House of Lords
House of Commons

Joint Committee on Human Rights

Scrutiny: Fourth Progress Report

Eighth Report of Session 2004–05

Drawing special attention to:

Identity Cards Bill
Serious Organised Crime and Police Bill
Inquiries Bill
Road Safety Bill
Child Benefit Bill
Electoral Registration (Northern Ireland) Bill

HL Paper 60
HC 388

House of Lords
House of Commons

Joint Committee on Human Rights

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Eighth Report of Session 2004–05

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
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Lord Campbell of Alloway	Jean Corston MP (Labour, *Bristol East)* (*Chairman*)
Baroness Falkner of Margravine	Mr Kevin McNamara MP (Labour, *Kingston upon Hull*)
Lord Judd	Mr Richard Shepherd MP
Lord Plant of Highfield	(Conservative, *Aldridge-Brownhills*)
Baroness Stern	Mr Paul Stinchcombe (Labour, *Wellingborough)*
	Mr Shaun Woodward MP (Labour, *St Helens South*)

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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: Nick Walker (Commons Clerk), Ed Lock (Lords Clerk), Murray Hunt (Legal Adviser), Róisín Pillay (Committee Specialist), Duma Langton (Committee Assistant), Pam Morris (Committee Secretary) and Tes Stranger (Senior Office Clerk).

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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 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 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. From time to time the Committee also publishes separate reports on individual Bills.

In this report the Committee provides further views on the human rights compatibility of three Bills in the light of Government responses: the Identity Cards Bill,[1] the Serious Organised Crime and Police Bill and the Inquiries Bill.[2] It also comments on the Road Safety Bill, the Electoral Registration (Northern Ireland) Bill and the Child Benefit Bill.

In relation to the Identity Cards Bill

The Committee notes the Government's argument that the Bill is enabling legislation, and agrees that this means that secondary legislation must be relied upon to ensure its human rights compatibility. But the Committee points out that it has repeatedly stressed the importance, where legislation intrudes on rights protected by Article 8 ECHR (right to respect for private and family life), for safeguards to be contained on the face of primary legislation (paragraph 1.5).

The Committee maintains its concerns at the scale of personal information which may be held on the National Identity Register under clause 1 of the Bill, in particular that held under clause 1(5)(h) and Schedule 1 paragraph 9, which allows details of previous checks against a particular entry in the Register to be recorded as part of that entry. The Committee concludes that the retention of this high level of information may not be sufficiently targeted at addressing the aims set out in clause 1(3) to ensure proportionate interference with Article 8 rights (paragraph 1.13).

Under clause 4 of the Bill, where a document, such as a passport, is designated by the Secretary of State, a person applying for that document must also apply to be entered on the Register. The Committee considers that the effectively compulsory registration of personal information, dependent on application for a designated document, gives rise to a risk of disproportionate interference with Article 8 rights (paragraph 1.21). The Committee also concludes that clause 6 of the Bill, which allows for a move to compulsory registration and identity cards, subject to a "super-affirmative" process of parliamentary approval

1 The Committee's initial views on the Bill are contained in its Fifth Report of Session 2004–05, *Identity Cards Bill*, HL Paper 35, HC 283

2 The Committee's initial views on the Serious Organised Crime and Police Bill and the Inquiries Bill are contained in its Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224

under clause 7, does not contain sufficient safeguards to ensure that regulations made under it would comply with Articles 8 and 14 (prohibition of discrimination) (paragraph 1.28).

In relation to disclosure of information contained on the Register, the Committee welcomes amendments made at report stage in the House of Commons to ensure that regulations made under clause 22 preclude disclosure of Schedule 1 paragraph 9 information, and may only permit disclosure of information from the Register to public authorities. The Committee nevertheless notes that the scope of disclosure, which engages Article 8 rights, remains very wide, and recommends that a requirement that information should be disclosed only to the extent necessary for the statutory purposes should be contained on the face of the Bill (paragraph 1.45).

In relation to the Serious Organised Crime and Police Bill

The Committee maintains its general concern that the provisions of Part 1 of the Bill relating to the powers of the Serious Organised Crime Agency (SOCA) to gather, store, use and disclose information, in the absence of safeguards on the face of the Bill such as recommended by the Committee in its previous report, give rise to a significant risk of incompatibility with Article 8 ECHR (paragraph 2.16). The Committee also reiterates its concern that SOCA's powers in relation to information extend to crime generally, and questions whether the Government has advanced sufficient justification for conferring on an agency created to combat serious organised crime such extensive powers in relation to information concerning ordinary crime (paragraph 2.21).

In relation to Part 3 of the Bill, which deals with police powers, the Committee noted in its previous report that the removal of the distinction between arrestable and non-arrestable offences will have the effect of extending a range of police powers, currently available in respect of serious arrestable offences, to other more minor offences. The Committee considers that the Government in its response has not provided sufficient explanation for this extension of powers, and says that it is not satisfied that use of such powers in cases which are not currently serious arrestable offences, in circumstances which interfere with the right to private life, would be justifiable in accordance with the requirements of Article 8.2 ECHR (paragraph 2.28). The Committee also considers that the proposals in the Bill to broaden the power to issue search warrants give rise to a significant risk of incompatibility with Article 8 (paragraph 2.38).

Part 4 of the Bill contains provision relating to public order in public places. The Committee concludes that it is not convinced that the proposed new offence of harassment intended to deter lawful activities is drafted as precisely as would be desirable in order to minimise the risk of a violation of rights under Articles 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 11 (freedom of assembly and association) (paragraph 2.54). On the other hand, the Committee concludes that the proposed new offences of incitement to religious hatred appear to be unlikely to give rise to a violation of Convention rights (paragraph 2.64). The Committee maintains its view that the Secretary of State's powers to designate sites which it would be an offence to enter as a trespasser are very wide, and expresses its lack of confidence that the measures would in practice be operated in a manner compatible with Convention rights (paragraph 2.69). The

Committee notes the significant improvements made to the Bill's provisions relating to police powers in the vicinity of Parliament, but recommends a number of further improvements to protect human rights (paragraph 2.77). The Committee welcomes the Government's clarification of the steps it will be taking to ensure that the provisions of Articles 3(1) and 40(1) of the Convention on the Rights of the Child are brought to the attention of the courts in deciding whether or not to allow reporting of prosecutions of juveniles for breaching ASBOs (paragraph 2.80), but retains some concerns about the human rights guidance to be provided to private individuals or companies contracted to undertake functions in respect of ASBOs (paragraph 2.83).

In relation to the Inquiries Bill

The Committee maintains a number of its concerns about the ability of inquiries set up under the Bill relating to deaths where agents of the state are implicated to comply with the requirement of Article 2 ECHR that an effective and independent inquiry must be held in such circumstances. The Committee welcomes amendments made to clause 14 of the Bill qualifying the ministerial power to terminate inquiries (paragraph 3.9), and to clause 9(1) qualifying the exception to the requirement for independence of inquiry panel members (paragraph 3.16). On the other hand, the Committee considers that risks of incompatibility with Article 2 remain in the case of the ministerial power to issue restriction notices limiting attendance at an inquiry or limiting disclosure of evidence provided to an inquiry (paragraph 3.10), and in the case of the ministerial power to withdraw funding from an inquiry which the Minister believes is operating outside its terms of reference (paragraph 3.14).

The Committee welcomes the Lord Chancellor's reassurance that the costs of legal representation of next-of-kin in Article 2 inquiries will normally be met by the Government in cases where people are unable to meet the costs of representation themselves (paragraph 3.19).

In relation to the Road Safety Bill

The Committee does not consider that the new power contained in clause 11 of the Bill to require an evidential breath test to be carried out at the roadside gives rise to any significant risk of incompatibility with Convention rights (paragraph 4.5). The Committee will however be writing to the Government to seek its justification for considering that the power to arrest if the police officer believes the equipment not to be working properly in clause 11(2) of the Bill, and the power to arrest and detain a person until he is fit to drive, contained in clause 11(9) to (12) of the Bill, are compatible with Article 5 (1) ECHR (paragraphs 4.6 and 4.14). The Committee also draws the attention of each House to human rights concerns arising from the increased penalty for the offence of failing to provide information about the identity of a driver (paragraph 4.18), disclosure of vehicle licensing and registration information to any foreign authorities with such responsibilities (paragraph 4.23), and the need for the purposes for which vehicle insurance information can be used by the police to be defined on the face of the legislation (paragraph 4.25).

In relation to the Child Benefit Bill

The Committee welcomes the Bill as a human rights enhancing measure insofar as it extends financial support to young people in education and training, including vocational training (paragraph 5.3), but it draws to the attention of each House that even an extension of benefit must be done in a non-discriminatory way, and that the regulations to be made under the Bill to give effect to the extended scope of the benefit will require scrutiny for justification for any differential treatment (paragraph 5.10).

In relation to the Electoral Registration (Northern Ireland) Bill

In light of the findings of the Electoral Commission about the fall in the number of registered voters in Northern Ireland, in part because of the impact of the Electoral Fraud (Northern Ireland) Act 2002, the Committee welcomes the Bill as a measure which positively enhances human rights (paragraph 6.11). The Committee raises one concern about the breadth of the discretion accorded to the Chief Electoral Officer in deciding whether to enter the name of former electors in the register (paragraphs 6.12–6.13).

Bills drawn to the special attention of both Houses

Government Bills

1 Identity Cards Bill

Date introduced to the House of Commons	29 November 2004
Date introduced to the House of Lords	21 February 2005
Current Bill Number	House of Lords 30
Previous Reports	5th

Introduction

1.1 In our Fifth Report of this Session, we set out our preliminary views on the Identity Cards Bill.[1] This is a Government Bill, which completed its consideration in the House of Commons on 10 February 2005. It was introduced in the House of Lords on 21 February 2005.[2] On 26 January, we wrote to the Home Secretary raising a number of concerns relating to the human rights compatibility of the Bill, and requesting further information or clarification on a number of points. This report contains our conclusions on the human rights compatibility of the Bill, taking into account the response of the Home Secretary to our letter.[3]

The human rights engaged

1.2 Our concerns with this Bill relate to the protection of the right to respect for private life under Article 8 ECHR. The gathering, storage or disclosure of personal information, each interfere with the Article 8 right to respect for private life.[4] "Personal information" has been broadly interpreted by the European Court of Human Rights, to include information establishing personal identity.[5] Interference with privacy rights may be justified under Article 8.2, however, where it is sufficiently clear and foreseeable in its application to be in accordance with law; where it serves a legitimate aim under Article 8.2, and is necessary for and proportionate to that aim, and serves a pressing social need. Under Article 14 ECHR read in conjunction with Article 8, an interference with private life must not be unjustifiably discriminatory.

1.3 As we pointed out in our initial report on the Bill, neither ID cards, nor the obligation to hold or carry such cards, in themselves engage the right to respect for private life under

1 Fifth Report of Session 2004–05, *Identity Cards Bill*, HL Paper 35, HC 823

2 HL Bill 30. Clause and paragraph numbers in this report refer to the Bill and Explanatory Notes as amended in Committee in the Commons (Bill 49)

3 Appendix 1

4 *Leander v Sweden* (1987) 9 EHRR 433

5 "Information relating to private life" protected by Article 8 includes any information relating to an identified or identifiable individual, including the systematic collection and storage of information which is otherwise publicly available: *Amann v Switzerland* (2000) 30 EHRR 843; *Rotaru v Romania* (2000) 8 BHRC 43

Article 8 ECHR.[6] We do not therefore call into question the provision made in the Bill for the issue of ID cards which, as the Home Secretary points out in his response, are the subject of long-standing schemes in many Council of Europe Member States. The difficulties of human rights compliance in this Bill relate not to the issue of ID cards, either on a voluntary or a compulsory basis, but to the related provision for the gathering, storage and in particular the disclosure of personal information as part of the National Identity Register to be established under the Bill.

1.4 In his response, the Home Secretary emphasises that this Bill is enabling legislation. Since many of the details of the scheme have yet to be decided, and are to be set out in secondary legislation, "all the powers in the Bill are capable of being exercised compatibly and its human rights compliance has to be judged ultimately by looking at the Bill and all the orders and regulations made under it".[7] The Home Secretary points out that, under the Human Rights Act, all secondary legislation made under the Bill must be compatible with ECHR rights.[8]

1.5 We agree that the extensive enabling powers provided for under this Bill will mean that secondary legislation must be relied upon to ensure its human rights compatibility. However this Committee has repeatedly stressed the importance, where legislation intrudes on privacy rights protected by Article 8 ECHR, of safeguards being contained on the face of primary legislation, which is subject to much fuller parliamentary scrutiny.[9]

Information held on the Register

1.6 In our earlier report on the Bill, we expressed concern at the range of information which could be held as "registrable facts" on an individual's record on the Register,[10] and questioned whether the holding of such extensive personal information could be considered relevant to and necessary for pursuit of the Bill's legitimate aims. We asked the Home Secretary why it was considered that the gathering and storage of information under the Bill served a legitimate aim, and was a necessary and proportionate response to that aim.

1.7 The Home Secretary in his response states that "the information held on the Register is limited to that regarded as necessary for the functioning of the Scheme" and considers that, in general, the Register will only record information of a "non-sensitive nature", much of which would already be publicly available.

1.8 We do not accept the Home Secretary's implication that the public availability of some of the information to be held on the Register deprives it of the protection of Article 8. Identifying information, of the kind to be held on the Register, has been held by the ECtHR to fall within the protection of Article 8,[11] and the systematic recording and storage of such

6 *Reyntjens v Belgium* App No 16810/90, where the Identity Card which the applicant was required to hold and carry contained only his name, sex, date and place of birth, current address, and the name of his spouse.

7 Appendix 1

8 Section 6 HRA

9 Nineteenth Report of Session 2003–04, *Children Bill*, HL Paper 161, HC 537, para.109–111

10 Clause 1(5) and Schedule 1

11 *Friedl v Austria* (1996) 21 EHRR 83; *Amann v Switzerland* (2000) 30 EHRR 843; *Niemitz v Germany* (1993) 16 EHRR 97. As we have noted above, the ECtHR has held that "personal information" should be broadly construed, and should

information engages Article 8 irrespective of whether the information is available elsewhere, and irrespective of whether it is further disclosed.[12] Entry of such information on the Register therefore in itself falls to be justified as necessary and proportionate to a legitimate aim under Article 8.2.

