accept to be bound by a limited number of the rights it establishes. To date the UK has accepted 60 of the 72 Rights in the 1961 Charter; it has not accepted additional rights contained in the first Protocol to the Charter, or in the Revised European Social Charter of 1996.

7 The recent inter-departmental review of international human rights obligations declined to alter this position but confined that the question of ratification of the Revised Charter “is kept under constant review”: International Human Rights Instruments: The UK’s position: report on the outcome of an inter-departmental review conducted by the DCA. July 2004.

8 Under the 1961 Charter, the UK participates in a reporting process which requires the submission of reports every two years to the European Committee of Social Rights. The Committee then issues its conclusions, and where a violation of the Charter is found, this may then be the subject of a recommendation of the Committee of Ministers.

9 Key ILO Conventions to which the UK is party include C87, Freedom of Association and Protection of the Right to Organise Convention, 1948; C98 Right to Organise and Collective Bargaining Convention 1949; C29, Forced Labour Convention 1930; C105, Abolition of Forced Labour Convention, 1957; C111, Discrimination (Employment and Occupation) Convention 1958; C.138, Minimum Age Convention, 1973; C182, Worst Forms of Child Labour Convention, 1999.

the Rights of the Child (CRC), the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the UN Convention on the Elimination of all forms of Racial Discrimination (CERD) also contain guarantees of economic and social rights.

The Committee on Economic, Social and Cultural Rights

11. The UN treaty body with responsibility for supervising the Covenant is the Committee on Economic Social and Cultural Rights (CESCR), a body of 18 independent experts, established in 1985,¹⁰ which meets in Geneva twice yearly. The reporting process follows the procedures outlined above.¹¹ It culminates in the publication by the CESCR of concluding observations which, although authoritative, have no binding legal force; they are intended to facilitate a continuing constructive dialogue with the State on implementation of the Covenant.

The UK Report

12. The UK's Fourth Report under the Covenant was examined in Geneva in April 2002, and the concluding observations were issued in May 2002. It is these concluding observations which form the basis of this inquiry. The UK's fifth report under the Covenant is due in 2007.

13. The FCO has lead departmental responsibility for preparing the report under the ICESCR, for submitting the report to the CESCR and for the subsequent dialogue (the role of the FCO is examined below). The report also includes input from a number of other government departments, including departments of the devolved administrations.

Progress of this Inquiry

14. In the course of this inquiry, we took oral evidence from Bill Rammell MP, Minister of State at the Foreign and Commonwealth Office. We also received written evidence from NGOs, trade unions and academic institutions, and we held a valuable roundtable seminar with a number of academics and NGOs concerned with economic, social and cultural rights.¹² We also visited South Africa, where we met the South African Constitutional Court, the South African Human Rights Commission, government officials responsible for human rights implementation and lawyers, NGOs and academics, to discuss the effect and value of the entrenchment of economic, social and cultural rights in the South African Constitution. Members of the Committee also attended a seminar on South African protection of economic and social rights, organised by the University of Cape Town Law School¹³ to coincide with the Committee's visit. We are grateful to all those who have assisted in this inquiry.

10 ECOSOC Resolution 1985/17 United Nations Doc E/1995/85

11 para. 3 above

12 Speakers at the seminar were: Professor Paul Hunt, Ian Byrne and Professor Stuart Weir

13 Chaired by Professor Geraldine Van Bueren

2 Economic and social rights in the UK

15. There has been a strong commitment by the UK Government to economic, social and cultural rights internationally. Successive FCO Annual Human Rights Reports support the importance of economic and social rights protection as an essential part of the protection of all human rights. The strongest statement is that in the FCO Annual Report for 1999 that—

The achievement of social and economic rights is enhanced by progress in achieving civil and political rights. The commitment to a right to development—which draws together the social and economic rights laid down in the Universal Declaration of Human Rights (1948) – underlines a vital lesson: that we fail to honour the Universal Declaration and cannot be upholders of human rights unless we commit ourselves to all rights for all people.¹⁴

This commitment to economic, social and cultural rights in the international context contrasts with an apparent reluctance to use the language of these rights when addressing relevant issues in domestic law and policy.

Status of the ICESCR in UK law

16. The UK has accepted international treaty obligations to protect economic and social rights under the ICESCR, the European Social Charter, and the Conventions of the ILO. The UK’s “dualist” legal system means that treaties, such as the ICESCR, do not in general take any legal force in domestic law unless they have been incorporated in domestic legislation. There are defined exceptions to this general principle, which enable the courts to take some account of the terms of an unincorporated treaty such as the ICESCR. These include the following—

- The courts assume that Parliament does not intend to legislate in a manner incompatible with the United Kingdom’s international legal obligations, including those arising under human rights treaties. They therefore interpret legislation in a manner consistent with those obligations whenever possible, even if there is no obvious ambiguity in the legislation.¹⁵
- In particular, where a statute was enacted to fulfil an international obligation, the courts will assume that it was intended to be effective for that purpose and will interpret the legislation accordingly.¹⁶
- Where the common law is uncertain or there is a gap in the law, courts try to make decisions in a manner compatible with international obligations.¹⁷

14 FCO Annual Report, 1999

15 *Garland v. British Rail Engineering Ltd.* [1983] 2 AC 751 at p. 771 *per* Lord Diplock; *Litster v. Forth Dry Dock & Engineering Co. Ltd.* [1990] 1 AC 546, HL

16 *R. (Mullen) v. Secretary of State for the Home Department*, Times, 31 Dec. 2002, CA, interpreting s. 133 of the Criminal Justice Act 1988 in the light of Art. 14.6 of the ICCPR.

17 *DPP v. Jones* [1999] 3 WLR 625, HL, at p. 634 *per* Lord Irvine of Lairg LC

- Where possible, courts exercise their discretion in a manner compatible with international obligations.¹⁸
- When reviewing the exercise of discretion by public authorities, the courts subject decisions or acts which interfere with human rights under international treaties to specially anxious scrutiny. Such decisions or acts require particularly strong justification if they are not to be regarded as irrational or disproportionate and, therefore, unlawful.¹⁹
- Courts regard people dealing with governmental bodies as having a legitimate expectation that, other things being equal, the Government will act in a manner consistent with the United Kingdom's international obligations. The Government can make it clear that it does not intend to be bound by its obligations in its domestic decision-making, but until it does so the courts are able to quash decisions which disappoint the claimant's legitimate expectation.²⁰
- When courts are required to decide what legal public policy demands, they regard it as being part of the legal public policy of this country that courts should give effect to clearly established rules of international law, and so they treat international obligations as an indication of public policy.²¹

17. The Covenant, as an international treaty, therefore has a very limited impact in our domestic law. This does not, however, render its provisions unimportant. In ratifying the Covenant, the UK has made a commitment, binding in international law, to abide by the terms of the Covenant. This requires government, Parliament and the courts to make efforts to ensure the fullest possible compliance with the terms of the ICESCR.

Legislative protection of economic, social and cultural rights

18. Although the UK system lacks legal protection for most economic and social rights as rights, that is not to say that the substance of those rights are unprotected. Under current legislation relating to housing, healthcare, employment relations and discrimination, for example, significant aspects of the Covenant rights are the subject of obligations on public bodies which may be judicially reviewed in the courts. The UK's framework of legislation in relation to race, sex and disability discrimination, now supplemented by regulations in relation to discrimination on grounds of religion and sexual orientation, provides substantial, though varying,²² protection for employment rights and rights of access to social services for a number of disadvantaged groups.²³ The courts, in adjudicating on this

18 *Rantzen v. Mirror Group Newspapers (1986) Ltd.* [1994] QB 670, CA

19 *Bugdaycay v. Secretary of State for the Home Department* [1987] AC 514, HL; *R v. Ministry of Defence, ex parte Smith* [1996] AC 517; *R. v. Secretary of State for the Home Department, ex parte Simms* [2000] AC 115, HL; *R. v. Secretary of State for the Home Department, ex parte Venables and Thompson* [1998] AC 407, HL

20 *R. v. Secretary of State for the Home Department, ex parte Ahmed and Patel* [1998] INLR 570, CA, approving and applying *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273, HC of Australia.

21 *Oppenheimer v. Cattermole* [1976] AC 249, HL; *Blathwayt v. Baron Cawley* [1976] AC 397, HL; *Cheall v. Association of Professional Executive Clerical and Computer Staff* [1983] 1 QB 127, CA

22 For example, protection against religious and sexual orientation discrimination extends only to employment matters.

23 Equal Pay Act 1970; Sex Discrimination Act 1975; Race Relations Act 1976; Race Relations (Amendment) Act 2000; Race Relations Act (Amendment) Regulations 2003; Disability Discrimination Act 1995; Employment Equality (Sexual Orientation) Regulations 2003; Employment Equality (Religion or Belief) Regulations 2003.

legislation, regularly make decisions that decide on the application and limits of economic and social rights. Democratic Audit, in its evidence to our inquiry, identified a body of cases in which it considered that the courts adjudicated, though not expressly, on economic and social rights.²⁴

The limitations of legislative protection

19. The application of what might be considered economic and social rights through judicial review of statutory duties suggests that consideration of their substance is by no means alien to the UK courts. This process does not, however, provide constitutional level protection of universally-applicable human rights standards of the type provided by the Human Rights Act in relation to civil and political rights. This may leave vulnerable marginalised groups or individuals, who fall outside of the scope of the legislation, since they cannot challenge the limitations of the legislation in protecting their economic, social or cultural rights.

20. Someone who falls outside of the general provision made by social security legislation, for example asylum seekers deprived of benefits under section 55 of the Nationality Immigration and Asylum Act 2002, cannot claim redress before the courts on the grounds that their rights to social security under Article 9 of the Covenant have been violated.²⁵ Although recipients of benefits could bring an action for judicial review of the allocation or non-allocation of particular benefits to them, as an inappropriate application of the Social Security Acts, they would have no access to the courts to challenge the levels of a particular type of benefit (prescribed under the legislation) which they considered to be insufficient to satisfy Article 9, or inadequate to ensure an adequate standard of living under Article 11. Where the Covenant rights are protected through legislation, therefore, the level to which these rights are protected is for Parliament and the Executive to determine.

Protection for ESC rights under the HRA

21. No clear line of demarcation can be drawn between the substance of rights classified as civil and political, and those classified as economic, social and cultural. Some measure of protection for economic and social rights is afforded by the primarily civil and political rights guaranteed under the Human Rights Act. For example, the right to an adequate standard of living (Article 11 ICESCR) is a more robust expression of the minimum protection available under the freedom from inhuman and degrading treatment (Article 3 European Convention on Human Rights (ECHR)), which will guard against the worst forms of destitution. Rights to privacy, personal autonomy and physical integrity, of the kind guaranteed by Article 8 ECHR, afford the individual rights in relation to the adequacy and competence of healthcare, and in relation to their autonomy in choosing whether and how they are cared for. These are rights which are key elements of the right to health as guaranteed by Article 12 ICESCR, though the guarantees it provides are more comprehensive. In relation to social rights, the right to freedom of association, guaranteed under Article 11 ECHR, protects the rights of trade unions and their members (as well as of those who decide not to join a trade union), though those rights are given more detailed

²⁴ Appendix 11

²⁵ Though see below para. 23 and paras. 119–121 on the applicability of Article 3 ECHR in these circumstances

expression in the instruments of the International Labour Organisation, in the European Social Charter and in the ICESCR.

22. Rights to protection of property, and to access to education, are guaranteed by the first protocol to the ECHR, also incorporated into UK law by the Human Rights Act. These rights are by their nature respectively economic and social (although property rights may also be classed as civil rights), and yet they are without difficulty guaranteed and applied by the UK courts, if in relatively circumscribed and qualified form, alongside the civil and political guarantees in the Convention and the Human Rights Act. Certain economic, social and cultural rights are in practice already a part of domestic law, and domestic discourse on rights.

23. The extent of the protection of economic rights afforded by the civil and political rights protections of the Human Rights Act has been given careful consideration by the UK courts in a series of recent cases dealing with the denial of benefits to asylum seekers who are deemed not to have claimed asylum within a reasonable time of their arrival in the UK, under section 55 of the Nationality Immigration and Asylum Act 2002. The Court of Appeal has recently held that the freedom from inhuman and degrading treatment guaranteed by Article 3 ECHR requires the State to provide support for those asylum seekers to whom section 55 applies, where they are not able to find support from sources other than the State and where the effect of section 55 is therefore to render them destitute.²⁶

24. In terms of legal protection and redress, therefore, ESC rights are for the most part protected through legislation, but there is limited opportunity to challenge gaps and inadequacies in this legislation, unless the matter can be brought within one of the rights protected under the Human Rights Act.

25. Because in our legislative scrutiny work we have consistently taken the view that the JCHR's remit, to consider "matters related to human rights in the United Kingdom", extends beyond the rights set out in the Human Rights Act to the international catalogue of human rights instruments to which the UK is a party, we have begun to introduce discussion of economic, social and cultural rights into parliamentary debate more regularly.

The EU Charter of Fundamental Rights

26. The EU Charter of Fundamental Rights contains guarantees of both civil and political, and economic, social and cultural rights,²⁷ as well as some guarantees of "third generation" rights, such as the right to environmental protection. It is likely that the Charter will, in the event of ratification of the Treaty on a Constitution for Europe,²⁸ involve the UK courts in consideration of the rights it contains, including guarantees of economic, social and cultural rights, albeit within a relatively narrow field where these rights apply to the

26 *SSHD v Limbuela, Tesema and Adam* [2004] EWCA Civ 540

27 Including rights to collective bargaining, to protection against unjustified dismissal, to fair and just working conditions, rights to social security and social assistance, and the right of access to preventative healthcare and medical treatment.

28 The Charter is contained in Part II of the Treaty

implementation of EU law. Despite the current declaratory status of the Charter, agreed in 2000, it has already been referred to by the domestic courts in a number of cases to inform consideration of domestic law and in particular the Human Rights Act.²⁹ In the recent case of *R v East Sussex County Council and the Disability Rights Commission, ex parte A, B, X and Y*,³⁰ Charter guarantees relevant to the care and physical integrity of people with disabilities, including the guarantee of the rights of people with disabilities in Article 26, were considered by the Administrative Court.³¹

27. The Charter is primarily intended to ensure the human rights accountability of institutions of the EU, but extends to certain actions of Member States. The field of application of the Charter is limited under Article 51, which makes the rights applicable to Member States “only where they are implementing Union law”.³²

28. It is likely that judicial application of some of the Charter rights, including some of the economic and social rights, will be constrained to some extent by Article 52.5. Article 52.5 states that provisions of the Charter which contain “principles” are applicable to Member State action only where those provisions have been the subject of national law implementation measures. Although the boundary between “rights” and “principles” in the Charter is unclear,³³ the explanatory notes suggest that it does not equate to a distinction between civil and political rights on the one hand, and economic and social rights on the other,³⁴ and some economic and social rights in the Charter may therefore fall outside of Article 52. Where economic and social rights in the Charter are considered by the courts to be “principles”, they may nevertheless be applied in appropriate cases within the scope of the Charter where implementing action has been taken.

