House of Lords
House of Commons

Joint Committee on Human Rights

Scrutiny of Bills: Fifth Progress Report

Twelfth Report of Session 2003-04

Drawing special attention to:

Children Bill
Finance Bill
Gender Recognition Bill
Assisted Dying for the Terminally Ill Bill
Promotion of Volunteering Bill

HL Paper 93
HC 603

House of Lords
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Joint Committee on Human Rights

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Twelfth Report of Session 2003–04

Report, together with formal minutes 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.

Current Membership

HOUSE OF LORDS	HOUSE OF COMMONS
Lord Bowness	Mr David Chidgey MP (Liberal Democrat, *Eastleigh*)
Lord Campbell of Alloway	Jean Corston MP (Labour, *Bristol East)* (*Chairman*)
Lord Judd	Mr Kevin McNamara MP (Labour, *Kingston upon Hull*)
Lord Lester of Herne Hill	Mr Richard Shepherd MP
Lord Plant of Highfield	(Conservative, *Aldridge-Brownhills*)
Baroness Prashar	Mr Paul Stinchcombe (Labour, *Wellingborough)*
	Mr Shaun Woodward MP (Labour, *St Helens South*)

Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

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

Current Staff

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

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Summary

The Joint Committee on Human Rights examines every Bill presented to Parliament. With Government Bills its starting point is the statement made by the Minister under section 19 of the Human Rights Act 1998 in respect of its compliance with Convention rights as defined in that Act. However, it also has regard to the provisions of other international human rights instruments to which the UK is a signatory.

The Committee does not in general publish separate reports on each Bill which raises human rights questions, but publishes regular progress reports on its scrutiny of Bills, setting out any initial concerns it has about Bills it has examined and, subsequently, the Government's responses to these concerns and any further observations it may have on these responses. The aim is to complete the cycle of consideration of a Bill before its second reading in the second House.

In this Report, the Committee's fifth scrutiny of Bills progress report of the 2003-04 Session, the Committee draws the special attention of each House to the human rights implications of two Government Bills, the Children Bill and the Finance Bill, and one on which it has previously commented, the Gender Recognition Bill. It also considers two private members' Bills: the Promotion of Volunteering Bill and the Assisted Dying for the Terminally Ill Bill.

In relation to the Children Bill:

The Committee draws attention to—

— concerns it has about the discretionary nature of the requirement on the proposed Commissioner to have regard to the Convention on the Rights of the Child (paragraphs 1.4 to 1.8);

— concerns it has about the extent and nature of the functions and powers proposed to be given to the proposed new Commissioner (paragraphs 1.9 to 1.15);

— concerns it has about the independence of the proposed Commissioner from Government (paragraphs 1.16 and 1.17);

— concerns it has about the nature of the duties imposed on those involved in the planning, commissioning and delivery of children's services and the failure to take account of refugee children in this respect (paragraphs 1.19 to 1.21);

— the sweeping nature of the powers conferred on the Secretary of State in relation to the holding and sharing of data on individual children, and the absence of clear safeguards for privacy rights on the face of the Bill (paragraphs 1.22 to 1.31; and

— the failure to include in the Bill any provision abolishing the common law defence of "reasonable chastisement" in respect to the corporal punishment of children (paragraphs 1.32 to 1.34).

The Committee has raised a number of questions with the Government in relation to these matters, and will report further.

In relation to the Finance Bill:

The Committee considers whether the imposition of a new liability for income tax in relation to benefits received from property previously disposed of might be in breach of Convention rights, and concludes that it is not (paragraphs 2.5 to 2.19).

However, the Committee expresses concern about the possibly discriminatory effect of creating a "spouse exemption" from liability for the new tax (paragraphs 2.20 to 2.22).

In relation to the Gender Recognition Bill:

The Committee considers representations it has received relating to the effect on religious liberties of the criminalisation of disclosure of a person's gender change. It concludes that in general the terms of the Bill's prohibition on the disclosure of a person's previous gender do not unjustifiably infringe the freedom to manifest one's religious beliefs (paragraphs 3.3–3.11) but that there are circumstances in which the criminalisation of such disclosure might nullify the purpose of the conscientious objection provisions (paragraphs 3.12–3.16).

In relation to the Assisted Dying for the Terminally Ill Bill:

The Committee notes that the Bill is substantially the same as a Bill introduced into the House of Lords in the 2002-03 Session (the Patient (Assisted Dying) Bill). The Committee concluded that the safeguards in that Bill were sufficient to protect the human rights of vulnerable patients. The safeguards in the present Bill have been strengthened, and the Committee concludes therefore that it has no reason to revise its earlier opinion (paragraphs 4.1 to 4.10).

However, the Committee considers that the obligation in clause 7(2) and (3) of the Bill on a doctor, who has a conscientious objection to assisting a terminally ill patient to die, to assist that patient to find another doctor who is willing to assist him or her, gives rise to a significant risk of a violation of the right to freedom of conscience of the doctor (paragraphs 4.11 to 4.16).

In relation to the Promotion of Volunteering Bill:

The Committee applauds the overall purpose of promoting volunteering as something which enhances human rights, but concludes that those of its provisions which seek to exempt volunteers and voluntary organisations from liability for negligence and from culpability for disclosure of certain protected data, would be likely to give rise to breaches of Convention rights (section 5).

Bills drawn to the special attention of each House

Government Bills

1 Children Bill

Date introduced to the House of Lords	3 March 2004
Current Bill Number	House of Lords 35
Previous Reports	None

Background

1.1 This is a Government Bill, introduced into the House of Lords on 3 March 2004. It received its Second Reading on 30 March 2004 and began its Committee stage on 4 May 2004. Baroness Ashton has made a statement of compatibility with Convention rights under s. 19(1)(a) of the Human Rights Act 1998. Explanatory Notes to the Bill have been published (HL Bill 35-EN). They deal with what the Government regards as the Convention issues to which the Bill gives rise at paras 208–212. The Bill was also accompanied by the publication Every Child Matters: Next Steps.

1.2 We published two relevant Reports in Session 2002–03: our Ninth Report, *The Case for a Children's Commissioner for England*, and our Tenth Report, *The UN Convention on the Rights of the Child*. In light of our extensive work on the subject matter of this Bill, we decided to go beyond an ordinary scrutiny report in relation to this Bill and, in addition, to consider the Bill in light of our earlier reports. In particular, we decided to examine carefully the proposed powers and functions of the Children's Commissioner, and to examine the extent to which the Bill has taken the steps necessary in order to give full effect to the UN Convention on the Rights of the Child in UK law. We took oral evidence from the three existing Commissioners, for Wales, Scotland and Northern Ireland, on 20 April 2004.[1]

1.3 We will publish a full report setting out the results of our consideration of the Bill in due course. Here we report on our initial consideration of the Bill and identify some key issues on which we have written to the Government.[2]

The human rights implications of the Bill

Children's Commissioner

1.4 Part 1 of the Bill provides for the establishment of a new Children's Commissioner, [3] whose general function is to promote awareness of the views and interests of children in

1 Minutes of Evidence, 20 April 2004, HC 537–i

2 See letter from the Chair, Appendix 1a

3 Cl. 1(1)

the UK.[4] Included in what the Commissioner may do in the exercise of his or her general function are "encouraging" persons exercising functions affecting children to take account of their views and interests, "advising" the Secretary of State on the views and interests of children, and "considering or researching" the operation of complaints procedures relating to children and any other matter relating to children.[5]

1.5 The provisions of Part 1 and Schedule 1 raise a number of issues concerning the compatibility of the office which is proposed with the UK's obligations under the UN Convention on the Rights of the Child ("the CRC").

Use of the CRC as a framework

1.6 The scheme of Part 1 of the Bill gives the CRC the status of a permissible relevant consideration: something to which, under clause 2(7), the Commissioner "may have regard" in considering what constitutes the interests of children. The CRC is only to "form the backdrop of the Commissioner's work *if he considers it appropriate*".[6]

1.7 The Government proposes instead that the new Commissioner will work within a framework constituted by the five aspects of children's well-being set out in clause 2(3)(a)–(e), which are the five outcomes identified by children as being most important to them during the consultation carried out on the Green Paper *Every Child Matters*. The Government "strongly believe that the views of children rather than the rights agenda should drive the commissioner's work".[7]

1.8 On the first day of the Bill's Committee stage, the Government has agreed to amend the Bill so that the Commissioner "must" rather than "may" have regard to the CRC.[8] However, it has continued to resist including an express reference to "rights" on the face of the legislation. It also continues to insist that the CRC be fitted into the framework constituted by the five identified outcomes, rather than the other way round. We have written to the Minister for Children on this point, **and draw this matter to the attention of each House**.

The Commissioner's mandate

1.9 We are also concerned about the terms of the Commissioner's mandate, and the extent to which it falls short of the Government's obligations under the CRC to establish independent national human rights institutions to promote and monitor the implementation of children's rights.[9]

4 Cl. 2(1)

5 Cl. 2(2)

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

7 Ibid at col. 1303

8 HL Deb., 4 May 2004, col. 1060

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

1.10 The functions of the Commissioner are set out in clause 2 of the Bill. A general function of "promoting awareness of the views and interests of children in the UK" appears weaker than a duty to promote, protect and monitor children's rights, or a mandate to ensure that legislation and practice is CRC-compliant. The vocabulary of "encouraging", "advising" and "considering or researching" used in clause 2(2) also appears to us to give rise to concerns about the effectiveness of these duties.

1.11 The view of the existing Commissioners was that the language defining the new Commissioner's mandate is far too weak, and contrasts with the much more robust duties placed on the other Commissioners, which require them to be more proactive in promoting, safeguarding and keeping under review.[10]

1.12 The Bill as drafted concentrates on the procedural aspects—that is promoting the views of and interests of children as something to be taken into account in the policy process. In our report last year we envisaged that the Commissioner should be given a much more substantive role.[11]

1.13 We have written to the Minister seeking an explanation of why the Commissioner is not to be given more strongly worded duties, **and we draw this matter to the attention of each House**.

The Commissioner's powers

1.14 The existing Commissioners drew attention to what they considered were significant omissions in the powers proposed to be given to the new office. These were—

- no power to review law, policy or practice for CRC compatibility
- no power to monitor
- no power to conduct investigations of its own initiative
- no power to require information to be provided, other than as part of an inquiry directed by the Secretary of State under clause 4(7)
- no power to consider individual complaints even if satisfied that the case raises a question of principle or policy affecting a large number of children or is otherwise a matter of public importance
- no power to intervene in litigation
- no power to make recommendations
- no power to publish reports other than through the Secretary of State.

1.15 We have written to the Minister asking for the government's justification for not giving these powers to the Commissioner**, and we draw these matters to the attention of each House**.

10 Minutes of Evidence, 20 April 2004, HC 537-i, QQ 26–29

11 Tenth Report of Session 2002–03, *The UN Convention on the Rights of the Child*, HL Paper 117, HC 81, at para. 25

Independence

1.16 We are concerned that the new Commissioner falls short of the CRC requirements in the degree of his or her independence from the Secretary of State. This is manifested in a number of ways:

- the Secretary of State has the power to direct the Commissioner to carry out investigations (clause 4(7));
- the Commissioner reports to the Secretary of State, not directly to Parliament ;
- the Secretary of State sets the Commissioner's budget; and
- the Commissioner is appointed by the Secretary of State for a renewable term.

1.17 All of the existing Commissioners considered that the lack of independence from the Secretary of State, or the appearance of it in the case of the renewability of the appointment, would undermine the effectiveness of the new Commissioner in the discharge of his or her functions.

1.18 We have written to the Minister also for the government's justification for not making the Commissioner truly independent of the Government in these various respects, **and we draw these matters to the attention of each House.**

Children's Services

1.19 Part 2 of the Bill makes provision for the better integration, planning, commissioning and delivery of children's services. Although this is not mentioned in the relevant part of the Explanatory Notes, this part of the Bill engages the important positive obligations owed to children under Articles 2, 3 and 8 ECHR, to take positive steps to protect their lives, to protect them from inhuman and degrading treatment, and to protect their physical integrity.

1.20 The duties in Part 2 are couched in similar language to that used in Part 1. We have written to the Minister seeking an explanation of the wording of the duties in clauses 6 and 7, **and we draw this matter to the attention of each House.**

1.21 Finally in relation to Part 2, the list of "partners" in clause 6(3) and the lists in clause 7(1) and 9(3) omits any organisations working with the children of refugees and asylum seekers. It appears from the Minister's speech at Second Reading that this is a deliberate omission, and that the Government is relying on its reservation to the CRC. However, the omission of this particular group of children from the institutional arrangements designed to fulfil the State's positive obligations to children under Articles 2, 3 and 8 raises the question of whether this gives rise to unjustifiable discrimination in the enjoyment of Convention rights. We have written to the Minister seeking the government's justification for this omission from the Bill**, and we draw this matter to the attention of each House.**

Information Sharing (Clauses 8 and 23)

1.22 Clause 8 provides for the creation of databases containing information in respect of persons to whom arrangements under clauses 6 or 7 of the Bill, and s. 175 Education Act 2002,[12] relate. The Secretary of State is given power either to require children's services authorities to establish and operate such databases[13] or to establish and operate one or more such databases him or herself, or make arrangements for doing so,[14] including by establishing a body corporate to establish and operate such databases.[15]

1.23 Clause 8(3) gives the Secretary of State power to make regulations to make provision in relation to the establishment and operation of any such databases, including (clause 8(4)):

- as to the information which may or must be contained in such database, including information as to services provided to, or activities carried out in relation to, the child or young person, and information as to the existence of any cause for concern in relation to them;[16]
- permitting or requiring the disclosure of information for inclusion in such database;
- permitting or requiring the onward disclosure of information included in such database;
- permitting or requiring any person to be given access to such database to add to or read the information.

1.24 The regulations may also provide that anything which may or must be done under the regulations must or may be done notwithstanding any rule of common law which prohibits or restricts the disclosure of information.[17]

1.25 The Secretary of State is given power to issue guidance and directions to any person or body establishing or operating such a database, who is under an obligation to comply .[18] Such guidance and directions can include the conditions on which access must or may be given to a database.[19]

1.26 From a human rights perspective, it is an important part of the State's positive obligation to secure Convention rights to all those within its jurisdiction that its laws facilitate the sharing of information about individuals to the extent that this is necessary to protect their Convention rights (including where necessary against interference by other individuals). *Some* provision in national law for information sharing concerning children

12 Duty on LEAs and governing bodies of maintained schools to make arrangements for ensuring that their respective functions are exercised with a view to safeguarding and promoting the welfare of children.

13 Cl. 8(1)(a)

14 Cl. 8(1)(b)

15 Cl. 8(2).Cl. 23 confers a similar power on the National Assembly for Wales, subject to Assembly procedures.

16 Cl. 8(5)

17 Cl. 8 (7)

18 Cl. 8(8)

19 Cl. 8(9)(a)

and young people is therefore required by the positive obligations imposed by human rights law.

1.27 However, there is an important countervailing privacy interest at stake: the sharing of any personal information is an interference with Article 8 ECHR which requires justification.[20] Children *prima facie* enjoy the benefit of the protection in Article 8, even though obviously the younger or more vulnerable the child the weightier is likely to be the justification for any interference with that right under Article 8(2). But the less vulnerable the child, and in particular the more mature they are, the more is likely to be required by way of justification for the interference.

1.28 The Explanatory Notes acknowledge that the creation of databases containing personal details of all children may constitute an interference with Article 8 rights, but asserts that the interference is proportionate and justified under Article 8(2).[21] No reasoning is offered to elaborate on this single sentence assertion that the interference with Article 8 is proportionate.

1.29 It is impossible for us to make any judgment about the proportionality of what will undoubtedly constitute an interference with Article 8 rights in the absence of more detail about what is proposed. We are concerned that the sheer breadth of the authority clause 8 proposes to confer on the Secretary of State to interfere with Article 8 rights, without any indication of the provision which will be made in relation to a large number of crucial questions including

- What is the purpose of keeping the information in the proposed databases?
- Whose personal information will be able to be included on the database?
- What kind of information will be included on the database?
- What is included in "information as to services provided to" a child in clause 8(5)(a)? Is this confined to specialist services provided to particularly vulnerable children, such as special educational need provision or psychiatric intervention, or does it include ordinary services such as health and education?
- What is meant by the broad phrase "information as to activities carried out in relation to" a child in clause 8(5)(a)?
- What is meant by "any cause for concern" in relation to a child in clause 8(5)(b)?
- How is it proposed to confine the recording of a cause for concern to the mere existence of such a cause for concern rather than its nature?
- In what circumstances may or must information be disclosed to those compiling the database? What will be the criteria determining when such disclosure is permitted or required?

20 See e.g. *M.S. v Sweden (1997)* EHRR; *R (Robertson) v City of Wakefield MC [2002]* 2 WLR 889 (disclosure of details on the electoral roll).

21 EN para. 209

- In what circumstances may or must information on the database be disclosed onwards? What will be the criteria?
- To whom will such disclosure be made?
- Who will be given access to the database?
- What will be the criteria for determining the level of access given to the database?
- What sorts of conditions will it be possible to impose on access to the database, or the use of information on the database?
- How long will data on the database be retained?
- To whom is it proposed to delegate the Secretary of State's discretion as to what may or must be done under the regulations (clause 8(6)). Will that person be regarded as a functional public authority for the purposes of the Human Rights Act1998?
- What is the proposed relationship between this legislation and the Data Protection Principles in the Data Protection Act 1998?

1.30 The Explanatory Notes[22] claim that clause 8 sets out "the principles that would govern information sharing using the information databases", and that the regulations will deal with "detailed operational requirements". In fact, clause 8 contains very few "principles" which would regulate the use of the proposed databases. Virtually all of the key questions which must be asked in order to assess for compatibility with Article 8 ECHR are left unanswered, to be dealt with in the regulations.

1.31 We have written to the Minister asking what the justification is for not dealing with the details of the proposed database in primary legislation, and for answers to the above questions**. We draw this matter to the attention of each House.**

Reasonable chastisement defence

1.32 In our Report on the UN Convention on the Rights of the Child, the Committee concluded, after taking evidence on the issue and careful consideration of the arguments, that the failure to replace or repeal the defence of reasonable chastisement was incompatible with the UK's obligations under the CRC.[23] The Bill does not include any provision abolishing the defence of reasonable chastisement. However, the Government has indicated that it is prepared to give careful consideration to any amendment brought forward on this issue and to consider allowing a free vote at the relevant stage of the Bill.[24] The Government's stated concern is that it does not want to interfere with the right of parents to punish their children appropriately, and it has said that it will not support any amendment which constitutes a ban on smacking children.

22 Para. 51

23 Tenth Report of Session 2002–03, *The UN Convention on the Rights of the Child*, HL Paper 117, HC 81 at paras 94–111.

24 Baroness Ashton, HL Deb 30 March 2004, col. 1308

1.33 We are concerned that the failure to remove the reasonable chastisement defence is in breach of the UK's obligation under Article 46 ECHR to abide by final judgments of the European Court of Human Rights. The decision in *A v UK* gives rise to an obligation on the UK to adopt general measures to prevent a repetition of the violation found in that case.

1.34 We have written to the DPP to ask if it his view that minor cases of smacking would not be prosecuted because they would not satisfy the public interest test.[25] We have also asked the Minister for the justification for not including in the Bill a short provision simply abolishing the common law defence of reasonable chastisement, in the interests both of legal certainty and of complying with the Strasbourg judgment in *A v UK*. **We draw this matter to the attention of each House.**

1.35 We will report further on the Bill in the light of the Government's response to the questions set out above.

25 See Appendix 1b

Finance Bill

Date introduced to the House of Commons	23 March 2004
Current Bill Number	House of Commons 89
Previous Reports	None

1.36 The Finance Bill was introduced to the House of Commons on 23 March 2004. The Chancellor of the Exchequer has made a statement under section 19(1)(a) of the Human Rights Act 1998 that in his opinion the provisions of the Bill are compatible with Convention rights. The Bill had its Second Reading on 20 April 2004 and is currently in Committee.

1.37 In light of a memorandum submitted to the Treasury Committee by Ms Anne Redston, and passed on to the JCHR,[26] we have considered whether the provisions of the Bill imposing a charge to income tax on the benefits of enjoying "pre-owned assets" (clause 84 and Schedule 15 of the Bill) are compatible with Article 1 of Protocol No. 1 of the Convention.

Explanatory Notes

1.38 The Explanatory Notes accompanying the Bill do not contain any consideration of the human rights implications of the Bill. This is unhelpful in relation to a Bill which runs to 310 sections and 40 Schedules.

1.39 We remind Ministers that statements of compatibility under s. 19(1)(a) of the Human Rights Act 1998 should only be made after careful consideration of the human rights implications of the Bill, and that the Explanatory Notes to the Bill should record the reasoning behind the conclusion that the provisions of the Bill are compatible with the Convention rights. The Treasury is not exempt from the need to explain itself in such a way.

Retrospectivity

1.40 Clause 84 and Schedule 15 of the Bill change the tax treatment of previously owned assets by imposing an income tax charge on the benefits of enjoying such assets[27] from the tax year 2005–06 onwards. They impose a new liability to income tax in relation to the benefits received by a former owner of property, subject to certain exemptions. The charge to income tax is imposed on a person who continues to enjoy benefits from property which he or she disposed of since 17 March 1986.[28] Schedule 15 makes provision defining what counts as enjoyment of such assets and quantifying the chargeable benefits.[29] Certain

26 Treasury Committee, Sixth Report of Session 2003–04, *The 2004 Budget*, HC 479-II. See Appendix 2.

27 Whether land, chattels or intangible assets.

28 Including where he or she has funded the acquisition of an asset for their use by a third person, and where the asset initially disposed of or acquired has been replaced by other assets enjoyed by the chargeable person.

29 In relation to land, in Sched. 15 paras. 3–5; in relation to chattels, in Sched. 15 paras 6 and 7; and in relation to intangible assets, in Sched. 15, paras 8 and 9.

disposals are exempt,[30] including those to a "spouse".[31] Transitional provision is made for a former owner who has made arrangements which are potentially chargeable for tax in 2005–06 to elect to have the property treated as part of their estate, and therefore as taxable for inheritance tax purposes, instead of paying the new income tax charge.[32]

1.41 The effect of these provisions is that individuals who have removed assets from their estates in order to avoid a charge to inheritance tax on their death, whilst retaining the ability to use those assets or other assets funded by the disposal, will be subject to an income tax charge based on the benefit they receive from the use of the asset. So, for example, an individual who transferred his house to his children, but continued to occupy it, will be liable to income tax chargeable as a proportion of the rental value of the property.