1.9 The Home Secretary in his response provided justification for the holding of particular registrable facts. In relation to the particular issue of second addresses, which are registrable facts under clause 1, the Home Secretary states that records of these will be necessary to allow for thorough checks before an individual is entered on the Register, and "to guard against criminals using an accommodation address whilst in reality using another address."

1.10 The material likely to be most intrusive of privacy is that held under clause 1(5)(h) and Schedule 1 paragraph 9 which allows details of previous checks against a particular entry in the Register to be recorded as part of that entry ("Schedule 1, paragraph 9 information"). The Government justifies holding such information as necessary to safeguard against inappropriate disclosure.[13] It points out that, if there were any complaint about how or by whom an ID card had been checked against the Register, the Schedule 1 Paragraph 9 information could establish the circumstances in which information from the Register had been accessed. Secondly, the Home Secretary notes the potential importance of this information for law enforcement agencies in the investigation of serious crime.

1.11 The Government also justifies holding "historic" information relating for example to previous nationality or addresses, and Schedule 1 Paragraph 9 records of past checks on the Register, on the basis that such information will not be disclosable to private persons under clause 14. However, as we discuss below, such information may be disclosed to certain public authorities, and to persons other than public authorities in the investigation of serious crime.

1.12 We retain our concern at the scale of the personal information which may be held under clause 1, in respect of all persons holding ID cards, and potentially, under a compulsory scheme, in respect of all persons in the UK. Although, as is pointed out by the Home Secretary,[14] the Register is not intended to hold highly personal details such as medical records, it will be designed to hold records of checks against the Register where a person has accessed public services connected with their private life. This would record, for example, occasions on which healthcare or mental healthcare services had been accessed. The Register will also hold records of checks against the Register by previous employers or prospective employers, and by law enforcement agencies conducting criminal investigations.[15] As we have previously pointed out, the degree of intrusion of privacy is likely to increase over time, as records of checks against the Register accumulate. In our view, such information cannot be regarded as "non-sensitive" and its systematic storage on

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extend to processing of "any information relating to an identified or identifiable individual:" *Niemitz v Germany* (1993) 16 EHRR 97; *Halford v UK* (1997) 24EHRR 52. In *R (Marper) v Chief Constable of South Yorkshire Police* [2004] UKHL 39, a majority of the House of Lords held that the retention of fingerprints did not engage Article 8; however, it has been held that the taking and retention of photographs intended to identify an individual do engage Article 8 (*Friedl v Austria*, op cit)

12 *Leander v Sweden* (1987)9 EHRR 433; *Rotaru v Romania* (2000) BHRC 43

13 Appendix 1

14 ibid.

15 Clause 1(5)(h), Schedule 1, para. 9

the Register amounts to a significant intrusion into private life rights protected by Article 8 ECHR, which must be strongly justified.

1.13 Whilst in some circumstances the gathering and retention of personal information such as is envisaged by the Bill will be justified, **we are concerned that the universal retention of this high level of information by way of compulsion in respect of large groups of persons and, ultimately, in respect of all UK residents, may not be sufficiently targeted at addressing the statutory aims set out in clause 1(3) to ensure proportionate interference with Article 8 rights**. **We draw these matters to the attention of both Houses.**

Entry on the Register of Information

1.14 Information may be entered onto the Register either voluntarily under clause 2(1); or where it is "otherwise available" to be recorded (clause 2(4)); or as a consequence of application for a document designated by the Home Secretary under clause 4; or following an order of the Home Secretary making entry on the Register compulsory under clause 6. Where entry on the Register is voluntary, Convention rights issues do not arise. The remaining means for entry onto the Register are considered below.

Information "Otherwise available"

1.15 Clause 2(4) of the Bill allows for information to be entered on the Register where it is "otherwise available to be recorded". The Home Secretary confirmed to us that this would allow for information to be recorded on the Register, whether or not an individual has applied to be or is entitled to be entered in it, if information capable of being recorded in an entry is otherwise available to be recorded.

1.16 The Government suggest that information entered under clause 2(4) would include information relating to failed asylum seekers or others about to be deported (to forestall future attempts to enter the UK) or individuals from outside the UK who are issued with a biometric visa on entry. Information on persons who were either not entitled to register, or had not yet done so, could also be recorded without their consent for national security reasons.

1.17 We do not agree with the Government's view that adding information already held elsewhere by Government to the Register would not engage Article 8 rights. In our view, the transfer of personal information to the Register without consent, to form part of a system of centralised data retention and identity checks, for the particular purposes served by the Register, does engage Article 8.

1.18 The Government have pointed out that the Data Protection Act requirements of notification will also apply to the ID cards scheme, so that "wherever practicable individuals will be notified that information is to be recorded on the National Identity Register". **We welcome this clarification, and recognise that notification of an individual's entry on to the Register assists in ensuring that the interference with Article 8 rights is in accordance with law as required by Article 8.2**. We note, however, that it is envisaged that some persons will be entered on the Register without their knowledge, and that, where an individual's information is otherwise available in terms of

clause 2(4), then entry on the Register is by way of compulsion, even under a nominally voluntary scheme. We also note that the circumstances in which information may be transferred to the Register in this way are not limited on the face of the Bill, and are not confined to the circumstances detailed in the response of the Home Secretary and referred to above. **We draw this to the attention of both Houses.**

Designated Documents

1.19 Under clause 4 of the Bill, where a document (such as a passport) is designated by the Secretary of State, a person applying for that document must also apply to be entered on the Register. We noted, in our first report on the Bill, that this would in effect make registration compulsory, where a person was either required to hold a particular document (for example a residence permit) or where they found it in practice necessary to hold a document (for example a passport or driving licence). The Government response to our concerns on this point suggests that the phased introduction of registration, through designating documents such as passports, is largely for reasons of administrative convenience

1.20 The Home Secretary in his response stresses that the requirement to obtain an ID card in addition to a passport does not in itself constitute an interference with Article 8 rights. We agree that the requirement to hold an ID card does not in itself interfere with Article 8 rights. However, the requirement to record personal information on a centrally held database, as a result of the designation of documents, will amount to such an interference, and must therefore be justified as necessary and proportionate in pursuit of a legitimate aim.

1.21 We note that, under the designated documents scheme, the interference with privacy rights involved in entry on the Register is likely to depend on application for documents unrelated to the statutory aims, bearing no necessary relation, for example, to the prevention or detection of crime or the protection of national security. We are not convinced that such a scheme of registration would be sufficiently targeted to constitute a proportionate means of pursuing the legitimate aims of the Register,[16] or that relevant and sufficient reasons have been put forward to justify such a scheme. **We consider that the imposition of what is effectively compulsory registration of personal information, dependent on application for a designated document unrelated to one of the aims of the Bill, by order made under clause 4, gives rise to a risk of disproportionate interference with Article 8 rights.**

1.22 We also raised the concern that designation of certain documents, and the consequent inequalities in interference with private life, could amount to discrimination in breach of Article 14 read in conjunction with Article 8 ECHR. The Home Secretary in his response disputes the application of Article 14, pointing to the requirement that in order to amount

16 In *Murray v United Kingdom*,(1994) 19 EHRR 193, para. 93, for example, the finding that recording of personal details of persons arrested (but never convicted) under Northern Ireland anti-terrorism legislation was found to be justified as necessary in a democratic society in the interests of the prevention of crime, since the personal information retained was relevant to arrests and investigation of terrorist crime.

to discrimination under Article 14, a difference in treatment must be on the basis of a personal characteristic.[17]

1.23 The requirement that differences of treatment, to fall within Article 14, should be on the basis of a personal status or characteristic, has not led to a restrictive application of Article 14 by the ECtHR, however. Article 14 has, for example, been found to be engaged in relation to differences of treatment dependent on freehold rather than leasehold property ownership;[18] on ownership of more rather than less than 20 hectares of land;[19] and on the basis of different military ranks.[20] In our view, therefore, the phased introduction of registration through designation of documents would need to ensure that any differences in the treatment of different groups were such as could be objectively and reasonably justified in light of the legitimate aims of the Bill. **We draw these concerns to the attention of both Houses.**

Entry on the Register by compulsion

1.24 Clause 6 of the Bill allows for a move to compulsory registration and ID cards, either for all, or for particular groups. Compulsion is to be provided for by ministerial order, subject to a "super-affirmative"[21] process of parliamentary authorisation under clause 7. As the Home Secretary notes in his response, the details of a move to compulsory registration and ID cards have yet to be settled. However, the Home Secretary confirms that, for example, non-EEA third country nationals might be required to register before other residents under clause 6.

1.25 In our first report on the Bill, we questioned whether a phased scheme of compulsion would be either a proportionate interference with private life (Article 8 ECHR) or non-discriminatory (Article 8 and Article 14 ECHR). A scheme which required only those under a particular age to register, for example, might be difficult to justify as sufficiently tailored to the statutory aims to amount to a proportionate interference with Article 8 rights.

1.26 The Government considers that any discrimination involved in the phased introduction of compulsory registration would be objectively justified, so that, for example, compulsory registration for certain non-nationals would be justified in the interests of enforcing effective immigration control, prohibitions on working and restricting access to public services.

1.27 For such compulsory registration to amount to a proportionate interference with Article 8 rights, it must be the least privacy intrusive measure available to support these aims. Given the amount of personal information which may be held on the Register, and the wide range of purposes for which it may be accessed, including in support of aims unrelated to immigration control, we consider that there is a risk that a measure applying

17 Citing *R (S and Marper) v Chief Constable of South Yorkshire* (2004) UKHL 39. See also *Kjeldson, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711

18 *James v UK* (1986) 8 EHRR 12

19 *Chassagnou v France* (1999) 29 EHRR 615

20 *Engel v Netherlands* (1976) 1 EHRR 647

21 EN para. 50

compulsory registration to non-nationals only would be found to amount to a disproportionate interference with Article 8 rights. There is a similar risk that the intrusion on privacy rights would be found to be discriminatory in breach of Article 8 and Article 14.

1.28 In our view, clause 6 does not contain sufficient safeguards to ensure that regulations made under it, allowing for the introduction of compulsory entry on the Register, would comply with the Convention rights. **Given the potential gravity of the intrusions on privacy rights which may follow from compulsory entry on the Register, we consider that such safeguards should be set out on the face of primary legislation, rather than left to secondary legislation as is envisaged by the Bill. We draw these concerns to the attention of both Houses.**

Identity checks for benefits and public services

1.29 Where registration becomes compulsory, access to any public services, including those that are free of charge, and access to benefits, may, by way of regulations, be made conditional on production of an ID card.[22] For those who are not required to register, only access to services which are not free of charge may be made conditional on production of a card.[23] Under clause 17, where there is a requirement to produce an ID card, regulations may allow the public service provider to be provided with information from the Register, in order to verify registrable facts about the individual applying for the service.[24]

1.30 The Government distinguishes between a right of access to the Register, and a right to receive information from it, only the second of which is permitted by the Bill. The Home Secretary in his response states—

> The information to be provided to a particular public service provider will depend on the nature of the service. It is not possible to set out the details of each potential case on the face of the Bill. Hence the extensive powers [to make regulations] in clause 17(2) and (3) and 41(6). The intention is to limit any information provided to that which is necessary in the particular case, for example, if a public service needs to confirm an individual's age or nationality, that information could be provided on the Register.

1.31 The Government also emphasises that, under clause 17(3) and 41(6), it is intended to establish a system of accreditation so that only those organisations agreeing to comply with a set of requirements will be provided with any information from the Register.

1.32 We welcome the Home Secretary's assurance that information provided under clause 17 would be limited to that which is necessary in the particular case. Such a limitation should support the proportionate disclosure of information in compliance with Article 8(2). We consider, however, that given the important privacy interests at stake, the principle that information may only be disclosed to the extent that it is relevant to a legitimate aim and necessary in the particular case, should be set out on the face of the Bill, rather than left to regulations.

22 Clause 15

23 Clause 15(2)

24 Clause 17(1)

1.33 As we noted in our previous report on the Bill, the scheme for authorisation provided for under clause 17(3) could provide an important safeguard for compliance with Article 8 rights. We expressed concern in that report that provision for a scheme of authorisation under clause 17(3) was enabling rather than mandatory. We retain our view, but welcome the Government's confirmation, in their response to us, that such a scheme will be put in place, and that authorisation under clause 17 would be conditional on maintaining standards in the protection and storage of information. **We draw these matters to the attention of both Houses.**

Verification of Identity

1.34 Clause 18 provides that where compulsory registration applies, then a person may be required to produce an ID card, or to give consent to a check against his or her entry on the Register, as a condition of doing any thing in relation to that person (clause 18(2)(c)). Such a condition may be imposed by any person either public or private. A check against the person's entry in the Register, under clause 14, may only be made with consent; however, there must be some concern that in certain cases this consent will be essentially involuntary or notional, where access to essential services, or entry into necessary contracts, may be dependent on consent to a check against the Register.

1.35 Safeguards on the disclosure of information under clause 14 are permitted but not required by clause 14(4), which allows for secondary legislation to impose restrictions on information that may be provided under clause 14, including restrictions to prevent the disclosure of irrelevant information.[25] The Government takes the view that, as an enabling measure, which seeks to provide flexibility in gradual development of the ID cards scheme, the Bill should not include such provisions on its face.[26] Given the serious interference with Article 8 rights permitted under clause 14, however, we consider that such flexibility is not warranted. In our view, Article 8 compliance could most effectively be ensured by provision in clause 14 for further constraints on the disclosure of information, including limiting the information that may be disclosed to that necessary for verification purposes.

1.36 In response to our concerns, the Secretary of State stressed that a system of authorisation, similar to that proposed under clause 17, will be established under clauses 14(6) and 41(6) for organisations to which information is to be provided. We welcome this assurance. In our view, however, the Bill should require rather than permit authorisation for an organisation to be provided with information on the Register, and it should also be a requirement on the face of the Bill that a check should only be authorised where relevant to and necessary for one of the statutory purposes. **We draw these matters to the attention of both Houses.**

Exchange of Information

1.37 Under clause 11, the Home Secretary,[27] or a designated documents authority,[28] may require information to be provided from specified bodies, including but not limited to

25 EN para. 93

26 Appendix 1

27 Clause 11(1)

public bodies, in order to confirm information which is entered or is about to be entered on the Register. It appears that the circumstances in which such information could be required would include circumstances where information relating to an individual would be gathered without their knowledge or consent, and would therefore engage Article 8.