29 *R v East Sussex County Council and the Disability Rights Commission, ex parte A, B, X and Y* [2003] EHC 167; *R (Robertson) v City of Wakefield Metropolitan Council* [2001] EHC Admin 915, at para 38, referring to the Charter’s guarantee of data protection rights, though acknowledging that it was at present “not a source of law in the strict sense.”; *R(Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497.

30 [2003] EHC 167 (Admin) Munby J, Para.73: “the Charter is not at present legally binding in our domestic law and is therefore not a source of law in the strict sense. But it can, in my judgment, properly be consulted insofar as it proclaims, reaffirms or elucidates the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the Convention.”

31 Article 26 states: “The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.”

32 The explanatory notes to Article 51 state that the Charter rights apply to Member States only where they act “in the scope of Union law”

33 For discussion on this point, see Goldsmith, *A Charter of Rights, Freedoms and Principles*, (2001) 38 CMLR 1201; Sionaidh Douglas-Scott, *The Charter of Fundamental Rights as a Constitutional Document*(2004) EHRLR 37; Diamond Ashiagbor, *Economic and Social Rights in the European Charter of Fundamental Rights* (2004) EHRLR 62; Jeff Kenner, *Economic and Social Rights in the EU Legal Order: the Mirage of Indivisibility*, in Hervey and Kenner, eds, *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Harts, 2003)

34 Explanations relating to the text of the Charter of Fundamental Rights, Conv 828/1/03. Rights which are identified as “principles” in the explanatory notes include the rights of persons with disabilities (Article 26); rights to social security and social assistance (Article 34); Rights to Healthcare (Article 35) and rights to environmental protection (Article 37). Rights which are not identified as principles include the freedom to choose an occupation and to engage in work (Article 15); the rights of the elderly to dignity and independence and to participate in social life (Article 25); the rights of workers to information and consultation (Article 27); the right to protection from unjust dismissal (Article 30); the right to fair and just working conditions (Article 31); the prohibition on child labour and the protection of young people at work (Article 31) and the right to family life, and to economic and social protection of the family (Article 33). The explanatory notes do not have any legal effect, though they may be an aid to interpretation of the Charter.

Popular attitudes towards economic and social rights

29. In the UK public’s perception of human rights, economic and social rights appear to rank highly. Surveys suggest that public support for guarantees of economic and social rights is relatively high. The ICM “State of the Nation” poll of 2000³⁵ asked respondents what rights they thought should be protected in a Bill of Rights.³⁶ The right which received the highest level of support (94%) was the right to hospital treatment on the NHS within a reasonable time. 87% of those surveyed supported protection of the right to join a trade union, and 86% supported the right to strike. 76% supported protection of the right of the homeless to be housed. These findings are reflected in a survey undertaken by the NIHRC as part of its consultation on a Bill of Rights for Northern Ireland. The survey found a high level of support for economic and social rights: support for the inclusion in the Bill of Rights of rights to health care and to an adequate standard of living was at 87% amongst Protestants, and 91% amongst Catholics.³⁷

30. The popular misconception which we noted in our Report on *The Case for a Human Rights Commission*, that human rights are a “criminal’s charter”, cannot be as easily applied to economic, social and cultural rights.³⁸ Rights to adequate healthcare and education, to equal treatment in the workplace, and to protection against the worst extremes of poverty, deal in the substance of people’s everyday lives. In a society which is setting out to build a “culture of rights” this public identification with core economic and social rights is not insignificant.

The Northern Ireland Draft Bill of Rights

31. In Northern Ireland, consideration has been given to including guarantees of economic, social and cultural rights within a domestic, legally enforceable, Bill of Rights. The Draft Bill of Rights for Northern Ireland, prepared by the NIHRC under the terms of the Belfast/Good Friday Agreement and the Northern Ireland Act³⁹ contains protection for ESC rights, including—

- the right to healthcare,
- the right to protection from destitution,
- the right to shelter,
- the right to work,
- the right to protection against a dangerous environment.

35 Published in Dunleavy, Margetts, Smith and Weir, *Popular Attitudes to Democratic Renewal in Britain*, (2001)

36 Asked whether there was a need for a Bill of Rights in Britain, 39% strongly agreed, 32% agreed, 13% neither agreed nor disagreed, 4% tended to disagree, and 3% strongly disagreed.

37 NIHRC, *A Bill of Rights for Northern Ireland, Summary of Opinion Poll Findings*, October 2001

38 Geraldine Van Bueren, *Including the Excluded: the Case for an Economic, Social and Cultural Human Rights Act*, 2002 Public Law p. 456 and p.457: “an Act enshrining economic, social and cultural rights would also help correct the unfortunately widely mistaken impression that human rights are just for criminals.”

39 Section 69(7). See our Fourteenth Report, Session 2002–03, *Work of the Northern Ireland Human Rights Commission*, HL Paper 132, HC 142

32. In its most recent considerations,⁴⁰ the NIHRC puts forward three options for protecting ESC rights. The first would guarantee the above rights in general terms, leaving their interpretation to the courts. The second would impose an obligation on the Northern Ireland Executive and the Northern Ireland Assembly to realise these rights progressively and to take legislative and other measures, and allocate the necessary resources to this end. It would require an annual progress report to be made by the Northern Ireland Executive to the Northern Ireland Assembly, outlining progress made in realising the rights. This option is intended to allow for litigation on these rights along the lines of the South African model, which limits the courts' review to the "reasonableness" of the steps taken by government in implementation. The third option envisages a combination of these two approaches. We consider the South African Constitution's model for the protection of economic, social and cultural rights, below.

40 Progressing a Bill of Rights for Northern Ireland, An update, April 2004

3 Comparative Approaches to Economic and Social Rights Protection

33. Internationally, the constitutional law of many states, including many European states, contains some measure of protection for economic, social or cultural rights.⁴¹ Amongst common law jurisdictions, the states with the most developed jurisprudence on economic, social and cultural rights are India and South Africa. Of these, the Indian system for protection of these rights has developed through judicial interpretation of the civil and political rights in the Constitution, in particular the right to life, in light of the “directive principles of social policy” contained in the Constitution as guidance to government in the formation of policy. The South African Constitution, by contrast, contains an express catalogue of economic, social and cultural rights.

The South African Constitution 1996

34. The South African Constitution of 1996, in clauses influenced by the ICESCR, protects a catalogue of basic economic, social and cultural rights. These are subject to varying degrees of protection. Some of these rights, including the economic and social rights of children,⁴² the requirement to provide emergency medical treatment,⁴³ and the prohibition on arbitrary evictions,⁴⁴ impose immediate obligations on the State.⁴⁵ Others, including adults’ rights to adequate housing⁴⁶ adequate healthcare, food, water and social security⁴⁷ and further education⁴⁸ are subject to the principle of progressive realisation within available resources, and will be breached where the State does not take reasonable steps to realise the rights.⁴⁹ The Constitution also protects cultural and linguistic rights, including the right to use the language and participate in the culture of one’s choice, so long as this right is not exercised in a manner inconsistent with the Bill of Rights.⁵⁰

Jurisprudence of the Constitutional Court

35. The South African Constitutional Court has re-affirmed the justiciability, within certain limitations, of economic, social and cultural rights under the Constitution, in a series of cases dealing with housing and healthcare rights.⁵¹ It has stressed the principle of

41 See Appendix 11

42 Section 28 (1)(c)–(f)

43 Section 27(3)

44 Section 26(3)

45 Other rights of immediate obligation include the right to basic education (section 29(1)(a)), and the economic and social rights of persons detained by the State (section 35(2)(e)).

46 Section 26

47 Section 27

48 Section 29(1)(b)

49 *Government of South Africa v Grootboom*, CCT38/00 21 Sept. 2000, *Minister of Health v Treatment Action Campaign*, CCT8/02, 5 July 2002; *Soobramoney v Minister for Health*, CCT 32/97, 27 November 1997; *Minister of Public Works v Kyalami Ridge Environmental Association* CCT 55/00, 29 May 2001.

50 Sections 30, 31

51 *Ex parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744(CC)

indivisibility and interdependence of all the Constitutional rights, based on the principle of human dignity, so that “affording socio-economic rights to all people ... enables them to enjoy the other rights enshrined in [the Constitutional Bill of Rights]”.⁵²

36. The Court has adopted a restrained approach to the scope of permissible review of economic, social and cultural rights, confined to consideration of whether the government has taken “reasonable” steps to protect the right.⁵³ In doing so, the Constitutional Court has expressly rejected a more radical approach which would require the State to provide certain minimal standards of constitutional economic and social rights to all its citizens, since—

[c]ourts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.⁵⁴

37. A series of cases before the South African Constitutional Court have shaped the scope of ESC rights protection. In *Government of South Africa v Grootboom*, the Constitutional Court found that the State’s failure to provide emergency accommodation for homeless applicants was an unreasonable denial of their right to adequate housing. The applicants had been evicted from an illegal squatter camp, and were living in another temporary settlement in extremely difficult and unhealthy conditions. Whilst government programmes were in place to develop social housing in the medium and long-term, the Court found that the absence of any government programme to address the needs of those in immediate need of emergency shelter, within the available resources, was an unreasonable interference with the right to adequate housing. It held that—

... to be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.⁵⁵

The Court ordered the Government to implement a programme, within available resources, to address the need for emergency housing as part of the right of access to adequate housing. In the recent case of *Port Elizabeth Municipality v Various Occupiers*⁵⁶ the Constitutional Court followed *Grootboom* to hold that the eviction of a group of illegal squatters on municipal land was not in accordance with the right to adequate housing, in the absence of any attempt by the municipality to resolve the squatters housing needs before making the eviction order.

52 *Government of South Africa v Grootboom*, CCT38/00, 21 September 2000, para. 23

53 This principle recognises that a range of possible measures could be adopted by the Government to uphold the constitutional ESC rights: *Grootboom*, para. 41

54 *TAC case*, para.38

55 *Grootboom*, para. 44

56 Case CCT 53/03 Judgment of 1 October 2004

38. The second case, *Minister of Health v Treatment Action Campaign*,⁵⁷ concerned the failure of the South African government to make available the anti-retroviral drug nevirapine which would prevent the transmission of HIV from mothers to babies. The Court found this to be an unreasonable denial of rights to healthcare and to children’s healthcare under sections 27 and 28 of the Constitution. It held that the government had failed to discharge its obligations under section 27(1) to devise and implement a comprehensive and co-ordinated programme to combat mother-to-child transmission of HIV. In reaching this conclusion, the Court took account of the reliable evidence available, both nationally and internationally, that nevirapine was safe; the minimal cost, which was well within the State’s resources, of making the drug widely available; and the fact that its prescription did not involve complex additional training for healthcare staff. The Court ordered the removal of restrictions on the availability of nevirapine, and the taking of reasonable measures to extend testing and counselling facilities throughout the public health service, to facilitate and expedite the use of the drug.

39. In the case of *Khosa and others v Minister of Social Development*,⁵⁸ the Constitutional Court held that the exclusion of permanent residents who were not South African citizens from provision of social welfare benefits, was an unreasonable and unjustifiable interference with the constitutional right to social security guaranteed to “everyone” under section 27 of the Constitution. This was considered in light of the guarantee of equality in section 9 of the Constitution. Noting that permanent residents were in a position largely analogous to South African citizens, and that extension of benefits to them would not have a significant budgetary impact, the Court considered that a limitation on their rights that affected their dignity and equality in material respects, could not be justified.⁵⁹

India

40. The Indian Constitution recognises economic, social and cultural rights as “Directive Principles of State Policy” which, unlike the guarantees of civil and political rights in the Indian Constitution, are not directly enforceable in the Courts, but are intended to serve as guidance for government policy.⁶⁰ The Indian law of economic, social and cultural rights has been developed incrementally by the courts, drawing on the Directive Principles as aids to interpretation of the civil and political rights which are justiciable under the Constitution, to elevate the status of the Directive Principles as constitutional rights. In particular the Indian Supreme Court has adopted an expansive interpretation of the constitutional right to life, based on principles of human dignity, to protect certain economic and social rights, including the right to adequate nutrition, clothing and shelter,⁶¹ the right to medical facilities,⁶² the right to earn a livelihood, and environmental rights.⁶³ In *Olga Tellis v Bombay Municipal Corporation*⁶⁴ the Supreme Court held that—

57 CCT8/02, 5 July 2002

58 CCT13/03

59 *ibid.*, para. 85

60 Part IV of the Constitution Directive Principles of State Policy are also contained in the Constitutions of Ireland, Sri Lanka, Namibia, Nigeria and Bangladesh.

61 *Frances Coralie Mullin v Administrator, U T of Delhi* (1981) 1 SCC 608

62 *Paschim Banga Khet Mazdoor Sabha v State of West Bengal*(1996) 4 SCC 37

63 *Mehta v Union of India* (2002) 4 SCC 356

The sweep of the right to life conferred by article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to the procedure established by law. That is but one aspect of the right to life. An equally important fact of that right is the right to livelihood because no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation.

41. In the *Tellis* case, the right to a livelihood meant that there was an obligation on the state to afford procedural fair hearing rights to a group of pavement-dwellers whose livelihoods were threatened by their eviction. Beyond procedural rights, the Supreme Court has held in *Paschim Banga Khet Mazdoor Sabha v State of West Bengal*⁶⁵ that the State's obligations to protect economic and social rights may include obligations to provide additional resources, for example to ensure essential healthcare services.