1.42 The concern which has been expressed about these provisions is that they amount to retrospective taxation, because taxpayers who undertook transactions up to 18 years ago will now be liable to a charge to income tax which was not contemplated when the transaction occurred, and that for this reason (or for some additional reason), the legislation may be in breach of Article 1 of Protocol No. 1 to the ECHR.

1.43 The Committee has considered whether the proposed new tax is compatible with the provisions of Article 1 of Protocol No. 1 as interpreted by the European Court of Human Rights.

1.44 Article 1 of Protocol No. 1 provides—

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

1.45 There is no doubt that the imposition by clause 84 and Schedule 15 of a new liability to pay income tax constitutes an interference by a public authority with the individual's peaceful enjoyment of their possessions within the meaning of Article 1 of Protocol No. 1: it is well established in Convention case-law that taxation is an interference with the rights guaranteed under that Article.[33]

1.46 However, taxation is *prima facie* justified under the second paragraph of Article 1 of Protocol No. 1, which expressly reserves the right of States to enforce such laws as they may deem necessary to secure the payment of taxes.[34] The Court of Human Rights has accorded States a very wide degree of latitude in relation to taxation under the second paragraph of Article 1 of Protocol No. 1, but it is not unlimited: the second paragraph must be construed

30 Sched. 15, para. 10

31 Sched. 15, para. 10(1)(c) and (d)

32 Sched. 15, paras 20–22

33 See e.g. *Spacek v Czech Republic (2000)* 30 EHRR 1010 at para. 39.

34 Ibid, para. 41

in the light of the principle laid down in the first sentence of the Article.[35] To be lawful under Article 1 of Protocol No. 1, therefore, even a taxing measure such as that contained in clause 84 and Schedule 15 must satisfy the requirements of legal certainty and proportionality.

1.47 For an interference to be lawful under the second paragraph of Article 1 of Protocol No. 1, it must satisfy the qualitative requirements of accessibility and foreseeability:[36] the law which imposes the tax must be published, intelligible and generally available in a form which enables the individual to organise their affairs knowing with reasonable certainty the consequences of acting in different ways.

1.48 In our view, the imposition of the new tax by clause 84 and Schedule 15 cannot strictly be said to be retrospective. It imposes a prospective liability, from the tax year 2005–06, in respect of the value of benefits received during those years. It is true that this imposes, in relation to certain arrangements, a tax which was not payable at the time that those arrangements were entered into, but that does not make the change retrospective. A retrospective provision would be one which levied the charge in respect of the benefit enjoyed in previous years. Such a tax would require very careful scrutiny for compatibility with the requirement of accessibility and foreseeability.

1.49 However, that is not the effect of what is proposed. Clause 84 imposes a prospective liability in respect of future benefits, and allows individuals who have already entered into arrangements whereby they have disposed of their assets to elect for them to be treated as part of their estate for inheritance tax purposes.

1.50 In any event, the requirement of legal certainty in Article 1 of Protocol No. 1 does not amount to an outright prohibition on retrospective taxation. In *National Provincial Building Society v UK*, for example, the Court held that a taxation measure which had been enacted with retroactive effect did not violate Article 1 of Protocol No. 1 because the interference was justified.[37]

1.51 We therefore conclude that the provisions of clause 84 and Schedule 15 are lawful for the purposes of Article 1 of Protocol No. 1 in the sense that they are sufficiently accessible and foreseeable and therefore "subject to the conditions provided for by law".

1.52 We have also considered the proportionality of the interference, which in this context requires consideration of whether the interference in question strikes a fair balance between the demands of the general interests of the community and the individual's fundamental rights. We have done so against the background of the Court's well-established case-law that in determining whether this requirement of proportionality has been met, "a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation and the Court will respect the

35 See e.g. *Gasus Dosier-und Fordertechnik Gmbh v The Netherlands (1995)* 20 EHRR 403 at para. 62.

36 See e.g. *Spacek*, above, at para. 54.

37 (1998) 25 EHRR 127.The measure in question was s. 53 of the Finance Act 1991, retrospectively validating taxing Regulations which had been held to be invalid by the House of Lords.

legislature's assessment in such matters unless it is devoid of reasonable foundation",[38] and provided that the measure does not amount to arbitrary confiscation.[39]

1.53 We consider that imposing a charge to tax in respect of the benefit derived from continued use of assets which have been disposed of in order to avoid liability to inheritance tax cannot be characterised as an arbitrary confiscation, devoid of reasonable foundation. We consider that, applying the fair balance test, the interference with the rights protected under Article 1 of Protocol No. 1 is justified by the public interest in safeguarding the public revenues and is proportionate to the end to be achieved.

1.54 **We therefore conclude that clause 84 and Schedule 15 of the Finance Bill do not give rise to any significant risk of incompatibility with Article 1 of Protocol No. 1 to the ECHR.**

Spouse Exemption

1.55 However, we are concerned about the human rights implications of one other feature of Schedule 15, namely the spouse exemption.[40] Disposals are not chargeable under the Schedule where the property was transferred to a "spouse" (or to a former spouse under a court order).[41]

1.56 The term "spouse" is not defined in this Bill, nor in the Inheritance Tax Act 1984, but is interpreted by the courts as meaning "parties to a lawful marriage". Confining the benefit of the exemption in paragraph 10 of Schedule 15 to the parties to a lawful marriage excludes from the scope of that exemption homosexual couples who live together as de facto spouses (but are legally unable to marry), heterosexual unmarried couples who live together as de facto spouses and people sharing a home on the basis of a long-term or family relationship which is not a sexual relationship.[42]

1.57 The spouse exemption in Schedule 15 to the Act therefore engages Article 14 in conjunction with Article 8 and Article 1 of Protocol No. 1 ECHR: by discriminating on grounds of sexual orientation and marital status, it raises the question, what is the objective and reasonable justification for excluding de facto spouses from the benefit of the exemption. **We draw this matter to the attention of each House.**

38 *National Provincial Building Society v UK*, above, at para. 80.

39 *Gasus Dosier-und Fordertechnik GmbH v Netherlands*, above, at para. 59.

40 Sched. 15, para. 10(1)(c). The exemption includes the case where the property is held in trust and the spouse or former spouse has an interest in possession: para. 10(1)(d).

41 The provision reflects the "spouse exemption" from liability to inheritance tax under s. 18 Inheritance Tax Act 1984.

42 These are matters which may also need to be considered in the content of the Civil Partnership Bill.

2 Gender Recognition Bill

Date introduced to the House of Lords	27 November 2003
Current Bill Number	House of Lords 56
Previous Reports	4th Report of Session 2003–04

Background

2.1 We reported on the Draft Gender Recognition Bill in our Nineteenth Report of last Session.[43] We reported on the Bill as introduced in our Fourth Report of this Session.[44] Since making that report, we have received a letter dated 25 March 2004 from the Christian Institute enclosing an Opinion from James Dingemans QC[45] on the implications of certain provisions of the Bill for religious liberties. The Bill completed its Committee Stage in the House of Commons on 16 March 2004. At present there is no date for remaining stages.

2.2 The Opinion considers three concerns that the provisions of the Bill interfere with the religious freedoms of individuals:

(1) the criminalisation of the disclosure of a person's gender history in circumstances where the person believes that it is necessary to do so to act consistently with their religious beliefs;

(2) the Bill exposes religious bodies to litigation by transsexuals asserting a right to marry; and

(3) the Bill increases the prospect of litigation against religious bodies generally.

We consider that only the first of these, concerning disclosure, raises a serious human rights issue warranting further consideration.

Disclosure

2.3 The Opinion argues that:

- Religious beliefs on transsexualism, as set out in the document *Christian Beliefs on Transsexualism*,[46] are within the scope of protection of Article 9 ECHR.
- Religious organisations have a right under Article 9 to regulate themselves in accordance with their beliefs and to enforce uniformity amongst their membership.
- Criminalising disclosures of a person's gender history by people who have acquired that information in connection with their functions as a member of a voluntary organisation is an infringement of Article 9 ECHR insofar as it interferes with the

43 Nineteenth Report of Session 2002–03, *Draft Gender Recognition Bill*, HL Paper 188, HC 1276.

44 Fourth Report of Session 2003–04, *Scrutiny of Bills: Second Progress Report*, HL Paper 34, HC 303.

45 See Appendix 3

46 Christian Institute, March 2004

right of members of a religious organisation to regulate themselves in accordance with their beliefs and to act out and enforce uniformity.

- To be compatible with Article 9 ECHR, the Bill must therefore permit disclosures necessary to allow religious organisations to regulate themselves in accordance with their beliefs.

2.4 The Opinion and covering letter from the Christian Institute state that the JCHR did not expressly consider the position of religious organisations when it reported on the Bill. This is not altogether correct. In our Fourth Report of Session 2003–04, we gave detailed consideration to the evidence of the Evangelical Alliance on the draft Bill.[47] We considered the argument made by the Evangelical Alliance that the provisions protecting the privacy of those who have acquired a new gender would violate the right of others, including religious groups, under Article 10 ECHR, to receive truthful information about a person's gender.[48] Religious groups were argued to have a legitimate interest in knowing the gender of those who participate in their activities.

2.5 We set out in that report our reasons for finding this argument unpersuasive.[49] In our view any right to the information would have to be based on the right of the person seeking disclosure of the information to respect for his or her private or family life under Article 8. We considered it very likely that the Bill's restrictions on disclosure could properly be regarded as necessary in a democratic society (i.e., a proportionate response to a pressing social need) for the purpose of protecting the right of the transsexual person to respect for his or her private life.

2.6 The point which is now made by the Christian Institute is in substance very similar to that which was made by the Evangelical Alliance, and which we considered in our earlier Report. The difference is that whereas the Evangelical Alliance relied on the right of religious organisations to obtain information under Article 10 ECHR, the Christian Institute relies directly on the right to manifest one's beliefs under Article 9 ECHR. In light of the Christian Institute's express reliance on Article 9, we have considered again whether the disclosure provisions in the Bill are compatible with Convention rights.

2.7 We are not persuaded by the argument that to be compatible with Article 9 ECHR, the Bill must permit disclosures necessary to allow religious organisations to regulate themselves in accordance with their beliefs. There are two principal reasons why we have reached this view.

2.8 First, we consider that on the current state of the Strasbourg case-law, as applied by domestic courts under the Human Rights Act 1998, the disclosure provisions do not constitute an interference with Article 9 because the practice relied upon, namely the regulation of the religious organisation in question so as to exclude transsexuals, is outside the scope of Article 9's protection, because it is not a direct expression of such belief, but rather a practice motivated by such belief.[50] Acts which do not directly express belief, but

47 Fourth Report of Session 2003–04, op cit., paras 4.34–4.40.

48 Ibid., para. 4.38

49 Ibid., para. 4.39

50 See *Arrowsmith v UK19* DR 5 (1980), applied by the Court of Appeal in *R (Williamson) v Secretary of State for Education and Employment [2003]* QB 1300.

are motivated by such belief, are not manifestations of religion or belief within the meaning of Article 9(1) and therefore do not attract the protection of that Article.[51]

2.9 We find this distinction, although true to the Strasbourg case-law, a difficult distinction to apply in practice, and we therefore prefer to rely on our second reason for concluding that there is no breach of Article 9 in failing to exempt from the disclosure provisions disclosures for the purposes of religious organisations enforcing uniformity in their membership.

2.10 Our second reason for concluding that there is no breach of Article 9 is that any interference with Article 9 rights is justified for essentially the same reason as given in paragraph 4.39 of our earlier Report. The right relied on by the Christian Institute is part of the right to manifest one's religious beliefs. As such, it is capable of being limited under Article 9(2), provided the limitation is proportionate. In our view the protection of the competing privacy right of transsexuals under Article 8 justifies the interference, given the fundamental importance of the interest at stake, as recognised by the Court of Human Rights.[52] The importance of the competing Article 8 rights, which go to the very core of an individual's identity, in our view means that, in any balancing exercise against the practice of enforcing uniformity amongst the members of a religion, the Article 8 rights must prevail.

2.11 The Committee therefore does not agree that the Bill, as it is currently worded, infringes Article 9 in the way alleged in the Opinion.

The Conscientious Objection Provision

2.12 However, there is one respect in which we do have a concern about compatibility of the Bill's disclosure provisions with Article 9.

2.13 The Bill properly gives effect to the right to freedom of conscience in the first sentence of Article 9(1) by providing a "conscientious objection" exception to the obligation on clergy in England and Wales to solemnise a marriage.[53] However, it would be a criminal offence under the Bill for a person to disclose to such clergy the information about a person's gender history which would entitle them to avail themselves of the conscientious objection exception.

2.14 Given that the purpose of the exception from the obligation to solemnise a marriage is to protect the Article 9 right of the individual member of the clergy, there is a risk that criminalising disclosure to them of information which would enable them to avail themselves of the right conscientiously to object will be seen as an interference with the

51 Some of the examples given in para. 5 of the Opinion of the reasons why religious organisations wish to be exempt from the criminalisation of disclosure demonstrate that the practices it is sought to defend are not direct expressions of belief but motivated by belief: for example, it is said that individual churches wish to be free to decide who should join or lead ladies' prayer meetings and who should use ladies' lavatories.

52 Implicit support for this conclusion can be derived from the decision of the High Court in *R (on the application of Amicus & others) v Secretary of State for Trade and Industry [2004]* EWHC 860 (Admin) (26 April 2004), in which the religious exemption from the Employment Equality (Sexual Orientation) Regulations 2003 (Regulation 7) was read very narrowly as affording an exception "only in very limited circumstances" (para. 115), in light of the importance of the principle of equal treatment.

53 Schedule 4, para. 3, inserting new s. 5B into the Marriage Act 1949.

underlying Article 9 right, or at least an impediment to the effectiveness of the protection for that right.

2.15 It would be possible to remedy this in a straightforward manner by amending clause 22(4) of the Bill to add an additional exception to the general prohibition on disclosure, where "the disclosure is to a member of the clergy to enable them to avail themselves of the exception in s. 5B of the Marriage Act 1949".

2.16 However, such provision could also be made by the Secretary of State by order, in exercise of the power in clause 22(5) of the Bill to make provision prescribing circumstances in which the disclosure of protected information is not to constitute an offence. Under clause 22(7), such an order may make provision permitting disclosure to persons of a specified description and for specified purposes. An order could therefore be made to the same effect as the amendment suggested above.

2.17 **We draw this matter to the attention of each House.**

Private Members' Bills

3 Assisted Dying for the Terminally Ill Bill

Date introduced to the House of Lords	8 January 2004
Current Bill Number	House of Lords 17
Previous Reports	7th Report of Session 2002–03

3.1 The Assisted Dying for the Terminally Ill Bill is a Private Member's Bill, introduced to the House of Lords by Lord Joffe. We recognise that euthanasia or assisted dying are repugnant ideas to many people, including some members of this committee, who hold them to be morally indefensible actions in most circumstances, regardless of whether the consent of the person who may be subject to them has been properly obtained. However, we are concerned here only with compliance with human rights, not with any broader moral or ethical judgements about the rights or wrongs of this Bill.

3.2 Lord Joffe introduced a somewhat similar Bill under the title Patient (Assisted Dying) Bill [HL] during the 2002–03 session. We reported on that Bill.[54] We concluded that legislation to allow people to help other people to die at their request would not be intrinsically incompatible with the right to life under ECHR Article 2. The compatibility of such legislation with the right to life—

> … would depend on the extent to which allowing such a measure to be operated would be consistent with the State's positive obligations under Article 2 to take active steps to protect life. We consider that the State has a discretion to allow such a measure in order to respect some patients' rights under ECHR Article 8, if satisfied that the rights of other, vulnerable, patients would be adequately protected.[55]

The Committee went on to conclude that the safeguards set out in the Bill were adequate to protect the rights of vulnerable patients.[56]

3.3 We now consider whether the current Bill satisfies those criteria.

The human rights implications of the Bill

3.4 The Assisted Dying for Terminally Ill Patients Bill [HL], like its predecessor the Patient (Assisted Dying) Bill [HL], would make it lawful for a physician to assist a person (A) to die, either by ending A's life or by providing A with the means of ending A's own life, if A is (i) a qualifying patient and (ii) has made a declaration which remains in force under the Bill.[57] In addition, there would be a statutory provision which substantially replicates, although it is not as wide as, the current common law rule that a person suffering from a terminal illness is entitled to request and receive such medication as may be necessary to

54 Joint Committee on Human Rights, Seventh Report of 2002–03, *Scrutiny of Bills: Further Progress Report* HL Paper 74, HC 547, paras. 44-61.

55 Ibid., para. 54

56 Ibid., para. 61

57 Cl. 1(1)

keep him free as far as possible from pain and distress.[58] At common law, this is justified by reference to a combination of the doctrine of 'double effect' and the patient's right to autonomy (the administration of drugs with the purpose of relieving pain and distress is not criminal, even if it hastens death, if it is in the patient's best interests and/or with the patient's consent).[59]

3.5 As we noted in our earlier report,[60] this would effect a major change in the criminal law of England and Wales and Scotland.[61] In each jurisdiction, intentionally doing anything to hasten a person's death constitutes the crime of murder contrary to common law, and assisting someone else to hasten his or her own death constitutes the crime of assisting suicide under section 2 of the Suicide Act 1961.

3.6 The law on human rights relating to such legislation has not changed since our earlier report. **We therefore remain of the view that the Bill is not intrinsically incompatible with ECHR Article 2, and that its compatibility depends on the extent to which it contains safeguards for the rights of vulnerable patients who do not wish to have their lives terminated with the assistance of a third party.**

3.7 The question which then arises is whether the safeguards in the Bill are sufficient to protect vulnerable, non-requesting patients against the risk of having their right to life under ECHR Article 2 violated. The safeguards which were contained in the earlier Bill, and which satisfied us when we considered that Bill, have been further strengthened in the current Bill. The safeguards (with main provisions additional to those contained in the earlier Bill in italics) are:

— the 'qualifying patient' must have—

> reached the age of majority (currently 18);
>
> been resident in the UK for at least twelve months before making the declaration; and
>
> satisfied the conditions set out below;[62]

— the qualifying patient must have made a declaration in a form set out in the Schedule to the Bill, before two individuals, one of whom must be a solicitor who holds a current practising certificate;[63]

— the solicitor may witness the declaration only if:

> *the solicitor is personally known to the patient or has proved his or her identity as a solicitor*;

58 Cl. 15

59 Cl. 15

60 Seventh Report of 2002–03, op cit., para. 45.

61 The Bill would not extend to Northern Ireland: cl. 17(2).

62 Cl. 1(2), definition of 'qualifying patient'.

63 Cl. 4(1), (2)

it appears to the solicitor that the patient is of sound mind and has made the declaration voluntarily; and

— the solicitor is satisfied that the patient understands the effect of the declaration;[64]

— *the other witness* (who must not be the attending or consulting physician, psychiatrist or other member of the care team, or a relative or partner of the patient) *may witness the declaration only if the patient is personally known to the witness or has proved his or her identity to the witness, and it appears to the witness that the patient is of sound mind and has made the declaration voluntarily*;[65]

— neither witness may be a person who owns, operates or is employed at a health care establishment where the person is a patient or resident,[66] and no one may witness a declaration if he or she has grounds for believing that he or she will benefit, financially or otherwise, from the patient's death;[67]

— the patient and witnesses must sign and witness the declaration at the same time and in the presence of the others;[68]

— before A makes the declaration, the attending physician must—

have been informed by A that A wishes to be assisted to die, and, if the patient persists in the request to be assisted to die, have satisfied himself that the request is made voluntarily *and that the patient has made an informed decision*;[69]

have examined A *and A's medical records* and found no reason to believe that A is incompetent;[70]

have determined that A has a *terminal* (not merely an irremediable) illness;[71]

have found A to be suffering unbearably as a result of that illness;[72]

have informed A of the diagnosis, the prognosis, the process of being assisted to die, and the available alternatives, including palliative care, hospice care, and the control of pain;[73] and

have referred the patient to a consulting physician;[74]

64 Cl. 4(3)
65 Cl. 4(4)
66 Cl. 4(7)
67 Cl. 10(4)
68 Cl. 4(6)
69 Cl. 2(2)(a) and (f)
70 Cl. 2(2)(b)
71 Cl. 2(2)(c)
72 Cl. 2(2)(d)
73 Cl. 2(2)(e)
74 Cl. 2(2)(g)

— before A makes the declaration, the consulting physician must—

have been informed by A that A wishes to be assisted to die, and, if the patient persists with the request to be assisted to die, have satisfied himself that the request is made voluntarily *and that the patient has made an informed decision*;[75]

have examined A and A's medical records and satisfied himself that the patient is competent;[76]

have confirmed the diagnosis and prognosis made by the attending physician;[77]

have concluded that A is suffering unbearably as a result of that illness;[78] and

have informed A of *the diagnosis, the prognosis, the process of being assisted to die, and* the available alternatives, including palliative care, hospice care, and the control of pain;[79]and

have advised the patient that, before such assistance, the patient will be required to complete a declaration which the patient can revoke;[80]

— there must be a waiting period of at least 14 days between the date on which the patient first informed the attending physician that the patient wished to be assisted to die and the date on which the patient is assisted to die;[81]

— a declaration would remain in force for only six months;[82]

— during that time the patient would be able to revoke the declaration, orally or otherwise, without regard to his or her physical or mental state, and, if it is revoked, the attending physician would be required to ensure that the revocation is noted on the patient's file and that the declaration is removed from the file and destroyed;[83]

— *if either physician is of the opinion that the patient may not be competent, the physician must refer the patient to a psychiatrist for a psychiatric opinion, and no assistance may be given to end the patient's life unless the psychiatrist has determined that the patient is not suffering from any psychiatric or psychological disorder causing impaired judgment, and that the patient is competent;*[84]

— no physician, psychiatrist or member of a medical care team may take any part in assisting a patient's death or in giving an opinion in respect of the patient if he or she

75 Cl. 2(3)(a) and (f)
76 Cl. 2(3)(b)
77 Cl. 2(3)(c)
78 Cl. 2(3)(d)
79 Cl. 2(3)(e)
80 Cl. 2(3)(g)
81 Cll. 1(2), definition of 'waiting period', and 4(8).
82 Cl. 4(8)
83 Cl. 6
84 Cl. 8

has grounds for believing that he or she will benefit, financially or otherwise, from the patient's death;[85]

— the attending physician must recommend to the patient that the patient notifies his or her next of kin of his or her request for assistance to die;[86]

— before taking any step to assist A to die, the attending physician must have—

informed A of his or her right to revoke the declaration at any time;

verified immediately before assisting the patient to die that the declaration is in force and has not been revoked by the patient; and

asked A immediately before assisting him or her to die whether he or she wishes to revoke the declaration;[87]

wilful falsification of a declaration or wilfully witnessing a statement known to be false would be criminal offences, together with various other contraventions of the requirements of the Bill;[88]

— there are provisions about documentation and record keeping, and the establishment of a commission to monitor the operation of the legislation and the documentation.[89]

3.8 There are other provisions to protect the rights of third parties. The right of medical staff to be free of any duty to assist someone to die if they conscientiously object to doing so would be preserved by clause 7. We do, however, have some concerns about clause 7 which we discuss in more detail below. By virtue of clause 9(1) to (3), where medical personnel act in accordance with a declaration which is in force and was made in accordance with the procedures laid down by the Bill they would not be guilty of a criminal or professional disciplinary offence. Lastly, the fact that a patient is assisted to die in accordance with the Bill would not invalidate any policy of insurance, as long as the policy has been in force for at least 12 months at the date of the patient's death.[90]

3.9 We consider that these safeguards are considerably stronger than those which were provided in the Patient (Assisted Dying) Bill [HL] in the 2002–03 session.