1.38 We asked the Home Secretary for clarification of the circumstances in which information could be required to be provided under clause 11. In reply, the Home Secretary stated that, where an application is made for entry on the Register, checks will be made against other databases, including those of the DVLA and the DWP, and birth, marriage and death records. The information sought will be confined to that necessary to confirm identity, and to protect against fraudulent applications. It is emphasised that "this data sharing to build up a biographical picture is … crucial in establishing that an application to register is genuine and thereby in maintaining the accuracy of the Register."

Disclosure of Information

1.39 In our first report on the Bill, we raised particular concerns about the potential for extensive disclosure of information under clauses 19–22 of the Bill. Under those provisions, the Home Secretary may disclose information from an individual's entry on the Register to a range of public authorities, some of which are specified in the Bill, and some of which are to be specified in regulations. The range of bodies to which information may be disclosed under clauses 19–21 may be further extended by way of regulations made under clause 22. It is envisaged that safeguards on authorisation will be set out in regulations under clause 23, including provision for authorisation by particular ranks in each organisation.

1.40 We expressed particular concern at the potential breach of Article 8 rights in the disclosure of Schedule 1 paragraph 9 information – information on previous checks against a person's entry in the Register. An amendment made to clause 22 of the Bill at Report stage in the House of Commons precludes disclosure of such information in regulations made under clause 22. A further amendment specifies that regulations under clause 22 may only permit disclosure of information from the Register to public authorities. **We welcome these amendments.** However, the scope of disclosure of information under the Bill remains very wide. Information from the Register, other than the record of previous checks, may be accessed by Government Departments, the police, Inland Revenue and Commissioners for Customs and Excise in relation to wide-ranging purposes (clause 19). Of particular concern are the following points.

- It remains the case, under clause 20(4), that Schedule 1 Paragraph 9 information regarding any person on the Register can be disclosed to persons other than UK public authorities, in relation to actual or potential proceedings, either in the UK or abroad, concerning serious crime.[29]

- Schedule 1 Paragraph 9 information in respect of any person on the Register may be disclosed to the police, Inland Revenue or Commissioners of Customs and

28 Clause 11(2)

29 Clauses 20(2) and (3) and sections 17 and 18 Anti-Terrorism Crime and Security Act 2001

Excise, or any Government Department in relation to the prevention or detection of serious crime. (clause 20(4)).

- Schedule 1 Paragraph 9 information regarding any person entered on the Register can be disclosed to the Intelligence Services, GCHQ, or the Serious Organised Crime Agency (clause 19(2)).
- Order-making powers under clause 22 permit the disclosure of personal information (excluding schedule 1 Paragraph 9 information), to any public authority.

1.41 The disclosure of personal data without consent engages Article 8 rights.[30] The wide scope of disclosure permitted under the Bill raises three concerns of Article 8 compliance: whether the provision for disclosure is sufficiently foreseeable in its application to be in accordance with law as required by Article 8(2); whether the disclosure of information permitted by the Bill would in every case pursue a legitimate aim under Article 8(2); and whether the provision for disclosure is sufficiently circumscribed, and subject to sufficient safeguards, to amount to a proportionate interference with Article 8 rights.

1.42 In response to the concerns raised in our first report on the Bill, the Government relies on the Human Rights Act obligation of those applying the scheme to comply with Convention rights,[31] as well as the oversight of the National Identity Scheme Commissioner who will report annually on the way the scheme has operated in practice.[32]

1.43 Whilst we agree that the oversight of the National Identity Scheme Commissioner does provide a valuable safeguard, we note that the oversight of the Commissioner is *ex post facto* only. Moreover, we do not consider that reliance on the duty of the implementing authorities, to exercise privacy-intrusive powers in accordance with their obligations as public authorities under the Human Rights Act 1998, provides a satisfactory guarantee of Article 8 rights given the gravity of the intrusion into private life represented by the disclosure provisions under the Bill, and the lack of safeguards on the face of the Bill itself. **We draw this to the attention of both Houses.**

1.44 The Government envisages that procedures for authorisation of the disclosure of information will be set out in regulations under clause 23, including provision for authorisation by particular ranks in each organisation. In our view, such safeguards are an essential condition of Article 8 compliance. Whilst we welcome the Government's confirmation that a scheme of authorisation will be put in place, we consider that such authorisation should be required, rather than permitted, by the Bill.

1.45 These disclosures of information are not subject to any requirement that there be a prior assessment of relevance, necessity and proportionality prior to disclosure. **Given the importance of the privacy interests at stake, a requirement that information should be disclosed only to the extent necessary for the statutory purposes should in our view be contained on the face of the Bill.**

30 *Leander v Sweden* (1987) 9 EHRR 433

31 Section 6 HRA

32 Clause 24

2 Serious Organised Crime and Police Bill

Date introduced to the House of Commons	24 November 2004
Date introduced to the House of Lords	8 February 2005
Current Bill Number	House of Lords 24
Previous Reports	4th

Introduction

2.1 This is a Government Bill, brought from the House of Commons on 8 February 2005. Baroness Scotland 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.[33] The Bill is due to receive its Second Reading in the Lords on 7 March 2005.

2.2 We reported on our initial consideration of the Bill in January 2005, identifying what we regarded as the most important human rights issues raised by the Bill and why we had written to the Government on 17 January 2005 asking a number of questions.[34] Caroline Flint MP, Parliamentary Under Secretary of State at the Home Office, responded to our letter on 3 February 2005, enclosing a memorandum by the Home Office in response to our questions.[35] In this Report we set out our conclusions about the human rights compatibility of the Bill in light of the Government's response.[36] It should be read in conjunction with our earlier Report.

Part 1 of the Bill: Gathering, storage, use and disclosure of information

2.3 In our earlier Report on the Bill, we raised a number of concerns about the compatibility with the right to respect for private and family life in Article 8 ECHR of provisions in Part 1 of the Bill concerning the powers of the Serious Organised Crime Agency (SOCA) in relation to the gathering, storage, use and disclosure of information.[37]

"In accordance with the law"

2.4 In particular, we expressed serious concerns about whether the provisions of the Bill satisfy the requirement in Article 8 that interferences with private life be "in accordance with the law", because the relevant provisions of the Bill are drafted in terms too general to satisfy the requirement of foreseeability, whereby a person must be able to foresee the consequences for him or her of a law which potentially affects them.

2.5 The Government in its reply accepts that both SOCA's functions and the information gateway provisions in the Bill are "drawn widely", but argues that this is necessary "to

33 Bill 24–EN

34 Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224, paras. 1.1–1.144

35 Appendix 2a

36 This Report does not deal with the new provisions concerning protection of the activities of animal research organisations (new clauses 142–146), introduced by the Government at Report Stage in the Commons, which the Committee has not yet considered. They may be the subject of a further report if the Committee considers them to raise significant human rights issues.

37 Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224, at paras. 1.20–1.43

encourage the proper and legitimate free flow of information between SOCA and appropriate bodies which will be the lifeblood for the effective and efficient functioning of SOCA".[38] The Government therefore accepts that the powers conferred by the Bill in relation to the gathering, storage, use and disclosure of information are wide, indeed that they are designedly so. Its main response to our suggestion in our earlier Report that, precisely because of the width of those powers, more adequate safeguards are required is that any additional safeguards would be "otiose", because both the Data Protection Act 1998 and the Human Rights Act 1998 will apply to any processing of information by SOCA.[39]

2.6 We recently had occasion to comment on precisely this argument in the context of the provisions authorising the use and disclosure of information in the Commissioners for Revenue and Customs Bill.[40] We pointed out that while it is legally correct to say that the duties under both the DPA 1998 and the HRA 1998 will apply, in practical terms this does not provide an answer to the lack of effective safeguards for the reasons pointed out by the Privy Counsellor Review of the Anti-terrorism, Crime and Security Act 2001 ("the Newton Report") in the context of that Act's provision for public bodies to disclose information to assist criminal investigations or proceedings, or to the intelligence and security agencies. The Newton Committee said—

> The protection offered by the Human Rights Act 1998 and the Data Protection Act 1998 seems to us to be illusory since the burden will lie on the individual to complain about the disclosure of their confidential information in circumstances where, almost by definition, he or she will be unlikely to know that disclosure has occurred.[41]

2.7 Moreover, as we pointed out in our earlier Report on the present Bill,[42] the Data Protection Act contains significant exemptions from the Act's protections where personal data are processed for the purposes of the prevention or detection of crime,[43] and the protection of the common law of confidentiality is expressly disapplied.

2.8 **We therefore remain of the view that the applicability of both the HRA 1998 and the DPA 1998 is no substitute for strong safeguards in the statutory scheme to ensure that the wide powers to gather, store, use and disclose confidential information about an individual, of which that individual will generally be unaware, is only exercised in circumstances where it is proportionate to do so. We draw this matter to the attention of each House**.

2.9 In our earlier Report, one of our principal concerns was the lack of specificity about the kind of information which can be gathered, stored, used or disclosed under powers

38 Appendix 2a, para. 5

39 ibid. The argument is repeated throughout the memorandum: see for example paras 15, 22, 24, 25, 27 and 28

40 Sixth Report of Session 2004–05, *Scrutiny: Second Progress Report*, HL Paper 41, HC 305, at paras 1.27–1.28

41 Privy Counsellor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review: Report*, HC 100, 2003–04, at para. 164.

42 Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224, at para. 1.35

43 Data Protection Act 1998, s. 29(1)(a) and (2)–(4). SOCA's own 'Statement of Information Management Practice' (deposited in the Libraries of each House on 10 February 2005) states at para. 8 that "s. 29 of the DPA creates powerful exemptions where personal data are disclosed for purposes related to the prevention and detection of crime", and, at para. 13, that "it is highly likely that any disclosures of personal data which are made within the terms of s. 29(3) DPA will fully comply with the disclosing person's obligations under the Human Rights Act."

provided by the Bill. In particular, we expressed concern that SOCA's "intelligence function" (its separate powers in relation to information) is not confined to information relating to serious crime but extends to information relating to crime generally, and that "information relating to crime" includes information relevant to the reduction of crime in other ways and the mitigation of its consequences, phrases we found too broad and vague to enable a person to know what kind of information about them could be gathered, stored, used and disclosed by SOCA pursuant to these powers. We also expressed our concern about the lack of a definition of "serious organised crime" in the Bill itself.

2.10 The Government in its response very fairly points out that serious organised crime does not operate in isolation from crime in general, but is closely interconnected with ordinary crime.[44] We accept this. We also accept that it would be artificial to suppose that there could be a clean dividing line between serious organised crime, which is the exclusive function of one agency, and ordinary crime, which is the exclusive function of another.

2.11 However, the Government proceeds from this premise to the conclusion that to limit SOCA's function to serious organised crime would cripple its effectiveness because it would require it to ignore crime in general, and that it must therefore be given an intelligence function in relation to crime generally. We do not accept this. We are concerned that the Government appears to be invoking a particularly serious threat (from serious organised crime) to justify taking exceptional powers to interfere with the individual's private life, which it then uses in relation to the lesser threat posed by ordinary crime. This is how civil liberties are gradually eroded over time.

2.12 We do not accept that restricting the intelligence function of SOCA to information concerning serious organised crime would cripple its effectiveness. The Government is concerned that such a limitation "would run the risk of SOCA having to determine whether the pursuit of any criminal activity for intelligence or enforcement purposes lawfully fell within its scope, significantly hampering its operational efficiency".[45] We concede that the tighter definition of its intelligence function would require the new agency to consider whether any particular use of its powers in relation to information lawfully fell within the scope of those powers, but that is the very purpose of constraining very wide discretionary powers within a legal framework.

2.13 **In our view, it is possible to devise a statutory formulation which would enable SOCA to exercise an intelligence function in relation to information concerning ordinary crime insofar as it is relevant to the exercise of its functions concerning serious organised crime. That would be a significantly narrower power than that currently conferred by the Bill. We draw this matter to the attention of each House**.

2.14 In our earlier Report we also expressed the view that adequate safeguards needed to be introduced into the Bill in order to provide sufficient clarity and precision about the scope and conditions of exercise of the authorities' discretionary power to gather, store, use and disclose information. We also gave a number of examples of the sorts of safeguards which the European Court of Human Rights has regarded as relevant when ascertaining whether

44 Appendix 2a, paras 8–12

45 Appendix 2a, para. 11

the legal framework for gathering, storing, using and disclosing information satisfies the requirement that interferences be "in accordance with the law".[46]

2.15 The Government does not accept the need for further safeguards on the face of the Bill, or even in a code.[47] However, it says that "in order further to secure its observance of Article 8 and the DPA SOCA has put in place standards for the identification of its information needs, its handling, storage, processing and dissemination of data." These standards are contained in SOCA's Statement of Information Management Practice. We have considered this document carefully to ascertain whether it meets the concerns we have expressed above and in our earlier report about the lack of adequate safeguards. The relevant standards are contained in paras 19–25. We welcome SOCA's commitment to adhere to these standards for the internal management of information. We agree that their adoption should help to secure further the Agency's observance of Article 8 ECHR in practice. However, as we recently commented in our report on the Commissioners for Revenue and Customs Bill,[48] reliance on management controls to guarantee the appropriateness and proportionality of using and disclosing personal information does not satisfy the requirement that interferences with the right to respect for private life must be in accordance with the law, if there are insufficient legally binding safeguards in the legislation itself.

2.16 **While we welcome SOCA's commitment to adhere to the standards set out in its Statement of Information Management Practice, we are disappointed that, notwithstanding our serious concerns about the lack of adequate safeguards on the face of the Bill, the Government will not be introducing any such safeguards. We have considered carefully the Government's reasons for not doing so but we do not find them persuasive. We remain of the view that the provisions of the Bill concerning the gathering, storage, use and disclosure of information give rise to a significant risk of incompatibility with Article 8 ECHR in the absence of such safeguards. We draw this matter to the attention of each House**.