42. The right to life and personal liberty, in Article 21 of the Constitution, has also been applied by the Supreme Court in conjunction with Directive Principles relating to education, health, and conditions of employment, to address the working conditions of child labourers in the carpet industry. In *Bandhua Mukti Morcha v Union of India*⁶⁶ the Supreme Court required measures to be taken to provide educational and health services to child labourers, and to provide them with adequate nutrition.⁶⁷

43. A feature of the Indian caselaw is the emphasis placed by the courts on implementation of judgments. Indian courts are active in ensuring implementation of their judgments, and in keeping under review the government's compliance with them.⁶⁸ In some cases the courts have issued a series of orders on the implementation of a judgment on economic and social rights.⁶⁹ In *Bandhua Mukti Morcha v Union of India*,⁷⁰ the Court recognised the importance of monitoring the enforcement of its judgments, and requested Periodic Reports from the authorities on implementation. The Supreme Court has also directed government to take measures to implement human rights protective legislation which it considers has not been sufficiently enforced.⁷¹

64 (1985) 3 SCC 545

65 (1996) 4 SCC 37

66 (1984) 3 SCC 161

67 *ibid.*, para. 13

68 For example by requiring that a State Government should submit Periodic Reports on progress in implementing the court's judgment: *Bandhua Mukti Morcha v Union of India*, *op cit.*

69 For example, *MC Mehta v Union of India*, *op cit.*

70 (1984) 2 SCR 67

71 *CEHAT v Union of India* (2003) 8 SCC 398; *Sheela Barse v Union of India* (1986) 3 SCR 443

4 The Status of Economic, Social and Cultural Rights

Progressive Realisation of Rights

44. It is a central principle of the Covenant that states undertake to achieve the full protection of the Covenant rights by way of progressive realisation, rather than with full and immediate effect.⁷² Article 2.1 of the Covenant states that—

Each State Party to the present Covenant undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

45. The principle of progressive realisation has been invoked to support a view of the Covenant rights as aspirational policy objectives, which do not impose precise legal obligations on states. Mr Rammell in his evidence indicated that, although he did not see economic and social rights as of any less importance than civil and political rights, he considered that the principle of progressive realisation justified a different approach to their protection—

We certainly do stand by our view that the rights set out in the Covenant constitute principles and objectives. If you look at the detailed wording of the covenant, that backs it up. It talks about progressive realisation with a view to achieving things progressively. It recognises that all the rights in the covenant could not be implemented immediately so that states are required to undertake steps to achieve them. It talks about things like the “highest attainable standard”, which suggests an ongoing commitment.⁷³

46. In our view, this interpretation of the Covenant rights understates the obligations which the Covenant imposes on the State in two ways. Firstly, progressive realisation is not of equal relevance to all of the rights in the Covenant. Many elements of the Covenant rights which do not require allocation of resources for their protection are recognised as imposing immediate obligations, in the same way as civil and political rights. This is the case, for example, in relation to the obligation of non-discrimination in the guarantee of the Covenant rights, under Article 2.2, and Article 3. It is the case in relation to the right to form and join trade unions, and the right to strike, under Article 8 of the Covenant; the right to protection against forced labour, under Article 6; the right not to be forcibly

⁷² Although it is not generally applicable under the European Social Charter as it is under the ICESCR, the notion of progressive realisation is inherent in some of the Charter's guarantees, and has been accepted by the European Committee of Social Rights “[w]hen the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve” and provided that there is measurable progress evidencing maximum use of available resources, towards the realisation of the right. The Committee has stressed that in achieving progressive realisation of rights, particular attention must be paid to marginalised groups: “States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings”. European Committee of Social Rights: *Autism-Europe v France*, Complaint No. 13/2002.

evicted without due process of law, as an element of the right to housing under Article 11; the right to protection against forced marriage under Article 10.1.⁷⁴

47. Furthermore, as the CESCR noted in General Comment No 3, States have a “core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”, irrespective of the principle of progressive realisation.⁷⁵

48. Where the principle of progressive realisation does apply, it serves in a number of respects, not to weaken, but to strengthen and specify the State’s obligation. Although it envisages an incremental approach, it requires of States that they do considerably more than support the Covenant rights as “principles and objectives”. The requirement of progressive realisation is by no means a weak obligation, in particular for a wealthy state. It requires states to “take steps” with immediate and continued effect, towards the protection of each of the Covenant rights. Such steps should be “deliberate, concrete and targeted”.⁷⁶ Progressive realisation requires a clear programme or plan of action for the progressive implementation of each of the Covenant rights.⁷⁷ This plan of action should take into account the Concluding Observations of the CESCR, and the general comments of the CEHR interpreting the obligations under the Covenant.

49. Rights must be protected to the maximum of available resources. General Comment No 3 states that—

In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.⁷⁸

50. The principle of progressive realisation further requires that there should be no retrogression in the protection of economic social and cultural rights—except in exceptional circumstances states must refrain from diminishing the protection of the Covenant rights through legislation, changes in policy or withdrawal of funds.⁷⁹ New legislation brought onto the statute book should be compliant with the Covenant rights and legislation in relevant fields should seek to implement the positive obligation under the ICESCR to fulfil the Covenant rights.

74 In General Comment No. 3 on the Nature of State Parties’ Obligations under the Covenant, the CESCR identifies a number of rights as capable of immediate realisation, including those in articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3). It states that “Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.”

75 See also Maastricht Guidelines on Violations of ESC rights, para.10. Although this obligation will not be frequently relevant to the UK, it will be relevant in particular instances, for example in relation to the deprivation of asylum seekers of benefits. See below.

76 General Comment No. 3 on the Nature of State Parties’ Obligations under the Covenant, 1990

77 *ibid.*, para. 4

78 *ibid.*, para. 10

79 *ibid.*, para. 9: “any deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”

Legal Incorporation of the Covenant Rights

51. There is no obligation on States Parties to the ICESCR to incorporate the Covenant in domestic law. A State's legal obligations are discharged once it has ensured the protection of the Covenant rights, by whatever means. The CESCR maintains, however, that incorporation of the Covenant rights in the domestic legal order is the most effective means of realising the Covenant rights. CESCR General Comment No 9 on the Domestic Application of the Covenant states that—

While the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.⁸⁰

The government view

52. The UK government view, as expressed before the CESCR and in evidence to this inquiry, continues to represent economic and social rights not as enforceable rights, but as aspirational policy goals. It therefore considers these rights unsuitable for incorporation in national law. The FCO's written evidence states—

The Government considers that the greater part of the provisions of the ICESCR are statements of principle and objectives which do not lend themselves to specific incorporation into legislation or to justiciable processes. The Government has, both before and since the coming into force of the Covenant, taken measures, including legislation and the adoption of policies and programmes, which advance the same principles and objectives as are set out in the Covenant.

Where the Covenant imposes a more precise obligation on State Parties and this has not hitherto been reflected in UK common law, existing legislation or administrative procedures, the UK's practice is to bring that law or procedure into line with the relevant obligation to ensure its implementation in national law.⁸¹

Mr Rammell confirmed this approach in his oral evidence to us—

I think there are differences between the ways that the Treaty has set out civil and political rights on the one hand, and economic, social and cultural rights on the other. I think that the two sets of rights neither can nor should be implemented in precisely the same way.⁸²

53. The government points to a number of obstacles to incorporation of the Covenant rights. First, it points to the imprecise wording of the Covenant rights. Mr Rammell cited the rights to adequate food, clothing and housing, as rights formulated in such general terms that they would be unsuitable for consideration in the courts.

80 General Comment No. 9, 03/12/98, E/C.12/1998/24

81 Appendix 1, paras. 23–24

82 Q 24

54. Second is a concern related to the separation of powers: that incorporation of the Covenant rights will allow the courts to usurp the proper functions of Parliament and government, as the democratic institutions of the State. Mr Rammell considered that—

... these are issues for which there is no absolute standard, and are rightly the business of governments and their electorates through general elections, to determine what standard we should achieve.⁸³

55. Third, and related to this, is the concern that incorporation of economic, social and cultural rights would lead to a constitutionally inappropriate, and practically unhelpful, engagement of the courts in resource allocation. Mr Rammell argued that—

... there is a significant risk that if we were to incorporate, and the courts were to look at one [ESC rights issue] in isolation, that could potentially have profound and adverse consequences on expenditure in other areas.⁸⁴

The view of the CESCR

56. The government's view that the ICESCR rights are unsuitable for incorporation or adjudication is at odds with that of the CESCR. The CESCR's concluding observations on the UK Report both dispute the UK position on the nature of ESC rights, and express concern at their lack of legal force in UK law—

The Committee deeply regrets that, although the State party has adopted a certain number of laws in the area of economic, social and cultural rights, the Covenant has still not been incorporated in the domestic legal order and that there is no intention by the State party to do so in the near future. The Committee reiterates its concern about the State party's position that the provisions of the Covenant, with minor exceptions, constitute principles and programmatic objectives rather than legal obligations that are justifiable, and that consequently they cannot be given direct legislative effect.⁸⁵

It “strongly recommended”—

... that the State party re-examine the matter of the incorporation of the ICESCR in domestic law. The Committee points out that, irrespective of the system through which international law is incorporated in the domestic legal order (monism or dualism), following ratification of an international instrument, the State party is under an obligation to comply with it and to give it full effect in the domestic legal order.⁸⁶

57. The CESCR has made clear that it is insufficient for State Parties to identify the Covenant rights en bloc as non-justiciable. General Comment 9 states—

The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would ... be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and

83 Q 24

84 *ibid*

85 Concluding Observations of the Committee on Economic, Social and Cultural Rights : United Kingdom of Great Britain and Northern Ireland—5 June 2002, E/C. 12/1/Add. 79, para. 11

86 *ibid.*, para. 24

interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.⁸⁷

Furthermore, the CESCR has taken the view that each of the Covenant rights contains at least some elements which are capable of being justiciable, including duties of non-discrimination and due process in regard to each right, and negative duties to refrain from interference with the right.

58. Much evidence to this inquiry voiced support for some form of incorporation of ESC rights.⁸⁸ It was also pointed out that the ICESCR is not the only model for incorporation. The Institute of Employment Rights suggested that the European Social Charter 1961, or the Revised European Social Charter 1996, could form the basis of incorporation, citing the long record of supervision and guidance that exists under the 1961 Charter, and to the jurisprudence of the European Committee of Social Rights developed under the collective complaints mechanism.⁸⁹ Below we consider the government's arguments against incorporation of the Covenant rights.

Economic, social and cultural rights and determinacy

59. **In assessing the justiciability or potential for domestic level protection of the Covenant rights, it is wrong to impose a rigid demarcation between civil and political rights on the one hand, and economic and social rights on the other, and to classify all economic and social rights as inherently vague and unenforceable.** Such an approach fails to address the specifics of the rights guaranteed contained by the Covenant.⁹⁰ The objection of indeterminacy is more pertinent in relation to the protection of some of the Covenant rights than in relation to others. Trade union rights, for example, protected under Article 8 of the Covenant, are not characterised by indeterminacy; neither is the right to protection against forced labour, under Article 6. Other of the Covenant rights are formulated in considerably more general terms, including for example, the right to the highest attainable standard of health under Article 12 ICESCR. Rights guaranteed in broad terms may, however, contain elements which are sufficiently determinate to be enforced in the courts. Aspects of the right to an adequate standard of health, relating to non-discrimination in its application and to procedural propriety in its implementation, are likely to be appropriate for consideration in the courts. The right to adequate housing under Article 11 ICESCR encompasses a right not to be forcibly evicted without due process of law—a right sufficiently determinate to be enforced in the courts. As we have noted above in relation to the rights protected under the Human Rights Act, there is considerable overlap between the substance of the rights classified as economic and social, and those classified as civil and political. **A classification of all aspects of all economic,**

87 General Comment No. 9, op cit, para 10

88 JUSTICE (Appendix 15), Democratic Audit (Appendix 11), The Children's Law Centre and Save the Children Northern Ireland (Appendix 6), Institute of Employment Rights (Appendix 14) and Committee on the Administration of Justice (Appendix 9).

89 Although the UK has not accepted the collective complaints mechanism, under Protocol No. 3 to the Charter.

90 General Comment No. 9, op cit; Lester and O Cinneide, *The Effective Protection of Socio-Economic Rights in Economic, Social and Cultural Rights in Practice, The Role of Judges in Implementing Economic, Social and Cultural Rights*, Yash Ohai and Jill Cottrell, eds., Interights 2004

social and cultural rights as beyond the reach of the courts is, as the CESCR has pointed out, arbitrary.⁹¹

60. Where rights are guaranteed in general terms, adding substance to these guarantees need not present insuperable difficulties to the courts. The rights in the European Convention on Human Rights, guaranteed in terms equally general to those of the ICESCR, have been given substance by the jurisprudence of the European Court of Human Rights as well as by the UK courts under the HRA. General concepts such as the right to respect for private life protected under Article 8 ECHR have been the subject of careful and principled development that has protected diverse aspects of personal privacy, identity and physical integrity, whilst balancing competing rights and interests.

61. That the same could be achieved in relation to (for example) healthcare rights under the ICESCR, is illustrated by the case law of the South African Constitutional Court. Applying principles of reasonableness to government action in forming healthcare policy and delivering healthcare services, the Court has found, in one instance, that the decision not to provide renal dialysis to an applicant was justified;⁹² and in another, that the decision not to provide an anti-HIV drug was not justified.⁹³ Similar principles would be capable of application by the UK courts.

62. National courts are assisted by a number of sets of international standards, in particular the Maastricht Guidelines on Economic, Social and Cultural rights;⁹⁴ the Limburg Principles;⁹⁵ and the general comments of the CESCR, which set out principled frameworks for assessing what is a permissible interference, and what is a violation, of ESC rights. There is also a growing body of case law of the European Committee of Social Rights, delivered under the collective complaints mechanism to the European Social Charter.⁹⁶

63. **The Covenant rights cannot be dismissed, en bloc, as incapable of protection in domestic law.** On a close reading of the Covenant, the view of the CESCR, that at least some element of each of the Covenant rights is capable of judicial application, is borne out. In addition to the practical concerns about incorporation, however, there are objections of principle based on the separation of powers, which we now turn to consider.

Economic, social and cultural rights and democracy

64. The Government's concerns about the potential of economic and social rights to undermine the role of government and Parliament raise important issues that are not to be dismissed lightly, and which have been arisen in other jurisdictions where economic, social and cultural rights have been enforced. **It is Parliament and government which must**

91 See para. 57 above

92 *Soobramoney*, op cit

93 *TAC case*, op cit

94 The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, E/CN.4/1987/17, Human Rights Quarterly, Vol 20 (1998) pp. 691–705.

95 The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986, UN Doc E / CN.4/1987/17

96 Under Protocol No. 3 to the European Social Charter—the UK is not a party to the collective complaints mechanism. The European Committee of Social Rights has so far delivered 12 decisions on the merits under the Collective Complaints Mechanism.

retain the primary responsibility for economic and social policy, an area where the courts lack substantial expertise and have limited institutional authority. This principle must, in our view, condition the scope of any extension of the powers of the courts in relation to economic, social and cultural rights. This does not mean, however, that government action in these spheres should be unaccountable against standards of economic, social and cultural rights, by which the UK has agreed to abide.

65. In the UK context, any question of incorporation of economic, social or cultural rights guarantees in domestic law can only be addressed in the context of the principle of the sovereignty of Parliament. The system devised in relation to the protection of ECHR rights under the Human Rights Act, whereby the powers of the courts do not extend to the striking down of incompatible legislation, must be taken as the model for any incorporation of additional human rights standards. In discussing the possibility of incorporating economic, social or cultural rights, we assume that any such incorporation would, as is the case with the rights guaranteed under the Human Rights Act, prevent the courts from striking down legislation that is incompatible with human rights standards, and would confine the powers of the courts to interpretation of legislation in accordance with human rights, and the issue of declarations of incompatibility in appropriate cases.