3.10 **In the light of this, we conclude that the safeguards in the current Bill would be adequate to protect the interests and rights of vulnerable patients, ensuring that nobody could lawfully be subjected to assisted dying without his or her fully informed consent. In our view, this would respect the right to personal autonomy and self-determination of mentally competent patients under ECHR Article 8.1, and would not be incompatible with the positive obligations of the State to protect life under ECHR Article 2. While recognising that the Bill relates to exceptionally sensitive matters of life**

85 Cl. 10(4)
86 Cl. 9
87 Cl. 5
88 Cl. 11
89 Cll. 13 and 14
90 Cl. 12

and death and affects people's right to life, we do not consider that it gives rise to a significant risk of incompatibility with those Convention rights.

Conscientious Objection

3.11 There is, however, one minor respect in which the Bill does give rise to a risk of violation of a Convention right.

3.12 Clause 7(1) of the Bill properly gives effect to the obligation on the UK under Article 9(1) ECHR to respect the individual's right to freedom of thought, conscience and religion. It achieves this by providing that no person shall be under any duty to participate in any diagnosis, treatment or other action authorised by the Bill to which that person has a conscientious objection.

3.13 There is a tension, however, between this protection for freedom of conscience in clause 7(1) and the provision made in clauses 7(2) and (3), which impose a duty on physicians who invoke their right to conscientiously object, to "take appropriate steps to ensure that the patient is referred without delay to a physician who does not have such a conscientious objection".

3.14 We consider that imposing such a duty on a physician who invokes the right to conscientiously object is an interference with that physician's right to freedom of conscience under the first sentence of Article 9(1), because it requires the physician to participate in a process to which he or she has a conscientious objection. That right is absolute: interferences with it are not capable of justification under Article 9(2).

3.15 We consider that this problem with the Bill could be remedied, for example by recasting it in terms of a right vested in the patient to have access to a physician who does not have a conscientious objection, or an obligation on the relevant public authority to make such a physician available. What must be avoided, in our view, is the imposition of any duty on an individual physician with a conscientious objection, requiring him or her to facilitate the actions contemplated by the Act to which they have such an objection.

3.16 In the absence of such a provision, however, **we draw to the attention of each House the fact that clauses 7(2) and (3) give rise in our view to a significant risk of a violation of Article 9(1) ECHR**.

4 Promotion of Volunteering Bill

Date introduced to the House of Commons	7 January 2004
Current Bill Number	House of Commons 18
Previous Reports	None

4.1 This is a private Member's Bill introduced to the House of Commons by Mr Julian Brazier MP. The Bill was read a second time in the House of Commons on 5 March 2004. It was considered for the first time in Standing Committee due to go into Committee on 5 May 2004.

4.2 The main effects of the Bill's provisions are as follows. Clause 2 seeks to relieve volunteers, voluntary organisations and volunteering bodies (defined in clause 1) of certain potential legal liabilities towards people (both adults and children) who undertake any activity administered or managed by or under the control of the volunteer, voluntary body or voluntary organisation, if the person undertaking such activities (or their parent or guardian in the case of a child) has been presented with and agreed a 'statement of inherent risk' setting out the principal risks inherent in the activity to be undertaken.[91] A statement of inherent risk would have to be taken into account by a court in any subsequent proceedings for negligence or breach of statutory duty. The court would have to recognise that certain activities give rise to risks without negligence, and that people may have knowingly accepted the risks.[92] Claims for negligence or breach of statutory duty resulting from the activity would then be upheld only if it would be manifestly unreasonable not to do so.[93]

4.3 Clause 4 would amend the Data Protection Act 1998 by inserting a new section 31A. Proposed new section 30A(1) would allow voluntary organisations, volunteering bodies or statutory bodies to reveal contact details relating to voluntary organisations or volunteering bodies and the names of officers of those organisations or bodies, provided that the information is disclosed in good faith and other than for commercial gain. Proposed new section 30A(2) would provide that a voluntary organisation, volunteering body or volunteer would not commit any offence if, in good faith and other than for commercial gain, he, she or it discloses any data where the disclosure is, in the opinion of the body or volunteer, necessary for or desirable in the public interest.

4.4 Clause 5 deals with the legal liability of the "Good Samaritan" type rescuer, who voluntarily comes to the assistance of somebody who is injured or suffering or at imminent risk of serious injury.[94] It would relieve such people of legal liability for non-intentional harm if, without payment or expectation of payment and acting in good faith, they assist others when the rescuer has reasonable grounds for believing that the assisted person is suffering or injured or faces imminent serious injury.

91 Cl. 2(1)–(3)

92 Cl. 2(4)(a) and (b)

93 Cl. 2(4)(c)

94 Cl. 5 therefore deals with "volunteers" in the technical legal sense, namely people acting voluntarily with no expectation of financial reward or other benefit.

4.5 The Chair wrote to Mr Julian Brazier on 31 March 2004, raising concerns we had identified in the Bill.[95] Mr Brazier replied on 22 April, indicating his intention to remove clauses 4 and 5 of the Bill in Committee.[96] We nonetheless set out our concerns about clauses 4 and 5 below, as well as about clause 2, for the information of each House.

The Human Rights Implications of the Bill

4.6 We welcome the purpose of the Bill, the promotion of volunteering, as one which has the potential to enhance the protection of human rights in the UK. One of the purposes of the guarantees contained in Article 8 of the ECHR is to ensure the development of the personality of the individual.[97] Moreover, in certain circumstances States may be under a positive obligation to adopt measures which are designed to achieve this objective.[98] Although we do not consider that the State is under a positive obligation to adopt measures such as the present Bill,[99] we recognise that the promotion of volunteering is an important means by which the State can make progress towards securing everyone's right under Article 8 to develop their personality by participating in the life of their community. In human rights terms it is an aim which, if achieved, would enhance the Article 8 rights both of volunteers themselves and of those who benefit from the activities which the generosity of volunteers make possible.

4.7 However, we consider that three provisions in the Bill engage rights under the ECHR in a way which gives rise to a significant risk of incompatibility and therefore require us to draw the Bill to the attention of each House.

4.8 First, clause 2(4)(c) of the Bill, which amends the common law defining the torts of negligence and breach of statutory duty in cases where a Statement of Inherent Risk has been agreed with the relevant person so as to restrict liability for those torts, engages the positive obligation on the State under Articles 2, 3 and 8 ECHR, to ensure that its laws protect individuals, and particularly vulnerable individuals such as children, against risks to their life, risks of inhuman or degrading treatment, and serious risks to their physical integrity. It also potentially engages Article 14 in conjunction with Articles 2, 3 and 8 and Article 13, namely the right not to be discriminated against, without objective and reasonable justification, in the availability of an effective remedy for breaches of those particular Convention rights.

4.9 Secondly, clause 5 of the Bill, also relieving voluntary rescuers of common law liability to those whom they negligently harm while trying to assist them, engages the same Convention rights.

95 See Appendix 5a

96 See Appendix 5b

97 See e.g. *Botta v Italy (1998)* 26 EHRR 241 at para. 33.

98 Ibid.

99 A positive obligation to adopt measures under Article 8 only arises where there is a "direct and immediate link" between the measure in question and the individual's private life: Botta, above, at para. 34. In Botta itself, the Court held there to be no obligation on the State to adopt measures to make private bathing establishments in holiday resorts accessible to the disabled, because the right to gain access to the beach and sea at a place distant from the applicant's normal residence was said to concern "interpersonal relations of such broad and indeterminate scope" that there could be no conceivable direct link between the positive measures sought and the applicant's private life: ibid., para. 35.

4.10 Thirdly, proposed new section 30A(2) of the Data Protection Act 1998, which would be inserted by clause 4 of the Bill, would engage the right to respect for private life under ECHR Article 8 by reducing the protection available for personal information.

The Positive Obligation to Protect by Law the Rights under Articles 2, 3 and 8

4.11 In relation to certain Convention rights (or serious interferences with those rights), the State is under a duty under the Convention to put in place a legal framework for the effective protection of those rights, including against interference by other private individuals.[100]

4.12 ECHR Article 2.1 provides that everyone's right to life shall be protected by law. ECHR Article 3 prohibits (among other things) degrading treatment of any person. Article 8 protects a person's physical integrity. All three Articles impose positive obligations on the state to take reasonable steps to protect people against threats of death[101] or degrading treatment[102] or threats to their physical integrity[103] in some circumstances. The availability of legal redress (civil as well as criminal) is one of the means by which the state discharges that positive obligation.[104]

4.13 Part of the protection provided by the law in the United Kingdom for the right to life under Article 2 is to require a person who negligently causes another's death to compensate the person's estate and dependants for the death by way of a claim under the Fatal Accidents Act 1976.[105] Similarly, the civil law of negligence and breach of statutory duty constitute an important part of the legal protection for the rights under Articles 3 and 8.

4.14 Clause 2(4)(c) of the Bill would restrict the scope of civil liability for negligently caused harm and therefore reduce the protection provided by law for Article 2, 3 and 8 rights. The important feature of cl. 2(4)(c) is that it is not a measure designed merely to stop frivolous or vexatious claims.[106] The purpose of the measure proposed in clause 2 of the Bill is self-avowedly to restrict the scope of liability for negligence. As the promoter of the Bill said at second reading, "The certificate would raise the bar to a higher threshold of proof in a negligence claim than the current balance of probabilities."[107] It is therefore an unavoidable consequence of clause 2 that a negligent volunteer, who, for example, failed to

100 See Keir Starmer, 'Positive obligations under the Convention' in European Human Rights Law (Legal Action Group, 1999), ch. 5.

101 *Osman v UK (1998)* 29 EHRR 245.

102 *Z v UK (2002)* 34 EHRR 3.

103 *X and Y v The Netherlands (1985)* 8 EHRR 235.

104 See e.g. *X and Y v The Netherlands (1985)* 8 EHRR 235 (civil law remedies in respect of sexual abuse insufficient to provide practical and effective protection for the Article 8 rights of a mentally handicapped girl; criminal law remedies required to discharge the positive obligation under Article 8 to adopt measures to secure respect for private life); *Stubbings v UK (1996)* 23 EHRR 213 (civil remedies in respect of sexual abuse recognised as one of the means by which States fulfil their positive obligation to secure respect for private life).

105 See Andrew Burrows, 'Judicial Remedies' in Peter Birks (ed.), English Private Law (Oxford: Oxford University Press, 2000), vol. 2, ch. 18, paras. 18.122–18.136.

106 Wide powers for disposing of such claims, and for penalising those who bring them in costs, already exist in the Civil Procedure Rules.

107 HC Deb, 5 March 2004, col. 1157. See also col. 1203: "we need a solid mechanism for raising the barrier for negligence claims against volunteers."

pay due care and attention whilst supervising children in his or her charge as a direct result of which one suffered injury, will not be liable in circumstances where, under the current law, he or she would be so liable.[108] The clause amends the substantive law of civil liability for harm caused, by restricting its scope. This is more serious than merely undermining the drive to secure greater professionalism in the voluntary sector. It will inevitably lead, in the circumstances of an appropriate case, to a finding that the UK has failed to provide the necessary legal protection for the rights guaranteed under Articles 2, 3 and 8, and is therefore in breach of the positive obligation under those Articles to secure such protection.

4.15 The same difficulty arises with Clause 5 of the Bill, which would remove the right of an injured person, or the representatives and dependants of a deceased person, to obtain compensation for an injury or death caused negligently by a rescuer who takes action in the reasonable belief that the person is suffering, or is injured, or faces imminent serious injury. In our view, this would deprive people of a significant protection against negligent interference with their right to life or to be free of degrading treatment or other interferences with their physical integrity.

4.16 **These clauses therefore give rise to a significant risk that the United Kingdom will be held in future cases to have failed to meet its responsibilities under ECHR Articles 2, 3 and 8. We draw this to the attention of each House.**

Discrimination in relation to remedies in respect of Convention breaches

4.17 We are also concerned that the effect of clause 2(4)(c) is to introduce a discrimination in the enjoyment of Convention rights which lacks an objective and reasonable justification, and will therefore give rise to breaches of Article 14 ECHR in conjunction with Articles 2, 3 and 8.

4.18 The effect of the proposed measure is that an individual who suffers negligently caused harm which is within the scope of Articles 2, 3 or 8 whilst undertaking an inherently risky activity will have a civil law remedy in respect of that harm if it is caused by the negligence of a public authority or a private contractor, but will not have such a remedy in identical circumstances where the harm is caused by the negligence of a volunteer.

4.19 The Parliamentary Under-Secretary of State for the Home Department, Fiona Mactaggart, expressed this concern during the Second Reading debate: "we need to guard against making provisions that create an imbalance of responsibility and duty between the voluntary sector and public and private sectors … the voluntary and community sectors should be considered on the same footing".[109]

4.20 Introducing such a distinction into the scheme of civil remedies for harms which include breaches of Convention rights involves a significant risk of a breach of Article 14

108 We agree with the analysis of the Parliamentary Under-Secretary of State for the Home Office, Fiona Mactaggart, on second reading, that the Bill gives volunteers "the right to be a bit negligent" (HC Deb 5 March 2004 col. 1198).See also ibid. col. 1201: "Ministers are not confident that the Bill can be amended not to give a free pass to the negligent."

109 HC Deb, 5 March 2004, col. 1201

ECHR, which requires that the enjoyment of Convention rights be secured without discrimination, unless there is an objective and reasonable justification for such difference of treatment.

4.21 We have considered the justifications, which have been offered by the promoter and supporters of the Bill on second reading, for effectively exempting volunteers from civil liability in circumstances where other defendants would be liable, but we are not persuaded that justification to the necessary high standard is made out. In particular, we note that there is scope for considerable disagreement as to whether the available evidence demonstrates that the scope of liability under the current law operates as major deterrent to volunteering. In the absence of overwhelming evidence to this effect, the justification offered for the differential treatment of people killed or injured by negligent volunteers does not in our view reach the very high threshold of justification required if such a serious interference with the equal protection of the underlying Convention rights is to be made out.

4.22 In our view, the availability of civil law remedies for the protection of such fundamental interests as those protected by Articles 2, 3 and 8 should not depend on the identity of the body which caused the harm in question.

4.23 **We therefore conclude that there is a significant risk that the enactment of clause 2(4)(c) would lead to a finding that the UK has unjustifiably discriminated between individuals in an analogous position by restricting the scope of civil law remedies against certain defendants in respect of the same harm. We draw this to the attention of each House.**

Data protection

4.24 Offences under the Data Protection Act 1998 are an important part of the protective scheme offering safeguards for people's rights under ECHR Article 8.1 in relation to informational privacy. Proposed new section 30A(2) would remove a criminal sanction for certain disclosures which would violate the right to respect for private life under ECHR Article 8.1. The right includes a right to informational privacy. If a person or body holds information of a personal nature (e.g. identity, membership of societies, sexual matters, addresses, telephone numbers, etc., etc.) the person holding it normally has a duty under the Data Protection Act 1998 not to reveal it save under strict conditions, and the State has a duty under ECHR Article 8.1 to provide protection against such disclosure by private persons and bodies, unless the disclosure is justified under Article 8.2 as being:

— in accordance with the law;

— in pursuit of one of the legitimate objectives listed in Article 8.2; and

— necessary in a democratic society for that purpose, meaning that it must be—

a response to a pressing social need for action, and

proportionate to the nature of that need and to the aim pursued. To be proportionate, it must go no further than necessary to achieve the object, either as to the extent of the information disclosed, the range of people to whom disclosure

is made, or the terms on which the disclosure is made, and there must be adequate safeguards (legal and procedural) against abuse.

4.25 In our view, the resulting criminal liability might not provide an adequate safeguard for Article 8 rights, because it would allow disclosures to take place in circumstances which do not satisfy the tests in ECHR Article 8.2 for justifying an interference with the right to informational privacy set out in paragraph 3.5 above. In particular, we consider the following factors to be significant:

— the range of data which could be disclosed without penalty is unlimited;

— the main test for disclosures would be the opinion (which need not be based on reasonable grounds) of the volunteer, voluntary organisation or volunteering body as to the necessity for or desirability of the disclosure, rather than the judgment of an independent body by reference to objective criteria;

— the test set out in the proposed new section, 'necessary for, or desirable in, the public interest', is much more permissive than the test in ECHR Article 8.2, which requires an independent body such as a court to determine the existence of a legitimate purpose and of a pressing social need for the disclosure, and the proportionality of the disclosure to the need; and

— as volunteers, voluntary organisations and volunteering bodies would often, and perhaps usually, not be 'public authorities' required by section 6 of the Human Rights Act 1998 to act in a manner compatible with Convention rights, there would be no general duty to ensure that disclosures are justifiable under ECHR Article 8.2.

4.26 **In our view, therefore, there is a significant risk that the enactment of proposed new section 30A(2) would leave data subjects without sufficient safeguards for their rights under ECHR Article 8.1 to enable us to be to be confident that the resulting legislative scheme under the Data Protection Act 1998 would meet the United Kingdom's positive obligation under the ECHR to respect those rights. We draw this to the attention of each House.**

Formal Minutes

Wednesday 12 May 2004

Members Present:

Jean Corston MP, in the Chair

Lord Campbell of Alloway	Mr Kevin McNamara MP
Lord Judd	Mr Paul Stinchcombe MP
	Mr Shaun Woodward MP

The Committee deliberated.

* * * * *

Draft Report [Scrutiny of Bills: Fifth Progress Report] proposed by the Chairman, brought up and read.

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

Paragraphs 1.1 to 3.17 read and agreed to.

Paragraph 4.1 read as follows:

"The Assisted Dying for the Terminally Ill Bill is a Private Member's Bill, introduced to the House of Lords by Lord Joffe. We recognise that euthanasia or assisted dying are repugnant ideas to many people, including some members of this committee, who hold them to be morally indefensible actions in most circumstances, regardless of whether the consent of the person who may be subject to them has been properly obtained. However, we are concerned here only with compliance with human rights, not with any broader moral or ethical judgements about the rights or wrongs of this Bill."

Amendment proposed, in line 4, to delete from "actions" to the end of the paragraph and insert:-

"The UK's current legal position is that Euthanasia, the intentional taking of life at the patient's request or for a merciful motive is unlawful and anyone alleged to have undertaken it is open to a charge of murder or manslaughter. Similarly, medical treatment which is given to a patient with the specific intention of hastening or inducing death, whether at the patient's wish or not, is an illegal act. Assisted suicide is unlawful in the United Kingdom." –(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 2	Not Content, 3
Lord Campbell of Alloway	Rt Hon Jean Corston MP
Mr Kevin McNamara MP	Lord Judd
	Mr Paul Stinchcombe MP

Paragraph 4.1 agreed to.

Paragraph 4.2 read as follows:

"Lord Joffe introduced a somewhat similar Bill under the title Patient (Assisted Dying) Bill [HL] during the 2002–03 session. We reported on that Bill. We concluded that legislation to allow people to help other people to die at their request would not be intrinsically incompatible with the right to life under ECHR Article 2. The compatibility of such legislation with the right to life—

> … would depend on the extent to which allowing such a measure to be operated would be consistent with the State's positive obligations under Article 2 to take active steps to protect life. We consider that the State has a discretion to allow such a measure in order to respect some patients' rights under ECHR Article 8, if satisfied that the rights of other, vulnerable, patients would be adequately protected.

The Committee went on to conclude that the safeguards set out in the Bill were adequate to protect the rights of vulnerable patients."

Amendment proposed, in line 4, delete from " Article 2" to the end of the paragraph and insert:-

"However on further reflection, given the fundamental nature of Article 2, from which there can be no derogation under Article 15, and having revisited the case-law of the of the Court, we are of the opinion that the Bill is incompatible with Article 2 and contrary to its clear words, and to Recommendation 1148 of the Parliamentary Assembly of the Council of Europe."—(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 2	Not Content, 3
Lord Campbell of Alloway	Rt Hon Jean Corston MP
Mr Kevin McNamara MP	Lord Judd
	Mr Paul Stinchcombe MP

Paragraph 4.2 agreed to.

Paragraph 4.3 read as follows:

"We now consider whether the current Bill satisfies those criteria."

Amendment proposed, to leave out paragraph 4.3 and insert the following new paragraphs in its place:

"Article 2 of the European Convention on Human Rights states that it is the duty of the states to defend human life, but it goes further than that and is not simply a negative statement. In the Osman case, the Court noted that "the first sentence of Article 2(1) enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take the appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the state's obligation in this respect extends beyond its primary duty to secure the right to life.