Legitimate aim

2.17 In our earlier report we expressed concern that certain of the Bill's provisions may not serve a "legitimate aim" in the sense of one of the purposes specified in Article 8.2 ECHR. We asked the Government which of the other purposes in Article 8.2 are relied upon as the legitimate aim justifying powers to interfere with Article 8 rights in order to "mitigate crime's consequences". In its reply the Government states that "in light of the type of work envisaged under these functions we consider it is unlikely that 'the reduction of crime in other ways' and the 'mitigation of its consequences' will involve the transfer of information about individuals.[49] **We welcome this clarification of the scope of the powers relating to the use and disclosure of information and we draw this matter to the attention of each House.**

46 Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, at para. 1.37

47 Appendix 2a, para. 29

48 Fourth Report of Session 2004–05, op cit., at para. 1.17

49 Appendix 2a, para. 22

2.18 We also asked the Government which of the purposes in Article 8.2 ECHR was relied on as the legitimate aim justifying disclosure of information for the purpose of the prevention, detection or investigation of conduct for which penalties other than criminal penalties are provided. The Government response is that the purpose of this provision is to ensure that SOCA will be able to share intelligence and information with local police forces for the purpose of their investigation and enforcement powers in relation to criminal behaviour and activities which are sanctioned by non-criminal penalties such as ASBOs.[50] It therefore relies on "the prevention of disorder or crime" in Article 8.2, or alternatively "the protection of the rights and freedoms of others".

2.19 **We note that civil orders, such as ASBOs, are available in respect of a wide range of behaviour which falls short of being criminal. We doubt that the provision in the Bill providing for the disclosure of information in relation to conduct for which non-criminal penalties are available can be said to serve the purpose of "the prevention of disorder or crime" in Article 8.2. The protection of the rights and freedoms of others may be capable of providing a justification, but reliance on this aim to justify a power conferred on an agency concerned with serious organised crime raises questions about the proportionality of the power. We draw this matter to the attention of each House**.

Necessity of the interference

2.20 We wrote to the Government asking it to identify the evidence demonstrating the necessity for conferring such wide powers on an agency designed to combat serious organised crime. The Government in its response relies on the magnitude of the harm caused by serious organised crime.[51] It states that in its view the powers to process information are entirely proportionate with SOCA's fundamental objective of tackling the harm cause by serious organised crime, which costs the UK £20 billion a year and also causes fear in communities. No other evidence appears to us to be identified by the Government.

2.21 **We do not doubt the need for a legislative response to combat serious organised crime. However, we question whether the mere assertion of the scale of the problem constitutes a sufficient justification for conferring on an agency created to combat such crime such extensive powers in relation to information concerning ordinary crime. We draw this matter to the attention of each House**.

Part 3 of the Bill: Police Powers etc

2.22 In our earlier Report on the Bill, we drew attention to concerns relating to proposals for extensions to powers of arrest and to powers to issue search warrants, for a power to photograph people in a place other than a police station in certain circumstances, and for civilian employees of police forces to exercise a number of powers of constables. We now return to these matters in the light of the Government's response.

50 Appendix 2a, para. 31

51 ibid., para. 17

Extended powers of arrest

Reasons for arrest

2.23 We asked the Home Secretary why it was thought that the purposes for which an arrest would be allowed under proposed new section 24 of the Police and Criminal Evidence Act 1984 (hereafter 'PACE') would be within the permitted reasons for interfering with a person's liberty under Article 5.1(c) of the ECHR, which allows 'the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on a reasonable suspicion of having committed an offence or when it is reasonably considered necessary to do so to prevent his committing an offence or fleeing after having done so'. We also asked about compatibility with the right to respect for private life under Article 8. We were particularly concerned about two of the reasons proposed in the Bill for making arrests: first, to prevent the arrestee from harming himself or herself; secondly, to allow the prompt and effective investigation of the offence or of the conduct of the arrested person.[52]

2.24 In its reply, the Government drew attention to the fact that the person arrested would have to be reasonably suspected of having committed, committing or being about to commit a criminal offence.[53] The Government also mentioned the positive obligation of public authorities under Article 2 of the ECHR to protect people's lives, and promised that there would be guidance in the proposed new Code of Practice on the use of the power to arrest people.[54]

2.25 As the reasons noted above would need to be met in addition to that requirement, enhancing rather than limiting the controls on the power to make an arrest, we accept that the proposed provisions would be likely to be compatible with the right to liberty under Article 5.1 of the ECHR. We also think that the interference would be likely to be justified as a necessary and proportionate interference with the right to respect for private life in accordance with Article 8.2 of the ECHR.

Effect of changes on availability of other powers

2.26 Noting that a number of other powers to interfere with people's liberty and physical integrity (including establishing road checks or road blocks, obtaining orders for access to or production of confidential or journalistic material, detaining a suspect for over 24 hours without charge, and delaying the exercise by suspects of their rights to have someone informed of their arrest and to receive legal advice) currently depend on a person having been arrested for a serious arrestable offence, we were concerned that the threshold circumstances for bringing those other powers into play would be unjustifiably diluted by the abolition of the concept of the 'arrestable offence' and its replacement with 'indictable offence' under what are now clauses 106 and 107 of, and Schedule 7 to, the Bill. We asked why the Government considered that using the powers where a person had been arrested

52 Proposed new ss. 24(5)(c)(i) and (d) and 24A(4)(a) of PACE in cl. 106 of the Bill. See our Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224, para. 1.83

53 Appendix 2a, para. 37

54 ibid., paras. 39 and 42

for a mere indictable offence would be compatible with the right to liberty and the right to respect for private life under Articles 5 and 8 respectively of the ECHR.

2.27 The Government replied that there could be circumstances in which it would in principle be proportionate to use the powers in respect of a non-summary offence that is not currently an arrestable offence. It points out that there are controls on the use of these powers, sometimes by senior police officers (in relation to setting up road blocks, detaining a suspect for over 24 hours without charge, and delaying the exercise by suspects of their rights to have someone informed of their arrest and to receive legal advice) and in other cases by justices of the peace or judges (in respect of obtaining orders for access to or production of confidential or journalistic material, or detaining a suspect for over 36 hours without charge). In addition, the principles on which the powers are to be exercised are contained in a Code of Practice issued under section 66 of PACE. The Government considers that these safeguards are effective ways of ensuring that Articles 5 and 8 of the ECHR will be met.[55]

2.28 This response is insufficient to alleviate our concern. The powers are not currently available in respect of arrestable offences, but only for *serious* arrestable offences. As the Government accepts, the Bill's proposals would make them available not just in respect of offences which are not serious arrestable offences, but in respect of offences which are not arrestable offences at all, if they are not so minor as to be triable only summarily. This is a significant extension of the powers. The Government has offered no explanation of its reasons for believing that there is a pressing social need for such an extension, or of its reasons for thinking that the extra availability of the powers would be proportionate to a legitimate aim. **We are therefore not satisfied that using the powers in cases which are not currently serious arrestable offences, in circumstances which interfere with the right to private life, would be justifiable in accordance with the requirements of Article 8.2 of the ECHR. We draw this to the attention of each House.**

Broadening the power to issue search warrants

2.29 In our previous report on the Bill, we drew attention to the risk that the proposed new power of a justice of the peace to issue a warrant ('an all-premises warrant') to enter more than one set of premises occupied or controlled by a named person, including premises not identified in the warrant or in the information supporting the application for it, would not be proportionate to a pressing social need, and so would not meet the requirement in Article 8.2 of the ECHR that any interference by a public authority with the right to respect for private life and the home be 'necessary in a democratic society' for one of the permitted objectives listed in Article 8.2. The new power would be contained in proposed amendments to section 8 of PACE, now contained in clauses 109 and 110 of the Bill.

2.30 Article 8 of the ECHR provides—

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

55 Appendix 2a, paras. 44–45

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

2.31 In view of the Government's failure up to that time to explain why it thought that the extended powers were necessary in a democratic society for one of the purposes listed in Article 8.2, we asked why it thought that the exercise of the powers would be compatible with rights under Article 8.[56]

2.32 It seems from the Government's reply that the purposes of the proposed changes are—

- to simplify the process of obtaining warrants, reducing bureaucracy by removing the necessity for a justice of the peace to grant separate warrants in respect of each set of premises which the police wish to search;[57]
- to reduce delays to investigation which currently occur when the police have to apply for an additional warrant for new premises 'when the basis for the search remains the same';[58] and
- to respond to 'the increasing complexity and organisation of criminals'.[59]

2.33 The Government considers that the safeguards would be adequate to protect rights, because an officer applying for a warrant would still have to satisfy the justice of the peace that the issue of a warrant would be justified in the circumstances of the investigation and having regard to the evidence that they reasonably believe will be found.[60] The justice of the peace would be able 'to ensure that the actions of the police are appropriate and proportionate'.[61] An analogy is drawn to Customs and Excise writs of assistance, which, the Government asserts, 'are thought to be compatible with the ECHR'.[62] We were concerned that there might be a lack of proportionality in making the power to issue search warrants under section 8 of PACE available in respect of offences which are not serious arrestable offences if the proposal (noted above) to abolish the class of serious arrestable offences is accepted. In its reply, the Government says that it does not follow from the current limits of the power—

> that it is disproportionate to reformulate the power bearing in mind the margin of discretion in this area. The provision only creates a power that must be exercised in a way which complies with Convention rights …. It has not been suggested that the current powers contain inadequate safeguards, and we do not consider that these

56 Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224, paras. 1.90 and 1.95–1.96
57 Appendix 2a, paras. 48 and 51
58 ibid., para. 49
59 ibid., para. 48
60 ibid.
61 ibid., para. 49
62 ibid., para. 48

> existing safeguards will be weakened merely because the power is in principle extended to a new category of cases.[63]

2.34 The Government's response does not alleviate our concerns. The proposed power would allow a justice of the peace to issue a warrant in respect of premises which the officer applying for the warrant cannot identify, on multiple occasions over a period of three months. It is not clear to us how a justice of the peace would be able to assess the proportionality of a search of unknown premises (which may be a private dwelling house) at any reasonable time of day or night, using force if necessary, at an unspecified time up to three months later, by which time circumstances might have changed significantly. The justice of the peace would be unable to exercise any continuing control over the use of this very wide authorisation having once issued it. Although we accept that senior police officers are usually very responsible when authorising their subordinates to use powers subject to their control, we are not satisfied that the administrative control by another police officer without external and independent control is likely to be a sufficiently reliable safeguard to ensure that an all-purposes warrant will be used only in response to a pressing social need and in a manner which is proportionate to a legitimate aim.

2.35 The Government's reference to Customs and Excise writs of assistance heightens out concern. We do not share the Government's confidence that these are compatible with rights under Article 8 of the ECHR. They are curious historical anomalies, first introduced by statute in the Statute of Frauds 1662.[64] They are issued out of the office of the Queen's Remembrancer, who is the Senior Queen's Bench Master *ex officio*, and are held in the offices of the Customs and Excise investigations branch, where the senior officer makes himself or herself responsible for their use by individual officers. They authorise any officer who is in possession of one to enter, if need be by force, any place where there is reasonable cause to suspect that anything liable to forfeiture under the Customs and Excise Acts is kept or concealed, and to search the place and seize any goods which may be found. As the Government says, they are issued at the beginning of each reign, and remain in force until six months after the end of it.

2.36 They are, in short, a general search warrant entirely free of prior judicial control. When originally introduced, the officer using one was liable at common law if no goods liable to forfeiture were in fact found.[65] Statute has weakened that protection for householders: statute now provides that a search under a writ of assistance can be justified by reasonable suspicion even if no goods liable to forfeiture are found. As a result, legal accountability for use of a writ is limited. The writ offers an unparalleled opportunity for arbitrary invasion of privacy and property. As such, it has been subjected to withering criticism in Canada, where the Canadian Law Reform Commission recommended its abolition in 1983.[66] Although in this country the Committee on Enforcement Powers of the Revenue Authorities in its 1985 *Report* recommended its retention with minor additional controls,[67] the legislation has never been tested against the standards of the ECHR. If it

63 ibid., para. 51

64 13 & 14 Car. II, ch. 11. On the history of the writ, see M. H. Smith, The Writs of Assistance Case, Berkeley: University of California Press, 1978

65 *Cooper v Booth* (1785) 2 Esp. 135

66 Canadian Law Reform Commission, Report No. 19 (1983)

67 Committee on the Enforcement Powers of the Revenue Authorities, *Report*, Cmnd. 9440 London: HMSO, 1985, vol. 4, paras. 35.7.52–35.7.79

were to be so tested, we consider that there is a significant risk of its being held to be insufficiently controlled to meet the requirements of Article 8.2 of the ECHR. The impression that the Government regards the proposed 'all premises' warrant as a major step towards an equivalent authorisation for the police is deeply troubling.

2.37 These factors would be sufficient to give rise to major misgivings as to the human rights implications of the proposed new warrants even if the Bill did not contemplate making them available in respect of far less serious offences than the current, more limited, warrants cover. As it is, the combination of these factors makes it impossible for us to be satisfied that the proposed new powers could be shown to be proportionate to a pressing social need in pursuit of a legitimate aim as required by Article 8 of the ECHR.

2.38 **For those reasons we conclude that the proposals in the Bill would be likely to give rise to a significant risk of incompatibility with the right to respect for private life and the home under ECHR Article 8. We draw this to the attention of each House.**

Taking photographs and moving images

2.39 In what is now clause 112 of the Bill there is a proposal to amend section 64A of PACE to allow people to be photographed in a place other than a police station, either with or without consent, or to have a moving image made, if he or she has been—

- arrested by a constable or taken into custody by a constable following arrest by someone else for an offence; or
- required to wait with a community support officer under the Police Reform Act 2002; or
- given a fixed penalty notice by a constable under the Criminal Justice and Police Act 2001 or the Road Traffic Offenders Act 1988 or the Education Act 1996, or by a community support officer or accredited person under the 2002 Act.

2.40 In our earlier Report on the Bill we noted that requiring someone to allow a photograph or moving image of him or her to be taken without his or her consent is likely to engage the right to respect for private life under ECHR Article 8, both in relation to the initial making of the image and in respect of its subsequent storage and use by the officer making the image or other officers. We therefore asked the Government why it thought that the power would be justified under Article 8.2, taking account of any safeguards to prevent the image from being held for longer than necessary or used for an improper purpose.