66. The South African courts, in applying constitutional guarantees of rights under a system which does, by contrast, allow for incompatible legislation to be invalidated by the courts, have been sensitive to the counter-majoritarian potential of the economic and social rights guarantees in the Constitution, where they are applied by the courts to overturn the decisions of government. Largely due to this concern, the Court has not used the constitutional rights as a blunt instrument against government policy, but has crafted standards of review which assess the reasonableness and non-discriminatory impact of government action in complying with the constitutional imperatives of socio-economic rights protection. These standards are based on principles of judicial review and respect for the decision-making of the executive, which are already applied in the UK courts, alongside review of the proportionality of interference with ECHR rights, under the HRA.⁹⁷

67. It could be said, therefore, that the South African approach to the protection of economic, social and cultural rights is not radically different from that of UK public law. It preserves the existing principles of judicial review of executive action, but in the context of an extended set of standards (of socio-economic rights) against which reasonableness and non-discriminatory impact of that action is to be judged. It allows the courts to undertake scrutiny of economic, social and cultural rights protection, whilst confining this scrutiny to matters within the courts' institutional competence.

68. In the complex inter-relationship between human rights and democracy, economic, social and cultural rights values and guarantees may, as with civil and political rights, enhance rather detract from democracy. The view was put to us in the course of meetings in South Africa, that the inclusion of socio-economic rights in the Bill of Rights had strengthened rather than undermined the country's democracy, by requiring government to provide reasoned, public justification for its treatment of the most vulnerable and excluded people in society, and by permitting often relatively powerless people to hold

97 *R (Daly) v SSHD* [2001] 2 AC 532

government to account for the actions that affected their lives. Furthermore, it was argued that public confidence in government was supported by the possibility that normally invisible decisions about the administration of public services could be made visible through constitutional litigation.

69. Incorporating economic and social rights in UK law could extend the culture of accountability which the Human Rights Act established in respect of civil and political rights. It could extend this culture of justification and accountability to cover matters that are fundamental to the lives of most citizens; and it would have most practical effect in protecting the rights of the people who are most marginalised and deprived in an unequal society.

70. Undoubtedly, some models for the incorporation of guarantees of the Covenant rights would have the potential to interfere with economic and social policy development by government and Parliament in a way which would be inappropriate and undesirable. However, it is also possible that incorporation of these rights could, with appropriate safeguards, be achieved without such constitutional impropriety.

Economic, social and cultural rights and resource allocation

71. We agree with the Government's view that it is inappropriate for the courts to engage in large-scale redistribution of resources. While we recognise that there is no absolute dividing line between what is a large or small reallocation of resources, we do not believe that the entrenchment of certain Covenant rights would necessarily impel the courts to engage in the wholesale reallocation of resources. The extent to which this would be the case must depend both on the range of rights incorporated—so that incorporation of the right to strike, for example, would not change the courts' role in the allocation of resources—and on the principles on which the court may adjudicate. Permitting the courts to adjudicate on the Covenant rights along principles of non-discrimination and reasonableness of decision-making would entail considerably less significant re-allocation of resources than permitting the courts to assess, for example, adequate minimum levels of rights to adequate housing or benefits.

72. Moreover, it is not the case that resource allocation by the courts is a feature unique to adjudication on economic and social rights. Decisions of the courts on matters of civil and political rights may also have substantial resource implications. The right to a fair hearing, under Article 6 ECHR, includes a right to legal aid where the interests of justice require it, in particular in complex cases which the individual cannot be expected to conduct without legal representation.⁹⁸ This, and other positive obligations that derive from ECHR rights, may have substantial resource implications. Democratic Audit pointed out that it cannot be assumed that resource allocation is limited to adjudication on ESC rights, and cited case law showing that the courts “do at times deal with resource allocation and socio-economic policy planning”. Democratic Audit argued that “it would be better that they did so openly, wherever possible in accordance with open textured standards, such as respect for the

98 *Airey v Ireland* (1979) 2 EHRR 305

dignity and integrity of the person, rather than within existing narrow and often unspoken bounds”.⁹⁹

Incorporation of the Covenant rights in UK law?

73. In our view, the case for incorporating guarantees of the Covenant rights in UK law, either by incorporating the terms of the Covenant itself, or by developing domestic formulations of the Covenant rights as part of a UK Bill of Rights, merits further attention. Any such measure should recognise the limits of the courts’ institutional competence in relation to rights that are progressively realised, and should limit judicial scrutiny to grounds of reasonableness and non-discrimination. Providing the Covenant rights with legal status in UK law would broaden and strengthen the developing culture of respect for human rights in the UK, and make clear that human rights address essential human needs, and help to ensure that provision is made for the most vulnerable people in our society. As with the incorporation of the ECHR rights under the Human Rights Act 1998, much of the benefit of incorporation might be expected to lie in the development of a culture of respect for human rights within government and Parliament. Democratic Audit stressed the need to see any incorporation of ESC rights as more than just a basis for litigation—

... incorporation could provide a human rights framework of shared values within which government and the public could develop and review policies and the allocation of resources for economic and social well-being in the UK and for improving the quality of public services.¹⁰⁰

74. The possibility of incorporation of rights under the Covenant, and under other international human rights instruments to which the UK is party, into UK law, is a topic to which we ourselves hope to give further detailed consideration, as we noted in our report on the Convention on the Rights of the Child.¹⁰¹

⁹⁹ Appendix 11

¹⁰⁰ *ibid.*, Ev 86

¹⁰¹ Tenth Report, Session 2002–03, *The UN Convention on the Rights of the Child*, *op cit.*, para. 23

5 Economic, social and cultural rights in policy development

Economic, social and cultural rights within government

75. Protection of economic, social and cultural rights through the courts is only one element of their implementation. In relation to the Human Rights Act, the JCHR has stressed that developing a “culture of rights” through changing practice in public bodies, and developing public policy and practice in accordance with human rights standards, is crucial to the effective implementation of the Act.¹⁰² Such measures are of particular importance in relation to certain “programmatically” aspects of economic, social and cultural rights, which require the implementation of strategies for progressive realisation of rights. The CESCR recommendations recognised the importance of using the Covenant in policy development within government—

The Committee further recommends ... that the State party review and strengthen its institutional arrangements, within the government administration, which are designed to ensure that its obligations under the Covenant are taken into account, at an early stage, in the Government’s formulation of national legislation and policy on issues such as poverty reduction, social welfare, housing health and education ... the Committee urges the State party to give careful consideration to its general comments and statements when formulating policies that bear upon economic social and cultural rights.¹⁰³

76. In our previous reports on the establishment of a “culture of human rights” under the guidance of a new Commission for Equality and Human Rights, we have recognised the need for greater mainstreaming of human rights in the development of government policy. In light of this, we have recommended the creation of a “positive” or “general” duty on public bodies to promote the rights protected under the Human Rights Act 1998.¹⁰⁴ We have stated that—

Requiring public authorities to assess all of their functions and policies for relevance to human rights and equality, and in the light of that assessment to draw up a strategy for placing human rights and equality at the heart of policy making, decision making and service delivery, would be an effective way of achieving the mainstreaming of human rights and equality which will be one of the [Commission for Equality and Human Rights’] principal purposes.¹⁰⁵

77. Analogous duties of promotion exist in the UK equality sector, in particular under the Race Relations (Amendment) Act 2000,¹⁰⁶ and under Section 75 of the Northern Ireland

102 Sixth Report, Session 2002–03, *The Case for a Human Rights Commission*, HL Paper 67-I, HC 489-I

103 Concluding Observations, para. 24

104 Eleventh Report, Session 2003–04, *Commission for Equality and Human Rights: Structure, Functions and Powers*, HL Paper 78, HC 536

105 *ibid.*, para. 32

106 Section 71 of the 2000 Act requires listed public authorities to have due regard to the need to eliminate unlawful racial discrimination, and to promote equality of opportunity and good relations between racial groups.

Act.¹⁰⁷ Studies of the operation of these regimes in practice have suggested that they have a real and valuable impact in combating inequality.¹⁰⁸ Positive duties under the Race Relations (Amendment) Act and under section 75 of the Northern Ireland Act may provide models for mainstreaming of economic, social and cultural rights in policy development.¹⁰⁹

78. In particular, the requirement under the Northern Ireland legislative scheme that equality “impact assessments” be carried out for policy or legislative proposals, may provide a model for economic, social and cultural rights integration in policy development. The impact assessment process has been credited not only with maintaining equality as a central policy concern, but also with establishing a more participatory approach to policy development and the application of equality standards, through the involvement of civil society in scrutiny of impact assessments.¹¹⁰

79. In our view it is essential to effective implementation of the Covenant that economic, social and cultural rights should be used as a framework for government policy development. Structures should be developed for assessing the impact of new policy and legislative proposals on protection of the Covenant rights, and on the obligation to progressively realise economic, social and cultural rights.

A human rights plan of action

80. A number of other recommendations of the CESCR also relate to ways of achieving progressive realisation of rights. One recommendation was that there should be a national human rights plan of action, which a recommendation of the Vienna Declaration, which followed the UN World Conference on Human Rights of 1993. The CESCR urged the UK—

... to prepare, as soon as possible, a national human rights plan of action in accordance with paragraph 71 of the 1993 Vienna Declaration and Programme for Action.¹¹¹

81. The idea of a plan of action, or of some equivalent form of clearly set out programme of action for the implementation of the Covenant rights, is inherent in the idea of progressive realisation.¹¹² At the UN World Conference Against Racism held in Durban in 2001, the

107 Section 75 requires public authorities to have due regard to the need to promote equality of opportunity in the performance of its functions. Public authorities are required to submit equality schemes to the Northern Ireland Equality Commission. The Commission may either approve the scheme or refer it to the Secretary of State, who may request the public authority to revise the scheme, or alternatively, may substitute a scheme for that prepared by the public authority.

108 *ibid*, para. 31. Commission for Racial Equality, *Towards Racial Equality: An evaluation of the public duty to promote race equality and good race relations in England and Wales* (2003); Colm O’Cinneide, *Taking equal opportunities seriously: the extension of positive duties to promote equality* (2003).

109 Professor Christopher McCrudden, *Mainstreaming Human Rights*, in *Human Rights in the Community: Rights as Agents for Change*, Colin Harvey, ed. (2004); McKeever and Ni Aolain, *Enforcing Social and Economic Rights at the Domestic Level—A Proposal*, [2004] 2 EHRLR 158, proposing the extension of the section 75 duty to include a duty to promote equality on the grounds of socio-economic status, and stressing the potential of section 75, together with the Northern Ireland programme “New Targeting Social Need” to mainstream economic and social rights in the public sector.

110 *McCrudden*, 2004, *op cit*

111 Concluding Observations, para. 27

112 General Comment No. 3, para. 4

Government agreed an Action Programme that committed each signatory to draw up a national action plan in consultation with minority communities and NGOs. The Committee on the Administration of Justice (CAJ) suggested that in relation to key Covenant rights the government should—

... have a plan which sets targets and timetables, and arises from an open, public, transparent and participative process wherein decision-makers have been held properly to account and alternatives have been actively considered ... Only in this way can the government show that it is genuinely seeking to meet its obligations fully and to progressively realise its obligations.¹¹³

82. Mr Rammell took the view that a plan of action would not at present be appropriate, but stressed that it was a matter for the Department of Constitutional Affairs. The Committee put the point to Lord Falconer when he gave oral evidence in December 2003.¹¹⁴ He suggested that consideration of the proposal should await the outcome of the review of the UK's international human rights obligations (which has now concluded), and the establishment of a Commission for Equality and Human Rights.¹¹⁵

83. One precedent for a national plan of action on human rights is South Africa, where a National Plan of Action was drawn up by government, in consultation with the South African Human Rights Commission and civil society, and published in 1998.¹¹⁶ The plan was expressly designed to follow the recommendation of the Vienna Declaration and Programme for Action.¹¹⁷ We have some scepticism about the efficacy of a national plan, which risks being drawn up in such broad terms that it does no more than impose a formalistic reporting process on departments already at risk of reporting fatigue. However, the commitment to progressive realisation does demand that some attempt is made to set benchmarks and measure progress against them. It would in our view be helpful for the government to draw together the broad outlines of its policy on human rights. This could take forward the recent review of international obligations,¹¹⁸ but most importantly it could set out the general principles of how the UK's domestic and international human rights obligations are to be implemented, including its obligations under the ICESCR. **In our view, the recent conclusion of the UK's review of international obligations, and decision to establish a Commission for Equality and Human Rights, makes this an opportune time for the Department of Constitutional Affairs to prepare a statement on how the government proposes to address its human rights obligations in action. The CEHR might then develop, with government, ways of measuring progress in achieving progressive realisation of key rights.**

Protection of the Covenant rights in Parliament

84. Parliament too has an important role to play, in ensuring the accountability of government against economic, social and cultural rights standards. It also has a role in

113 Appendix 9, Ev 80

114 Minutes of Evidence taken before the Joint Committee on Human Rights, 8 December 2003, HL Paper 45, HC 106-i

115 Q 25

116 The National Action Plan was lodged with the United Nations on 10 December 1998

117 National Action Plan for the Promotion and Protection of Human Rights, Introduction, page 10, page 18.

118 International Human Rights Instruments: the UK's Position. Report of the Outcome of an Interdepartmental Review by the Department of Constitutional Affairs. 1 July 2004

scrutinising legislation for compatibility with ICESCR standards. We have adopted a policy of scrutinising all legislation introduced to Parliament against all international human rights standards, including economic, social and cultural rights under the ICESCR, the European Social Charter, and the instruments of the International Labour Organisation. We have regularly made reference to the Covenant rights in legislative scrutiny and have drawn attention to potential incompatibilities with economic, social and cultural rights standards.¹¹⁹ While government departments themselves scrutinise proposed legislation for compliance with ECHR rights, they do not, at least in any explicit way, undertake this scrutiny in respect of ICESCR rights, or in respect of other rights protected in international but not in national law.

85. A statement under section 19 of the HRA must specify that the Minister responsible for a Bill has considered the compliance of the Bill's provisions with the Convention rights, and must certify either that the Minister is satisfied that the Bill complies with the ECHR, or that although the Bill may not so comply, the Minister nevertheless wishes to proceed with the Bill. The section 19 process provides the catalyst for Parliament's informed scrutiny of the human rights implications of the Bill.

86. The section 19 process can operate equally effectively in relation to economic, social and cultural rights, as in relation to the principally civil and political rights protected under the Human Rights Act. From our own experience of this scrutiny, we can see no impediment created by the nature of the rights contained in the ICESCR to the application of a section 19 type mechanism to these rights. In our view, an obligation on government to address compliance with these rights at an early stage, before the introduction of a Bill to Parliament, would significantly enhance protection of the Covenant rights. It would also assist Parliament, and the JCHR, in its scrutiny of legislation, and enrich parliamentary debate on matters affecting economic, social and cultural rights.