In the case of Pretty, the Court stated: "The consistent emphasis in all the cases before the Court has been the obligation of the state to protect life. The Court is not persuaded that the "right to life" guaranteed in Article 2 can be interpreted as involving a negative aspect … nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life. The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention." With regard to Article 8, the judgment states, "it does not appear to be arbitrary to the Court for the law to reflect the importance of the right to life, by prohibiting assisted suicide."

The Council of Europe's Recommendation 1418 (1999) on the Protection of Human Rights and the Dignity of the Terminally Ill and Dying states—

> The Assembly therefore recommends that the Committee of Ministers encourage the member states of the Council of Europe to respect and protect the dignity of the terminally ill or dying persons in all respects:…
>
> by upholding the prohibition against intentionally taking the life of terminally ill or dying persons, while:-
>
> (i) recognising that the right to life, especially with regard to a terminally ill or dying person, is guaranteed by the member states, in accordance with Article 2…
>
> (ii) recognising that a terminally ill or dying person's wish to die never constitutes any legal claim to die at the hands of another person;
>
> (iii) recognising that a terminally ill or dying person's wish to die cannot of itself constitute a legal justification to carry out actions intended to bring about death.
>
> —(*Mr Kevin McNamara.*)

Question put, That the Amendment be made.

The Committee divided:

Content, 2	Not Content, 3
Lord Campbell of Alloway	Rt Hon Jean Corston MP
Mr Kevin McNamara MP	Lord Judd
	Mr Paul Stinchcombe MP

Paragraph 4.3 agreed to.

Paragraphs 4.4 and 4.5 read and agreed to.

Paragraph 4.6 read.

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

The Committee divided:

Content, 3	Not Content, 2
Rt Hon Jean Corston MP	Lord Campbell
Lord Judd	Mr Kevin McNamara MP
Mr Paul Stinchcombe MP	

Paragraph 4.7 read as follows:

"The question which then arises is whether the safeguards in the Bill are sufficient to protect vulnerable, non-requesting patients against the risk of having their right to life under ECHR Article 2 violated. The safeguards which were contained in the earlier Bill, and which satisfied us when we considered that Bill, have been further strengthened in the current Bill. The safeguards (with main provisions additional to those contained in the earlier Bill in italics) are:

— the 'qualifying patient' must have—

  reached the age of majority (currently 18);

  been resident in the UK for at least twelve months before making the declaration; and

  satisfied the conditions set out below;

— the qualifying patient must have made a declaration in a form set out in the Schedule to the Bill, before two individuals, one of whom must be a solicitor who holds a current practising certificate,

— the solicitor may witness the declaration only if:

the solicitor is personally known to the patient or has proved his or her identity as a solicitor;

it appears to the solicitor that the patient is of sound mind and has made the declaration voluntarily; and

— the solicitor is satisfied that the patient understands the effect of the declaration;

— *the other witness* (who must not be the attending or consulting physician, psychiatrist or other member of the care team, or a relative or partner of the patient) *may witness the declaration only if the patient is personally known to the witness or has proved his or her identity to the witness, and it appears to the witness that the patient is of sound mind and has made the declaration voluntarily*;

— neither witness may be a person who owns, operates or is employed at a health care establishment where the person is a patient or resident, and no one may witness a declaration if he or she has grounds for believing that he or she will benefit, financially or otherwise, from the patient's death;

— the patient and witnesses must sign and witness the declaration at the same time and in the presence of the others;

— before A makes the declaration, the attending physician must—

have been informed by A that A wishes to be assisted to die, and, if the patient persists in the request to be assisted to die, have satisfied himself that the request is made voluntarily *and that the patient has made an informed decision*;

have examined A *and A's medical records* and found no reason to believe that A is incompetent;

have determined that A has a *terminal* (not merely an irremediable) illness;

have found A to be suffering unbearably as a result of that illness;

have informed A of the diagnosis, the prognosis, the process of being assisted to die, and the available alternatives, including palliative care, hospice care, and the control of pain; and

have referred the patient to a consulting physician;

— before A makes the declaration, the consulting physician must—

have been informed by A that A wishes to be assisted to die, and, if the patient persists with the request to be assisted to die, have satisfied himself that the request is made voluntarily *and that the patient has made an informed decision*;

have examined A and A's medical records and satisfied himself that the patient is competent;

have confirmed the diagnosis and prognosis made by the attending physician;

have concluded that A is suffering unbearably as a result of that illness; and

have informed A of *the diagnosis, the prognosis, the process of being assisted to die, and* the available alternatives, including palliative care, hospice care, and the control of pain; and

have advised the patient that, before such assistance, the patient will be required to complete a declaration which the patient can revoke;

— there must be a waiting period of at least 14 days between the date on which the patient first informed the attending physician that the patient wished to be assisted to die and the date on which the patient is assisted to die;

— a declaration would remain in force for only six months;

— during that time the patient would be able to revoke the declaration, orally or otherwise, without regard to his or her physical or mental state, and, if it is revoked, the attending physician would be required to ensure that the revocation is noted on the patient's file and that the declaration is removed from the file and destroyed;

— *if either physician is of the opinion that the patient may not be competent, the physician must refer the patient to a psychiatrist for a psychiatric opinion, and no assistance may be given to end the patient's life unless the psychiatrist has determined that the patient is not suffering from any psychiatric or psychological disorder causing impaired judgment, and that the patient is competent;*

— no physician, psychiatrist or member of a medical care team may take any part in assisting a patient's death or in giving an opinion in respect of the patient if he or she has grounds for believing that he or she will benefit, financially or otherwise, from the patient's death;

— the attending physician must recommend to the patient that the patient notifies his or her next of kin of his or her request for assistance to die;

— before taking any step to assist A to die, the attending physician must have—

informed A of his or her right to revoke the declaration at any time;

verified immediately before assisting the patient to die that the declaration is in force and has not been revoked by the patient; and

asked A immediately before assisting him or her to die whether he or she wishes to revoke the declaration;

wilful falsification of a declaration or wilfully witnessing a statement known to be false would be criminal offences, together with various other contraventions of the requirements of the Bill;

— there are provisions about documentation and record keeping, and the establishment of a commission to monitor the operation of the legislation and the documentation."

Amendment proposed, in line 1, at the beginning to insert, "Even if the purposes of the Bill were to be compatible with Article 2".—(*Mr Kevin McNamara.*)

Question, that the Amendment be made, put and negatived.

Another Amendment proposed, in line 4, after "which" insert "then".—(*Mr Kevin McNamara.*)

Question, that the Amendment be made, put and negatived.

Paragraph 4.7 agreed to.

Paragraphs 4.8 and 4.9 read and agreed to.

Paragraph 4.10 read as follows:

"In the light of this, we conclude that the safeguards in the current Bill would be adequate to protect the interests and rights of vulnerable patients, ensuring that nobody could lawfully be subjected to assisted dying without his or her fully informed consent. In our view, this would respect the right to personal autonomy and self-determination of mentally competent patients under ECHR Article 8.1, and would not be incompatible with the positive obligations of the State to protect life under ECHR Article 2. While recognising that the Bill relates to exceptionally sensitive matters of life and death and affects people's right to life, we do not consider that it gives rise to a significant risk of incompatibility with those Convention rights."

Amendment proposed, in line 1, leave out "In the light of this" and insert "Nevertheless".—(*Mr Kevin McNamara.*)

Question, That the Amendment be made, put and negatived.

Another Amendment proposed, in line 1, leave out "would be" and insert "are not".—(*Mr Kevin McNamara.*)

Question, That the Amendment be made, put and negatived.

Another Amendment proposed, in line 4, leave out from "consent" to the end of the paragraph.—(*Mr Kevin McNamara.*)

Question, That the Amendment be made, put and negatived.

Paragraph 4.10 agreed to.

Paragraphs—(*Mr Kevin McNamara.*)—brought up and read, as follows:

"DETAILED ANALYSIS OF BILL

CLAUSE 1

Clause 1(1) sets out the general purpose of the Bill. Clause 1(2) is a definition clause.

CLAUSE 2

Clause 2(2)(b)

There is no positive requirement to determine that the patient is competent (other than that which is implicit in Clause 2(2)(f)). It is enough that the clinician has no reason to believe that the patient is incompetent. The Committee is of the opinion if ever there was a class of decisions about medical "treatment" in which accurate assessment of competence is crucial, this is it.

The assessment of competence is not an exact science. Psychiatrists are experienced in the assessment of competence more so than other clinicians. However, dangerously within the bill there is a requirement in this clause to assess competence at all, the assessment of competence envisaged is one performed by the attending clinician, who will not be a psychiatrist. It is alarming that there is no requirement for a psychiatric assessment in all cases—only those in which either the attending or consulting physician have doubts about competence: Clause 8.

It is a well established principle of the law of consent that one can be competent for some purposes but not for others. The greater the ramifications of the proposed intervention, the greater the degree of competence which will be required before the patient can be said to have consented properly. Where the inevitable outcome of consent to a procedure is death, the standard of competence should be the very highest. The Committee is of the opinion that nothing more than complete comprehension of the diagnosis, the prognosis, the therapeutic and palliative options should be enough.

Competence can fluctuate in time. A patient can be competent one hour and incompetent the next. This Clause does not acknowledge this. It appears to regard competence as a once and for all phenomenon—effectively only requiring competence at the time of the examination. There are a number of possible unfortunate consequences, for example, a patient who, when a competent and thus a qualifying patient, has asked for help in dying may then, for whatever reason, becomes incompetent. He is then legally incapable of giving consent to an act which causes his death. If asked, he might have changed his mind about dying, and very much want to live. Since there is no requirement in the Bill for constant review of competence (and in particular no requirement for its reassessment at the time that any act causing the patient's death would be performed), such a patient might be killed against his will. The initial, unreviewed clinical assessment of competence has the effect of an irrevocable and binding advance directive which results in the patient's death.

Absent from the Bill is any recognition that depression, which falls short of impairing legal competence, can affect patient's decisions about ending their lives. This is well recognised. It needs to be taken into account. There are three points to make:

(a) That such depression may itself be the main reason why the patient wishes to die.

(b) That such depression can often be treated.

(c) That even if untreated, depression (and thus the will to die which often accompanies it) fluctuates.

Clause 2(2)(c)

There should be a high degree of diagnostic and prognostic certainty about the "determination". The existing draft does not require such certainty. As presently drafted, the determination, to qualify, does not have to be in accordance with an overwhelming medical consensus, or even competently reached. Since Clause 2(3) demands equally little of the consulting physician, Clause 2(3) offers no real safeguard.

As to "terminal", (which is defined in Clause 1) it could cover depression that is progressive, refractory to therapy and that is likely to lead to the patient's suicide. The term is vague and ill-defined.

Clause 2(2)(d)

This imposes a requirement that the attending clinician shall have "concluded that the patient is suffering unbearably as a result of that terminal illness."

"Unbearable suffering" is defined in Clause 1 as follows: '"Unbearable suffering" means unbearable suffering whether by reason of pain or otherwise which the patient finds so severe as to be unacceptable and results from the patient's terminal illness, and "suffering unbearably" shall be construed accordingly.' This definition of "unbearable suffering" is fraught with difficulties.

The Clause apparently intends to indicate that it must be the patient who is unable to bear the suffering: that is the clear sense of the Clause 1 definition taken together with Clause 2(2)(d). But that, at the moment, is not completely clear. As presently drafted, it would be possible to read Clause 2(2)(d) as entitling the clinician to conclude that the "patient is suffering unbearably" if the patient's suffering was unbearable for his relatives (for example).

The main objection to the definition of "unbearable suffering" comes from the part which defines it as "unbearable suffering whether by reason of pain or otherwise … " (My emphasis). This would appear to license, for example, the assisted dying of a patient who had a terminal condition, whose physical symptoms from that condition were entirely under control, but who was depressed as a result of the condition, or felt that their debility was too humiliating to be borne, or even felt that they were suffering unbearably because of the sense that they were making unreasonable demands on their carers. It would also seem to drive a coach and horses through the insistence in other definition sections that the qualifying illness should be a physical one.

As with previous Clauses, Clause 2(2)(d) does not contemplate, let alone insist on, constant review of the position. A patient who is suffering unbearably at the time of the relevant examination may not be suffering unbearably at the time that an act of assisting dying is performed. Provisions to ensure that the patient still wants to die at the time of the act of assisted dying do not cure this defect. The patient might at that time want to die for reasons which would not fall within Clause 2.

It is worth noting that the patient is not required to declare that he is suffering unbearably, or anything about the nature of his suffering. In a Bill full of formal requirements this is a

curious omission. If anyone's subjective views were important, one would have hoped that they would be the patient's.

Clause 2(2)(e)

Clause 2(2)(e)(iv) must impose on clinicians the heaviest possible burden of explanation. It must have the effect of requiring them to indicate that there is never any need for assisted dying because of fears about pain or choking, since there is always the ultimate palliative option of sedation to unconsciousness. That being the case, it is difficult to see why any patient, properly counselled, would opt for death for reasons other than a concern about dignity or being a burden to others. Such concerns should not qualify a patient for assisted dying under a properly drafted Clause 2(2)(d).

Clause 2(2)(f)

The requirement that the attending physician is "satisfied that [the patient's] request is made voluntarily and that the patient has made an informed decision" seems to present a number of difficulties.

The test is a subjective one. Different physicians will require different degrees of proof to be "satisfied". Judges trying cases of undue influence often spend weeks listening to detailed evidence from friends, relatives, lawyers and clinicians in order to satisfy themselves on the balance of probability (a lower standard than that which should be adopted in a case like this), that undue influence has or has not been exerted. To impose a similar burden on clinicians would be unworkable. Not to impose it would be worrying.

Clause 2(3)

All the comments about the role of the attending physician apply equally to the consulting physician.

It is of concern that the consulting physician is only required to be involved at the stage of the preliminary request. He is not involved in any way at the time that any act of assisted dying actually occurs. Things might have changed dramatically by then, but the attending physician is the only arbiter of whether they have or not. The time when the act is to be carried out is a more important time than the time when the initial request is made. It is curious that fewer checks apply to that later time.

CLAUSE 7

The difficulty here is that the distinction between conscientious objection and clinical objection is not clear. This blurring is a consequence of Clause 2(2)(d): see paragraph 3.3 above. Because opinion can intrude into the assessment of whether or not a patient "is suffering unbearably", it would be possible, in the event of a clinician refusing to certify that the qualifying criteria had been met, to invoke Clause 6 as a mandate for clinician-shopping. The "conscientious" (or clinical) objector, would be statutorily required to find someone who disagreed with him about the interpretation of Clause 2(2)(d).

CLAUSES 10 AND 11

The subjectivity of various elements of Clause 2 has already been highlighted. This would make conviction for an act of assisted dying that did not comply with the provisions of the Bill extremely difficult to achieve.

CLAUSE 15

This has the effect of imposing on a doctor a positive obligation to give analgesia when a patient asks for it. There are two objections to it:

a) It is a well established principle of medical law that no doctor can be obliged to treat in a particular way. The apparent exception to this (that a doctor is obliged to act in the best interests of the patient), only applies to incompetent patients, and has no relevance here. This Clause creates a statutory exception to this. This is not in itself offensive, subject to the considerations in (b) below.

b) The Clause has the effect of forcing a doctor to put analgesic considerations above all other clinical considerations, even if he considers that it is not generally in the patient's best interests to do so.

   Imagine the following hypothetical case. A patient has a qualifying "irremediable condition." He suffers pain (whether from the irremediable condition or from another wholly unrelated cause). His clinicians conclude that the pain cannot be wholly eliminated (although it can be reduced) without giving a fatal dose of medication, but that the next day the patient is likely to be wholly pain free and will live many more years of pain-free, productive life. Under the Clause, the clinicians would be required, against all their clinical judgment, effectively to kill the patient.

Accordingly, while Clause 15 seems simply to be a restatement of the law of double effect, it is very far from being so.

CLAUSE 16(1)(a)

This gives the Secretary of State power to make regulations "to ensure the intent of this Act is carried out."

That is a most unusual provision. It gives potentially infinite powers. The primary legislation should "ensure the intent of [the] Act is carried out." We have not been informed of what type of regulations the proponents of the Bill envisage might be made under this clause.

Question, That the paragraphs be read a second time, put and negatived.

Paragraph 4.11 read and agreed to.

Paragraph 4.12 read as follows:

"Clause 7(1) of the Bill properly gives effect to the obligation on the UK under Article 9(1) ECHR to respect the individual's right to freedom of thought, conscience and religion. It achieves this by providing that no person shall be under any duty to participate in any

diagnosis, treatment or other action authorised by the Bill to which that person has a conscientious objection."

Amendment proposed, at the end of the paragraph, to add: "The requirement for a medical practitioner to co-operate in the process of assisted suicide (by finding a sympathetic colleague) would be a conscious violation contrary to Article 9 (first sentence). Article 9(1) of the First Sentence is not subject to any form of derogation as contained in 9(2)." .—(*Mr Kevin McNamara.*)

Question, That the Amendment be made, put and negatived.

Paragraph 4.12 agreed to.

Paragraph 4.13 read as follows:

"There is a tension, however, between this protection for freedom of conscience in clause 7(1) and the provision made in clauses 7(2) and (3), which impose a duty on physicians who invoke their right to conscientiously object, to "take appropriate steps to ensure that the patient is referred without delay to a physician who does not have such a conscientious objection"."

Amendment proposed, in line 1, leave out "tension" and insert "contradiction".—(*Mr Kevin McNamara.*)

Question, That the Amendment be made, put and negatived.

Paragraph 4.13 agreed to.

Paragraph 4.14 read and agreed to.

Paragraph 4.15 read as follows:

"We consider that this problem with the Bill could be remedied, for example by recasting it in terms of a right vested in the patient to have access to a physician who does not have a conscientious objection, or an obligation on the relevant public authority to make such a physician available. What must be avoided, in our view, is the imposition of any duty on an individual physician with a conscientious objection, requiring him or her to facilitate the actions contemplated by the Act to which they have such an objection."

Amendment proposed, in line 1, leave out from "We consider" to "available" in line 4.—(*Mr Kevin McNamara.*)

Question, That the Amendment be made, put and negatived.

Paragraph 4.15 agreed to.

Paragraph 4.16 read and agreed to.

Paragraphs—(*Mr Kevin McNamara*)—brought up and read, as follows:

Judicial Supervision

Article 2 as a Procedural Right: The Need for Judicial Supervision

Article 2 places procedural duties upon the State to minimise and investigate unlawful deaths. This Bill could be open to abuse. Although a competent individual can decline life preserving treatment, the courts have taken a role upon themselves to maintain supervision of issues of 'life and death'.

In Re F Lord Donaldson (in the Court of Appeal) held that important medical decisions (in that case, the sterilisation of an adult incompetent) must be made by the High Court. In the House of Lords, Lord Brandon of Oakbrook summarised this:-

Firstly, the operation will in most cases be irreversible, …thirdly, the deprivation of that right gives rise to moral and emotional considerations to which many people attach great importance; fourthly, if the question whether the operation is in the best interests of the woman is left to be decided without the involvement of the court, there would be a greater risk of it been decided wrongly, or at least of it being thought to be decided wrongly; fifthly is there is no involvement by the court, there is a risk of the operation being carried out for improper reasons or improper motives, and sixthly, involvement of the court in the decision to operate, if that decision is reached, should serve to protect the doctor

It is abundantly clear that a decision to seek euthanasia is the type of decision that should be referred to a High Court Judge. This is because of the risks identified above; further as held by Sir Thomas Bingham MR in Airedale NHS Trust v Bland the 'reassurance of the public' is a judicial consideration. However, under the Assisted Dying for the Terminally Ill Bill a class of patients would have this safeguard removed and this would be a 'discriminatory' practice requiring justification.

In Re T (Adult: refusal of medical treatment), Lord Donaldson held:-

> ... commensurate with the gravity of the decision ... The more serious the decision, the greater the capacity required

We are of the opinion judicial supervision in the Bill is required to remain compliant procedurally with the positive obligations of Article 2. This test is prescient in that individuals suffering from a terminal illness would be classified as 'vulnerable persons' requiring a heightened standard of Crown/ State protection: Z v United Kingdom.

The Committee draws attention of both Houses to the observations of the U.N. Committee on Human Rights on the operation of the Netherlands' Law on Euthanasia in its implications for the "slippery slope" argument.

> The new Act contains, however, a number of conditions under which the physician is not punishable when he or she terminates the life of a person, inter alia at the "voluntary and well considered request" of the patient in a situation of "unbearable suffering" offering "no prospect of improvement" and "no other reasonable solution". The Committee is concerned lest such a system may fail to detect and prevent situations where undue pressure could lead to these criteria being circumvented. The Committee is also concerned that, with the passage of time, such a practice may lead to routinization and insensitivity to the strict application of the requirements in a way

not anticipated to. The Committee learnt with unease that under the present legal system more than 2,000 cases of euthanasia and assisted suicide (or a combination of both) were reported to the review committee in the 2000 and that the review committee came to a negative assessment only in three cases. The large numbers involved raise doubts whether the present system is only being used in extreme cases in which all the substantive conditions are scrupulously maintained. [110]

CONCLUSION

Lord Joffe's Bill is arguably contrary to the European Convention by reason of the 'intentional' taking of life, which is an impermissible act and contrary to the clear words of Article 2 and Recommendation 1418. The inter-action between the obligation on the State to preserve life and the obligation on the State to protect personal autonomy remains uncertain.

Further, the procedural safeguards to prevent abuse are inadequate. Judicial supervision of the level of a High Court Judge is required to prevent medical abuse, and measures have to be taken to prevent abuse by relatives seeking financial or material gain.

Finally, a requirement for a medical practitioner to co-operate in the process of assisted suicide would be a conscience violation contrary to Article 9."—(*Mr Kevin McNamara*.)

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

The Committee divided:

Content, 2	Not Content, 3
Lord Campbell of Alloway	Rt Hon Jean Corston MP
Mr Kevin McNamara MP	Lord Judd
	Mr Paul Stinchcombe MP

Paragraphs 5.1 to 5.26 read and agreed to.

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

Amendment proposed, after "report", to insert ", with the exception of section 4,".—(*Mr Kevin McNamara*.)

Question put, That the Amendment be made.

110 Emphases added

The Committee divided:

Content, 1	Not Content, 4
Mr Kevin McNamara MP	Rt Hon Jean Corston MP Lord Campbell of Alloway Lord Judd Mr Paul Stinchcombe MP

Main Question put.