2.41 In relation to the initial making of the image, the Government replied that it was regarded as a proportionate response to a problem that sometimes arises when a suspected offender is dealt with on the street without being arrested, and in later proceedings there is a dispute as to whether the person charged with an offence was the person who was required to wait by a Community support officer or issued with a fixed penalty notice. In respect of the use of the image, the Government pointed out that images could not be disclosed to others save for a purpose related to the prevention or detection of crime, the

investigation of an offence or the conduct of a prosecution.[68] The Government also undertakes to give further guidance on the taking of an image in the street, focusing on maintaining privacy and the exercise of discretion, in a revision to the Code of Practice on identification.[69]

2.42 **In the light of this, and bearing in mind that the retention and storage of the image would have to meet the requirements of ECHR Article 8.2, we are satisfied that this power is unlikely to give rise to a significant risk of violating the right to respect for private life under ECHR Article 8**.

New powers for civilian employees of police forces

2.43 In what are now clauses 116 to 119 and Schedules 8 and 9, the Bill proposes to allow people other than constables, employed by and under the direction and control of the chief officer of police, to exercise the powers of a custody officer in a police station (clauses 116 and 117), to operate in plain clothes to investigate an offence (clause 118), and to obtain information about registration plate suppliers and people's motor insurance details (clause 119). This last power would also be exercisable by civilian employees of the British Transport Police Authority who are under the direction and control of the Chief Constable of the British Transport Police Force. Taken as a whole, the proposals would make people who do not hold the office of constable responsible for protecting the rights of suspects and others in the course of criminal investigations. We therefore asked the Government what steps would be taken to ensure that the civilian employees exercising these powers would be properly trained and subject to an appropriate disciplinary structure before they start to exercise their new powers.

2.44 With regard to disciplinary structures, the Government referred to the requirement in sections 38(4) and 39(4) of the Police Reform Act 2002 that, before designating a person other than a constable to exercise the functions of a constable, the chief officer of police must 'be satisfied that the person is suitable, capable and has received adequate training to carry out the functions and exercise the power and duties to be conferred on him by virtue of the designation.' The designated persons would be subject to the normal disciplinary arrangements of their home police force, and (by virtue of Part 2 of that Act) to the jurisdiction of the Independent Police Complaints Commission.[70]

2.45 In relation to training, the Government explains that there is a national training programme available for custody officers, and there are National Occupational Standards for the Police Sector covering the work of custody officers. Work is under way by the National Centre for Policing Excellence and stakeholders to develop guidance on achieving those standards, which, combined with the competency framework, should later this year provide 'definitive standards for police and police staff employed in the custody suite'.[71] The other functions which, under the Bill, could be conferred on Community Support Officers are the subject of a recently completed National Learning and Development

68 Appendix 2a, paras. 54 and 55, and see PACE, s. 64A(4)

69 Appendix 2a, para. 55

70 Appendix 2a, para. 57

71 Appendix 2a, paras. 58–60

Programme for Community Support Officers, developed by the Central Police Training and Development Authority (CENTREX).[72]

2.46 We welcome these steps. However, the Government told us that it remains 'a matter for individual force policy on training required before the appointment of police officers' to the role of custody officer. We are particularly concerned about the use of civilian employees to discharge the responsibilities of custody officers. The custody officer has a high constitutional responsibility for protecting the rights of suspects. First, he or she must decide whether to authorise detention of a person brought to a police station after being arrested elsewhere. In performing this role, which is a key protection for individual liberty under ECHR Article 5, the custody officer must be ready to refuse the request of the arresting officer, who may sometimes be senior in rank to the custody officer, that detention be authorised. Secondly, the custody officer must ensure that the rights of suspects are respected while they are in detention. Here, too, it may be necessary for the custody officer to act contrary to the wishes of other, sometimes more senior, officers. It is likely to be uncomfortable even for someone holding office under the Crown and responsible personally for his or her decisions and actions to take this step. A civilian employee of the police, in relation to whom the other officers have the character of an employer, is likely to find it even more difficult.

2.47 **We consider that careful thought needs to be given to the machinery for ensuring that any civilian employee who performs the duties of a custody officer is fully aware of their duties, including the obligation to refuse, if necessary, to comply with the wishes of other officers and to give appropriate instructions to those officers. It is equally important to ensure that all police officers are aware that they will have to accept the orders and decisions of the civilian employee who performs the functions of a custody officer. As this will involve a reversal of the normal relationship between police officers and civilian employees, instruction for all police officers, as well as all civilian employees designated to perform the functions of a custody officer, is essential. We recommend that this should be provided**.

2.48 **We further recommend that successful completion of the programmes to which the Government referred in its reply to us should be a necessary condition for designating a person for the purpose of exercising any of the powers which the Bill seeks to extend to people who are not police officers**.

Part 4 of the Bill: Public Order in Public Places etc

2.49 We raised with the Government concerns about five matters—

- the proportionality of a proposed new offence of harassment with a related power to grant an injunction restraining an offence or apprehended offence;
- the compatibility with freedom of expression under ECHR Article 10 of the proposed new offence of inciting religious hatred;

72 Appendix 2a, para. 61

- the compatibility of a proposed new offence of entering a designated site as a trespasser, and of police powers in the vicinity of Parliament, with freedom of expression and assembly under Articles 10 and 11 respectively of the ECHR;

- the steps to be taken to ensure that judges are aware of the duties of the United Kingdom under Articles 3.1 and 40.1 of the Convention on the Rights of the Child (CRC) when giving effect to a proposed presumption in favour of allowing the reporting of proceedings against children who are accused of breaching anti-social behaviour orders (ASBOs); and

- the steps to be taken to ensure that a body to which a local authority might be allowed to contract out its responsibilities in relation to ASBOs would act in a manner compatible with rights under the ECHR and the Human Rights Act 1998, and would take into account the United Kingdom's obligations under the CRC.

Harassment

2.50 We asked the Government about the compatibility of the proposed new offence, to be contained in a new sub-section (1A) in section 1 of the Protection from Harassment Act 1997, inserted by what is now clause 121(2) of the Bill, with the rights to manifest a belief in public, to freedom of expression, and to freedom of peaceful assembly under Articles 9, 10 and 11 respectively of the ECHR. The proposed new offence would consist of pursuing a course of conduct (meaning either conduct on at least two occasions in relation to a single person or conduct on one occasion in relation each of two or more persons)[73] which involves harassment of two or more persons, and when the person pursuing the course of conduct knows or ought to know that it involves harassment of those persons, and by which he or she intends to persuade any person (not necessarily the persons harassed) not to do something that that person is entitled or required to do, or to do something that he or she is not under an obligation to do. Clause 121(5) would insert a new section 3A in the 1997 Act allowing the High Court or County Court to grant an injunction restraining a breach or apprehended offence under the proposed new section 1(1A) of the 1997 Act.

2.51 The Explanatory Notes to the Bill as introduced to the House of Lords say that the aim of these provisions is to remove a difficulty caused by decisions of courts to the effect that the existing offence under section 1 of the Protection from Harassment Act 1997 does not apply to companies but only to individuals. The Explanatory Notes suggest that, as a result, 'it is unclear how far employees of a company can benefit from this provision when they have not previously themselves been harassed even though a fellow employee has been'.[74] (This is a slightly different formulation of the purpose of the measure from that set out in the Explanatory Notes to the Bill as first introduced to the House of Commons).[75] In our earlier Report on the Bill, we noted that freedom to protest forcefully for one's beliefs, and to do it where it is likely to have an effect on people's thinking, is one of the hallmarks of a democratic society. While we accepted that there was a pressing social need to protect people going about their lawful business and private lives against harassment and

73 Proposed new s. 7(3) of the Protection from Harassment Act 1997, to be inserted by cl. 121(7)(a) of the Bill

74 HL Bill 24—EN, para. 295

75 See our Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224, para. 1.111

disruption on account of their beliefs or lawful activities, we drew attention to the very wide formulation of the prohibited purpose (persuading a person not to do something he or she is entitled or required to do, or persuading him or her to do something he or she is not under an obligation to do), which seemed to us to be capable of inhibiting ordinary political demonstrations. We therefore asked how the Government expected that the offence would be prevented from operating in a way that disproportionately interferes with rights under Articles 9, 10 and 11 of the ECHR.

2.52 The Government in its reply accepted that the measure would go beyond the context of protests against bioscience companies by animal-rights extremists, and expressed its consciousness of 'the need to ensure that legitimate protest is not restricted in any way.' However, the Government did not agree that the proposed offence was too widely formulated. It drew attention to the need for harassment to have occurred on at least two separate occasions, although it need not have been directed against the same individual on each of those occasions.[76] The Government accepted that the offence might be committed by people engaged in a protest outside a MP's constituency office, for example, which on one occasion harassed the MP and on another occasion harassed the MP's secretary. However, it considered that where public order is threatened by a large group of demonstrators the police are more likely to use other powers, such as those under the Public Order Act 1986, to deal with disorder.[77] The Government also undertook to issue guidance to the police and others on the use of the new provisions before they are brought into effect.[78]

2.53 **We are not wholly reassured by the Government's reply. The notion of harassment seems to us to be sufficiently elastic to cover a wide range of demonstrations and protests directed against people and institutions. Political protestors are particularly likely to have the intention of persuading people to do things they have no obligation to do, or not to do things they are free to do. We accept that the protestors would commit an offence only if they took action on two or more separate occasions; indeed, we did not intend in our earlier Report on the Bill to suggest otherwise; but the occasions might be separated by a long period of time, and the protests might be at entirely different locations**.

2.54 **We are therefore not convinced that the new offence proposed in the form of a new section 1A of the Protection from Harassment Act 1997 is drafted as precisely as would be desirable in order to minimise the risk of a violation of the rights under Articles 9, 10 and 11 of the ECHR. Furthermore, assuming that the Government is correct in saying that the police would normally use powers under the Public Order Act 1986 to deal with disorder, we find it hard to see that it is necessary and proportionate for the proposed new offence to cover ordinary political protests. We draw these matters to the attention of each House**.

76 Appendix 2a, paras. 63–64

77 ibid., para. 66

78 ibid., para. 67

Stirring up religious hatred

2.55 Clause 124 of and Schedule 10 to the Bill would amend Part 3 of the Public Order Act 1986, to create a number of new offences of incitement to religious hatred, to be defined in a new section 17A of the 1986 Act as meaning 'hatred against a group of persons defined by reference to religious belief or lack of religious belief'.[79] In our earlier Report on the Bill, we outlined the background to these proposals and their possible human rights implications,[80] and reached the following conclusions—

- In view of the approach of the European Court of Human Rights to the stirring up of racial hatred and of Article 20 of the ICCPR and its effect on the interpretation of Articles 9 and 10 of the ECHR, it seemed very likely that it would be a justifiable interference with freedom of expression and freedom of religion to make advocacy of religious hatred that constitutes incitement to hostility, violence or discrimination a criminal offence.

- In order to be justifiable for that purpose, legislation would have to be shown to be clearly aimed at it and proportionate to the goal. The proportionality test in this case should be a fairly strict one: if restrictions were wider than reasonably necessary, they could threaten the freedom of public debate and religious expression and undermine the tolerance of other points of view which are essential foundations of our democratic and multi-faith society.

- The proposed legislation is arguably wider than necessary for the limited purpose set out in above, in that it would catch words, conduct, publications and recordings which are likely to stir up religious hatred but do not advocate it, and it is not limited to words, conduct, publications and recordings which constitute incitement to discrimination, hostility or violence: it applies whenever the words, etc., are intended or likely to stir up hatred, without regard to the more remote consequences.

- These restrictions on freedom of expression and, potentially, of religious manifestation could still be proportionate to the legitimate aim. The wider they are, the greater is the risk that they will be regarded as disproportionate; but it is significant that the conditions for conviction under the legislation proposed in the Bill would set a higher threshold than Danish legislation at issue in the case of *Jersild*.[81]

- The restrictions would be no greater than existing restrictions in relation to incitement to racial hatred under the Public Order Act 1986, but those were enacted well before the Human Rights Act 1998, and were not subjected by Parliament to detailed scrutiny by reference to human rights standards.[82]

79 Para. 3 of Sched. 10 to the Bill. For comparison, s. 17 of the Public Order Act 1986 currently defines 'racial hatred' as meaning 'hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.'

80 Fourth Report of 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224, paras. 1.119–1.127

81 (1994) 19 EHRR 1

82 Fourth Report of 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224, para. 1.128

2.56 We therefore asked the Government why it considered that the provisions as drafted were likely to be regarded as a proportionate response to a pressing social need so as to justify the interference with Article 10 of the ECHR.

2.57 In its reply, the Government said that, while it did not believe that incitement to religious hatred was commonplace—

> it does exist and where it exists it has a disproportionate and corrosive effect on communities, creating barriers between different groups and encouraging mistrust and suspicion. At an individual level this can lead to fear and intimidation. It can also lead indirectly to discrimination, abuse, harassment and ultimately crimes of violence against members of our communities. It is legitimate for the criminal law to protect citizens from such behaviour.[83]

2.58 After pointing out that the behaviour is not always covered by existing offences (for example, they do not cover religious groups which are not also groups defined by reference to ethnic origin such as Sikhs and Jews),[84] the Government set out five grounds for its belief that the proposed measures would be proportionate to the pressing need to combat incitement to religious hatred, as follows[85]

- The current offence of incitement to racial hatred, on which the proposed offence is based, is only rarely prosecuted, with only 44 convictions between 1986 and the end of 2004. It is accepted as a necessary measure to combat racism.

- There has been no new case law since 2001, when we concluded that similar measures to the ones proposed now were likely to be compatible with Convention rights,[86] to suggest that the current proposals are less likely to be compatible now than they were then.

- In deciding whether to authorise prosecutions for the proposed offences, the Attorney General would have to act compatibly with Convention rights, and the courts would have to interpret 'hatred' in a way that respects Convention rights.

- In performing their functions, both the Attorney General and the courts would have to have regard to freedom of religion under Article 9 of the ECHR, and to Article 17 which prohibits abuse of rights. One's rights under Article 9 include a right to manifest one's religion without having hatred stirred up against one, and this includes a right to proselytise, an activity which in the Government's view can be conducted without stirring up hatred. The purpose of the proposed measures is to prevent such hatred being stirred up, and to that extent they seek to protect Article 9 rights.