87. One means of addressing this would be for the government to decide as a matter of policy to include in the explanatory notes published with a Bill on its introduction to Parliament, a statement as to whether the Bill is considered to comply with ICESCR rights, and a short explanation, where appropriate, of why this is considered to be the case. This could take a similar form to the explanation of compliance with ECHR rights which is currently as a matter of practice included in the explanatory notes. This is a practice which the government could also consider extending to other aspects of the UK's international human rights obligations, including for example its obligations under the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Racial Discrimination, or the Convention on the Elimination of all forms of Discrimination Against Women.

88. We recommend that the government should build on existing practice by extending the aspects of explanatory notes to Bills which enlarge on the section 19 statement to include a discussion of conformity or non-conformity with international human rights obligations. We further recommend that a timely opportunity be sought to introduce legislation to make such a human rights impact assessment a duty.

¹¹⁹ Including for example in reports *passim* on the Housing Bill 2002; the Nationality Immigration and Asylum Bill 2002; the Asylum and Immigration (Treatment of Claimants) Bill 2003.

6 Protection of the Covenant rights by a Commission for Equality and Human Rights

89. The decision to establish a Commission for Equality and Human Rights offers an opportunity to further the protection and promotion of the international human rights standards accepted by the UK, including those in the Covenant. The Covenant standards of economic and social rights present an opportunity to the Commission to draw together its work in promoting and achieving equality in public services and the workplace on the one hand, and in promoting and protecting human rights. In its concluding observations, the CESCR recognised the importance of a Human Rights Commission in this regard, and urged the creation of a commission “with a mandate to promote and protect all human rights, including economic, social and cultural rights”.¹²⁰ The recent DTI White Paper *Fairness for All: A New Commission for Equality and Human Right*” proposes that—

The CEHR will ... play a role in promoting public awareness and understanding of human rights, and the responsibilities associated with them, including those arising from the international agreements on human rights to which the UK is a signatory.

90. In oral evidence, Mr Rammell also took a positive approach to the potential of the new Commission in relation to the Covenant rights, although he recognised that the government—

... would need to think through very carefully how it would work and how it would interrelate with the work that we are undertaking to implement the covenants.¹²¹

91. The Covenant standards of economic and social rights present an opportunity to the Commission to draw together its work in promoting and achieving equality in public services and the workplace on the one hand, and in promoting and protecting human rights. In a new integrated Commission, application of the Covenant standards could in our view helpfully inform and give coherence to both the “equality” and the “human rights” strands of the Commission’s work.

92. There are useful precedents for human rights commissions playing a prominent role in protection of ESC rights. One of the core functions of the South African Commission, under section 184(3) of the Constitution, is to require information from all government departments, annually, on their progress towards better protection of economic and social rights, and to publish their conclusions from this research.¹²² The Commission has developed a set of questionnaires or “protocols” on each of the economic and social rights, as a basis for assessing progress in the realisation of the rights. It publishes an Annual Report on Economic and Social Rights, containing the information collected through this process, which includes recommendations on measures to be taken to further implement

¹²⁰ Concluding Observations, para. 28

¹²¹ Q 51

¹²² The Commission must issue an annual request to relevant organs of state each to provide it with “information on the measures they have taken towards the realisation” of economic and social rights.

the constitutional rights.¹²³ This constitutional role for the Commission recognises that the realisation of economic, social and cultural rights is not achieved solely in the courts, and is seen as a significant element of the constitutional checks and balances that operate in relation to the Bill of Rights.

93. The Northern Ireland system for protection against discrimination, under section 75 of the Northern Ireland Act, may also provide a useful model for enforcement of economic, social and cultural rights. The Northern Ireland Equality Commission has a role in approving the Equality Schemes required under section 75, and has a duty to investigate complaints against public authorities for non-compliance with approved equality schemes. Failure of a public authority to comply with recommendations of such an investigation may result in the Commission referring the matter to the Secretary of State, who may direct the public authority to take appropriate steps.¹²⁴

94. Whilst a comprehensive annual review of all ESC rights protection would be a very ambitious undertaking for the new CEHR, we see the potential for some review of protection of the Covenant rights, preferably on a regular basis, to form a useful part of the programme of work of the Commission. Given the particular importance for economic, social and cultural rights protection of “programmatic” enforcement in the development and implementation of policy, by government and public bodies, the Commission could play a valuable role in reviewing this enforcement.

95. The CESCR has suggested that national human rights institutions could have a number of functions in this regard, including: promoting educational and information programmes; scrutinising both existing laws and Bills for ICESCR compliance; providing technical advice and conducting surveys on ESC rights; identifying national level benchmarks for the realisation of ESC rights; conducting research and inquiries on the practical realisation of ESC rights; monitoring compliance with ICESCR rights; and examining individual complaints of breaches of these rights.¹²⁵

96. Education and training on the Covenant rights is one area where the new Commission might fill a gap particularly highlighted in the CESCR concluding observations—

... to ensure that human rights education curricula and training programmes for schoolchildren and for the judiciary, prosecutors, government officials, civil servants and other actors responsible for the implementation of the Covenant give adequate attention to economic, social and cultural rights.¹²⁶

97. Democratic Audit also expressed concern about the general lack of awareness of ESC rights in the UK, and highlighted the need for education and information provision.¹²⁷ The Children’s Rights Alliance stated that “there has been no systematic dissemination of information about the Covenant to children or adults, nor any systematic valuation of children’s rights.” It noted that although citizenship education became a statutory subject

123 SAHRC, 4th Annual Economic and Social Rights Report, 2000–2002

124 *McCrudden*, 2004, op cit

125 General Comment No. 10 on the Role of National Human Rights Institutions in the Protection of Economic Social and Cultural Rights

126 Concluding Observations, para. 30

127 Appendix 11

from September 2002, initial guidance on citizenship for primary schools does not refer to human rights.¹²⁸

98. Our inquiry has also suggested that there is a dearth of information amongst civil society on economic, social and cultural rights, and on the reporting process under the Covenant. We consider this matter in more detail in Chapter 10. We would envisage the CEHR having a key role in providing information to civil society, and in encouraging and facilitating civil society participation in discussions and consultations on economic, social and cultural rights protection.

99. The examination of individual complaints does not fit with the form of Commission proposed by the government, or indeed by us.¹²⁹ It is also envisaged that, following the establishment of the new Commission, the JCHR will retain the primary responsibility for providing human rights scrutiny of Bills.¹³⁰ **Several functions of the new CEHR, proposed in the White Paper *Fairness for All*, could be used by the new Commission to contribute to implementation of the Covenant rights. These include—**

- **Promoting awareness of the Covenant rights, alongside other human rights standards, in the public sector, in private sector organisations carrying out public functions, and amongst the general public;**¹³¹
- **Advising Ministers (or the Scottish Executive or Welsh Assembly Government) or making proposals to them on current or proposed laws and their impact on the Covenant rights;**¹³²
- **Research on implementation of Covenant rights, and using the Covenant rights to inform more general research and analysis;**¹³³
- **Training and education on economic, social and cultural rights;**¹³⁴
- **Carrying out general inquiries related to the Covenant as well as other human rights standards;**¹³⁵
- **Making third party interventions in the courts to inform the court about relevant Covenant standards in appropriate cases.**¹³⁶

100. **Beyond the functions expressly proposed for the Commission in the White Paper, its role in the promotion and protection of ESC rights could also extend to—**

- **contributing to the review of UK Periodic Reports by the CESCR;**¹³⁷

128 Appendix 7. Qualification and Curriculum Authority (2000) Personal, social and health education and citizenship at key stages 1 and 2, Initial Guidance for Schools.

129 Department for Trade and Industry, *Fairness for All: A New Commission for Equality and Human Rights*, Cm 6185, May 2004

130 *ibid.*, para. 3.28

131 *ibid.*, paras. 3.9, 3.13

132 *ibid.*, paras. 3.35–3.36

133 *ibid.*, para. 3.39

134 *ibid.*, para. 3.40

135 *ibid.*, para. 4.3

136 *ibid.*, para. 4.11

- **contributing to, or commenting on, strategies or plans of action that implement Covenant rights;**
- **preparing codes of practice for public authorities in relation to, for example, the right to education.**

101. We recommend that the government should give consideration to how these functions might be provided for under the Commission’s founding legislation.

137 The Northern Ireland Human Rights Commission, which is the only human rights commission already established in the UK, has played an active role in commenting on the State Report, informing the dialogue with the CEHR in Geneva, and commenting on the concluding observations, in respect of the ICESCR as well as the reporting processes under the other UN human rights treaties.

7 Poverty, inequality and access to services

102. Poverty and inequality are the central concerns of economic, social and cultural rights. The CESCR has emphasised¹³⁸ that poverty constitutes a denial of rights under the Covenant. It has stressed the importance, in human rights terms,¹³⁹ of a participative approach to poverty reduction involving those directly affected by poverty. The significance of inequality and social exclusion for economic and social rights protection is at its most acute in a wealthy society such as that of the UK. The CESCR's concluding observations reflect this, highlighting problems of poverty and unequal protection of the rights of particularly vulnerable groups.

103. The CESCR raised concerns under Article 11 ICESCR, which protects the right to an adequate standard of living, including the right to adequate housing. It noted the persistence of high levels of poverty, particularly in Northern Ireland and amongst ethnic minorities, people with disabilities and older persons, and the increasing gap between rich and poor.¹⁴⁰ It raised particular concerns in relation to high levels of child poverty, and highlighted the persistence of poor quality housing and fuel poverty.¹⁴¹ The CESCR urged the government to continue to address poverty and social exclusion as a matter of high priority.¹⁴²

104. Levels of child poverty raise issues in relation to the UK's obligations under the Convention on the Rights of the Child as well as under the ICESCR.¹⁴³ A number of the CESCR concluding observations mirror those of the Committee on the Rights of the Child¹⁴⁴ (including in relation to discrimination, housing, minimum wage, poverty, human rights education and integrated education). The Children's Law Centre and Save the Children Northern Ireland stress in their evidence the importance of the Covenant rights for children, and warn against the "compartmentalisation" of children's rights under the Convention on the Rights of the Child, arguing that: "the ICESCR is a crucial UN treaty in terms of the potential of the rights it holds to positively impact on the lives of those children and young people most disadvantaged."

105. The Government's written evidence confirms that it "regards the fight against poverty and social exclusion as central to its entire programme"¹⁴⁵ and recognises that a number of groups are disproportionately affected by poverty, in particular ethnic minorities; people

138 Statement on Poverty and the ICESCR E/C.12/2001/10

139 Under both the ICESCR and the Declaration on the Right to Development

140 Concluding Observations, para. 18

141 *ibid.*, para. 20

142 *ibid.*, para. 37

143 Tenth Report, Session 2002–03, *The UN Convention on the Rights of the Child*, *op cit.*, para. 66

144 Concluding Observations of the Committee on the Rights of the Child on the UK Report, September 2003

145 Appendix 1, para. 159

with disabilities; children and women.¹⁴⁶ The evidence emphasises the government’s efforts to reduce child poverty and recent falls in the levels of “absolute” child poverty.¹⁴⁷

106. Whilst this report is not an appropriate place to address the detail of government policy on poverty and social exclusion,¹⁴⁸ in our view the Covenant rights should provide a framework and an additional impetus for government policy in this area. The obligation of progressive realisation of the Covenant rights under Article 11 and Article 2.2 ICESCR should provide the standard against which government progress in poverty reduction is assessed. The Covenant obligations of the progressive and non-discriminatory realisation of rights, which we set out above, require continued and measurable progress; safeguards against retrogression; clear targets and benchmarks for poverty reduction; and the equal treatment of vulnerable groups. **In our view a rights-based approach can assist government in addressing poverty, and Parliament and civil society in scrutinising its success in doing so. The periodic reporting process before the CESCR can provide an important forum for assessing this progress against the Covenant standards.**

Discrimination

107. Article 2.1 protects against discrimination in the application of the Covenant rights, and Article 3 makes specific provision for non-discrimination on the grounds of gender. In its concluding observations the CESCR noted the—

Continuing *de facto* discrimination in relation to some marginalized and vulnerable groups in society, especially ethnic minorities and persons with disabilities, in various fields, including employment, housing and education.¹⁴⁹

Following from this concern, the CESCR noted that it—

... regrets the unwillingness of the State party to adopt comprehensive legislation on equality and protection from discrimination, in accordance with Articles 2.2 and 3 of the Covenant.

108. The Committee “strongly recommended” that the UK enact such legislation, and it urged the government “to take more effective steps to combat *de facto* discrimination, in particular against ethnic minorities and people with disabilities, especially in relation to employment, housing and education”.¹⁵⁰

109. The level of inequality in housing, employment and education in regard to the two groups identified by the CESCR, ethnic minorities and people with disabilities, is well documented, including in evidence to this inquiry, and is recognised in the government’s written evidence.¹⁵¹

146 Appendix 1, para. 163

147 *ibid.*, para. 168

148 For a thorough consideration of government policy on child poverty, see Report of the Select Committee on Work and Pensions, *Report on Child Poverty*, March 2004. The Report recommended a comprehensive UK-wide strategy for reducing child poverty, which would establish a clear policy framework to be pursued up to 2010.

149 Concluding Observations, para. 14

150 *ibid.*, para.31. These recommendations are reflected in the concluding observations of the Committee on the Elimination of Racial Discrimination, September 2003.

151 Appendix 1, para. 162, et seq

110. These inequalities should be considered in the context of the legislative framework of the UK's equality laws. As UK legislation has developed incrementally, from the 1970s onwards, it has become increasingly complex and piecemeal, with differing standards of protection, and differing scope of protection, applying in relation to discrimination on each of the protected grounds, which are currently race, gender, disability, sexuality and religion.¹⁵²

111. We have received extensive evidence, both in this inquiry and in our inquiry into the structure, functions and powers of the new Commission for Equality and Human Rights, voicing support for a Single Equality Act.¹⁵³ Although the government has not declared its opposition to the idea of a Single Equality Act in principle, it has deferred work on such legislation, and has rejected suggestions that it is a necessary basis for the successful operation of the Commission for Equality and Human Rights.¹⁵⁴ In our report on the structure, functions and powers of the CEHR, we expressed the hope that priority would be given to addressing the need for harmonisation of the equality legislation. We urged that a Single Equality Bill should be introduced to “level up” the laws against discrimination on all grounds, and in particular to extend protection against age, sexuality and religious discrimination to the provision of goods and services, and to place a positive duty on public authorities to promote equality across all the equality strands. A robust and coherent legislative framework is of prime importance in securing the delivery of basic economic, social and cultural rights that the CESCR identifies in its concluding observations. **We urge the Government to give a higher priority to the development of a single Equality Act designed to ‘level up’ the laws against discrimination on all grounds, and in particular to extend protection against age, sexuality and religious discrimination to the provision of goods and services, and to place a positive duty on public authorities to promote equality across all the equality strands.**

A free-standing right to equality

112. The CESCR's concerns regarding inequality in the delivery of employment, education and housing rights also highlight the limits of the non-discrimination guarantees in the HRA. The Human Rights Act incorporates Article 14 ECHR, which guarantees non-discrimination in the protection of the other ECHR rights. However, its reach is limited to the equal protection of civil and political rights, as it does not provide a “free-standing” right to equality where the Convention rights are not engaged. Such a free-standing equality right is established in Protocol 12 of the ECHR, which has not as yet been ratified by the UK, and does not therefore form part of the Human Rights Act. In its recent review

152 The relevant legislation includes: the Equal Pay Act 1970; Sex Discrimination Act 1975; Race Relations Act 1976; Race Relations (Amendment) Act 2000; Race Relations Act (Amendment) Regulations 2003; Disability Discrimination Act 1995; Disability Discrimination Act 1995 (Amendment) Regulations 2003; Disability Discrimination (Pensions) Regulations 2003; Employment Equality (Sexual Orientation) Regulations 2003; Employment Equality (Religion or Belief) Regulations 2003; Race Relations Act 1976 (Amendment) Regulations 2003. Regulations on Age discrimination are expected to be introduced shortly. A Draft Disability Discrimination Bill was published in December 2003.