The Committee divided:

Content, 4	Not Content, 1
Rt Hon Jean Corston MP Lord Campbell of Alloway Lord Judd Mr Paul Stinchcombe MP	Mr Kevin McNamara MP

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

Ordered, That certain papers be appended to the Report.

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

[Adjourned till Wednesday 19 May at a quarter past Four o'clock.

Appendices

Appendix 1: Children Bill

1a. Letter from the Chair to Rt Hon Margaret Hodge MP, Minister of State for Children, Young People and Families, DfES

The Joint Committee on Human Rights is considering how to report to each House on the Children Bill. Our starting-point is of course the statement made under s.19(1)(a) of the Human Rights Act 1998; but the Committee's remit extends to human rights in a broad sense including, in particular in this case, the UN Convention on the Rights of the Child ("the CRC"). In light of the Committee's extensive work on that Convention and related matters, it has decided in the case of this Bill to go beyond its usual scrutiny of compliance questions and, in addition, to consider the Bill in light of its earlier reports.[111] In particular, it has decided to examine carefully the proposed powers and functions of the Children's Commissioner, and the extent to which the Bill gives effect to the UN Convention on the Rights of the Child in UK law. It has now carried out an initial examination of this Bill and would be grateful for your comments on the following points.

PART 1 AND SCHEDULE 1:THE CHILDREN'S COMMISSIONER

The provisions of Part 1 and Schedule 1 raise a number of issues concerning the compatibility of the office which is being created with the UK's obligations under the CRC.

(a) Use of the CRC as a framework

As currently framed, the scheme of Part 1 of the Bill gives the CRC to the status of a permissible relevant consideration: something to which, under clause 2(7), the Commissioner "may have regard" in considering what constitutes the interests of children. The CRC is only to "form the backdrop of the Commissioner's work *if he considers it appropriate*" (emphasis added).[112]

The Government prefers the new Commissioner to work within a framework constituted by the five aspects of children's well-being set out in clause 2(3)(a)–(e), which are the five outcomes identified by children as being most important to them during the consultation carried out on the Green Paper *Every Child Matters*.[113]

In its Concluding Observations on the UK in October 2002, the UN Committee on the Rights of the Child expressed its concern that the CRC had not been recognised as the appropriate framework for the development of strategies at all levels of government throughout the UK.[114]

In its Tenth Report, *The UN Convention on the Rights of the Child*, the Committee stated its belief that children will be better protected by incorporation of at least some of the rights, principles and provisions of the CRC into UK law.[115]

111 *The Case for a Children's Commissioner for England*, Ninth Report of Session 2002–03 and *The UN Convention on the Rights of the Child*, Tenth Report of Session 2002–03.

112 Baroness Ashton, HL Deb., 30 March 2004, cols 1302–3

113 Ibid. at col. 1303

114 Concluding Observations of the UN Committee on the Rights of the Child (Thirty-First Session): UK, para. 14.

115 HL Paper 117, HC 81, at para. 22

The evidence to us of all three children's commissioners for the devolved jurisdictions of the UK was that using a rights framework was crucial to the effectiveness of their work.[116] The Commissioners' evidence also showed that the commonly held fear about a rights framework, that it leads to a conflictual, adversarial approach to the protection of children, which is not always in their best interests, has in practice proved misplaced.[117]

On the first day of the Bill's Committee stage in the Lords, the Government agreed to amend the Bill so that the Commissioner "must" rather than "may" have regard to the CRC.[118] However, we remain concerned that the CRC will be fitted into the framework constituted by the five identified outcomes, rather than the other way round.

Question 1. In light of the above, and in particular the important evidence of the existing Commissioners speaking with the benefit of their practical experience, why was the CRC not adopted from the outset as the framework for the Children's Commissioner?

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

(b) Terms of the Commissioner's Mandate

The Committee is concerned that the Commissioner's mandate falls short of the Government's obligations under the CRC to establish independent national human rights institutions to promote and monitor the implementation of children's rights.[119]

The functions of the Commissioner, in clause 2 of the Bill, are expressed in very qualified terms. A general function of "promoting awareness of the views and interests of children in the UK" and of "encouraging", "advising" and "considering or researching" appears much weaker than a duty to promote, protect and monitor children's rights, or to seek to ensure that legislation and the practice of public authorities are CRC-compliant. The view of the existing Commissioners was that the terms defining the new Commissioner's mandate were too hedged about in contrast to the more straightforward duties placed on the other Commissioners.[120] The Committee is concerned that the Bill concentrates on the procedural aspects—that is, promoting the views and interests of children as something to be taken into account in the policy process at the expense of a clearer championship role, as envisaged in our report last year.[121]

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

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

116 Peter Clarke, Minutes of Evidence, 20 April 2004, HC 537-I, Q1

117 Ibid., Q8, Q10, Q 32

118 HL Deb., 4 May 2004, col. 1060

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

120 Minutes of Evidence, 20 April 2004, HC 537-i, QQ 26–29

121 Tenth Report, para. 25.

(c) The Commissioner's powers

The Committee is concerned that the Commissioner's powers are insufficient and that the Commissioner also falls short of the CRC requirements in its lack of independence from the Secretary of State. The most significant omissions to which the existing Commissioners drew attention in their evidence were:

- no power to review law, policy or practice for CRC compatibility
- no power to conduct investigations on its own initiative
- no power to require information to be provided, other than as part of an inquiry directed by the Secretary of State under clause 4(7)
- no power to consider individual complaints even if satisfied that the case raises a question of principle or policy affecting a large number of children or is otherwise a matter of public importance
- no power to intervene in litigation
- no power to make recommendations
- no power to publish reports other than through the Secretary of State.

Question 5. What is the justification for not giving the Commissioner each of the above powers?

PART 2: CHILDREN'S SERVICES

Part 2 of the Bill makes provision for the better integration, planning, commissioning and delivery of children's services. Although this is not mentioned in the relevant part of the Explanatory Notes, this part of the Bill engages the important positive obligations owed to children under Articles 2, 3 and 8 ECHR, to take positive steps to protect their lives, to protect them from inhuman and degrading treatment, and to protect their physical integrity. It is clear that the lack of inter-agency co-operation and proper co-ordination of the various agencies with functions concerning children has been responsible for some serious cases in which the State has failed to protect children from risks to their lives or physical integrity.[122]

The human rights question raised by Part 2 of the Bill is whether the duties imposed by those provisions are sufficient to prevent that future breaches of the UK's positive obligations under Articles 2 and 3. The Committee is concerned that the way in which the duties in Part 2 are framed suffers from the same weakness as the provisions in Part 1: in particular there is no express direct duty on children's services authorities and other key agencies to promote and safeguard the welfare of children, as required by the CRC. For example, the duty to co-operate in clause 6(4) is only a duty to co-operate in the *making* of arrangements, not a duty to co-operate in the *carrying out* of those arrangements once made. The wording of the duty in clause 7(1) is not phrased as a primary duty to ensure that authorities discharge their functions in a way which safeguards and promotes the welfare of children, and a secondary duty to make arrangements for facilitating the performance of this duty.

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

122 See e.g. *Z v UK (2002)* 34 EHRR 3 at paras 73–75 and the Victoria Climbié case.

Clause 7(2)(b) of the Bill does not impose the duty (to make arrangements etc.) directly on the contractor. This would avoid the problem of relying on authorities to make provision to ensure the performance of the underlying duty in their contracts with third parties.[123]

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

Finally in relation to Part 2, the list of "partners" in clause 6(3) and the lists in clause 7(1) and 9(3) omit any organisations working with the children of refugees and asylum seekers. It appears from the Minister's speech at Second Reading in the Lords that this is a deliberate omission, and that the Government is relying on its reservation to the CRC, which we have criticized on a number of occasions. However, the omission of this particular group of children from the institutional arrangements designed to fulfil the State's positive obligations to children under Articles 2, 3 and 8 gives rise to the question of whether this gives rise to unjustifiable discrimination in the enjoyment of Convention rights. The recent criticism in the report of the inquiry into the death of Toni-Ann Byfield, criticising the lack of co-ordination between immigration agencies and other authorities is relevant in this context.

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

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

CLAUSES 8 AND 23: INFORMATION SHARING

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

It follows that the positive obligations on the State to take active steps to protect the lives of children under Article 2 ECHR, and to protect them from inhuman and degrading treatment under Article 3 or serious risks to their physical integrity under Article 8,[124] referred to above, may require, in certain circumstances, the sharing of information about the child, to the extent that it is necessary to provide the requisite protection for the rights at stake. *Some* provision in national law for information sharing concerning children and young people is therefore required by the positive obligations imposed by human rights law.

123 See Seventh Report of Session 2003–04, *The Meaning of Public Authority under the Human Rights Act*.

124 See *Z v UK*, above

However, there is an important countervailing privacy interest at stake: the sharing of any personal information is an interference with Article 8 ECHR which requires justification.[125] Children *prima facie* enjoy the benefit of the protection in Article 8, even though obviously the younger or more vulnerable the child the weightier is likely to be the justification for any interference with that right under Article 8(2). But the less vulnerable the child, and in particular the more mature they are, the more is likely to be required by way of justification for the interference.

The Explanatory Notes acknowledge that the creation of databases containing personal details of all children may constitute an interference with Article 8 rights, but asserts that the interference is proportionate and justified under Article 8(2).[126] No reasoning is offered to elaborate on this single sentence assertion that the interference with Article 8 is proportionate. It is, therefore, impossible for the Committee to make any judgment about the proportionality of what will undoubtedly constitute an interference with Article 8 rights in the absence of more detail about what is proposed. Given the breadth of the authority it proposes to confer on the Secretary of State to interfere with Article 8 rights, the lack of any indication of the provision which will be made in relation to a large number of crucial questions is problematic. These questions include:

- What precisely is the purpose of keeping the information in the proposed databases?
- Whose personal information will be able to be included on the database?
- What kind of information will be included on the database?
- What is included in "information as to services provided to" a child in clause 8(5)(a)? Is this confined to specialist services provided to particularly vulnerable children, such as special educational need provision or psychiatric intervention, or does it include ordinary services such as health and education?
- What is meant by the broad phrase "information as to activities carried out in relation to" a child in clause 8(5)(a)?
- What is meant by "any cause for concern" in relation to a child in clause 8(5)(b)?
- How is it proposed to confine the recording of a cause for concern to the mere existence of such a cause for concern rather than its nature?
- In what circumstances may or must information be disclosed to those compiling the database? What will be the criteria determining when such disclosure is permitted or required?
- In what circumstances may or must information on the database be disclosed onwards? What will be the criteria?
- To whom will such disclosure be made?
- Who will be given access to the database?
- What will be the criteria for determining the level of access given to the database?
- What sorts of conditions will it be possible to impose on access to the database, or the use of information on the database?
- How long will data on the database be retained?

125 See e.g. *M.S. v Sweden (1997)* EHRR; *R (Robertson) v City of Wakefield MC [2002]* 2 WLR 889 (disclosure of details on the electoral roll).

126 EN para. 209

- To whom is it proposed to delegate the Secretary of State's discretion as to what may or must be done under the regulations (cl. 8(6)). Will that person be regarded as a functional public authority for the purposes of the Human Rights Act1998?

- What is the proposed relationship between this legislation and the Data Protection Principles in the Data Protection Act 1998?

The Explanatory Notes (para. 51) claim that clause 8 sets out "the principles that would govern information sharing using the information databases", and that the regulations will deal with "detailed operational requirements". It appears to the Committee that, in fact, clause 8 contains very few "principles" which would regulate the use of the proposed databases. The key questions which must be asked in order to assess for compatibility with Article 8 ECHR are left unanswered, to be dealt with in the regulations.

The Committee in its reports has repeatedly stressed the fundamental importance of the right to respect for private life in Article 8 ECHR. Any interference with the right must be strongly justified, and adequate procedural safeguards against arbitrariness are essential. The Committee has also repeatedly stressed the importance of these safeguards being contained in the primary legislation in order for it to be possible to say that the legislation is compatible with Convention rights. The fact that the regulations must be made by affirmative resolution procedure does not meet this point.[127]

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

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

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

Reasonable Chastisement Defence

The Bill does not contain any provision abolishing the defence of reasonable chastisement. However, the Government has indicated that it is prepared to give careful consideration to any amendment brought forward on this issue and to consider allowing a free vote at the relevant stage of the Bill.[128] The Government's stated concern is that it does not want to interfere with the right of parents to punish their children, and it has said that it will not support any amendment which constitutes a ban on smacking children.

In its Report on the UN Convention on the Rights of the Child, the Committee concluded, after taking evidence on the issue and careful consideration of the arguments, that the failure to replace or repeal the defence of reasonable chastisement was incompatible with the UK's obligations under the CRC.[129]

127 The House of Lords Delegated Powers and Regulatory Reform Committee has expressed its concern about the broad delegation involved in the skeleton provisions of clauses 8 and 23, despite the importance and sensitivity of their subject-matter, and has invited the House to decide whether the more significant aspects of the provision in those clauses should be included on the face of the Bill: 12th Report, 2003–04, HL 62, para. 23. In light of these comments, the Minister on Second Reading undertook to consider what further detail might practically be included on the face of the Bill before Committee stage: Baroness Ashton, HL Deb., 30 March 2004 col. 1213.

128 Baroness Ashton, HL Deb 30 March 2004, col. 1308

129 JCHR Tenth Report of Session 2002-03, HL Paper 117, HC 81 at paras 94–111.

The Committee is also concerned that the failure to remove the reasonable chastisement defence is in breach of the UK's obligation under Article 46 ECHR to abide by final judgments of the European Court of Human Rights. The decision in *A v UK* gives rise to an obligation on the UK to adopt general measures to prevent a repetition of the violation found in that case. The Committee of Ministers has so far refused the UK Government's requests to adopt a final resolution stating that it is satisfied that the judgment has been complied with. The UK Government's argument before the Committee of Ministers is that, following the coming into force of the Human Rights Act 1998 and the Court of Appeal's refinement of the reasonable chastisement defence in light of the decision in *A v UK* in *R v H,* no further general measures are required in order to comply with the judgment. The Committee of Ministers has not accepted that argument, and has asked at its most recent meeting (April 2004) for an interim resolution to be drawn up, suggesting that it considers it necessary for the UK to take some steps by way of changing its domestic law in order to implement the judgment.

We have written to the DPP to ask if it is his view that minor cases of smacking would not be prosecuted because it would not satisfy the public interest test in the Code for Crown Prosecutors, and intend to take evidence from him on this and related matters on 19 June.

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

RESPONSE

The Committee would also be grateful for an indication of what, if any, representations you have received in connection with this Bill in relation to human rights issues, and to what specific points those representations were directed.

In view of the progress of the Bill in the House of Lords the Committee wishes to report your responses to the above questions, and its conclusions on them, at as early a date as possible. The Committee would therefore be grateful for a reply by 27 May at the latest.

12 May 2004

1b. Letter from the Chair to Ken Macdonald QC, Director of Public Prosecutions

In its Tenth Report of Session 2002–03, *The UN Convention on the Rights of the Child*, the Joint Committee on Human Rights concluded—

> … that the time has come for the Government to act upon the recommendations of the UN Committee on the Rights of the Child concerning the corporal punishment of children and the incompatibility of the defence of reasonable chastisement with its obligations under the Convention. We do not accept that the decision of the Government not to repeal or replace the defence of reasonable chastisement is compatible with its obligations under the Convention on the Rights of the Child. [Paragraph 111]

In reaching this conclusion, the Committee observed—

> There is little ambiguity in Article 19 of the CRC, which requires States Parties to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse ... while in the care of parent(s), legal guardian(s) or any other person who has the care of the child". On the face of it, the retention of the defence of reasonable chastisement is a breach of Article 19 (although there is room for debate over the word "appropriate"). Its wholesale repeal could have the virtue of greater clarity than the current law. *It would then be necessary to rely on current prosecution policy—the evidential test and the public interest test—to ensure that mild smacks of children, like minor assaults on adults, would not be prosecuted. Careful prosecution guidelines would have to ensure that there is a reasonable degree of legal certainty for parents at the same time as providing greater protection for children.* [Paragraph 109, emphasis added]

The issue of the abolition of the defence is very likely to resurface in connection with the Children Bill, which, as you will probably be aware, is currently going through Parliament. The Committee will be reporting on the Bill fairly shortly.

In this context, the Committee would welcome your view on the words in italics in the quotation above. Would you, in short, consider that public prosecutors would have any great difficulty in applying such a policy were the current defence to be abolished?

It would be very helpful to have your response as soon as possible.

4 May 2004

1c. Letter from Martyn Jones MP, Chairman, Welsh Affairs Committee, House of Commons

I am writing with regard to the Government's proposal to establish a Children's Commissioner for England.

As you will be aware, the Children's Commissioner for Wales was established under the Care Standards Act 2000, and its remit extended under the Children's Commissioner for Wales Act 2001. That remit covers all devolved matters, while reserved matters remain the responsibility of Westminster. The Government propose to include those reserved matters in the remit of a Children's Commissioner for England.

In my Committee's report on the Empowerment of Children and Young People in Wales, we considered the role of the Children's Commissioner for Wales. The majority of our witnesses agreed that the Commissioner's remit should be extended to include reserved matters. We concluded that:

> "The Children's Commissioner for Wales supports Welsh children for the majority of their needs. It would make little sense for him to relinquish that role to another Commissioner once a child's needs crossed over into to a reserved matter. Such a circumstance could run the risk of undermining any continuity and trust that had been built up between that child and the Commissioner for Wales. (Paragraph 103)
>
> **We conclude that the current limits on the remit of the Children's Commissioner for Wales do not serve best Welsh Children and Young People in the Youth Justice System. We recommend that the powers of the Children's Commissioner for Wales be extended to those Welsh children residing in the secure estate outside of Wales. A suitable vehicle for enacting that change**

> **would be the proposed legislation to establish a Children's Commissioner for England.** (Paragraph 104)
>
> **We further believe that the current representation of young people in Wales with regard to reserved matters is inadequate. However, we do not believe that the interests of children and young people in Wales would be best served by conferring powers over them, with regard to reserved matters, to a Children's Commissioner for England. We recommend that the Government include in any Bill to establish a Children's Commissioner for England, Clauses to extend the powers of the Children's Commissioner for Wales to cover all non-devolved areas of policy for children and young people in Wales.**" (Paragraph 105)

The Government's response to that report rejected these recommendations. It stated that:

> "Although only one Commissioner will have responsibility for non-devolved matters affecting children, we are clear that the Children's Commissioner must work with the Devolved Commissioners when considering matters that impact on children in the Devolved Administrations. The Children Bill proposes a duty on the Children's Commissioner to take the views and work of her UK counterparts into account when looking at non-devolved issues. The intention is that the Commissioner will be proactive in seeking the views of the other UK Children's Commissioners in such circumstances. The other UK Children's Commissioners will also be able to raise issues and offer their views to the Commissioner on these matters, which the Commissioner must then consider. Once appointed, we would expect the Children's Commissioner to collaborate with the other Commissioners to draw up detailed arrangements for effective working on behalf of all UK children, for example through the development of Memorandums of Understanding".

While the Government intends to place a duty on any Children's Commissioner for England to take the views and work of its UK counterparts into account when looking at non-devolved issues, there is the implication that the Children's Commissioner for England will take on the role of the senior Commissioner. However, that Commissioner would not enjoy the same level of independence from Government currently enjoyed by the Children's Commissioner for Wales.

My Committee remains of the opinion that children and young people in Wales would be best served by a Children's Commissioner for Wales whose remit covered all aspects of their lives. Passing children between Commissioners depending on the specific matter in hand is not a satisfactory solution. Furthermore, passing the case of a Welsh child to a Children's Commissioner for England has the potential to undermine the cultural identity of that child.

I understand that your Committee has already considered the case for a Children's Commissioner for England. Should your Committee revisit that inquiry or undertake scrutiny the Children Bill, I would be grateful if you could include this issue in your deliberations.

24 March 2004

1d. Letter from Lena Nyberg, President, European Network of Ombudspersons for Children (ENOC), on the Children Bill

I understand that your Committee will be reviewing the legislation in the Children Bill establishing a Children's Commissioner. I am aware that the Joint Committee last year recommended establishment of an independent Commissioner able to safeguard and promote the rights and best interests of children.

The European Network of Ombudspeople for Children (ENOC) is open to "independent national or regional institutions set up through legislation specifically to promote children's rights and interests". At our 2001 annual meeting in Paris, the Network unanimously adopted "ENOC's Standards for Independent Children's Rights Institutions". These Standards incorporate the Paris Principles (Principles relating to the Status of National Human Rights Institutions, adopted by the UN General Assembly in 1993) and use them as their foundation. While the preamble to the Standards recognises that they are aspirational, that not all member-institutions meet all of the Standards, they note: "But its [ENOC's] members agree that parliaments and governments should be encouraged to review the status of existing institutions in the light of the Standards and to ensure that the design of new institutions conforms with the Standards and with the Convention on the Rights of the Child".

My attention has been drawn to the legislation in Part 1 of the Bill. It appears to fall short of the relevant international standards in a number of ways, among them:

- No requirement to promote and protect the rights of children;
- Permission, but no obligation, to have regard to the UN Convention on the Rights of the Child;
- Government control of the formal investigatory powers of the Commissioner;
- Government power to impose conditions on funding.

Before admitting an institution to membership of the Network, the legislation establishing it is reviewed by members. From a quick consultation with member-institutions, it appears that the legislation currently before your Parliament does not meet the criteria for membership of the Network, nor its Standards.

We hope that, in the interests of children in England and the effective promotion and protection of their rights, the Joint Committee will urge the Government to ensure appropriate independent functions and powers for the Commissioner.

29 March 2004

1e. Memorandum from Action on Rights for Children on the Children Bill

The Children Bill currently before Parliament proposes radical changes to the way in which children's services are delivered in England and Wales. While we welcome in principle the intended appointment of a Children's Commissioner for England, it is the provisions of Part 2 that concern us.

Part 2 of the Bill proposes that confidential information about children and families be shared and stored on a database without their knowledge or consent. The Government appears to be seeking something of a 'blank cheque' from Parliament by asking that the Secretary of State be empowered to establish one or more databases, and to define issues

of data storage and access, by Regulations and Guidance rather than by primary legislation.