- The effect of Article 17 of the ECHR is to deprive people of the right to freedom of expression under Article 10 so far as they use that freedom in a manner which is 'incompatible with the values proclaimed and guaranteed by the Convention,

83 Appendix 2a, para. 69

84 ibid., para. 70

85 ibid., para. 71

86 Second Report of 2001–02, *Anti-terrorism, Crime and Security Bill*, HL Paper 37, HC 372, paras. 57–60

> notably tolerance, social peace and non-discrimination', as the European Court of Human Rights held in its admissibility decision in *Norwood v. United Kingdom*.[87] The Government considered that many cases arising under the proposed new measures would fall within the scope of Article 17.

2.59 We find this reasoning persuasive. We accept the existence of a serious, albeit limited, problem of incitement to hatred on religious grounds. We consider that the measures proposed in the Bill are unlikely to give rise to any violation of the right to freedom of expression under Article 10 of the ECHR, for two reasons. First, incitement to hatred on religious grounds will often not attract the protection of Article 10, because it will fall foul of Article 17, which provides

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

2.60 In *Norwood v. United Kingdom* the applicant was a regional organiser for the British National Party who displayed in the window of his first-floor flat a large poster with a photograph of the Twin Towers in flames, together with the words 'Islam out of Britain—Protect the British People' and a crescent and star in a prohibition sign. He was charged with the offence of displaying writing, a sign or other visible representation which was threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby, contrary to section 5 of the Public Order Act 1986. The prosecution also alleged that he should be subject to aggravated penalties on account of the display being motivated by hostility towards a racial or religious group, in accordance with sections 28 and 31 of the Crime and Disorder Act 1998 as amended by the Anti-terrorism, Crime and Security Act 2001, section 39. The applicant argued that his conviction violated his right to freedom of expression under ECHR Article 10, and was discriminatory contrary to Article 14. The Second Section of the European Court of Human Rights wrote—

> The Court notes and agrees with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14 … [88]

2.61 Where words, signs, etc., are used with the intention of stirring up religious hatred, we cannot imagine circumstances in which such behaviour would fall outside Article 17.

2.62 Secondly, where there is no intention to stir up religious hatred, and a prosecution is brought on the basis of words, etc., which are objectively likely to stir up such hatred, we consider that the socially divisive effects of such displays would make it justifiable to

87 App. No. 23131/03, decision of 16 November 2004, Eur. Ct. HR (Second Section), unreported

88 ibid. at p. 4

restrict freedom of expression by imposing a penalty, as long as the penalty in any individual case is not disproportionate to the character of the behaviour. Bearing in mind the importance of the United Kingdom's obligations under Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 20 of the International Covenant on Civil and Political Rights,[89] and the matters to which the Government has drawn attention, it seems to us that any interference with rights under ECHR Article 10 would be likely to be a proportionate response to a pressing social need to prevent disorder or crime and to protect the rights and freedoms of others.

2.63 We note the point, made in the submission from the British Humanist Association, that restrictions on stirring up religious hatred are different from restrictions on stirring up racial hatred: 'Restrictions are far more easily defended in the case of race … since race is in a sense without content: it has no ideology, teachings or dogma … '. The Association suggests that differences between race and religion call into question the appropriateness of simply applying existing legal rules on the stirring up of racial hatred to the stirring up of religious hatred.[90] We accept that those differences exist. None the less, we do not consider that they prevent the application of the same rules to religion as to race being justifiable under ECHR Article 10.2.

2.64 Having given careful consideration to the issue in the light of developments since 2001, we have come to the same conclusion as we did then:[91] the proposed measures appear to us to be unlikely to give rise to a violation of Convention rights.

Entering a designated site as a trespasser

2.65 Clause 125 of the Bill would make it an offence to enter as a trespasser a site designated by the Secretary of State if the site is comprised in Crown land or in land belonging to Her Majesty in Her private capacity or to the immediate heir to the Throne in his private capacity, or it appears to the Secretary of State that it is appropriate to designate the site in the interests of national security. A defendant would have a defence if he or she could prove that he or she did not know had had no reasonable cause to suspect that the site had been designated. The Attorney-General's consent to prosecution would be required. Clause 126 would create an equivalent offence in Scotland, only without any requirement for a Law Officer to consent to a prosecution. Clause 127 would permit a constable to arrest a person without a warrant if the constable reasonably suspects that he or she is committing or has committed an offence contrary to clause 120. Under clause 128(1), the right of the public to have access to land under the Countryside and Rights of Way Act 2000, section 2(1) and (in Northern Ireland) Part III of the Countryside (Northern Ireland) Order 1983 would not apply to designated sites.

2.66 In our earlier Report on the Bill, we noted that the then Home Secretary, on Second Reading in the House of Commons, had described these clauses as dealing with trespass, and as arising from the investigation that followed an intrusion into Windsor Castle. We noted that the power to designate sites went well beyond protecting royal residences

89 See our Fourth Report of 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224, paras. 1.125–1.127

90 Submission from the British Humanist Association, printed as Appendix 1b to our Fourth Report of 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224, pp. 92–96 and at 93–4, paras. 12–14

91 Second Report of Session 2001–02, *Anti-terrorism, Crime and Security Bill*, HL Paper 37, HC 372

against trespassory entry. We drew attention to the breadth of the power, its capacity to interfere with the rights to freedom of expression and to freedom of peaceful assembly under Articles 10 and 11 respectively of the ECHR, and the fact that the power to designate sites on the ground of national security depended entirely on the Secretary of State's subjective view.[92] We therefore asked the Government why it thought that such a wide power to designate sites would be prescribed by law, serve a legitimate aim, and be proportionate to that aim for the purposes of ECHR Articles 10.2 and 11.2.

2.67 The Government did not agree that the clauses conferred a very wide discretion, and said that in implementing the provisions 'full account will be taken of any ECHR issues which will be balanced against the security and operational needs of the site, as well as other issues such as the co-operation of the 'appropriate person' with regard to notices'.[93]

2.68 We remain of the view that the provisions would confer a very wide discretion on the Secretaries of State. As amended in the House of Commons, the Bill would now confer that discretion in respect of sites in Scotland as well as in England and Wales. It is not correct to say that the Secretaries of State would be free to balance Convention rights against 'the security and operational needs of the site, as well as other issues'.[94] This response displays a misunderstanding of the requirements of Articles 10 and 11 of the ECHR. The obligation of the Secretaries of State would be to act compatibly with the Convention rights, not to take account of them and balance them with other matters.[95] Although it may be possible to justify an interference with the rights, before making any designation the relevant Secretary of State would have to be able to show that any interference with rights under Articles 10 and 11 was a proportionate response to a pressing social need to advance one of the legitimate aims specified in Articles 10.2 and 11.2 respectively. If that could not be done, the designation would not be 'necessary in a democratic society' for a legitimate purpose within those Articles, and would amount to a violation of the Convention rights. This might be difficult, particularly as the offence of entering a designated site as a trespasser under clause 125 does not involve the prosecution proving that the defendant knew or should have known of the designation, but instead imposes on the defendant the burden of establishing, by way of defence, that he or she did not know and had no reasonable cause to suspect that the site had been designated.[96]

2.69 **The way in which the Government's response was phrased does not give us confidence that the measures would in practice be operated in a manner compatible with Convention rights, or that appropriate safeguards are in place to secure compatibility short of a challenge before the courts. We draw this matter to the attention of each House**.

92 Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224, paras. 1.133–1.134

93 Appendix 2a, para. 73

94 ibid.

95 See Human Rights Act 1998, s. 6(1)

96 See cl. 125(4), and the submission from the Human Rights Committee of the Cambridge Branch of the European Law Students' Association, Appendix 2b, Part 7

Police powers and offences in the vicinity of Parliament

2.70 In the Bill as originally introduced to the House of Commons, there were provisions to allow the senior police officer present to give people directions in respect of their behaviour in an area, within one kilometre of the edge of Westminster Square in any direction, to be designated by the Secretary of State by order. The senior police officer was to be empowered to give directions if he or she reasonably believed that a person's behaviour had had or could have the result of hindering any person from entering or leaving the Palace of Westminster, or hindering the proper operation of Parliament, or spoiling the visual aspect, or otherwise spoiling the enjoyment by members of the public, or any part of the designated area. It was to be an offence for a person knowingly to fail to comply with such a direction, unless he or she could prove that the failure arose from causes beyond his or her control.

2.71 We considered that these provisions raised in an acute form a threat of an over-broad power with the capacity to interfere with the rights to freedom of expression and to freedom of peaceful assembly under Articles 10 and 11 respectively of the ECHR in an area of London that is much used by people bringing legitimate political views to the attention of members of the country's principal legislature. We noted that a designation, followed by a direction from a police officer, would make otherwise entirely lawful conduct into a criminal offence, and that one of the purposes for which a designation was contemplated, to prevent people from 'spoiling the visual aspect, or otherwise spoiling the enjoyment of members of the public', was not a legitimate aim for interfering with the Convention rights. Observing that there was no provision for notice to be given of a designation, we thought that it might be difficult to show that the interference with rights was 'prescribed by law' within the meaning of Articles 10.2 and 11.2 of the ECHR.[97] We therefore asked the Government why it thought that the interference could be justified under Articles 10.2 and 11.2.

2.72 In relation to the question as to whether a designation would be 'prescribed by law' the Government replied that it would be made by order and so would be available on the HMSO Website, as well as being published in a Home Office circular. The Metropolitan Police would also be expected to have details of it on their website. With regard to the purposes for which an area could be designated, the Government understood our concern, and said that it would be introducing new clauses.[98]

2.73 As amended in the House of Commons and introduced to the House of Lords, the provisions take a rather different form. It would be an offence for any person to organise, take part in or carry on a demonstration in a designated area (other than a public procession covered by sections 11–13 of the Public Order Act 1986, or conduct which is lawful under section 220 of the Trade Union and Labour Relations (Consolidation) Act 1992) without authorisation from the Commissioner of Police of the Metropolis.[99] Six days' clear notice to the Commissioner would be required.[100] If the required notice is given, the

97 Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224, paras. 1.132–1.33 and 1.135–1.138

98 Appendix 2a, paras. 74–75

99 Cl. 129

100 Cl. 130

Commissioner would have to give the authorisation, but would be empowered to impose on those organising or taking part in the demonstration such conditions, in writing, as in the Commissioner's reasonable opinion are necessary for the purpose of preventing any of the following—

- hindrance to any person wishing to enter or leave the Palace of Westminster;
- hindrance to the proper operation of Parliament;
- serious public disorder;
- serious damage to property
- disruption to the life of the community;
- a security risk in any part of the designated area;
- risk to the safety of members of the public (including any taking part in the demonstration).

The conditions could include requirements as to—

- the place where the demonstration may or may not be carried on;
- the times at which it may be carried on;
- the period during which it may be carried on;
- the number of people who may take part in it;
- the number and size of banners or placards used;
- maximum permissible noise levels.

2.74 Failure to comply with the conditions would constitute an offence.[101] The use of a loudspeaker in a street in the designated area would always be prohibited.[102] When the demonstration is under way, the senior police officer at the scene would have power to impose additional requirements or to vary those imposed by the Commissioner.[103]

2.75 The new clauses are a great deal less unsatisfactory than those in the Bill as originally introduced to the House of Commons. It would no longer be possible to prohibit demonstrations in the vicinity of Parliament. The purposes for which conditions could be imposed are more closely in line with the requirements of the Convention rights to freedom of expression and peaceful assembly. We welcome these significant improvements. Nevertheless, there are aspects of the new clauses which cause us some concern.

101 Cl. 131
102 Cl. 135
103 Cl. 132

2.76 As the submission from the Human Rights Committee of the Cambridge Branch of the European Law Students' Association (Cambridge ELSA)[104] points out, the provisions would establish the initial position that any demonstration in a designated area is a criminal offence unless authorisation is obtained. This is a significant departure from the present position in domestic law, under which processions are presumed to be lawful unless something unlawful happens, and static demonstrations on land adjoining highways may be lawful.[105] Although the Commissioner must give the authorisation if the demonstrators give six days' notice, and (together with the senior officer at the scene) would have to act in a manner compatible with Convention rights, including the positive obligation to take reasonable steps to enable people to exercise their rights,[106] when imposing conditions, there are gaps in the provisions as currently drafted which could make it difficult to ensure that they are operated in such a way as to avoid depriving people of the very essence of their rights or interfering disproportionately with them. We draw particular attention to the following matters.

- The provisions do not require the Commissioner to respond within a fixed time to notice given by a demonstrator. This could make it difficult or impossible to organise the demonstration in accordance with any conditions imposed by the Commissioner.[107]

- The meaning of 'demonstration' is uncertain. The Bill makes it clear that a single person can constitute a demonstration, but it is not clear what that person would have to be doing, or planning to do, to make it necessary for him or her to give six days' notice to the Commissioner.[108]

- The purposes for which conditions may be imposed include the prevention of any level of hindrance to people wishing to enter or leave the Palace of Westminster, hindrance to the proper operation of Parliament, disruption to the life of the community, security risk, or risk to safety of members of the public.[109] It is not clear how 'disruption to the life of the community' relates to the permitted aims when interfering with the rights to freedom of expression and freedom of peaceful association under Articles 10 and 11 of the ECHR. In any case, it would be easier to ensure that arrangements would satisfy the tests of pressing social need and proportionality, forming part and parcel of the requirement that any interference be 'necessary in a democratic society' in Articles 10.2 and 11.2, if conditions were permitted only to prevent such risks when they were significant or substantial.[110]

2.77 **While welcoming the significant improvements made to the Bill since our last Report on it, we draw to the attention of each House the scope for further improvements to protect human rights in connection with the regulation of demonstrations in the vicinity of Parliament by specifying the time within which the**

104 Appendix 2b

105 See for example *DPP v. Jones (Margaret)* [1999] 2 AC 240, HL

106 See for example *Plattform 'Ärzte für das Leben' v. Austria* (1988) 13 EHRR 204, Eur. Ct. HR

107 Appendix 2b, Part 1

108 ibid., Part 3

109 Cl. 131(3)(a), (b), (e), (f), (g)

110 Appendix 2b, Part 4

Commissioner should respond to notice of a planned demonstration, defining 'demonstration', and ensuring that conditions would be imposed only to protect against a significant or substantial threat to an interest falling within the scope of Articles 10.2 and 11.2 of the ECHR.