153 Written evidence of Democratic Audit (Appendix 11), The Children's Law Centre and Save the Children Northern Ireland (Appendix 6), JUSTICE (Appendix 15). Eleventh Report, Session 2003–04, *Commission for Equality and Human Rights: Structure Functions and Powers*, op cit., para. 46. See also the Concluding Observations of the Committee on the Elimination of Race Discrimination, September 2002.

154 QQ 96–98

of international human rights obligations,¹⁵⁵ the government supported in principle the inclusion of a free-standing right to equality in the ECHR, but declined to adopt the Protocol. The review cited the government's concern that the impact of the Protocol on domestic law would be difficult to predict, and that the scope of application of the Protocol, and the availability of a defence of objective and reasonable justification for differential treatment, remained uncertain pending clarification by the European Court of Human Rights.

113. We do not agree with the Government's view that uncertainty as to the application of Protocol 12 justifies the UK's continued refusal to ratify. The experience of implementation of the Human Rights Act 1998 does not support the government's suggestion that incorporation of Protocol 12 in domestic law would be likely to lead to an "explosion of litigation".¹⁵⁶ On the contrary, there is every reason to expect that the UK courts would apply the new Protocol in accordance with the settled principles of Strasbourg jurisprudence, including the principle of objective and reasonable justification of discriminatory treatment. Moreover, ratification and incorporation of Protocol 12 would support international law obligations already undertaken by the UK, under Article 26 of the ICCPR and Article 2.2 of the ICESCR, which guarantees non-discrimination in the protection of the ICESCR rights. **We recommend that the Government should ratify Protocol 12 to the European Convention on Human Rights, and that Protocol 12 should be included amongst the rights protected under the Human Rights Act.**

114. A free-standing right to equality is also contained in Article 26 of the International Covenant on Civil and Political Rights (ICCPR). Although the UK is party to the ICCPR, it has not yet accepted the right of individual petition under the Optional Protocol to the ICCPR, which would allow individuals to bring complaints to the UN Human Rights Committee, including in respect of Article 26. We consider below the question of acceptance of the right of individual petition under the ICCPR, which would allow individuals to bring complaints to the UN Human Rights Committee, based on ICCPR rights including Article 26.

Rights of individual petition

115. Ratification of rights of individual petition under the Conventions that protect against race and gender discrimination would also provide individuals with an important tool to combat the inequality the CDESCR identifies. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Elimination of All Forms of Racial Discrimination (CERD) contain important protections for economic and social rights. The International Covenant on Civil and Political Rights (ICCPR), in Article 26, contains a free-standing guarantee of equality which would also support the rights guaranteed by the ICESCR. The Government has decided, following its recent Review of International Human Rights Obligations, to ratify the optional protocol to CEDAW, but rights of individual petition under other UN instruments will not be

¹⁵⁵ *International Human Rights Instruments: the UK's Position*. Report on the outcome of an inter-departmental review conducted by the DCA, July 2004, Appendix 6

¹⁵⁶ *ibid.*, Appendix 6

accepted until an assessment is made, in two years time, of the impact of accepting the CEDAW right of individual petition.

116. We welcome the decision to allow the right of individual petition under the Convention on the Elimination of All Forms of Discrimination Against Women, and we urge the government to consider acceptance of other rights of individual petition at an early stage. We would not anticipate a high incidence of recourse to these procedures. The majority of human rights issues should be capable of resolution within our domestic legal and political systems. Nevertheless, and in particular in the absence of domestic incorporation of the human rights protected in international law under the UN treaties, the right of individual petition provides an important “long stop” of accountability for people in the UK. **In our view, the government should consider the need for the right of individual petition under these treaties in light of the concerns about *de facto* inequality highlighted by the Committee on Economic, Social and Cultural Rights.**

Homelessness

117. Article 11 ICESCR protects the right to housing, as part of the right to an adequate standard of living. The right has been interpreted by the CESCR as going beyond a right to shelter, to extend to a right to “live somewhere in security, peace and dignity”.¹⁵⁷ In its concluding observations, the CESCR noted with concern the persistence of homelessness, especially amongst certain groups of society, such as ethnic minorities, and high levels of alcoholism and mental illness amongst the homeless.¹⁵⁸

118. The government responded to this by highlighting practical initiatives designed to address the problem, including the establishment in March 2002 of a Homelessness Directorate (for England) charged with investigating and addressing the underlying causes of homelessness; the establishment of a Homelessness Monitoring Group for Scotland;¹⁵⁹ the adoption of a national strategy to tackle homelessness by the National Assembly for Wales¹⁶⁰ and the review of the Northern Ireland Housing Executive homelessness strategy in 2002.¹⁶¹ However, since the CESCR’s concluding observations were issued, levels of homelessness have continued to rise.¹⁶² NGOs pointed out that not all marginalised groups affected by homelessness are being reached by these measures, or included in government strategies.¹⁶³

119. Provision of housing for the homeless is the subject of a comprehensive legislative framework in the UK.¹⁶⁴ The Homelessness Act 2002, which came into force in July 2002, imposes a duty on local authorities to provide housing for the homeless. It requires Local Housing Authorities to carry out a review of homelessness in their area and to adopt a

157 General Comment No. 4 on the Right to Adequate Housing

158 Concluding Observations, para. 19

159 Appendix 1, para. 243

160 *ibid.*, para. 248

161 *ibid.*, para. 259

162 Shelter press release, 14 March 2004. 215,910 households were found to be homeless last year (up 11.4 %) and 95,060 homeless households are now in temporary accommodation (up 13.4% since Dec 2002). ODPM homelessness statistics, March 2004 (Quarter 4, 2003)

163 Disability Rights Commission (Appendix 2), Children’s Law Centre (Appendix 6), ATD Fourth World (Appendix 5)

164 Homelessness Act 2002

homelessness strategy.¹⁶⁵ Statutory protections against homelessness do not, however, protect certain groups of asylum seekers.¹⁶⁶ The Nationality, Immigration and Asylum Act 2002 allows for all support to be withdrawn from an asylum seeker who cannot be shown to have claimed asylum within a reasonable period of arrival in the UK. During the passage of this legislation through Parliament, we drew attention to the likelihood of these provisions breaching Article 11 ICESCR, as well as Article 3 ECHR.¹⁶⁷

120. Following its coming into force, the Nationality, Immigration and Asylum Act 2002 gave rise to particularly acute problem of homelessness and destitution for asylum-seekers deprived of benefits under section 55 of that Act. Reports by the Greater London Authority and by the Refugee Council provided evidence of acute and widespread destitution resulting from the application of section 55.¹⁶⁸ Withdrawal of support was challenged in a series of cases as in breach of freedom from inhuman and degrading treatment under Article 3 ECHR, culminating in the case of *Limbuela* before the Court of Appeal.¹⁶⁹ In that case, applying Article 3 ECHR, the Court of Appeal held that for the government to withdraw support from people unable to find support from other sources, without any clear plan as to how they should be provided for, would amount to a breach of Article 3.¹⁷⁰

121. In response to the Court of Appeal decision in the *Limbuela* case, the use of section 55 to deprive asylum seekers of support has been largely suspended, pending a government appeal of the case to the House of Lords. **We reiterate our conclusion stated during the passage of this legislation, that the application of section 55 of the Nationality, Immigration and Asylum Act 2002 is likely to breach human rights standards. The levels of homelessness and destitution which reliable evidence indicates have in practice resulted from section 55 are very likely to breach both the obligation of progressive realisation of rights under Articles 9 and 11 ICESCR (since they represent a regression in the protection of these rights for asylum seekers), and the obligation to ensure minimal levels of the Covenant rights to the individuals affected by section 55.**

Access to Higher Education

122. Article 13 (2)(c) requires that “higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.” In its concluding observations, the CESCR expressed concern that the introduction of tuition fees and student loans under the Teaching and Higher Education Act 1998 was inconsistent with Article 13(2)(c) and “has tended to worsen the position of students from less privileged backgrounds, who are already underrepresented in tertiary education”.¹⁷¹

165 Questions have, however, been raised about the efficacy of implementation of the Act in practice: *The Act in Action, An assessment of homelessness reviews and strategies*, Shelter 2004.

166 First Report, Session 2001–02, *Homelessness Bill*, HL Paper 30, HC 314

167 Twenty-third Report, Session 2001–02, *Nationality, Immigration and Asylum Bill: Further Report*, HL Paper 176, HC 1255

168 GLA, *Destitution by Design: Withdrawal of Support from in-country asylum applicants: An impact assessment for London*, February 2004; Refugee Council, *Hungry and Homeless: the impact of the withdrawal of state support on asylum seekers, refugee communities and the voluntary sector*, April 2004.

169 *SSH D v Limbuela, Tesema and Adam* [2004] EWCA Civ 540

170 *ibid*

171 Concluding Observations, para. 22

123. These issues have been the subject of extensive parliamentary debate during the passage of the Higher Education Act 2004, which abolishes the current systems of tuition fees and replaces them with a system allowing universities to charge variable “top-up” fees, payment of which may be deferred. The impact of this step on accessibility of higher education to those on lower incomes is a matter of considerable controversy. The government has stressed the potential of the legislation to enhance access to higher education, by abolishing the payment of up-front fees; however it has been criticised by student organisations and trade unions as limiting access to higher education. We have not inquired into the merits of the new legislation in any detail. **Both the government and its critics have argued the case for changes to the funding of higher education from the standpoint of the desirability of increasing access to it. In its implementation and review of the Higher Education Act 2004, the government should explicitly recognise the obligation of progressive realisation of access to higher education under Article 13 (2)(c) of the ICESCR.**

Religious segregation of education in Northern Ireland

124. The CESCR’s concluding observations express concern that “the educational structure in Northern Ireland continues to be heavily segregated on the basis of religion, despite the increased demand for integrated schools”¹⁷² and reiterates the recommendation made in its 1997 concluding observations that measures should be taken to establish additional integrated schools where there is demand for them. This reflects the concluding observations of the UN Committee on the Rights of the Child, which also recommended increased budgetary provision and incentives for integrated schooling in order to meet parental demand in Northern Ireland.¹⁷³

125. Education in Northern Ireland is primarily provided through either Protestant or Catholic schools. Although relatively few schools provide integrated education, there is a statutory duty on the Department of Education to encourage and facilitate the development of integrated education, and that measures have recently been taken to make it easier for new integrated schools to qualify for public funding.¹⁷⁴

126. The Northern Ireland Human Rights Commission (NIHRC) pointed out that, in Northern Ireland, religious segregation of education was a matter of parental preference and was not imposed by the State. It opposed any imposition of integration,¹⁷⁵ but favoured enhanced financial support for integrated education, and expressed concern that there were families who wish to avail of integrated education but were unable to do so. The Committee on the Administration of Justice (CAJ) pointed out in that although there has been an increase in funding for integrated schools in Northern Ireland in recent years, demand had not fully been met.¹⁷⁶

127. The provision of integrated or segregated education is a complex issue both in policy and in human rights law terms. Under the ICESCR, States Parties agree their commitment

172 Concluding Observations, para. 23

173 Concluding Observations of the UN Committee on the Rights of the Child: United Kingdom, October 2002

174 Under the Education Reform (Northern Ireland) Order 1989. Appendix 1, paras. 321–326

175 Appendix 4, para. 44

176 Appendix 9

to education that will “promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups” (Article 13 (1)). The States Parties also undertake “to have respect for the liberty of parents ... to ensure the religious and moral education of their children in conformity with their own convictions.” The CESCR general comment on the right to education notes the importance of the cultural acceptability of education.¹⁷⁷ Parental choice is also a component of the right to education protected under Article 2 of Protocol 1 to the ECHR, as incorporated under the HRA. It provides that “the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” Nevertheless, where education by religious institutions is funded by the State, the Privy Council, upholding a decision of the Supreme Court of Mauritius and drawing on international human rights standards, has recently affirmed the duty to ensure that such educational provision does not discriminate against children from other religious backgrounds.¹⁷⁸

128. We agree that the unavailability of education that is not segregated along religious lines, in Northern Ireland or indeed elsewhere in the UK, may raise issues in relation to education rights under the ICESCR. Both the ICESCR, and education rights protected under the HRA,¹⁷⁹ require that parents’ convictions should be respected in the education of their children. Under an education system segregated along religious lines, however, that may not always be effectively achieved. In particular, where education is solely provided in segregated schools reflecting the two main religious communities, there may be implications for the adequacy and cultural acceptability of educational provision for children from other minority religious or cultural groups. **We recommend that the financial support provided for integrated education should be assessed having regard to human rights considerations under the ICESCR.**

177 General Comment on the Right to Education, para. 6.

178 *Bishop of Roman Catholic Diocese of Port Louis and Others v Suttyhudeo Tengur and Others*, Privy Council Appeal No. 21 of 2003, Judgment of 3 February 2004.

179 Article 2, Protocol 1 ECHR. *X v UK* (1978) 14 DR 179; *Belgian Linguistics Case* (No. 2) (1968) 1 EHRR 252.

8 Workplace rights

The national minimum wage

129. Article 7 ICESCR guarantees the right to just and favourable conditions of work, and Article 7(a)(ii) in particular guarantees the right of workers to “a decent living for themselves and their families.” Related to this is the Article 11 right to “an adequate standard of living for himself and his family, including adequate food, clothing and housing.”