The Green Paper, *Every Child Matters,* explained in detail how the system would operate: every child would have a central file, and a 'flag' would be placed upon it whenever an agency had a 'concern'. If two agencies flagged a file, this would be the trigger for sharing information in order to decide whether further intervention was necessary.

Although 'concern' is not defined in the Bill, the Government has made it clear that information-sharing should go far beyond the situation in which it is currently permitted: where a child is at risk of significant harm.[130] It has so far been suggested that 'concerns' should, amongst others, include: seeming upset at school, failure to achieve expected levels at Key Stages, low birth-weight, or the mental health issues of a family member. It would appear that 'concerns' do not have to be backed by evidence.

Clauses 6 & 7 would place a duty upon a wide range of agencies to cooperate with the Children's Services Authority (CSA), including Primary Care Trusts, Local Authorities, schools, and anyone providing services under s114 Learning and Skills Act 2000—which includes private companies. **Clause 7** appears to refer to those to whom the CSA may delegate its functions, which further widens the potential number of people involved.

Clause 8 provides for the establishment of databases for the purpose of sharing information. Although the Government has said that it intends to establish 'local' databases containing only minimal information, the powers that it is in fact seeking could allow the establishment of one national database, and require that all agencies' files about a child be held upon it.

We are alarmed that The Secretary of State could be given such far-reaching powers without the detailed scrutiny and agreement of Parliament.

Clause 8(7) purports to overturn any Common Law presumption of patient or client confidentiality. We fear that it could ultimately operate to abolish such confidentiality altogether.

We are concerned that, if every aspect of a child's life is potentially under Government scrutiny, this may in fact constitute destruction of the essence of his/her right to a private and family life, (Article 8 ECHR; Article 16 UNCRC)

Even if this is found not to be the case, the provisions of Clause 8 entail such a significant loss of private and family life that we cannot accept that they are a proportionate response to child protection concerns.

The Government has deflected criticism of the provisions of Part 2 of the Children Bill by asserting that the need for child protection outweighs any considerations of privacy.

Figures indicate that in a population of 10.5 million under-16s[131] in England and Wales, 27,670 (0.26%) children are on child protection registers.[132] Even allowing that ten times that number of cases of abuse had not yet come to light, the figures suggest that the

130 Department of Health: Data Protection Act 1998 Guidance to Social Services 2000

131 National Census 2001

132 Table 7.21, *Children and young people on child protection registers*, 31 March 2002, ONS

overwhelming majority of children are not suffering abuse. A major study published by the NSPCC in 2000 would appear to confirm this.[133]

We cannot, in any case, see how the Bill's provisions will do anything other than aggravate the current situation.

- Widespread information sharing could compromise the safety of all children. The greater the number of agencies involved, the greater the risk of corrupt use or disclosure of children's data.

- Children already at risk of harm may be overlooked. It is likely that those working with children will tend to flag every minor concern rather than risk accusations of negligence. The system will be constantly delivering alerts for trivial issues; consequently, situations where intervention is urgently needed will tend to be obscured.

- There is currently a serious shortage of child protection social workers, and many Local Authorities are already fully stretched in coping with referrals. Increasing the potential workload to include issues that are not related to children's safety may bring the entire system to breaking point.

- As caseloads increase, there is a real danger of over-dependence on the computer system with an associated risk that the duty of care will, in practice, be given to the machinery.

- High levels of entries on the database increase the likelihood of human error when inputting data, impairing the accuracy of the records. As children and parents would not have the opportunity to correct mistakes, inaccuracies could lead either to time-wasting, unwarranted intervention, or to failure to identify a child at risk of harm.

- Government databases have a poor track record. Should the database become overloaded and fail, children in urgent need of protection may be missed entirely.

- Children may be reluctant to seek help or advice when they fear that their confidence will be breached.

- Parents may be deterred from seeking advice from GPs or other agencies for their own mental health or substance-abuse problems at an early stage, instead delaying requests for help until they are at crisis point. This could only aggravate problems within the family and increase the possibility of harm to children.

24 March 2004

133 *Child Maltreatment in the United Kingdom*, NSPCC, 2000

1f. Memorandum from the Mayor for London on the Proposed powers of the Children's Commissioner for England in the Children Bill

Mayor of London

1 .1 This evidence paper is submitted on behalf of the Mayor of London. Under the 1999 Greater London Authority Act, the Mayor has a range of specific powers and duties, and a general power to do anything that will promote economic and social development, and environmental improvement, in London.

1 .2 The Mayor's statutory responsibilities include the preparation of strategies, plans and policies for London covering transport, spatial development and planning, culture, ambient noise, air quality, waste management, biodiversity and economic development. The Mayor has also chosen to develop a range of other policy initiatives, including on children and young people, childcare, alcohol and drugs, rough sleepers, domestic violence and poverty.

1 .3 In January 2004, the Mayor published his children and young people's strategy for London, *Making London Better for All Children and Young People*. Since 2000, the Greater London Authority (GLA) and functional bodies[134] have taken forward work to better promote children's interests and rights in relation to, for example, transport, policing and spatial development policies.

Children Bill - Children's Commissioner

2.1 In his Parliamentary Briefing on the Children Bill,[135] the Mayor sought the incorporation of an independent Children's Commissioner for England with a regional structure; strengthened measures on private fostering; and law reform on physical punishment.

2.2 The Mayor stressed the importance of the Children's Commissioner for England having clear statutory powers and duties which are fully compliant with the Paris Principles (UN principles adopted in 1993 for the development of independent national human rights institutions).

2.3 The Children's Commissioner's role must extend to monitoring, promoting and protecting children's rights in relation to the development of policy and legislation at Westminster alongside an appropriate regional structure to ensure the Commissioner is able to protect the needs, rights and interests of all London's children.

2.4 During the Parliamentary passage of the Children Bill, the Mayor will be making the case for the establishment of an Assistant Commissioner for London, or other appropriate mechanisms, to ensure issues of particular concern for London's children are taken up at a national level. This case is developed below.

Rationale for Regional Structures

3.1 A main function of the Children's Commissioner is proposed as "promoting awareness of the views and interests of children" (Children Bill). In order to safeguard the interests and rights of London's children and young people, the Commissioner structures

134 Functional bodies in the GLA group are London Development Agency, London Fire and Emergency Planning Authority, Metropolitan Police Authority and Transport for London.

135 Mayor of London, Children Bill: House of Lords Second Reading, Tuesday 30 March 2004, GLA, 2004.

must address the size of London's child population (1.62m under 18 years old), and their unique diversity and specific issues.

3.2 On a population basis, London has two and a half times the number of children and young people than Wales, nearly three times the number in Scotland and one and a half times the number in Northern Ireland, where there are Commissioners.

3.3 41% of London's children and young people (aged under 18) belong to a black, Asian or minority ethnic group (53% in Inner London), and between them they speak around 300 different languages. They continue to experience the highest levels of poverty and inequality of any region in the UK—for example, after housing costs, the child poverty rate in Inner London is 48%.[136] London is also home to disproportionately high numbers of children who are doubly disadvantaged by poverty and discrimination—including refugees, homeless children and disabled children. The Mayor believes that to reflect this diversity regional structures will be required for the new Children's Commissioner office.

3.4 It is vital that the Children's Commissioner for England operates within an understanding of the complexity of established government structures in London, apprised of and engaged at the local government level in health, social care and education, and crucially with the roles of regional government in, for example, planning, community safety, culture and transport policies as they affect children. For example, children's opportunities to play in green and open spaces are being addressed by the London Plan[137] and supplementary and best practice guidance, while child community safety issues come within the remit of the Metropolitan Police Authority (and Service), Transport for London and the London Child Protection Committee.

3.5 Similarly, the Children's Commissioner will need to work with well-established regional government and other Londonwide structures. The GLA now has a strategic policy unit for children, operating between local and central government tiers and in liaison with key bodies such as the Association of London Government and Government Office for London. Other, key pan-London partnerships of statutory and voluntary agencies include the London Health Commission, London Workforce Taskforce, and London Housing Forum, as well as specialised groups—for example, in education, the London Challenge team and London Schools Commissioner.

3.6 In addition, the region is a practical and effective level for developing consultation mechanisms and engagement with children and young people. Consultations conducted by the Office of Children's Rights Commissioner for London[138] highlighted that children particularly identify with the neighbourhood and city-wide levels when raising quality of life, safety and well being issues for them.

3.7 Finally, international precedents exist for regional commissioner or ombudsman institutions—in Austria, Spain, Australia, Belgium and the Russian Federation.

Second Reading Debate. House of Lords (30 March 2004)

4.1 Several Peers raised that "consideration be given to an assistant commissioner for London and for other regions or that appropriate mechanisms to ensure that the particular concerns of, for example, London's children can be taken to a national level" (Baroness Thornton), and for a commission "with assistant commissioners in the regions

136 Mayor of London, The Case for London, GLA, 2004

137 Mayor of London, The London Plan, GLA, 2004

138 *Sharpe S, Sort it Out! Revisited*, Office of the Children's Rights Commissioner for London, 2002. The office was a three-year demonstration project that operated from 2000–03.

matching devolution and able to respond to local people and needs" (Baroness Howarth of Breckland).[139]

4.2 The level of resources to be made available for the Children's Commissioner for England was also raised in debate. Concerns were expressed at the proposed budget given the size of the English child population (of over eleven million), which was compared with the higher budget per child in each of the commissioner's offices in Wales, Scotland and Northern Ireland.[140]

Summary of recommendations

5.1 The Children Bill should include clear statutory powers and duties for an independent Children's Commissioner for England, fully compliant with the Paris Principles.

5.2 The Children Bill should be amended to include provision of an Assistant Commissioner for London, or other appropriate mechanisms, to ensure issues of particular concern for London's children are taken up at a national level and the proper engagement of regional government in improved outcomes for London's children.

14 April 2004

1g. Memorandum from The Children's Society on the Children Bill

INTRODUCTION

The Children's Society believes the Children Bill presents an historic opportunity to respond to the many systematic failures to protect children's rights and welfare that have been identified over the last fifteen years. There is much in the Bill to be welcomed, however we believe it includes a range of provisions which either raise concerns about children's rights, or require strengthening or broadening if all children's rights are to be respected and protected by the new legislation.

CHILDREN'S COMMISSIONER

The creation of a commissioner for children in England is long-awaited, however our welcome for it is tempered with disappointment at its:

- Weak function, without reference to promoting children's rights and welfare;
- Weak connection to the United Nations Convention on the Rights of the Child (UNCRC) ('may' have regard, compared with 'must' or 'shall' in other UK Commissioners' legislation);
- Weak requirements to involve children ('take reasonable steps to involve' in carrying out their functions);
- Investigatory powers that can only be exercised with the permission of the Secretary of State, and the concomitant lack of independence from government;

139 Speeches by Baroness Thornton and Baroness Howarth of Breckland, Second Reading debate, House of Lords, 30 March 2004, Hansard.

140 Speeches by Baroness Walmsley, Lord Prys-Davies and Lord Thomas of Gresford, op cit.

- Non-existent powers to support children in legal proceedings or to take cases on their behalf

- Lack of required response to its reports and recommendations from Government or any other bodies

The Joint Committee has itself been prominent among the influential voices that have pushed for the creation of a children's commissioner, and has made its own detailed examination and reports. We are active members of the coordinating group for the Children's Rights Alliance for England, who are submitting to the Committee at greater length about the Bill's commissioner provisions. Therefore we feel it unlikely that we need in this briefing to repeat the same detailed evidence about the international standards and expectations against which these provisions should be assessed.

To have come so far as to face the real prospect of all children in the UK having their own commissioner, only to create a tangibly inferior children's champion for England to those in the rest of the UK, would not only be a great disappointment for children in England, it would create a constitutionally confusing and unbalanced structure. The intended 'UK-wide representative of children' to parliament would be in the paradoxical position, under these provisions, of being substantially weaker than any commissioner in the devolved nations, lacking the independence from government the other commissioners each have in their own jurisdictions. **We believe substantial amendment is required to make this Bill's Commissioner the strong, independent champion that children in England were promised, and to enable him or her to collaborate effectively with the other three children's commissioners to ensure a UK-wide role is equally strong and independent for all children.**

SHARED OUTCOMES FOR CHILDREN (Clause 2(3), clause 6(2))

We welcome proposals in the Bill to create a statutory framework of five outcomes for improving the well-being of children. It is proposed that one of the functions of the Children's Commissioner will be that of reporting on progress on the outcomes (clause 2(6)) and the outcomes are to be used as the framework for planning and accountability for the new children's services authorities (clause 6(2)). The critical question is how the outcomes will be made meaningful as a means of monitoring and accounting for activity.

We have serious concerns about how the outcomes will be implemented across Government departments, in all policy and legislation. It must be clear that optional or selective use of the outcomes will put at risk the aims and potential value of the outcomes framework. The use of the outcomes framework must be binding right across Government structures. We draw attention to the fact that the Bill is before the House of Lords at the same time as the Asylum & Immigration (Treatment of Claimants etc.) Bill, which proposes a number of measures that will adversely affect refugee children

The Bill should be amended to create obligations upon all parts of Government to attest to the fact that they have assessed the impact of policy and legislation upon the outcomes for children, and that measures will not act to their detriment.

The Bill needs to go further in embracing the UNCRC as the clear and critical standard for how children should be understood, respected and treated. As a signatory State to the Convention for over ten years, it is time that the UK Government made clear its commitment to making children's rights a reality, by tying new policy and reform for children to their rights to protection, provision and participation. By making explicit how the five outcomes reflect our wider obligations to children's rights under the Convention, by specifying the relevant Articles of the Convention for each outcome, not only will our

commitment to the Convention be made more real, but also our progress in implementing the UN Convention, and our reporting to the Committee on the Rights of the Child, will be greatly enhanced.

CHILDREN'S VIEWS

The Green Paper spells out the Government's commitment to ensuring that children's voices and experiences are heard and that they are involved in the design and delivery of services. This is something that has wide-spread support and is enshrined in Article 12 of the UNCRC. However there is a distinct lack of emphasis on ensuring that this is embedded within the children's services structures proposed in the Bill. The only duty that the Bill establishes to involve children and young people is placed with the Children's Commissioner and even then it is a duty only to "take reasonable steps to involve children". (clause 2(4)).

The law is currently inconsistent about listening to children and a critical gap remains in relation to social services assessments of children's needs under section 17 and in relation to child abuse investigations under section 47. One of the key problems highlighted by the Victoria Climbié Inquiry was the lack of any focus on ensuring that she was spoken to or that her views were sought and recorded.

Disabled children and young people are particularly vulnerable to abuse and are more likely to be cared for away from home. This increases their exposure to risks yet all too often professionals undertaking assessments fail to communicate directly with them.

We urge the Government to take the opportunity that this Bill presents to create a new duty on local authorities to actively seek the wishes and feelings of all children for whom there are concerns. This would be consistent with obligations under Article 12 of the UNCRC.

NEW DUTIES

The nature of the new duty

The new duty, under Clause 7 of the Bill is very welcome, and particularly the inclusion of youth offending teams, prisons and secure training centres. We believe this is a significant step in the right direction to address the evidence of the failures of our youth justice system to protect or promote the rights of children under UN and European standards. The Children's Society is concerned, however, that the nature of the duty created under Clause 7 (2) is ambiguous, and insufficiently strong to guarantee that the authorities subject to it could not continue to be able to act in ways that are detrimental to a child's welfare or safety.

The duty to discharge functions 'having regard to the need to safeguard and promote the welfare of children' is in effect an administrative test, requiring a demonstrable point in decision-making at which child safety and welfare were considered. Our interest is in what kind of additional safeguard this new duty would provide in practice for children in the care of, and/or subject to the decisions of, the listed authorities. In theory at least, the actions of authorities subject to this duty need not change at all as a result of it, permitting them to put children's safety and welfare needs second, in favour of carrying out their primary functions. Where meeting children's needs would sit in conflict with the carrying out of primary functions, the duty does not appear to help in guiding decision-making. For example, for prisons who have a primary 'functional' interest in maintaining order and security among inmates, having regard for the child's welfare may conflict with the need for consistency in the application of the rules that are used to maintain that

order. A recent example of the current ambiguity is the case of a 17 year old male sentenced to a Detention and Training Order who was twice placed on the segregation unit of Warren Hill Young Offenders' Institution (YOI) for periods of five days and four days respectively, despite earlier in his sentence presenting a significant risk of self-harm and para-suicidal behaviour.[141]

We believe that in order to be consistent with Article 3 (best interests of the child) and Article 19 (right to protection from any physical or mental harm) of the UN Convention on the Rights of the Child, the new duty should, *as a minimum*, require that no action or decision by an authority listed under Clause 7 should be taken which would be detrimental to children's safety or welfare. The Joint Committee on Human Rights[142] has recently recommended that an amendment be sought at the earliest opportunity to The Children Act 1989 in order to place a statutory duty to safeguard the welfare of children on the Prison Service. It would be a missed opportunity if clause 7 did not provide the full protection to children that is so desperately needed.

The Persons and bodies to whom the duty applies: who's missing?

We believe the inclusion of youth offending teams and governors of prisons and secure training centres is a long-awaited positive response to criticism from the United Nations Committee on the Rights of the Child, the Joint Committee on Human Rights[143] successive reports from HM Inspector of Prisons and more recently the Safeguarding Children[144] report, which found that "*the welfare needs of children and young people who commit offences were not being adequately addressed by those responsible for their welfare*".

Similar concerns have also been raised in relation to the treatment of children in immigration detention centres. Reports by HM Inspectorate of Prisons on inspections of five immigration removal centres in 2002 highlight the inappropriateness of detaining children in this way. In Dungavel in Scotland, HMIP were accompanied by HMIE who conducted a follow up visit in the summer of 2003. HMIP said in their report on Dungavel:

> We note HMIE's view that in general terms 'the positive development of children was compromised by the secure nature of the facility and the uncertainty surrounding the length of stay … It is that the welfare and development of children is likely to be compromised by detention, however humane the provisions, and that this will increase the longer detention is maintained.

The Bill should be amended to include immigration detention centres and others with responsibilities towards children across the immigration service from ports through to support and accommodation providers under the new duty in Clause 7. In particular the regional office of the National Asylum Support Service has an important role in providing services to children and families in respect of the basic provision of housing and subsistence and should also be included within this duty.

Reading across from Clause 7 to Clause 8, which permits databases to be created containing personal identifying information about all children, we believe that persons or bodies establishing and operating such databases should also have a clear safeguarding duty. In *Every Child Matters: the next steps* the Government rightly

141 *R (on the application of B.P.) v Secretary of State for the Home Department (2003)* EWHC 1963.

142 Joint Committee on Human Rights, *The UN Convention on the Rights of the Child*, Tenth Report of Session 2002–03, HL Paper 117, HC 81.

143 ibid

144 *Safeguarding Children: A Joint Chief Inspectors' Report on Arrangements to Safeguard Children*, October 2002.

makes clear that it shall be a matter of utmost priority that databases should be able to keep children's personal details safe from the dangers of hacking and malfunction, and emphasises that any entering and sharing of information through the database should only ever be done with the aim of ensuring children's needs and interests are met. Many respondents to the Government consultation highlighted the risk that gaining access to a database of this kind could become a target for adults with harmful intent towards children. The implications of ensuring that a database operates not only to guard, but to promote the safety of children are wide-ranging, and include the necessity of ensuring that all people who work on, or otherwise have access to the database are comprehensively police checked through the Criminal Records Bureau. Many such safeguards will properly be a matter for regulation and guidance, however we believe it is vital that persons or bodies operating a database under Clause 8 are given a strong safeguarding duty as part of this Bill, reflecting their intended pivotal role within multi-agency safeguarding activity. It may be that such a duty should be incorporated into clause 8, however it would seem logical, if the nature of the Clause 7 duty were to be strengthened as we have argued, to simply include database operators under in the list in Clause 7 (1).

INFORMATION SHARING (Clause 8)

The Children's Society recognises that sharing information and records between agencies is an area of confusion, where different working cultures often clash, and where gaps and barriers to effective protection often lie. It is important, if not inevitable, that new IT technologies should be explored for their potential in aiding efficient, appropriate information sharing, not only to make professional practice more consistent, but also to reduce the frustrations for many children and families of repeatedly telling their stories and being 'comprehensively assessed' by multiple agencies.

The provisions of clause 8 do little themselves to expand upon or explain how databases will operate, what information they will store, how and to whom access will be permitted, and what standards will be applied (eg. how long is a concern to be logged on the system? What 'standard of proof' would apply to logging concerns, such as drug misuse, in relation to family members?). Without this detail, however, it is hard to judge whether the permissions and requirements created for the operation of databases are proportionate and necessary. We are concerned by Clause 8 (7), which places a requirement on database operators to obey regulations on disclosure of information, 'notwithstanding any rule of common law' that would otherwise prohibit disclosure. We must assume that this provision is made in the Bill because it is the intention that under regulation common law protection for individuals' confidentiality is to be effectively altered or by-passed.

Our particular concern is the possibility that the threshold for disclosure of personal information to a third party *without* the appropriate consent to do so will be lowered from situations where the child is believed to be at risk of significant harm, to include situations where sharing information may be beneficial, but not essential to a child's safety and well-being. We are in full agreement with the principle that information and early concerns can and should be shared between agencies at an earlier stage than crisis point, however this can usually and most appropriately be done with the full knowledge and consent of the child/or parent.

Interference with common law standards of confidentiality and consent to information sharing would clearly raise concerns about children's and other family members' rights under Article 8 of the European Convention on Human Rights, and under Article 16 of the UN Convention on the Rights of the Child (both of which assure the right to respect for privacy, family, home and correspondence). Children and young people consistently say that confidentiality is

important to them in considering whether, and with whom, they might share their problems. The Government's summary of responses from children to the Green Paper reinforces this message. If changes in aid of improving information sharing were to have the effect of diminishing agencies' ability to offer a confidential service (or indeed to keep confidential the fact of a service being accessed by the child at all), then it may have the perverse effect of deterring children from seeking preventative help and advice (such as advice on safer sex and contraception), which could itself create avoidable and substantial risks to their safety.