Reporting cases against children for breaching ASBOs

2.78 Clause 138 would amend section 1 of the Crime and Disorder Act 1998 to allow proceedings against a child or young person for the offence of breaching a requirements imposed by an ASBO to be reported at the discretion of the court. There would be a presumption in favour of allowing reporting, at least to the extent of requiring the court to give its reasons if it gives a direction restricting reporting under section 45 of the Youth Justice and Criminal Evidence Act 1999.[111] In our earlier Report on the Bill, we noted that this would engage the right of the child to respect for his or her private life under ECHR Article 8. We had doubts as to the justification offered by the then Home Secretary, on Second Reading in the House of Commons, for interfering with Article 8 rights: to 'allow local communities to be involved in the justice system by ensuring that breaches of antisocial behaviour orders can be publicised, so that people can see who is doing what and where it is being done'.[112] We thought that the benefits of publicising a conviction for breach an order were less clear than those of publicising the making of an order, and we considered that there should be a balancing of the Article 8 rights of the child and the Article 10 rights of the press in each case on its own facts. We drew attention to Articles 3.1 and 40.1 of the Convention on the Rights of the Child, which made it clear that an assessment should be made in each case of the likely effect on the child of allowing reporting, taking account of the child's best interests and sense of dignity and worth. We therefore asked the Government what steps would be taken to ensure that those provisions of the Convention on the Rights of the Child would be brought to the attention of courts when considering, in the light of the proposed measures, whether or not to restrict reporting.[113]

2.79 The Government replied that it understood our concerns, and would explore different avenues to ensure that courts are aware of those provisions. Guidance would be given to courts, and there would be discussions with the Department for Constitutional Affairs and the Judicial Studies Board to consider options for doing so, which might include issuing guidance for magistrates and Justices' Clerks or highlighting the provisions in the next publication of the Youth Court Bench Book. The Government said that it would also raise the matter with the Sentencing Guidelines Council, which is planning to consider sentencing guidelines during 2005 in respect of both juvenile offenders and those who breach ASBOs.[114]

2.80 We are grateful to the Government for these undertakings. The steps that it proposes would be likely to make a major contribution to ensuring that the provisions are operated

111 Proposed new sub-s. (10D) and (10E) of section 1 of the Crime and Disorder Act 1998, to be inserted by cl. 138(2) of the Bill

112 HC Deb, 7 December 2004, col. 1059

113 Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224 paras. 1.140–1.142

114 Appendix 2a, para. 76

in a way that is compatible with the requirements of the Convention on the Rights of the Child, which, although not part of domestic law in the United Kingdom, binds the United Kingdom in international law.

Protecting human rights where local authorities contract out functions relating to ASBOs

2.81 Clause 139 would insert a new section 1F in the Crime and Disorder Act 1998 to allow the Secretary of State to make an order providing that a local authority may contract out its functions in respect of ASBOs. In our earlier Report on the Bill, we noted that it would be by no means certain that a private individual or company to which functions are contracted out would be a public authority for the purpose of the Human Rights Act 1998, and so under an enforceable legal duty by virtue of section 6(1) of that Act to act in a manner compatible with Convention rights. Nor was it certain that such individuals or companies would be familiar with the state's responsibilities under other human rights instruments, such as the Convention on the Rights of the Child. We therefore asked the Government how it would ensure that the bodies to which these functions could be contracted out would act in a manner compatible with Convention rights and would take into account the United Kingdom's obligations under the Convention on the Rights of the Child.[115]

2.82 The Government replied that a body entirely dedicated to performing a local authority function, such as some Arms Length Management Organisations (ALMOs) performing housing functions on behalf of a local housing authority, would fit the profile of a public authority within the meaning of section 6 of the Human Rights Act 1998. However, it accepted that not all organisations to which functions might be contracted out would necessarily be of that kind. In relation to other organisations, the Government said that there would be a safeguard in that proposed new section 1F(7)(a) of the Crime and Disorder Act 1998 would apply section 72 of the Deregulation and Contracting Out Act 1994 to the arrangements made with local authorities. The effect of this would be to make the local authority assume responsibility for breaches of Convention rights by the contractor while exercising contracted out ASBO functions. Furthermore, proposed new section 1F(9) would require contracting bodies to have regard to guidance issued by the Secretary of State, and this could make known the Convention rights and the obligations under the Convention on the Rights of the Child to contracting bodies. In addition, the Secretary of State's order might include (under proposed new section 1F(2)) conditions requiring the local authority to produce a written specification for the contracting body so that the body is able to discharge its function in a manner that complies with the Human Rights Act 1998. Finally, the Secretary of State would have to consult with representatives of local government and other appropriate persons before making an order under proposed new section 1F. In the course of the consultation process, the proposed contracting bodies would be scrutinised to determine whether they are aware of obligations under the ECHR and of the need to discharge their functions accordingly.[116]

115 Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224, paras. 1.143–1.144

116 Appendix 2a, paras. 76–83

2.83 **We are somewhat reassured by the Government's response in relation to contracting out of local authorities' functions in respect of ASBOs. However, we draw to the attention of each House the importance of ensuring that contracting bodies know what they have to do before they start to do it. In that regard, we do not regard the local authorities' responsibility for violations of Convention rights after the event as a sufficient safeguard. We would welcome a clear undertaking from the Government that guidance from the Secretary of State under proposed new section 1F(9) would, in fact, make known both their obligations in relation to Convention rights under the Human Rights Act 1998 and the relevant requirements of the Convention on the Rights of the Child to contracting bodies, and that orders made under proposed new section 1F would, in fact, impose requirements for local authorities actively to bring to the attention of contracting bodies the steps they need to take to comply with those obligations**.

3 Inquiries Bill

Date introduced to the House of Lords	25 November 2004
Current Bill Number	House of Lords 26
Previous Reports	4th

Introduction

3.1 The Inquiries Bill is a Government Bill, which aims to provide a consolidated legislative framework for inquiries into matters of public interest. In our Fourth Report of this Session,[117] we raised a number of concerns regarding the compliance of the Inquiries Bill with Convention rights, in cases where the Bill provided the framework for an inquiry into an unnatural death which implicated agents of the state; or into incidences of inhuman or degrading treatment or torture. We raised these matters in a letter to the Lord Chancellor,[118] and received a reply on 6 February 2005.[119] The Lord Chancellor in his reply provided clarification of the application of certain provisions of the Bill, and drew attention to a number of amendments tabled to the Bill at report stage in the House of Lords, and to the implications of these amendments for European Convention on Human Rights (ECHR) compliance. In this report, we set out our final views on the human rights compatibility of the Bill incorporating the amendments made at report stage in the House of Lords,[120] and taking account of the Lord Chancellor's response to our letter.

The human rights implications of the Bill

The Duty to Investigate: Articles 2 and 3 ECHR

3.2 Article 2 ECHR protects the right to life. It requires not only that the state should refrain from taking life intentionally, but also that the state should take positive steps to protect life, and that it should provide an independent and effective investigation following any death which may have been caused by the actions or neglect of agents of the state.[121] The Article 2 duty to investigate requires that there must be an inquiry on the initiative of the state; that the inquiry must be independent; that it must be capable of leading to a determination of whether any use of force was justified, and to the identification and punishment of those responsible for the death; that it must be prompt and proceed with reasonable expedition; that it must be open to public scrutiny to a degree sufficient to ensure accountability; and that the next-of-kin of the deceased must be involved in the inquiry to the extent necessary to safeguard their legitimate interests. [122]

3.3 In our Fourth Report, we raised two related concerns as to the compatibility of the Bill with the Article 2 positive obligation to inquire into a death which implicates the state.

117 Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224

118 ibid., Appendix 2a

119 Appendix 3

120 References to clauses in the Bill refer to the version of the Bill as amended on Report stage in the House of Lords, HL Bill 26

121 *McCann v UK* (1996) 21 EHRR 97. The Article 2 duty to investigate extends to all deaths in the custody of the state. This duty was considered by us in our Third Report of Session 2004–05, *Deaths in Custody*, HL Paper 15-1, HC 137-1

122 *Jordan v UK* (2003) 37 EHRR 2 paras.105–109

First, we questioned whether an inquiry under the Bill would be sufficiently independent to satisfy Article 2, and second, whether the Bill would provide an inquiry that met the standard of effectiveness required by Article 2.

3.4 Article 3, which protects the freedom from torture, inhuman and degrading treatment and punishment, may also impose a duty to hold an independent and effective inquiry in certain circumstances,[123] although in some cases the Article 3 investigatory obligation may be satisfied by compliance with the Article 13 right to an effective remedy.[124] As we noted in our previous report, inquiries conducted under the Bill which deal with allegations of torture or inhuman or degrading treatment may also be required to meet Article 3 requirements of an independent and effective inquiry. **We draw this matter to the attention of both Houses**.

Independence

3.5 Article 2 requires that an investigation into a death be independent both institutionally and in practice.[125] In our Fourth Report, we raised a number of concerns relating to the institutional independence of an inquiry established under the Bill. In particular, we noted—

- The power of the responsible Minister to bring an inquiry to a conclusion at any stage before the publication of the report (clause 14(1)(b));
- The power of the responsible Minister to issue a restriction notice at any time during the course of the inquiry, limiting attendance at the inquiry or the disclosure or publication of evidence or documents provided to the inquiry (clause 19(2));
- The power of the responsible Minister to withhold material from publication in the report of the inquiry, where this is required by law, or where it is considered to be necessary in the public interest (clause 25(4));
- The power of the responsible Minister to withdraw funding from an inquiry where he or she believes that the inquiry is operating outside its terms of reference, or is likely to do so (clause 39(4));
- The permissibility in exceptional circumstances of appointments to an inquiry panel of a person having a direct interest in the matters under consideration, or an association with an interested party (clause 9(1)) .

3.6 A number of these provisions have been subject to amendment at report stage of the Bill in the House of Lords.

3.7 In his response to our letter, the Lord Chancellor stressed that the majority of inquiries under the Bill would not engage Article 2, and that where Article 2 was in issue in an inquiry, there would be an obligation on both the responsible Minister, and the inquiry

123 *Assenov v Bulgaria* 90/1997/874/1086

124 *Ilhan v Turkey* App. No 22277/93

125 *Ergi v Turkey* (2001) 32 EHRR 18

panel, as public authorities under the Human Rights Act 1998, to exercise their powers in a manner compatible with Article 2. [126]

3.8 The Lord Chancellor also points out that "because it is theoretically possible for a power to be exercised incompatibly with Article 2 rights, does not mean the power itself is incompatible with Article 2 rights." We accept that an inquiry may satisfy many of the requirements of the Article 2 duty to investigate, through careful application of the powers available to Ministers and others under this Bill. However, we do not consider that this argument in itself meets our concerns as to the independence of an inquiry established under the Bill, since the independence of a tribunal is secured both by the institutional and legal structure in which it operates, and by the restraint and impartiality exercised in practice by those involved. Even given proper restraint by Ministers in the exercise of the powers considered above, their availability in respect of an inquiry would risk affecting its independence, both actual and perceived.

3.9 In our previous report on the Bill we raised concerns that the power of the responsible Minister to bring an inquiry to an end before publication of the inquiry's report, without any provision in the Bill as to the circumstances in which the power could be used, or any need for reasons to be given for the decision to terminate the inquiry, could compromise independence. Amendments made to the Bill at report stage in the House of Lords require a Minister to consult the chairman of an inquiry panel before issuing a notice to end the inquiry (clause 14(3)) and require the Minister to give reasons for exercising the power to terminate the inquiry (clause 14(4)). The Lord Chancellor further states in his letter to the Committee that the ministerial power to terminate an inquiry is intended for use in exceptional circumstances only, for example where evidence arises that demonstrates the inquiry is no longer needed. We welcome the amendments made to clause 14, which go some way towards meeting our concerns, by enhancing the transparency of the decision to terminate the inquiry. However, we note that the circumstances in which the ministerial power to end the inquiry may be exercised remain wide, and will need to be exercised with considerable restraint in cases where Article 2 is engaged, in order to ensure that the requirement of independence is met.

3.10 We also raised concerns about the impact of ministerial "restriction notices" on the independence of the inquiry. Restriction notices may limit attendance at the inquiry, or limit the disclosure or publication of evidence or documents provided to the inquiry (clause 19(1)). They may be made only where they are either required by law, or where they are conducive to the inquiry fulfilling its terms of reference or necessary in the public interest, having regard to the need to allay public concern, the need to avoid any risk of harm or damage; confidentiality; and the need to avoid delay, inefficiency or additional cost. The Lord Chancellor's letter states that: "In many cases, a Minister might well consider that issuing a restriction notice once an inquiry was underway would be too damaging to public confidence in the inquiry, and that any restrictions should be left to the chairman to consider." Nevertheless, he considers it "necessary to have the power to issue restrictions, for both the chairman and the Minister, to ensure that they can comply with any duties placed upon them to safeguard information or to prevent a risk of harm." He

126 Section 6 HRA; there would also be an obligation to interpret the terms of the legislation in accordance with the Convention rights: section 3 HRA.

notes that, for example, the Minister might wish to withhold information if disclosure of the information could put individuals at risk in breach of Article 2. We appreciate that there may be circumstances in which both attendance at an inquiry, and publication of material produced to an inquiry, may be validly restricted, and do not dispute the allocation of these powers to the Chairman of the inquiry. However, **we remain of the view that the independence of an inquiry is put at risk by ministerial power to issue these restrictions, and that this lack of independence may fail to satisfy the Article 2 obligation to investigate, in cases where an inquiry under the Bill is designed to discharge that obligation**.

3.11 As we noted in our previous report on the Bill, it is the default position that the Minister retains the duty of publication of the report (clause 25(1)), although the duty of publication may be allocated to the Chairman by the Minister under clause 25(2). If the Minister retains the duty of publication, he or she may withhold it from publication where required by law, or where necessary in the public interest. We remain concerned that the second aspect of this power, to withhold publication in the public interest, is wide enough to compromise the independence of an inquiry. Whether withholding the report would be in the public interest is to be assessed according to a number of criteria, including the extent to which non-publication would inhibit the allaying of public concern; confidentiality; and any risk of harm or damage that could be avoided or reduced by withholding publication. "Harm or damage" includes damage to national security or international relations, damage to the economic interests of the UK or to any part of it, or damage caused by disclosure of commercially sensitive information.