130. In its concluding observations, the CESCR welcomed the introduction of a national minimum wage¹⁸⁰ but expressed concern that the minimum wage was not set at a level to provide all workers with an adequate standard of living in accordance with Articles 7(a)(ii) and 11 of the Covenant; that it did not apply to under 18s, and that it discriminated against those between 18 and 22, by prescribing a lower minimum wage for this age group.¹⁸¹ It urged the UK “to ensure that the level of the national minimum wage is determined with due regard to the requirements of an adequate standard of living”. It recommended that minimum wage protection should be extended to workers under 18 years of age and that the scheme should be applied in a non-discriminatory manner to persons between 18 and 22 years of age”.¹⁸²

131. Some progress has been made towards compliance with these recommendations. From 1 October 2004, the adult rate for the minimum wage has been raised to £4.85 per hour, and the rate for those between 18 and 21 inclusive has been raised to £4.10. Following a recommendation from the Low Pay Commission, the government introduced a minimum wage rate for 16 and 17 year olds, of £3.00 per hour, from 1 October 2004.¹⁸³ The Low Pay Commission has recently begun a review of the operation of the minimum wage.¹⁸⁴ **We welcome progress in raising the level of the minimum wage, and the introduction of a minimum wage for 16 and 17 year olds, but note the continuing inequality of protection for younger workers, identified by the CESCR as of concern under Article 7(a)(ii). We recommend that this should be taken into account in the Low Pay Commission’s review of the national minimum wage.**

The right to strike

132. The CESCR has repeatedly identified UK law as incompatible with the right to strike, as it is protected under Article 8 of the Covenant. Article 8 (1) (d) guarantees “the right to strike, provided that it is exercised in conformity with the laws of the particular country”.

180 Concluding Observations, para. 6

181 *ibid.*, para. 15

182 *ibid.*, para. 33

183 www.dti.gov.uk/er/nmw/index.htm

184 LPC Press Notice, 2 August 2004

This reflects similar guarantees of the right to strike, in the Conventions of the ILO,¹⁸⁵ and in the European Social Charter,¹⁸⁶ international instruments to which the UK is party.

133. Under the current law, employees have the freedom to engage in industrial action.¹⁸⁷ Engaging in strike action will, however, constitute a breach of the employment contract which may in certain circumstances result in dismissal. Trade unions which organise strikes may also incur liability in tort.

134. Where a strike is considered to be a lawful one, employees will be afforded some protection by the law of unfair dismissal, in that they cannot be dismissed for an eight week “protected period” following the commencement of strike action.¹⁸⁸ The Employment Relations Act results in some changes to this, though to an extent which is considered insufficient by some of those that submitted evidence to us.¹⁸⁹ It extends the 8 week period in cases where the employer has not taken reasonable steps to settle the dispute through involvement in mediation or conciliation procedures.¹⁹⁰ The Act also allows the protected period of eight weeks to be extended in the case of a lock-out.¹⁹¹

135. Trade unions enjoy immunity from tortious liability for organising strike action where action is taken in contemplation or furtherance of a trade dispute,¹⁹² where it satisfies balloting and notice obligations,¹⁹³ and where it constitutes primary, rather than secondary strike action.¹⁹⁴ The law impacts restrictively on trade unions in a number of ways. First, the statutory immunity for tortious liability does not apply to all torts, only to those identified under the legislation.¹⁹⁵ Second, and perhaps the most significant restriction on immunity from tortious liability, “secondary” disputes (such as “sympathy strikes”) do not fall within the immunity, as they are outside the definition of a “trade dispute”.¹⁹⁶ One of the effects of this limitation is that there may be tortious liability for strike action taken against a parent company that is the *de facto* but not the immediate employer involved in the trade dispute.¹⁹⁷ In addition, where there is a transfer of a business, action concerning the future employer and future terms of employment will not

185 Convention 87 ILO Convention on Freedom of Association (where the right to strike is an implied right in Article 3).

186 Article 6(4) European Social Charter guarantees the right to collective bargaining, including the right to take collective industrial action.

187 Trade Union and Labour Relations (Consolidation) Act 1992, s. 236

188 Employment Relations Act 1999. Protection against dismissal is also deemed to be unfair where it takes place after the end of the eight week period but the employee concerned had ceased strike action before the end of that period; or where the employer had not taken reasonable steps to resolve the dispute.

189 Evidence of the Institute of Employment Rights (Appendix 14); Transport and General Workers Union (Appendix 20); National Union of Rail Maritime and Transport Workers (Appendix 18)

190 Section 28

191 Section 26

192 TULRCA, s. 219

193 TULRCA, ss. 226 and 234

194 TULRCA, s. 224

195 UNISON (Appendix 21) refers to a case against Nottingham City Council where there was found to be no immunity from liability for the tort of inducing breach of statutory duty (though an injunction granted as a result of this was later overturned).

196 TULRCA, s. 244

197 Appendix 21

be within the definition of a trade dispute. Third, written evidence also argues that balloting and notice requirements imposed on trade unions are unnecessarily onerous.¹⁹⁸

136. In its concluding observations, the CESCR found, referring to its earlier concluding observations of 1997, that the failure to incorporate the right to strike in domestic law breached Article 8. Reiterating its 1997 recommendations on this point,¹⁹⁹ it recommended that the right to strike should be incorporated in legislation and that strike action should no longer entail the loss of employment.

137. These conclusions are echoed in successive findings of the ILO Committee of Experts, in its reviews of UK compliance with ILO Convention 87,²⁰⁰ as well as in the findings of the Council of Europe European Committee of Social Rights.²⁰¹ The Institute of Employment Rights cited repeated findings by these bodies that the UK law fails to protect the right to strike.

138. The Institute of Employment Rights told us that—

If the United Kingdom is to meet minimum international standards, some radical surgery will be required to labour laws which remain the most restrictive in Europe, notwithstanding the Employment Relations Act 1999 and the enactment of the Employment Relations Bill currently before Parliament.²⁰²

139. The IER argued for protection of the right to strike, either by direct incorporation of one of the international treaties, such as the ICESCR, European Social Charter, or ILO Conventions, or by legislation broadly based on one of these instruments, and a number of related legislative measures including the widening of the definition of a trade dispute under the Trade Union and Labour Relations (Consolidation) Act 1992, and the abolition of the prohibition on secondary industrial action in support of other employees, and protection against dismissal of workers for taking part in a strike.

140. The Government maintained that the current law sufficiently protects the right to strike to comply with Article 8. It noted that “the law ensures that workers are free to withhold their labour if they wish”²⁰³ and that trade unions are free to organise industrial action, within certain limitations.²⁰⁴ It concluded that, taken together, this legal framework was sufficient to comply with the Covenant.²⁰⁵ In particular, it disputed the CESCR’s view that protection against loss of employment following strike action was necessary in order to protect the right to strike. It stated—

198 Appendix 10. Although balloting obligations are revised by the Employment Relations Bill, (clause 21) the CWU states in its written evidence that the new regime would be even more onerous than the existing law, and would breach the Covenant and the European Social Charter.

199 In its concluding observations of 1997, the CESCR, after criticising the failure to guarantee the right to strike, added that “[t]he Committee does not find satisfactory the proposal to enable employees who go on strike to have a remedy before a tribunal for unfair dismissal. Employees participating in a lawful strike could not ipso facto be regarded as having committed a breach of an employment contract.”

200 Written Evidence of the Institute of Employment Rights (Appendix 14), para. 3.5

201 *ibid.*, paras. 4.6–4.9. European Committee of Social Rights, Conclusions XVII-I United Kingdom, April 2004.

202 Appendix 14, para. 7.1

203 Appendix 1, para. 105

204 *ibid.*, para. 106

205 *ibid.*, para. 107

... giving protection against loss of employment is one means by which national legislatures can secure or at least assist in securing, compliance with the Covenant. But [the government] does not consider that the Covenant, which does not refer explicitly to the dismissal of strikers, makes such a protection essential in all circumstances or requires, where the protection is given, that it must be indefinite.²⁰⁶

141. Government evidence points out that there have been very few cases of dismissal following strike action, but acknowledges that this is a possibility. Evidence from trade unions suggests that the impact of the restrictions on industrial action is significant. It cites particular cases where the weak legal protection afforded to striking employees has had serious consequences for trade union members. The Communications Workers Union stated that it has on several occasions desisted, on legal advice, from taking industrial action in cases where it would otherwise have considered such action justified and proportionate, and that it has sometimes felt obliged to repudiate strike action by members so as to avert the risk of an injunction against them, thus leaving their members unsupported against dismissal.²⁰⁷ UNISON cited cases where injunctions have been granted against it, restraining industrial action.²⁰⁸

142. The CESCR concludes that current law places undue restrictions on the right to strike, as protected in Article 8 ICESCR. We consider that the Government should take seriously the successive findings of the authoritative international bodies overseeing treaties to which the UK has become party, and should review the existing law in the light of them.

Collective bargaining

143. In its 1997 concluding observations on Article 8 (which were referred to and affirmed in the 2003 concluding observations)²⁰⁹ the CESCR expressed concern that “the legally accepted practice of allowing employers to differentiate between union and non-union members by giving pay raises to employees who do not join a union is incompatible with Article 8 of the Covenant” and it recommended “that the right of employers to grant financial incentives to employees who do not join unions be abolished”.²¹⁰ The law on this point is amended by the Employment Relations Act 2004, following the decision of the European Court of Human Rights, in the case of *Wilson and Others v United Kingdom*²¹¹ which found the legislative provision for this practice also breached the right to freedom of association guaranteed by Article 11 ECHR.²¹²

206 Appendix 1, para. 108

207 In support of this contention the CWU (Appendix 10) cites the recent case of *BT plc v CWU* [2003] IRLR 58

208 In particular, it highlighted the case of *University College London NHS Trust v UNISON* [1999] ICR 204 where an injunction was granted where strike action was held to fall outside the definition of a trade dispute. Written evidence of the RMT also cites a case where an injunction was been granted against it and refers to the impact of the legislation in preventing it from supporting its members.

209 Concluding Observations, para. 16

210 The European Committee of Social Rights has also found the UK to be in breach of Article 6.2 of the European Social Charter on this matter: Conclusions XVII-I (UK), April 2004

211 35 EHRR 523

212 The Court held that section 148 of the Trade Union and Labour Relations (consolidation) Act 1992, as amended by the Trade Union and Employment Reform Act 1993, breached Article 11 in that it provided that a breach of the right of employees under section 146 of the 1992 Act not to have any action taken against them, short of dismissal, to prevent or deter them from being or seeking to become a member of an independent trade union, or penalising

144. We welcomed the provisions of the Employment Relations Act 2004, which go a significant way to remedying the incompatibility with Article 11 ECHR and with Article 8 ICESCR, but we consider that the Act leaves some incompatibilities unremedied. In particular, in our thirteenth Report, we expressed concern that the failure to provide trade unions (rather than only employees) with an avenue for redress of their rights under Article 11 ECHR, where inducements were offered to employees not to join the trade union, could result in a violation of both the Article 11 right and the right to a remedy.²¹³

In our Thirteenth Report, we pointed out that provisions of the Employment Relations Act could lead to incompatibilities with ECHR rights. In our view the Act is also likely to leave incompatibilities with Article 8 ICESCR, as identified by the CESCR in its 1997 concluding observations.

them for doing so, did not give rise to a remedy for an employee unless the employer's action was one that no reasonable employer could take.

213 Thirteenth Report, Session 2003–04, *Scrutiny of Bills, Sixth Progress Report*, HL paper 102, HC 640, para. 2.19. See also Twentieth Report, Session 2003–04, *Scrutiny of Bills, Eighth Progress Report*, HL Paper 182, HC 1187, para 4.4, where we welcomed amendments made to the Bill protecting the rights of members of unrecognised trade unions in relation to inducements.

9 Family life rights

Domestic Violence

145. The CESCR’s concluding observations expressed concern at the high incidence of domestic violence²¹⁴ and recommended that the Government continue its efforts to combat the problem.²¹⁵ The Committee on the Administration of Justice (CAJ) point out in their written evidence that the incidence of domestic violence in Northern Ireland is particularly high.²¹⁶

146. Since the concluding observations were issued, the Domestic Violence, Crime and Victims Bill has been introduced. The Bill contains proposals to strengthen legislative protection against domestic violence, and includes measures to ensure that prosecutions can be taken. In our reports on the Bill, we have pointed to the progress the Bill makes in protecting family life rights under Article 8 ECHR, and in ensuring against discrimination in the protection of family life rights (under Article 8 and Article 14 ECHR) by extending protection against domestic violence to those in non-traditional family relationships.²¹⁷ This provision of the Bill should also assist in the equal protection of rights under Article 10 ICESCR. In our Report, we also drew attention to the creation of a new offence of causing or allowing the death of a child or vulnerable adult, which applies where someone living in the household as a child or other vulnerable person either causes their death directly, or fails to take reasonable steps to protect them against a significant risk of physical harm resulting from the actions of another member of the household.²¹⁸ We pointed to the capacity of the new offence to protect the right to life.²¹⁹ **We welcome the measures in the Domestic Violence Bill designed to enhance protection against domestic violence, in particular violence against children.**

Physical punishment of children

147. The CESCR recommended that the physical punishment of children should be prohibited, in light of Article 10.1 and 10.3 of the Covenant, which accord special protection to the family, and to children and young persons. We considered the physical punishment of children in our report on the Convention on the Rights of the Child,²²⁰ following the recommendation of the UN Committee on the Rights of the Child that “reasonable chastisement” should be abolished as a defence to a charge of assault on a child.²²¹ We also took into consideration the decision of the European Court of Human Rights in *A v UK*,²²² which found a breach of the freedom from inhuman or degrading treatment (Article 3 ECHR) in a case where the defence of reasonable chastisement had

214 Concluding Observations, para. 17

215 *ibid.*, para. 35

216 Appendix 9

217 Clause 1 of the Bill. Third report, Session 2003–04, *Scrutiny of Bills: Progress Report*, HL Paper 23, HC 252, para. 2.5

218 Clause 4 of the Bill. Third report, Session 2003–04, *op cit*, para. 2.7

219 *ibid*

220 Tenth Report, Session 2002–03, *The UN Convention on the Rights of the Child*, *op cit*

221 Committee on the Rights of the Child, Concluding Observations on the UK, October 2002

222 (1999) 27 EHRR 611

been successfully invoked. In our report on the Convention on the Rights of the Child we concluded that retention of the defence of reasonable chastisement was incompatible with the government's obligations under the Convention on the Rights of the Child.²²³

148. More recently, in relation to the Children Bill currently before Parliament, we expressed concern that the government's failure to remove the defence of reasonable chastisement meant that the decision of the ECtHR in *A v UK* had not been satisfactorily implemented.²²⁴ At report stage the House of Lords amended the Bill to include a new provision restricting the availability of the reasonable chastisement defence but not abolishing it altogether.²²⁵ The amendment removes the availability of reasonable chastisement as a defence to the offences of wounding and causing grievous bodily harm,²²⁶ assault occasioning actual bodily harm,²²⁷ and cruelty to persons under 16. It leaves the defence available to a charge of common assault. **In our further report on the Children Bill we concluded that whilst the restriction of the reasonable chastisement defence proposed by the amendments introduced in the House of Lords was likely to satisfy Article 3 ECHR as currently interpreted by the European Court of Human Rights, and went some way towards achieving compatibility with the Convention on the Rights of the Child (CRC), it did not fully meet the CRC obligation, as interpreted by the UN Committee on the Rights of the Child, or the obligation under the ICESCR, as interpreted by the Committee on Economic, Social and Cultural Rights. We reiterate that conclusion here.**

223 Tenth Report, Session 2002–03, *The UN Convention on the Rights of the Child*, op cit., para. 111

224 Twelfth Report, Session 2003–04, *Scrutiny of Bills: Fifth Progress Report*, HL Paper 93, HC 603, paras 1.32–1.34

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

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

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

10 The reporting process

149. The CESCR's General Comment No 1 identifies the objectives of the reporting process as—

- to facilitate a comprehensive review by a State of its rules, procedure and practice in implementing the Covenant;
- to ensure the ongoing monitoring by a State of its rules, procedure and practice in implementing the Covenant;
- to allow a State to demonstrate the extent to which it has developed policies and programmes to progressively implement the Covenant;
- to facilitate public scrutiny of relevant government policies;
- to provide a basis on which the State, together with the Committee, can evaluate progress towards realisation of the obligations in the Covenant;
- to identify the factors and difficulties inhibiting implementation of the Covenant;
- to facilitate exchange of information among States, and so encourage a better understanding of the common problems they face.²²⁸

150. The periodic reporting process under the ICESCR offers the opportunity for domestic debate on how economic, social and cultural rights can and should be protected. The potential value of the reporting process under this and other UN human rights instruments is that it provides a regular link between domestic policy and legal debates and the international system of rights protection.