CHILD SAFETY ORDERS

Clause 48 of the Children Bill amends the Crime and Disorder Act 1998, to remove the sanction of imposing a care order on a child for breach of a child safety order, and replaces it with the power to make a parenting order. This is, relatively speaking, a positive amendment, as it was always a matter of great concern that a care order should be used (or threatened) as a punishment. It does raise, however, the likelihood of child safety orders being more readily and widely used than they are currently. One of the reasons for extremely low take-up of child safety orders has been professionals' resistance to the inappropriate threat of care orders being made as a means of enforcement. The likely impact of amending the legislation in this way will be to encourage more widespread use of child safety orders. **We believe this raises again the whole argument, rehearsed extensively but unsuccessfully in 1998 (and therefore before the Joint Committee on Human Rights was established), that the child safety order represents a de facto reduction in the age of criminal responsibility.**

The Joint Committee on Human Rights itself has recently recommended review of the law on the age of criminal responsibility on the grounds that it is too low at 10. The child safety order permits the making of a court order, including restrictions and requirements placed directly upon the child, for any child under the age of ten (with no lower age limit) where—

> *the court is satisfied:*
>
> *(a) that the child has committed an act which, if he had been aged 10 or over, would have constituted an offence;*
>
> *(b) that a child safety order is necessary for the purpose of preventing the commission by the child of such an act as is mentioned in para a) above;*
>
> *(c) that the child has contravened a ban imposed by a curfew notice; and*
>
> *(d) that the child has acted in a manner that caused or was likely to cause distress to one or more persons not of the same household as himself.*

While welcoming the change to the draconian sanction of a care order, The Children's Society remains concerned about the practice of drawing young children into court-ordered restrictions for behaviour for which they cannot be held responsible in criminal law, and for which only a civil standard of proof will be required to make an order. A child whose problem behaviour is a cause for concern certainly should receive interventions, for them individually and for their family, that are designed to address problems and improve behaviour. These can and should be provided under the Children Act 1989, section 17, creating a duty upon local authorities to provide services for children 'in need', and under section 47, if they are at risk of significant harm.

It should also be questioned whether it is appropriate to sanction a breach of a child safety order by a child, by placing an order upon the parent (Clause 48 (2)). This is particularly open to question where the parent may, under the existing terms of the child safety order, already be subject to a parenting order. This raises the prospect that while a parent may be complying with the terms of their parenting order in their own right (by attending parenting sessions, counselling etc), they may nonetheless face breach proceedings because of a repeat incident by their child. Breach of their parenting order (whether the existing order or one made in response the to child's breach of their order) will be an offence itself, incurring a fine or community sentence. While we would not argue for courts to sanction a child under 10 , *as if they were* criminally responsible for breaching an order, neither are we comfortable with the idea that the sanction should fall exclusively to the parent for the child's breach. Many parents of young children with behavioural difficulties have been seeking help for some time before any parenting order is made, and have to work long and hard to develop parenting skills and to address their own problems that may be contributing to their child's misbehaviour. It may take some time, and may require a wide range of issues within the family to be addressed by health, social care and education services, before seeing the desired improvement in the child's behaviour. The parent may be making progress and yet still face a fine or community sentence as a consequence of their child's continued bad behaviour being seen as their failure. The prospect of a criminal punishment and record for the parent being dependent on the child's behaviour may in fact have the detrimental effect of worsening tension in the parent/child relationship.

We believe that the difficulty in establishing an appropriate means of sanctioning breach of a child safety order arises from the fact that it is in essence inappropriate to place a child under 10 under a court order of this kind. We are also mindful of the questions raised by the Joint Committee on Human Rights in its scrutiny of the Anti-Social Behaviour Bill (now Act) 2003, in respect of parenting orders' engagement with families' Article 8 rights.[145] Considerations rested on the question of beneficial intention and the welcome given by parents to support being offered. In this case, however, the question of what the intention of making a parenting order is, is complicated by the proposal that parenting orders can be made both concurrently to support the child's order, and as a sanction when the child's order doesn't work.

There must also be some concern about child safety orders in the context of intentions to widen information sharing and to establish shared electronic records about children. It is to be assumed that if the government intends that information such as low birth weight or a parent's depression should be shared among professionals as a risk indictor, then an intervention as serious as the making of a child safety order would certainly be a matter that would be recorded and potentially known among those professionals who come to work with the child. The child safety order can only be imposed when criminal behaviour is alleged, but the decision to make the order will not be subject to a criminal standard of proof. The fact of being subject to a child safety order will nonetheless *imply* guilt of criminal activity, and may incur prejudicial reactions from other agencies and professionals, for example, when secondary schools are considering whether to admit the 10/11 year-old child as a new pupil. The presumption of innocence until guilt is proven will be greatly blurred by making a child safety order, which could leave children in a no-man's land of not *being* a criminal but being considered to be one. Child safety orders, regardless of the improving amendment in this Bill, still raise concerns for children's Article 6 ECHR rights to innocence until guilt is proven, and a fair adjudication of their alleged wrongdoing.

145 Joint Committee on Human Rights, *Anti-Social Behaviour Bill*, Thirteenth Report of Session 2002–03, HL Paper 120, HC 766.

The UN Committee on the Rights of the Child, in its 2002 report on the UK,[146] urged us to "*… review the new Orders introduced by the Crime and Disorder Act 1989 and make them compatible with the principles of the Convention*". As the child safety order was one of the new orders created by that Act, we believe we should follow the Committee's recommendation, and more fundamentally review the child safety order than merely to reform the permitted penalty for its breach.

EQUAL PROTECTION FROM VIOLENCE FOR CHILDREN

One of the key barriers to ensuring greater protection for children is that children are currently not given equal protection in law from physical violence. The common law confirmed by statute in the Children & Young Person's Act 1933, specifically states that children can be physically assaulted if it can be shown that it was in the pursuit of punishment of the child, or "reasonable chastisement". The Joint Committee on Human Rights,[147] in its tenth report , supported the need for change:

> We have examined the case for retaining the defence, but find the lack of respect it embodies for children's entitlement to be free from physical assault to be unacceptable

We support the view that removing this defence would send out a clear message that children are equal in law, would make it easier for children to identify abusive behaviour towards them and would set a clear standard for the care of children to be supported by public education and support for parents. The Children Bill, intended to reform and strengthen protection for children, is the right legislation in which to enact such reform.

The Children's Society is a member of the Children Are Unbeatable! Alliance which has been campaigning for a change to the law since 1998.

26 March 2004

Appendix 2: Finance Bill

Memorandum from Ms Anne Redston, Ernst & Young, submitted to the Treasury Committee

Small businesses (REV BN 34 and paras 5.91–5 of the Budget Report)

In 2002 the Chancellor introduced a 0% rate of tax on the first £10,000 of corporate profits. The Hansard record of the relevant parliamentary debates, as well as figures produced by the Institute of Fiscal Studies, show that the Government was aware at the time that this 0% rate would induce many small businesses to incorporate, and this is indeed what happened.

In the 2003 Pre-Budget Report, the Government announced that it was introducing measures in this Budget "to ensure that the right amount of tax is paid by owner managers of small incorporated businesses on the profits extracted from their company."

No further information was provided, despite the request of this Select Committee, a request which was welcomed by businesses and their advisers.

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

147 Joint Committee on Human Rights, *The UN Convention on the Rights of the Child*, Tenth Report of Session 2002–03, HL Paper 117, HC 81.

In his Budget speech, Gordon Brown said he was going "to close a loophole under which some have, without changing their economic activities, used our zero tax rate, not to invest or grow but simply to avoid tax and NI by reclassifying their income as dividends." He referred to the withdrawal of dividends from small businesses as "avoidance" and a "loophole".

Given that the Government had clearly changed its mind on small business taxation, the proposed 19% tax is probably the "least worst" option. Nevertheless:

— The PBR announcement caused widespread uncertainty for small businesses, which was not helped by the Government's refusal to consult on this major change to the tax system for the smallest and most vulnerable businesses. This refusal undermined confidence in the consultation process, and implies that the "Code of Practice on Consultation" is ignored for fiscal reforms. The Code clearly and correctly sets out why consultation is desirable, saying that its "main purpose is to improve decision-making, by ensuring that decisions are soundly based on evidence, that they take account of the views and experience of those affected by them, that innovative and creative options are considered and that new arrangements are workable." In other words, the reason why consultation is recommended is that it is the method most likely to produce an effective outcome. Abandoning consultative mechanisms increases the risk of a bad decision, and removes the opportunity to build a consensus before implementation.

— It is disingenuous of the Chancellor to claim, as he did in the Budget speech, that he expected small businesses benefiting from the 0% rate to retain the £10,000 worth of profits in the business. The proprietor of an enterprise with gross profits of around £15,000 a year needs to withdraw this money in order to live. The only people who can afford to retain such a low level of profit are those who are not running a business at all, but are indulging a hobby, or those have an alternative source of income such as investments. The new 19% regime thus penalises the genuine small business owner who needs to work in order to live.

— Businesses which incorporated in the last two years did so at the invitation of the Government; this was made clear in the parliamentary debates on the subject, when Dawn Primarolo referred to the 0% rate as a "gift horse" which small businesses surely would not refuse. However, these taxpayers are now branded as tax avoiders. This is unfair, and angers the many honest business people who reasonably believed they were utilising a Government-provided tax incentive, not taking advantage of a loophole. This usage of "tax avoidance" also dilutes its impact—if these small businesses are tax avoiders, then avoiding tax is clearly a sin which individuals can commit by accident, while genuinely believing that they are responding to a Government incentive.

— While this new 19% rate on dividends is less harsh than some of the mooted alternatives, it nevertheless increases compliance costs for businesses. However, no regulatory impact assessment (RIA) has yet been published. Since an RIA is required as a precursor to inform the Minister's decision on policy, it is assumed that it exists; now the Budget decision has been announced, it would be helpful if it could be made public.

— Again, while the proposed change is simpler than many of the alternatives, there are some complexities, particularly around the interaction with retained profits. The change commences on 1 April, but there is currently no draft legislation, guidance notes or worked examples. These are urgently needed. Depending on the complexity, workshops staffed by Revenue officials could be helpful. Many of these

micro-businesses do not have tax advisers because their income levels puts bespoke advice out of their financial reach.

— The Budget report says that "the growth in small owner-managed businesses, as well as the changing nature of employment and contractual relationships, is creating challenges for the definitions and boundaries in the tax and national insurance systems between income from self-employment and the remuneration of owner-managers. The Government therefore proposes to consider the strategic issues raised by these developments, to ensure that the tax system reflects the realities of today's changing labour market and business environment. A discussion paper will be issued at the time of the 2004 Pre-Budget Report." Currently a marginal difference in commercial reality can cause significant change to tax and NIC liabilities. Levelling the playing field, will introduce more certainty and fairness into the tax system. However, it will also involve a number of fundamental issues, such as whether NICs are a tax in all but name. If the review is to be effective, the Government will need to have an appetite for radical reform, for instance, reducing the disproportionately large tax and NIC burden borne by employees and employers.

Pre-owned assets (REV BN 40 and para 5.88 of the Budget Report)

Some individuals have entered into arrangements allowing them to remove assets from their estates to avoid a charge to IHT, while retaining the ability to use those same assets. In the PBR, the Government said it was introducing an income tax charge based on the individual's use of the asset.

The PBR proposals were wide-ranging and would have caught many innocent transactions, such as transfers between married couples or situations where a parent gave money to a child to buy a home, and subsequently needed to move in with the child because of the parent's infirmity.

Representations were made by professional bodies concerning the PBR proposals and the Government have now agreed that the charge to income tax will not apply in a number of situations. These are set out in Revenue press release BN40 and (in slightly different terms) in the Budget Report at paragraph 5.88.

In addition, individuals who are not able to unwind existing structures, for example because of trust law constraints, will be able to elect for the asset in question to form part of their estate for IHT purposes and thus avoid the income tax charge.

These clarifications and exclusions are welcome. However, the pre-owned assets proposal still gives rise to a major concern.

It is widely accepted that a sound tax system should not be retrospective, so that taxpayers have certainty in their fiscal dealings with the Government. The Budget Report at paragraph 5.88 states that the proposed pre-owned assets legislation "is not retrospective as it will not take effect until April 2005." However, transfers of assets which occurred after 18 March 1986 will fall within this new tax regime. Taxpayers who undertook transactions 18 years ago will now suffer a tax charge which was not in contemplation when the transaction occurred. The only alternative is for them to undo those transactions, either in reality or for tax purposes, if they do not want to suffer the new tax income tax cost. It is difficult to see why this is not retrospective taxation. In addition, it would appear that the legislation may be a breach of Article 1 of Protocol No. 1 to the European Convention on Human Rights.

19 March 2004

Appendix 3: Gender Recognition Bill

Letter from the Christian Institute and Opinion from James Dingemans QC

When the Gender Recognition Bill was considered by the House of Lords, I know that you were concerned about the Bill's implications for religious liberty. That is why we wanted you to see a copy of this new legal opinion. The advice is that this legislation does put religious liberty at risk.

The enclosed opinion by James Dingemans QC concludes that the Bill contains provisions "which are likely to infringe the religious rights of individuals" and leaves Churches which act in accordance with their beliefs open to litigation which "is likely to be divisive, costly and of benefit only to the lawyers".

The Bill provides exemptions for pension companies and sporting bodies—but not Churches. Under the Bill normal counselling and pastoral practice can be made a criminal offence, in some cases punishable by a £5,000 fine.

In the rush to get this legislation onto the statute book, it appears the Government has not considered the implications for religious liberties. Perhaps it would have been helpful if the Joint Committee on Human Rights had expressly considered the position of religious organisations [para 20 of the opinion].

In your capacity as a member of the Joint Committee on Human Rights, can I urge you to look into this issue as a matter of great urgency? We understand that the remaining stages of the Bill will be debated in the Commons in the next month or so.

Can I ask you, even at this late stage, to press the Government to amend the legislation to ensure that religious bodies are properly protected?

25 March 2004

Summary of the opinion

James Dingemans QC was asked to consider the implications of the Bill for religious freedoms. The main conclusions are as follows:

Disclosure

- There are many legitimate circumstances [para 21] where one Church leader would need to disclose a transsexual's birth sex to another leader. Under the Bill this is made unlawful unless the individual consents.

- Criminalising Church leaders would 'infringe' their religious rights and freedoms: "Their ability to project their message about beliefs in relation to transsexualism would be effectively removed." Under the Bill pension companies will be protected, but religious organisations will not [para 22].

Litigation against religious bodies

- Sex Discrimination Act (SDA) there is "the prospect of divisive and costly litigation" against Churches using the SDA [para 28].

- The Human Rights Act could lead to the decisions of C of E ministers on baptism or confirmation being brought before the secular courts [para 29].

Ultimately although such litigation should fail, there are lengthy court cases ahead for Churches [para 30] and the Bill gives scope for litigation against individual Churches which "is likely to be divisive, costly and of benefit only to the lawyers." [para 32]

Marriage

The Bill permits a member of the Church of England clergy to refuse to conduct a marriage involving a transsexual. There is some legal controversy as to whether a person residing in a parish can insist on having a marriage celebrated in the parish Church. There could therefore be complicated legal arguments in court if a C of E parish Church did not want to hold a transsexual wedding [paras 25–26].

Article 9

Article 9 of the European Convention on Human Rights (ECHR), as enshrined in the Human Rights Act 1998, provides for an unqualified right to freedom of thought, conscience and religion. ECHR law establishes the following principles:

1. Religious rights have a 'primordial place' in democratic society and the 'pluralism indissociable' from democratic society depends on religious rights [para 17.1];

2. there is an increasing burden on Parliament to protect religious views [para 17.2];

3. any State interference with the right of freedom of association for religion would be difficult to justify [para 17.3].

Christian opposition to transsexual lifestyles, cogently argued, is a religious belief protected by Article 9 [para 18]. Religious beliefs are already protected by exemptions from several other pieces of legislation [paras 19.1–19.4].

ADVICE

1. I have been asked to advise in relation to concerns about religious freedoms raised in connection with the Gender Recognition Bill (as printed on 11 February 2004), 'the Bill'.

2. The Bill has been produced in part response to the decision of the European Court of Human Rights in *Goodwin v The United Kingdom* (11 July 2002). In that case it was held that a person who had been the subject of a sex change ought to have the right to seek recognition in the acquired gender. The absence of such a right violated the applicant's rights guaranteed by articles 8 and 12 of the European Convention on Human Rights, 'ECHR', namely the right to respect for private and family life and the right to marry.

3. The effect of the Bill is that if a gender recognition certificate is issued to a person (who has or has had gender dysphoria and who has lived in the acquired gender for a period of two years) 'the person's gender becomes for all purposes the acquired gender'. It becomes an offence, among other things, to disclose a person's historical gender if the information has been obtained 'in connections with the functions of ... a voluntary organisation'. It appears from published guidance that there are about some 5,000 persons affected in the United Kingdom.

4. I am instructed that the principal concerns about religious freedoms relate to:

4.1 The criminalisation of persons for disclosing a person's original gender in circumstances where the person believes that it is necessary to do so to act consistently with their religious beliefs;

4.2 That religious bodies might be the subject of litigation by transsexuals or trans persons (I have used the term 'trans person' in this Advice—reflecting the terminology in recent cases and articles) asserting a right to marry;

4.3 That the Bill will increase the prospect of litigation against religious bodies.

THE RELIGIOUS BELIEF

5. There are religious organisations whose beliefs on transsexualism are summarised in the document 'Christian beliefs on transsexualism', Christian Institute, March 2004. In the document reference is made to passages from the bible and to the works of Christian theologians to support the propositions that: 'the body determines personhood, not just the mind'; and that 'Biblical Christians hold that sex change' surgery desecrates a body made in the image of God. And the Bible teaches that the State should validate what is right and not what is wrong'. For these reasons individual Churches wish to be free to decide such matters as who should join or lead ladies' prayer meetings, who should use ladies' lavatories and who should be entitled to receive Holy Communion.

RIGHTS AND FREEDOMS

6. Article 9 of the European Convention on Human Rights, 'ECHR', scheduled to the Human Rights Act 1998, provides for an unqualified right to freedom of thought, conscience and religion and a further right to manifest religion, or belief, in worship, teaching, practice and observance. This further right is subject to the right of States to limit the right so long as the limitations are prescribed by law, and are necessary in a democratic society. Religious rights are also protected by article 10 (freedom of expression), article 11 (freedom of peaceful assembly) and article 2 of the first protocol (State to respect the rights of parents to ensure education in conformity with their own religious and philosophical convictions).

7. The European Court of Human Rights has considered religious rights in a number of decisions. In *Kokkinakis v Greece 1993 17 EHRR 397* it was said (at paragraph 31) that 'freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life ... the pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of conscience, it also implies, inter alia, freedom to 'manifest [one's] religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions'. In that case reference was made to the report in 1956 drawn up under the auspices of the World Council of Churches which recognised that bearing Christian witness was a responsibility of every Christian and every Church'. In *Kokkinakis* a law under which a Jehovah's Witness had been prosecuted for bearing witness (to the wife of a Greek Orthodox minister) was said in that case to have infringed the religious rights of the Jehovah's Witness.

8. In *Otto-Preminger v Austria 1994 EHRR 34* in which the actions of the Austrian State in seizing a film satirising religious beliefs was upheld, the statements made in *Kokkinakis* were repeated. It was also said (at paragraph 47) 'those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guarantee under article 9 to the holders of those beliefs and doctrines. Indeed, in

extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them'.

9. In *Wingrove v United Kingdom 1996 24 EHRR 1* a case upholding a refusal to classify a film which infringed the laws of blasphemy, it was said by the Commission (at page 18, paragraph 52) that 'the Court has emphasised the primordial place in a democratic society of freedom of thought, conscience and religion, safeguarded by article 9 of the Convention'.

10. As part of religious freedom it has been held that religious organisations must be able to choose with whom to associate. As was pointed out in *X v Denmark 1976 5 DR 157* 'a Church is an organised religious community based on identical or at least substantially similar views. Through the rights granted to its members under article 9, the church itself is protected in its right to manifest its religion, to organise and carry out worship, teaching practice and observance, and it is free to act out and enforce uniformity in these matters'.

11. This approach was reaffirmed in *Hasan v Bulgaria 2002 EHRR 1339*. In that case the State had recognised one individual, but not another, as leader of the Muslim community. In that case the European Court of Human Rights (at paragraphs 60 to 62) stated 'While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares ... The Court recalls that religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin ... Where the organisation of the religious community is at issue, article 9 must be interpreted in the light of article 11 of the Convention which safeguards associative life against unjustified State interference. Seen in this perspective, the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which article 9 affords.' The Court specifically rejected (at paragraph 81) a Government argument that nothing prevented the applicant and others from organising meetings stating 'it cannot seriously be maintained that any State action short of restricting the freedom of assembly could not amount to an interference with the rights protected by article 9 of the Convention even though it adversely affected the internal life of the religious community'.

12. Other jurisdictions have recognised that the State should not be entitled to force an organisation to accept persons whose lifestyle is inconsistent with the values which the organisation seeks to promote. In *Boy Scouts of America v Dale 2000 8 BHRR 535* the United States Supreme Court noted that the presence of a homosexual scout master in the scouts 'would, at the very least, force the organisation to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behaviour'. This was contrary to the message which the Boy Scouts wanted to promote. It was noted that the acceptance of homosexual behaviour had become more widespread and that the views of the Boy Scouts might be considered to be increasingly out of step with the views of society as a whole. It was noted that this factor did not diminish the rights of the Boy Scouts to protection.

13. It is plain that the manifestation of religious beliefs in spheres beyond the religious organisations can cause all sorts of problems for society. This was a point made by Rix LJ in *R (Williamson) v Secretary of State for Education and Employment 2003 QB 1300* at paragraph 95. The ECHR expressly permits limits to be imposed on such manifestations of religious beliefs. Areas of conflict have included refusals to work on certain days of the

week, see *Kottinnen v Finland 87-A DR 68* and *Stedman v United Kingdom 1997 EHRR CD 168*. The wearing of religious headscarves in secular universities has been said to be legitimately prevented, see *Karaduman v Turkey 74 DR 93*. An individual cannot refuse to pay that portion of tax which is used to support the armed forces despite religious objections, see *C v UK 1983 37 DR 142*. Indeed the right of secular authorities to collect taxes has been the subject of religious discussion over the centuries.