151. For the scrutiny of the CESCR and the work of government in contributing to the reporting process to be worthwhile, and to have tangible benefits in the implementation of the Covenant rights, it must be integrated with the development of domestic law and policy. This requires wide awareness of the Covenant obligations at all levels of government, and a commitment to continuous scrutiny and review to advance Covenant rights. Beyond government, the reporting process will also be most effective if it involves both Parliament and civil society.

Departmental responsibility for the ICESCR

152. Currently, the Foreign Office is the lead department in the preparation of the report to the CESCR and the subsequent scrutiny process. In the preparation of the report, the FCO consults with other relevant government departments. The ICESCR report is the only report to a UN treaty body for which the FCO has lead responsibility (though in respect of each report it has a role in formally submitting the report to the UN in Geneva, and in providing information for the report on the Overseas Territories). A number of the NGOs

²²⁸ General Comment No. 1, Reporting by States Parties, 24/02/89

that submitted written evidence reported that they had found departmental responsibility for preparation of the ICESCR report unclear or difficult to establish.²²⁹

153. Mr Rammell, in oral evidence, acknowledged that responsibility for the ICESCR reporting process sat uneasily with FCO responsibilities, noting that “there is something of an anomaly that the FCO leads on preparing this report since we do not lead on any of the explicit policy areas apart from in respect of the overseas territories”. He noted that discussions were going on, at both official and ministerial levels, between the FCO and the DCA as to where departmental responsibility for the report should properly lie. He acknowledged that “given the new DCA’s domestic focus of its human rights unit, there is clearly a strong logic to the DCA playing a central role”.²³⁰

154. Lord Falconer noted that discussions between departments were still continuing but acknowledged the logic of central responsibility in the DCA. He continued—

I also see that the Department, wherever the formal responsibility is, will have the meat, and the burden of determining what is happening in order to discharge the responsibility of reporting back on the review will be primarily mine. There will be other departments involved as well, but obviously we have a responsibility in that respect.²³¹

155. In our view it is unsatisfactory that the Foreign Office should have lead responsibility for a report which primarily concerns detailed and complex issues of domestic law and policy. Locating responsibility for the ICESCR within the FCO encourages a view of the Covenant as principally a matter of international diplomacy, and the reporting process as a largely procedural matter, and discourages an understanding of the Covenant as a set of rights and standards, the implementation of which has practical implications for everyday life in the UK. The substance of ICESCR rights protection clearly concerns a number of government departments: the Department for Work and Pensions, the Department of Health and the Department for Education and Skills would all have substantial responsibilities related to the Covenant rights. Nevertheless, the Department of Constitutional Affairs, as the department with responsibility for domestic human rights matters, has a more central interest in the implementation of the Covenant in the UK. **We recommend that the co-ordination of the reporting process under the ICESCR should be transferred to the Department of Constitutional Affairs.**

Co-ordination between departments

156. As we have noted, the ICESCR concerns responsibilities across many government departments, as well as departments within the devolved administrations. Mr Rammell noted that, although the preparation of the report and dissemination of the concluding observations was undertaken by the FCO, implementation of the Covenant rights in the area of responsibility of a particular department was very much a matter for that department.²³² FCO written evidence confirmed that, once the concluding observations are

229 For example see written evidence of the Committee on the Administration of Justice (Appendix 9) or from the Children’s Law Centre and Save the Children UK in Northern Ireland (Appendix 6)

230 Q 15

231 Q 49

232 Q 7

received, they are disseminated to all Government Departments, Overseas Territories and Crown Dependencies which have responsibilities under the ICESCR.²³³ The FCO's role goes no further. Its evidence states—

Individual Government Departments are responsible for ensuring compliance with the ICESCR in respect of their policies and implementation of the rights contained in the Covenant. Overall monitoring of the UK's compliance with the ICESCR is the responsibility of the relevant treaty monitoring body, the CESCR. The Concluding Observations of the Committee are used by individual Government Departments to review where appropriate their compliance with the ICESCR, particularly where the Concluding Observations make specific recommendations with regard to compliance.²³⁴

157. Suggestions were put to us for a more active government response to the concluding observations, including the establishment of a cross-departmental review group in Whitehall and in each of the devolved administrations;²³⁵ and the preparation of a plan of action to give effect to the concluding observations, including agreed targets and timeframes.²³⁶ Mr Rammell acknowledged that “it is arguable that we need a more formalised structured procedure for analysing and responding to recommendations, department by department”.²³⁷ We agree that the current system too readily allows the concluding observations to be forgotten, or put aside until the next reporting round.²³⁸ **There should be a body within government that drives progressive implementation of the Covenant rights, and that works in conjunction with the CESCR, through responding to the concluding observations, to do this. In our view, more active co-ordination in the implementation of the Covenant is needed. In particular, the co-ordinating department should follow up with other government departments on their response to the concluding observations, and on the implementation measures they propose.** The DCA human rights unit would in our view be well placed, given its responsibility for implementation of human rights in government, to take an active role in ensuring implementation of the Covenant rights, in the context of the CESCR concluding observations. It should work together with the new Commission for Equality and Human Rights to develop an effective reviewing mechanism for implementation of economic, social and cultural rights.

Co-ordination with the devolved administrations

158. We received evidence from NGOs working in Northern Ireland that the devolved administrations were not sufficiently involved in the reporting process. The CAJ argued that “the devolved administrations must and should have a vital role to play in developing the UK's report to the UN”.²³⁹ Save the Children Northern Ireland/Children's Law Centre suggested that “one government department in each jurisdiction needs to be given lead

233 Appendix 1

234 *ibid.*, para. 8

235 Appendix 4

236 Appendix 6

237 Q 1

238 Written evidence of Democratic Audit is critical of the failure to demonstrate sustained follow-up and policy and legislative changes in response to the CESCR's conclusions and recommendations (Appendix 11)

239 Appendix 9

responsibility for taking forward the implementation of the concluding observations ... The lead department should have responsibility for the development of a co-ordinated, integrated plan of action, involving all relevant departments, to give effect to the concluding observations”.²⁴⁰ **We recommend that the devolved administrations should also identify a department with lead responsibility for implementation of obligations under the ICESCR, and for taking forward the concluding observations.**

The role of human rights commissions

159. We see a substantial role for the new Equality and Human Rights Commission in furthering implementation of the Covenant rights. That role should in our view include contributing to the consideration of the UK Report in the CESCR. The only human rights commission so far established in the UK, the Northern Ireland Human Rights Commission (NIHRC) has played an active role in informing the reporting process. However, written evidence from the NIHRC states that it was not consulted during the drafting of the UK Fourth Report and was not provided with a copy of the report.²⁴¹ **The NIHRC, and, when established, the Scottish Human Rights Commission and the Commission for Equality and Human Rights should be kept informed of the reporting process at all stages. The Commissions have an important role in providing independent commentary on the State report, in providing authoritative information to the CESCR, and in informing the public and facilitating debate on the Covenant rights and UK implementation of them.**

Liaison with NGOs, civil society and the public

160. It appears from the written evidence, both of NGOs and of the FCO, that government has not actively sought to involve NGOs in the reporting process. The NIHRC points out in its written evidence that trade unions, employer organisations and NGOs, were not kept informed of the reporting process during the last reporting cycle. A number of NGOs (with previous involvement in the CESCR reporting process) state that they were not informed of the report's publication, or consulted during its preparation, or sent copies of the concluding observations. Oxfam regretted the lack of collaboration between government and the voluntary sector in the preparation of the report, and pointed out that no evidence had been sought from those living in poverty to inform the government's report. Oxfam called for dialogue between the voluntary sector and the government to explore how the process might be improved to incorporate the experience of those living in poverty.²⁴² More generally, Democratic Audit expressed concern about “the general lack of publicity and debate on the ICESCR reporting process within all sectors, as well as the general ignorance about ESC rights in the UK”, and considered that the government was not doing enough to fulfil its responsibilities under the Covenant to ensure that the public was fully informed about the reporting process.²⁴³

240 Appendix 6

241 Appendix 4, para. 59

242 Appendix 17, para. 50

243 Appendix 11

161. Consultation with interested organisations, including circulation of draft reports for comment, does appear to take place more thoroughly in relation to the reports under other UN human rights treaties, for example the ICCPR, and CERD. The FCO evidence acknowledges that: “there are no formal procedures for directly disseminating the concluding observations beyond Government. Individual government departments are responsible for deciding how far they wish to disseminate the concluding observations”.

162. The FCO evidence notes that the Department of Constitutional Affairs' NGO Forum on Human Rights has established a sub-committee to monitor progress on the implementation of recommendations of each of the international treaty bodies, including the CESCER (though ICESCR compliance has not as yet been considered—there has been only one meeting of the sub-committee so far). **We welcome the potential of the NGO forum to involve NGOs in the reporting process under the ICESCR. Beyond this, however, we hope that efforts can be made to involve NGOs outside of the forum, in particular those concerned with issues of poverty and access to social services, as well as trade unions and employers' organisations.**

11 Conclusion

163. In a culture of respect for human rights, the economic, social and cultural rights embodied in the International Covenant should not be regarded as the poor cousins of the civil and political rights incorporated into UK law by the Human Rights Act. As we have emphasised repeatedly in this report, the two sets of rights are not distinct and should not be divided.

164. What our inquiry into the UK's reporting process under the ICESCR has most particularly revealed is that insufficient attention is currently given within government to the ways in which these rights can be used to provide a point of reference in the development of policy and legislation.

165. There are ways in which this situation can be ameliorated. We recommend that ministerial responsibility for the monitoring of compliance with the ICESCR be transferred to the Department of Constitutional Affairs. We recommend that it, together with the new Commission for Equality and Human Rights, should develop ways of measuring, with some degree of objectivity, progress in realising the Covenant rights.

166. We also recommend that, in the preparation of legislation, government departments should look beyond the range of the Convention rights to the wider international obligations which the UK has accepted in the human rights field. The examination of proposed legislation against these standards should be made explicit in the explanatory notes to Bills.

167. More widely, we recommend that attention to the Covenant rights should be reinvigorated throughout the public sector. The new Commission for Equality and Human Rights should regard this as a key task—the Covenant rights in particular can provide a framework which unites the concerns of both “equality” and of “human rights”. The government, as well as the Commission, needs to promote the Covenant rights as a set of positive guarantees and aspirations—as a standard under which the endeavours of Parliament, the government, public authorities and civil society can unite.

Formal Minutes

Wednesday 20 October 2004

Members Present:

Jean Corston MP, in the Chair

| | |
|---------------------------|------------------------|
| Lord Bowness | Mr David Chidgey MP |
| Lord Campbell of Alloway | Mr Paul Stinchcombe MP |
| Lord Judd | Mr Shaun Woodward MP |
| Lord Lester of Herne Hill | |
| Lord Plant of Highfield | |
| Baroness Prashar | |

The Committee deliberated.

* * * * *

Draft Report [The International Covenant on Economic, Social and Cultural Rights], proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 167 read and agreed to.

Resolved, That the Report be the Twenty-first 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 Baroness Prashar do make the Report to the House of Lords.

[Adjourned till Wednesday 27 October at a quarter past Four o'clock.]

Witnesses

| Thursday on Monday 15 September 2003 | Page |
|---|-------------|
| Mr Bill Rammell , a Member of the House of Commons, Parliamentary Under-Secretary, Mr Jon Benjamin , Head of the Human Rights Policy Department, and Ms Helen Upton , Assistant Legal Adviser, Foreign and Commonwealth Office | Ev 1 |

List of Written Evidence

| | | |
|----|--|--------|
| 1 | Memorandum from the Foreign and Commonwealth Office | Ev 9 |
| 2 | Memorandum from the Disability Rights Commission | Ev 44 |
| 3 | Supplementary memorandum from the Disability Rights Commission | Ev 50 |
| 4 | Memorandum from the Northern Ireland Human Rights Commission | Ev 51 |
| 5 | Memorandum from ATD Forth World | Ev 61 |
| 6 | Memorandum from Children's Law Centre and Save the Children UK in Northern Ireland | Ev 63 |
| 7 | Memorandum from the Children's Rights Alliance for England | Ev 69 |
| 8 | Supplementary memorandum from the Children's Rights Alliance for England | Ev 73 |
| 9 | Memorandum from the Committee on the Administration of Justice | Ev 77 |
| 10 | Memorandum from the Communication Workers Union | Ev 83 |
| 11 | Memorandum from Democratic Audit, Human Rights Centre, University of Essex | Ev 84 |
| 12 | Memorandum from Friends, Families and Travellers | Ev 93 |
| 13 | Memorandum from the GMB | Ev 95 |
| 14 | Memorandum from the Institute of Employment Rights | Ev 95 |
| 15 | Memorandum from JUSTICE | Ev 114 |
| 16 | Memorandum from Liberty | Ev 119 |
| 17 | Memorandum from OXFAM UK | Ev 119 |
| 18 | Memorandum from the National Union of Rail Maritime and Transport Workers | Ev 126 |
| 19 | Memorandum from Physicians for Human Rights-UK | Ev 128 |
| 20 | Memorandum from the Transport and General Workers Union | Ev 133 |
| 21 | Memorandum from UNISON | Ev 135 |