14. It is also clear that it is not for the State, or for Courts, to judge religious beliefs. The reason for this was explained in *Dale* at page 541. In that case a lower Court had examined the Scouts' literature and concluded that excluding homosexuals was inconsistent with its overarching objectives. The majority of the Court said our cases reject this sort of inquiry; it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent'. The majority also cited a case in which it was said religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection'.

15. In *R v Chief Rabbi, ex parte Wachmann 1992 1 WLR 1036* Simon Brown J (now Lord Brown) noted 'the Court is hardly in a position to regulate what is essentially a religious function—the determination whether someone is morally and religiously fit to carry out the spiritual and pastoral duties of his office. The Court must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognised divide between Church and State'. In *Williamson* Arden LJ recorded (at paragraphs 251 and 252) the proper approach to the assertion of religious beliefs saying 'In my judgment, it is a mixed question of fact and law whether a person has a religious belief for the purpose of article 9. Thus the first step is for the Judge to make findings on the evidence as to what are the actual beliefs of the complainant, so far as relevant ... the second step is for the judge to decide whether those beliefs constitute religious beliefs for the purposes of the Convention. The latter is principally a question of law … Religious texts often form the basis from which adherents develop specific beliefs. It is not the Court's function to judge whether those beliefs are fairly based on the passages said to support them. Its function at the fact-finding stage is to decide what the beliefs are and whether they are genuinely held by the complainant. The fact that the beliefs are based on religious texts may help the Court reach its decision on this factual issue'.

16. For similar reasons, when legislating in areas of religious beliefs, the legislature must not itself decide what religious views are, or are not, worthy of recognition. In his article 'A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious Schools in Queensland' Reid Mortensen, senior lecturer in law at the University of Queensland, Australia noted when reporting on a debate about the proper ambit of discrimination laws (at page 11) 'a surprising number of Christians in the Government presented theologically informed reasons for the application of sexuality and marital status discrimination laws to employment decisions in religious schools. They appealed to the principles of tolerance taught by Christ, the place of free will in the biblical tradition, the moral insignificance of sexual conduct, the malleability of Christian morals, and the need for Churches to modernise. These may well be good and true principles, but if parliamentarians want their churches, or church schools, to exemplify them then they should take efforts to do so through the appropriate Synod, congregational meeting or school council. It is not proper for Christian parliamentarians, inactive or uninfluential in their own churches' forums, to exploit the privileged position they have in Parliament, and try to realise their religious beliefs by use of the coercive powers of government'.

17. In these circumstances it seems to me that it is possible to identify the following principles:

17.1 Religious rights have a 'primordial place' in a democratic society and the pluralism indissociable' from a democratic society depends on religious rights;

17.2 It is not the function of the Courts (or the legislature) to judge the acceptability of the religious views (even if the Judge or the members of Parliament are members of the same religion) if the religious views have attained a sufficient level of cogency. Indeed, as the views become less accepted by modern society as a whole, the greater becomes the burden on the Courts and legislature to protect them;

17.3 Religious rights which have been held to be of particular importance are the rights to bear witness and the rights 'to act and enforce uniformity' in the organisations. Any threatened interference with these rights by others will engage the responsibility of the State. Any threatened interference with these rights by the State is unlikely to be capable of justification.

RELIGIOUS BELIEF AND PROTECTION

18. It seems to me that the religious beliefs of those religious organisations who hold views summarised in the document 'Christian beliefs on transsexualism' have acquired sufficient cogency (whether or not they are considered to be right or wrong) to attract protection under article 9 of the ECHR. This view is part supported by sections 19(3) and (4) of the Sex Discrimination Act which permitted discrimination by an organised religion on the grounds that a person had not undergone any gender reassignment.

19. There are a variety of statutory provisions which provide some measures to protect religious freedoms. These include:

19.1 The Sex Discrimination Act 1975, as amended. Section 19 provides that for the purposes of an organised religion requirements that a person be of a certain sex, or has not undergone any gender reassignment, are permitted for the purposes of the doctrines of the religion;

19.2 the School Standards and Framework Act 1998 which provides, at sections 58 to 60, for discrimination in favour of those holding religious opinions in accordance with the tenets of the religion or religious denomination specified in relation to the school;

19.3 the Employment (Religion and Belief) Regulations 2003. These prevent discrimination against persons in relation to employment on the grounds of their religion or belief. It is permitted to discriminate on the grounds of religion and belief where the ethos of the organisation requires a person to be of a certain religion or belief;

19.4 the Employment Equality (Sexual Orientation) Regulations 2003. These prevent discrimination against persons in relation to employment on the grounds of sexual orientation but do provide exemptions for genuine occupational requirements (under regulation 7(2)) and for organised religions where a requirement has been applied to comply with the doctrines of religion or to avoid conflicting with strongly held religious convictions of a significant number of the religion's followers. These exemptions are the subject of a challenge brought on behalf of 7 trades unions. CARE, The Evangelical Alliance and the Christian Schools Trust have all intervened to make submissions in support of the exemptions on the basis that they are necessary to protect their religious rights and freedoms. Counsel for the Secretary of State for Trade and Industry adopted the analysis of

religious rights and freedoms advanced on behalf of the Interveners. Richards J reserved judgment on Friday 19 March 2004.

DISCLOSURE

20. In the draft Bill provision was made permitting disclosure 'in the course of official duties'. The Parliamentary Joint Committee on Human Rights, and the Department of Constitutional Affairs both considered that this was too uncertain to be an interference which was 'in accordance with law'. This is almost certainly right. However the provision was removed. No attempt was made to define the circumstances the provision might be properly used. It does not appear that the Joint Committee expressly considered the position of religious organisations.

21. A number of examples where if a disclosure was made it would be criminal have been set out in appendix 1 of the email sent to me on 15 March 2004. These include a Roman Catholic priest who is unable to disclose to his Bishop (both of whom hold the religious beliefs set out in paragraph 5 above) that a male candidate for ordination is a female to male trans person; a vicar who is about to perform a marriage by a female member of his congregation (who holds the religious beliefs set out in paragraph 5 above) to a person who he knows (from his work) to be a female to male trans person; a curate who discovers (from his work) that a marriage candidate is a trans person and that the vicar (who holds the religious beliefs set out in paragraph 5 above) is about to perform the marriage; one elder of a Church (which has collectively declared itself to hold the religious beliefs set out in paragraph 5 above) discovers that a member of the congregation is a trans person and wants to discuss the appropriate response with fellow elders.

22. It seems to me that criminalising disclosures made in these circumstances would infringe the rights and freedoms of the individuals concerned. The religious organisations would lose the right to act and enforce uniformity. Their ability to project their message about beliefs in relation to transsexualism would be effectively removed. It is obviously necessary to protect the private lives of trans persons. However it is also necessary to protect the rights of religious organisations. It seems to me that, in circumstances where the Bill criminalises disclosures made by members of voluntary organisations, the Bill must (in order to protect the religious rights engaged) permit disclosures necessary to allow the religious organisations to regulate themselves in accordance with their beliefs. There does not appear to be any pressing reason why such limited disclosures ought not to be made. I note that where money is concerned (in the form of pension schemes) disclosure is permitted, see section 22(4)(h). The protection of money (and property rights in general) is less important in a democratic society than the protection of religious freedoms, see generally *Grape Bay v Attorney General of Bermuda 2000 1 WLR 574*.

23. Although a defence pursuant to Human Rights Act 1998 would be available in any criminal proceedings brought against persons making disclosures it is obviously desirable to avoid unnecessary litigation. Any such litigation would be unlikely to foster the main aims of the Bill.

MARRIAGE

24. The Bill provides, at section 11 and schedule 4, for amendments to the Marriage Act 1949. Section SB will provide that 'A clergyman is not obliged to solemnise the marriage of a person if the clergyman reasonably believes that the person's gender has become the acquired gender under the Gender Recognition Act 2004. A clerk in Holy Orders of the Church in Wales is not obliged to permit the marriage of a person to be solemnised in the church or chapel of which the clerk is minister if the clerk reasonably believes that the person's gender has become the acquired gender under that Act'.

25. This provision will mean that ministers of the Church of England and Church of Wales will not be required to solemnise the marriage of trans persons (again this supports the analysis that the religious beliefs in this area are entitled to protection). Ministers in the Church of Wales do not have to permit their Church or chapel to be used for such a service. There is some legal controversy about whether or not a person residing in a parish can insist on having a marriage celebrated in the parish Church, see Michael Smith at *5 Ecclesiastical Law Journal 34*.

26. The provision permitting a Minister from refusing to allow the Church of which he is a minister to be used does not extend to the Church of England. It appears that this is because the Church of England has not asked for this provision to apply. Although the absence of such a provision may well infringe the religious views of a Minister of the Church of England (and their respective congregations) it does seem to me that the legislature is entitled to rely on the views expressed by the leaders of the Church of England in this respect. Part of the right to organise themselves as a religion means that ministers of a Church have to accept the rulings from the governing authorities of the Church (see paragraph 17.3 above). It does not seem to me that it is for the legislature to determine whether or not the leaders of the Church of England have authority to agree to such a provision. Assuming that the leaders of the Church of England have not asked for such a provision it does not seem to me that individual Ministers of the Church of England will be able to assert any claim under the Human Rights Act if such a marriage does take place in the Church of which they are Minister. This would still leave open the issue about whether or not a person residing in a parish can insist on having a marriage celebrated referred to in paragraph 25 above.

27. It does not seem to me that a trans person could insist on having a marriage service carried out in a non-established Church pursuant to the Human Rights Act 1998. This is because such a Church would not be a public authority for such purposes, see Hautaniemi v Sweden Appl No. 24019/94 and Aston Cantlow v Wallbank 2003 3 WLR 283. Further it seems to me that, even if the Church was considered to be a public authority within the meaning of the Human Rights Act 1998, it does not seem to me that the trans persons' demands to respect for their private lives and rights to marry would trump the rights of the Minister to religious freedom.

LITIGATION

28. However there are other arguments which could be relied on by the trans person in litigation against Churches. In particular the Sex Discrimination Act 1975 might provide a means for such litigation. In *P v S and Cornwall County Council 1996 ECR 1-2143* the European Court of Justice stated that 'sex discrimination cannot be confined to discrimination based on the fact that a person is of one or other sex, but that it includes discrimination which arises as a result of the gender reassignment of the person concerned'. In *KB v NHS Pensions Agency Case C-117/01* the European Court of Justice noted the 'unshakeable belief of transsexuals that they must obtain recognition'. In this respect it is to be noted that some Members of Parliament when discussing the Gender Recognition Bill in the House of Commons Standing Committee A (pt 3) have expressed the view that the Sex Discrimination Act will extend into these situations. The interrelationship of the wording of section 19 of the Sex Discrimination Act (referred to in paragraph 19.1 above) and section 9 of the Bill ('the person's gender becomes for all purposes the acquired gender') seems to me to permit of argument. It is possible to submit that if a person's gender has become for all purposes the acquired gender it cannot be said that the person has 'undergone gender reassignment'. This does not seem to me to be the intention of those drafting the Bill, see the letter dated 8 February 2004 from Lord Filkin. However it does raise the prospect of divisive and costly litigation.

29. Further possibilities exist for challenge. Ministers of the Church of England, when performing baptisms or confirmations, might be carrying out a public function within the meaning of the Human Rights Act 1998. The possibility of litigation between the trans persons and the Churches then becomes more likely. In *Parry v Vine Christian Centre Cardiff County Court 15 February 2002* proceedings were brought against the Vine Christian Centre by a trans person in relation to a refusal to permit her to continue as a member of the Church and to use the female lavatory. The case was summarily dismissed but it illustrates, even before the enhanced protections available under the Gender Recognition Bill, that legal challenges were made.

30. It appears from reports of debates that the Government view is that such challenges should fail. Although, for the reasons given above, it seems to me that should be the result, the cases are likely to occupy considerable time and divert the resources of the Churches into litigation. A closely drawn exemption designed to preserve both the rights of trans persons and the religious rights engaged by this Bill seems to me the best way to avoid unnecessary, costly and divisive litigation.

CONCLUSION

31. It seems to me that the religious beliefs relating to trans persons set out in the document 'Christian beliefs on transsexualism' are (whether one considers them to be right or wrong) entitled to protection pursuant to the provisions of the ECHR. Similarly it seems to me that individual Churches are entitled to organise themselves so that they can act in accordance with their religious beliefs in their dealings with trans persons.

32. The Bill contains provisions which would criminalise disclosures made for religious purposes which are likely to infringe the religious rights of individuals. Further the Bill, in its current form, gives scope for litigation against individual Churches seeking to act in accordance with their religious beliefs. Such litigation is likely to be divisive, costly and of benefit only to the lawyers.

23 March 2004

Appendix 4: Assisted Dying for the Terminally Ill Bill

Letter from Lord Lester of Herne Hill QC

I am sorry not to be present at the Joint Committee meeting this afternoon. I will be involved in the Grand Committee on the Civil Partnership Bill. However, I do have some short observations about the Draft Progress Report, in relation to the Assisted Dying for the Terminally Ill Bill. In my view the Committee was right in its conclusions on the earlier version of the Bill, as set out in the Seventh Report of 2002–03. This Bill contains even stronger safeguards and in my view the conclusions of the Draft Progress Report are sound and do not require amendment. I do not agree with Kevin McNamara's amendments, nor do I agree with his analysis of the Convention case law.

12 May 2004

Appendix 5: Promotion of Volunteering Bill

5a. Letter from the Chair to Mr Julian Brazier MP

As part of its function to consider human rights in the United Kingdom, the Joint Committee on Human Rights examines all bills introduced to either House with a view to reporting to each House on their compatibility with Convention rights under the Human Rights Act 1998, and with other rights which arise in international law under human rights instruments by which the United Kingdom is bound. The Committee has given initial consideration to the human rights implications of the Promotion of Volunteering Bill, which you introduced to the House of Commons.

As you know, Clause 4 would amend the Data Protection Act 1998 by inserting a new section 30A. Proposed new section 30A(2) would provide that a voluntary organisation, volunteering body or volunteer would not commit any offence if, in good faith (whatever that means in this context) and other than for commercial gain (presumably allowing a purpose of non-commercial gain), he, she or it discloses any data where the disclosure is, in the opinion of the body or volunteer, necessary for or desirable in the public interest. This would engage the right to respect for private life under ECHR Article 8 by reducing the protection available for personal information. Offences under the Data Protection Act 1998 are an important part of the protective scheme offering safeguards for people's rights under ECHR Article 8.1 in relation to informational privacy. Proposed new section 30A(2) would remove a criminal sanction for certain disclosures which would violate the right to respect for private life under ECHR Article 8.1. The right includes a right to informational privacy. If a person or body holds information of a personal nature (e.g. identity, membership of societies, sexual matters, addresses, telephone numbers, etc., etc.) the person holding it normally has a duty under the Data Protection Act 1998 not to reveal it save under strict conditions, and the State has a duty under ECHR Article 8.1 to provide protection against such disclosure by private persons and bodies, unless the disclosure is justified under Article 8.2.

The Committee is concerned that there is a significant risk that the resulting criminal liability might not provide an adequate safeguard for Article 8 rights, because it would allow disclosures to take place in circumstances which do not satisfy the tests in ECHR Article 8.2 for justifying an interference with the right to informational privacy set out in paragraph 3.5 above. In particular, the Committee considers the following factors to be significant:

— the range of data which could be disclosed without penalty is unlimited;

— the main test for disclosures would be the opinion (which need not be based on reasonable grounds) of the volunteer, voluntary organisation or volunteering body as to the necessity for or desirability of the disclosure, rather than the judgment of an independent body by reference to objective criteria;

— the test set out in the proposed new section, 'necessary for, or desirable in, the public interest', is much more permissive than the test in ECHR Article 8.2, which requires an independent body such as a court to determine the existence of a legitimate purpose and of a pressing social need for the disclosure, and the proportionality of the disclosure to the need; and

— as volunteers, voluntary organisations and volunteering bodies would often, and perhaps usually, not be 'public authorities' required by section 6 of the Human Rights Act 1998 to act in a manner compatible with Convention rights, there would be no general duty to ensure that disclosures are justifiable under ECHR Article 8.2.

The Committee is also concerned about clause 5 of the Bill, which would relieve people of legal liability for non-intentional harm if, without payment or expectation of payment and acting m good faith, they assist others when the volunteer has reasonable grounds for believing that the assisted person is suffering or injured or faces imminent serious injury. The Committee considers that may engage the right to life under ECHR Article 2 and the right to be free of degrading treatment under ECHR Article 3. ECHR Article 2.1 provides that everyone's right to life shall be protected bylaw. Part of the protection provided by the law in the United Kingdom is to require a person who negligently causes another's death to compensate the person's estate and dependants for the death by way of a claim under the Fatal Accidents Act 1976 (See Andrew Burrows, 'Judicial Remedies' in Peter Birks (ed.), English Private Law, OUP, 2000), vol.2, ch. 18, paras. 18.1.22–18.136). ECHR Article 3 prohibits (among other things) degrading. treatment of any person. Both Articles impose positive obligations on the state to take reasonable steps to protect people against threats of death or degrading treatment in some circumstances. The availability of legal redress (civil as well as criminal) is one of the means by which the state discharges that obligation. Clause 5 of the Bill would remove the right of an injured person, or the representatives and dependants of a deceased person, to obtain compensation for an injury or death caused negligently by a volunteer who takes action in the reasonable belief that the person is suffering, or is injured, or faces imminent serious injury. In our view, this would deprive people of a significant protection against negligent interference with their right to life or to be free of degrading treatment. If (as may often be the case) the volunteer is not a public authority within the meaning of section 6 of the Human Rights Act 1998, it would not be possible to maintain an action merely on the ground that his or her acts are not compatible with a Convention right. Even if the volunteer is a public authority, clause 5 could have the effect of relieving it of the obligation to act in a manner compatible with Convention rights when dealing with a person who is reasonably believed to be suffering, injured, or facing imminent serious injury.

The Committee is minded to draw the attention of each House to these matters. The Committee understands the difficulties which the sponsors of private Members' Bills, with limited resources, often face in responding to questions from the Committee about the human rights implications of their bills. Nevertheless, without suggesting that you are under any obligation to respond to its concerns, the Committee would of course give full weight to any representations which you might wish to put before it, and would publish them in a future report. The Committee is likely to be considering your Bill at its meeting on 28 April; so any response from you would need to be with us by 21 April to be useful.

31 March 2004

5b. Letter from Mr Julian Brazier MP to the Chair

Thank you for your letter of 3l March. It is helpful of you to have briefed me on the view of the Joint Committee on Human Rights.

In fact, it is my intention to drop both clause 4 and clause 5 from the Bill, focussing on the certificates of inherent risk and the protection they would give to organisations and volunteers in the adventure training and sports fields. For that reason it would be very helpful if you could confirm that there is nothing in the first two clauses that presents an ECHR problem, as your letter appears to imply, focussing as it does on the last two clauses.

We did, in fact, get clause 2, as the main clause of the Bill, checked in outline by a Human Rights QC who, subject to a small change we included, gave it his blessing.

22 April 2004

Public Bills Reported on by the Committee (Session 2003–04)

* indicates a Government Bill
Bills which engage human rights and on which the Committee has commented substantively are in bold

BILL TITLE	*REPORT NO*
Air Traffic Emissions Reduction [*Lords*]	3rd
Armed Forces (Pensions and Compensation)*	3rd
Assisted Dying for the Terminally Ill [*Lords*]	**12th**
Asylum and Immigration (Treatment of Claimants, etc)*	**3rd & 5th**
Cardiac Risk in the Young (Screening)	10th
Carers (Equal Opportunities)	8th
Child Trust Funds*	3rd
Children [*Lords*]*	**12th**
Christmas Day (Trading)	8th
Civil Contingencies*	**4th & 8th**
Civil Service	8th
Companies (Audit, Investigations and Community Enterprise*	**10th**
Consolidated Fund*	3rd
Consolidated Fund (No. 2)*	10th
Constitution for the European Union (Referendum)	10th
Crown Employment (Nationality)	4th
Domestic Violence, Crime and Victims [*Lords*]*	**3rd & 4th**
Employment Relations*	**4th, 8th & 10th**
Executive Powers and Civil Service [*Lords*]	3rd
European Communities (Deregulation)	10th
European Parliamentary & Local Elections (Pilots)*	**8th**
Finance*	**12th**
Fire and Rescue Services*	8th
Fisheries Jurisdiction	10th
Fisheries Limited (United Kingdom) [*Lords*]	10th
Gangmaster (Licensing)	8th
Gender Recognition [*Lords*]*	**4th & 12th**
Harbours [*Lords*]	3rd
Health and Safety at Work (Offences)	8th
Health Protection Agency [*Lords*]*	3rd
Higher Education*	3rd
Highways (Obstruction by Body Corporate)	8th
Horserace Betting and Olympic Lottery*	3rd
Housing	**8th & 10th**

Human Rights Act 1998 (Making of Remedial Orders) Amendment [*Lords*]	8th
Human Tissue*	4th
Justice (Northern Ireland)*	4th
Motor Vehicles Insurance Disc	10th
National Insurance Contributions and Statutory Payments [*Lords*]*	4th
Patents [*Lords*]	8th
Pensions*	10th
Performance of Companies and Government (Reporting)	4th
Planning and Compulsory Purchase*	**3rd, 8th & 10th**
Promotion of Volunteering	**12th**
Property Repairs (Prohibition of Cold Calling)	10th
Protective Headgear for Young Cyclists	10th
Public Audit (Wales) [*Lords*]*	3rd
Referendum (Thresholds)	4th
Retirement Income Reform	10th
Scottish Parliament (Constituencies)*	8th
Smoking in Public Places (Wales) [*Lords*]	4th
Sovereignty of Parliament (European Communities)	10th
Statute Law (Repeals) [*Lords*]*	3rd
Sustainable and Secure Buildings	4th
Telecommunications Masts (Registration)	8th
Tobacco Smoking (Public Places and Workplaces) [*Lords*]	10th
Town & Country Planning (Enforcement Notices and Stop Notices)	10th
Town & Country Planning (Telecommunication Masts)	8th
Traffic Management*	8th
Trespassers on Land (Liability for Damage and Eviction)	**10th**
Wild Mammals (Protection)(Amendment) [*Lords*]	3rd
Wild Mammals (Protection)(Amendment)(No. 2)	8th