3.12 The Lord Chancellor in his letter characterises the circumstances in which a Minister may withhold publication of a report under clause 23 as "very limited" and the type of harm or damage envisaged by the Bill as being harm or damage that is "very serious in nature." He also stresses that the requirement in clause 23(5) to take account of the extent to which withholding information might inhibit the allaying of public concern "will weight heavily in favour of publication." **We welcome this reassurance**.

3.13 We note that an amendment made to the Bill at report stage in the House of Lords makes clear that information which may be accessed under the Freedom of Information Act cannot be withheld from publication in the inquiry report (clause 25(7)). We also note however that under the exceptions set out in Part II of the Freedom of Information Act, significant categories of information may be withheld.[127] **In our view, in inquiries designed to fulfil the Article 2 obligation of an effective and independent investigation, responsibility for publication of the report must be allocated to the Chairman of the inquiry at the outset under clause 25(2) in order to ensure compliance with Article 2.** We have not received reassurances from the Government that this would be the case in relation to any inquiry which engaged Article 2. **We draw this matter to the attention of both Houses.**

127 For example, there is an absolute exemption in relation to information supplied by, or relating to, bodies dealing with security matters (section 23).There are qualified exemptions in relation to information disclosure of which would prejudice national security (section 24); national defence (section 26); international relations (section 27); relations with or between devolved administrations (section 28) the economic interests of the United Kingdom (section 29) or aspects of law enforcement (section 31).

3.14 In our previous report on the Bill, we raised the concern that under clause 36, there is ministerial power to withdraw funding from an inquiry which the Minister believes to be operating outside its terms of reference. The Lord Chancellor in his letter states that the clause provides a mechanism for ensuring the inquiry remains on track, and argues that "as the Minister would only be intervening in to ensure the inquiry keeps within the remit agreed at the outset in the terms of reference, I do not consider that this clause undermines the role of the chairman or affects compatibility with Article 2." Whilst we appreciate the need for an inquiry to adhere to its terms of reference, it is in our view a characteristic of an independent inquiry that the terms of reference are interpreted and applied by the Chairman and inquiry panel. **We are concerned that the threat of withdrawal of funding by the Minister could unduly constrain the independence of an inquiry, and fail to satisfy the Article 2 requirement of an independent inquiry**. **We draw this matter to the attention of both Houses.**

3.15 We also voiced concern regarding the exception to the requirement of independence of inquiry panel members, under clause 9 (1). The Lord Chancellor in his letter points to the necessity to have some ministerial discretion to appoint panel members who do have some interest in the events under scrutiny, as in some instances it may be difficult to find a panel member who does not have some link with these events.

3.16 We note that, at report stage, amendments were made to the Bill to qualify the exception in clause 9 (1). Where previously the Bill required only that the Minister must be of the opinion a person's links with the subject matter of the inquiry would not influence his or her conduct of the inquiry, there must now be reasonable belief that the person's interest or association will not affect the impartiality of the inquiry. **We welcome this amendment, which provides an important safeguard for independence.**

Effectiveness

3.17 We have previously expressed the concern that provision for ministerial control, through restriction notices and power to terminate an inquiry, or withhold publication of material in the report, may raise issues of the inquiry's effectiveness in accordance with Article 2. In particular, we expressed concern that, without further safeguards on the face of the Bill, the power to issue restriction notices may impair an inquiry's effectiveness, potentially in breach of Article 2 ECHR, by limiting public accountability and restricting the access of next-of-kin to the inquiry proceedings. We also noted that Ministerial control of the publication of the report under clause 25 had the potential to frustrate compliance with the Article 2 requirements that the inquiry be open to a sufficient degree of public scrutiny to ensure accountability, and to ensure that the next-of-kin of the deceased were provided with an explanation of the circumstances of the death.

3.18 The Lord Chancellor points out in his response that, under the Bill, there is a presumption in favour of both public hearings and publication of the report. We remain concerned at the wide extent of powers to issue restriction notices under the Bill, and the consequent potential for inquiries to fall short of the standards of effectiveness required by Article 2 where the right to life is engaged. We accept, however, that the powers are capable of being exercised in accordance with the requirement of effectiveness in Article 2 in inquiries where the right to life is in issue. **In relation to the publication of reports, we re-**

emphasise our conclusion above that, where Article 2 is in issue, responsibility for the publication of the report should be allocated to the Chairman of the inquiry at the outset (under clause 25(2)), rather than to the Minister, in the interests of ensuring an effective, as well as an independent, inquiry.

Legal Representation

3.19 The Lord Chancellor notes that although it has been the practice of recent inquiries to keep legal representation to a minimum, participants considered to have a direct interest in the inquiry are normally permitted representation, and this would include next-of-kin in Article 2 cases. He also states that the government "will normally agree to meet the costs of participants who are considered to have such a direct interest in the inquiry that they require representation but who may be unable to meet representation themselves. Family members would be included in this group." It is envisaged that the Chairman of an inquiry would make awards on legal representation on this basis. We welcome this reassurance. **We emphasise that, in cases where Article 2 is engaged, it is a requirement of an effective investigation that there should be full participation of next-of-kin, and that decisions on awards for legal representation will need to reflect this**.

Article 10 ECHR

3.20 Article 10 ECHR protects the right to receive information, and this right may be breached where the state prevents a person from receiving information which others are willing to impart.[128] In our previous report we did not raise Article 10 issues, but during the report stage of the Bill in the House of Lords concerns were raised regarding the compatibility of restriction notices made under clause 19(2)(b) with the right to receive information under Article 10.[129] Limitations on public access to an inquiry imposed under clause 19 are unlikely to raise issues of information rights under Article 10 ECHR, as the UK courts, relying on Strasbourg caselaw, [130] have held that Article 10 does not in general require an inquiry to be heard in public.[131] However, limitations imposed by the Minister on the disclosure of material by way of a restriction notice would engage the freedom to receive information under Article 10. We note that Baroness Ashton of Upholland acknowledged in the course of the debate that where the exercise of the power to issue restraint notices engaged freedom of expression rights, the Minister would need to exercise this power in accordance with Article 10. [132] We welcome this statement.

128 *Leander v Sweden* (1987) 9 EHRR 433 para 74

129 HL Deb, 8 February 2005, col. 711

130 *Leander v Sweden,* op cit.

131 *R (Persey) v Secretary of State for the Environment* [2002] 3 WLR 709; *R (Howard) v Secretary of State for Health* [2002] 3 WLR 738, distinguishing *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292

132 HL Deb, 8 February 2005, col. 712

4 Road Safety Bill

Date introduced to the House of Commons	30 November 2004
Current Bill Number	House of Commons 54
Previous Reports	None

Introduction

4.1 This is a Government Bill introduced into the House of Commons on 30 November 2004. The Secretary of State for Transport, Alistair Darling MP, has made a statement of compatibility with Convention rights under s. 19(1)(a) of the Human Rights Act 1998. The Explanatory Notes which accompany the Bill state that no issues arise in connection with specific provisions of the Bill which merit special attention.[133] The Bill received its Second Reading on 11 January 2005 and completed its Committee stage on 3 February.

The human rights implications

4.2 The main human rights implications of the Bill are—

(1) whether the new power to require evidential breath tests at the roadside is compatible with the rights to dignity, liberty and a fair trial and the privilege against self-incrimination, and whether the associated power to arrest if the police officer believes the equipment not to be working properly is compatible with the right to liberty

(2) whether the power to arrest, take to and detain at a police station a person who has provided a breath specimen at the roadside, is compatible with the right to liberty

(3) whether increasing the penalty for the offence of failing to provide information about the identity of a driver is compatible with the right to a fair trial and the privilege against self-incrimination

(4) whether the new power to disclose licensing and registration information to foreign authorities and the new power of the police to obtain information about the insurance status of vehicles are compatible with the right to respect for private life.

Power to require roadside evidential breath specimens and associated power of arrest (clauses 11(2) and (5))

4.3 Under the current law, contained in the Road Traffic Act 1988, a police constable in uniform has the power in certain circumstances to require a "preliminary breath test" at the roadside,[134] for screening purposes, but can only require the provision of breath

133 Bill 10–EN at para. 196

134 Section 6 Road Traffic Act 1988

specimens for analysis, for possible use in court ("evidential breath tests") at a police station.[135]

4.4 Clause 11 makes a number of amendments to the current law to enable evidential breath tests, the results of which are admissible in court, to be carried out at a hospital, or at or near a place (such as the roadside) where the preliminary test was required.[136] The amendments include the power to detain the person at or near the place where the preliminary test was required, in order to require him to provide an evidential breath test.[137] They also include the power to arrest without warrant a person who has given a breath specimen at the roadside under the new power if the constable who imposed the requirement to provide the specimens has reasonable cause to believe that the device used to analyse the specimens has not produced a reliable indication of the proportion of alcohol in the breath of the person.[138] This enables the police officer to take the person concerned to a police station if he believes the equipment not to be working properly.

4.5 We have considered whether the new power to require an evidential breath test to be carried out at the roadside is compatible with the right to dignity in Article 8 ECHR, the right to personal liberty in Article 5 ECHR and with the right to a fair trial in Article 6(1) ECHR. **We do not consider the new power to give rise to any significant risk of incompatibility with any of those rights.**

4.6 **We consider, however, that the associated power to arrest in new clause 6D(1A) of the Road Traffic Act 1988 if the police officer has reasonable cause to believe that the equipment has not produced a reliable result, is incompatible with the right to liberty in Article 5 ECHR and we have written to the Government asking why it considers the power to be so compatible.**

Power to arrest and detain until fit to drive (clause 11(9)–(12))

4.7 Clause 11(9)–(12) amends the current power to detain at a police station a person who has been required to provide a breath specimen. The current law provides that a person required to provide a breath specimen may afterwards be detained at a police station until it appears to the constable that, were that person then driving or attempting to drive a vehicle on a road, he would not be committing a drink driving offence (the power to detain "until fit to drive").[139] This power to detain at a police station does not apply, however, if it appears to a constable that there is "no likelihood" of the person driving or attempting to drive a vehicle whilst he or she is over the limit.[140]

4.8 Clause 11(10) adds a new power, in relation to people who provided the specimen other than at a police station (for example, at the roadside), enabling them to be arrested, taken to and detained at a police station until it seems to the constable concerned that they

135 Section 7(2) Road Traffic Act 1988
136 Clause 11(5), inserting a new s. 7(2) Road Traffic Act 1988
137 Clause 11(3), inserting new s. 6D(2A) Road Traffic Act 1988
138 Clause 11(2), inserting new s. 6D(1A) Road Traffic Act 1988
139 Section 10(1) Road Traffic Act 1988
140 Section 10(2)

are fit to drive.[141] As the Explanatory Notes put it, although the police may complete the evidential breath testing procedure satisfactorily at the roadside "they may need in some circumstances to arrest the person and detain him at a police station until he is fit to drive".[142]

4.9 We have considered whether this power of arrest and detention following the giving of a breath specimen is compatible with the right to liberty in Article 5(1) ECHR, which provides that no one shall be deprived of their liberty save in certain strictly defined circumstances and in accordance with a procedure prescribed by law.

4.10 The new power to arrest and detain in clause 11(10) is conferred by amending an existing power to detain at a police station. The underlying power to detain at a police station until fit to drive in s. 10 Road Traffic Act 1988 is very broadly worded. On its face it appears to authorise detention until the police officer is subjectively satisfied that the person who has given the breath specimen is fit to drive, unless the police officer is subjectively of the view that there is no likelihood of them driving or attempting to drive whilst still over the limit.

4.11 We accept that the existence of a power to detain where there is a risk of a person committing another offence is necessary in order to protect public safety, and that this is explicitly recognised in Article 5(1)(c) ECHR which provides that one of the exceptions to the right to liberty is "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence". However, such a power must be strictly defined so as to ensure that it is only used where it is strictly necessary to achieve that purpose.

4.12 In our view, s. 10 of the Road Traffic Act 1988, as amended by clause 11(10) of the Bill, does not satisfy that test. It purports to authorise detention of a person who has been found to be over the limit until such time as a police officer, in their subjective view, considers them fit to drive, unless in the officer's view (again subjective) there is no likelihood of the person driving or attempting to drive. This seems to us to give rise to the possibility of routine detention of individuals who have been breathalysed and found to be over the limit until they are judged to be fit to drive, which is likely to be several hours. We see no reason why a person who has been breathalysed and been found to be over the limit should not be released unless there are reasonable grounds to believe that they will try to drive their vehicle again whilst still over the limit. A person who has been breathalysed and found over the limit at the roadside could be released from the police station.

4.13 In our view, in order to be compatible with Article 5(1)(c) ECHR, s. 10 of the Road Traffic Act 1988 should be amended to provide that a person who has provided a specimen may only be detained if the police officer has reasonable grounds for suspecting that he or she will commit a further offence if released.

141 Amending s. 10(1). The new power is still subject to s. 10(2): the power to arrest or detain a person who gave a specimen at a place away from the police station does not apply if it appears to the constable that there is no likelihood of their driving or attempting to drive whilst still over the limit.

142 EN para. 43

4.14 **We have therefore written to the Government asking it why it considers the power to detain until fit to drive, as presently drafted, is compatible with Article 5(1) ECHR, and to consider introducing an amendment to s. 10 of the Road Traffic Act 1988 which would require the police constable to have reasonable grounds for suspecting that another offence will be committed if the person is released.**[143]

Increased penalty for breach of duty to give information as to identity of driver (clause 23)

4.15 Clause 23 increases the penalty for the offence of failing to provide information about the identity of a driver,[144] by raising from 3 to 6 the maximum number of penalty points which can be imposed for the offence.[145]

4.16 The underlying offence in respect of which this clause increases the penalty engages the privilege against self-incrimination, which has been held to be implicit in Article 6(1) ECHR, and the presumption of innocence in Article 6(2). The Privy Council considered the human rights compatibility of the obligation to provide information about the identity of a driver in *Brown v Stott*.[146] It decided that to impose such an obligation, on pain of criminal sanction, was not a disproportionate response to the problem of maintaining road safety.

4.17 In *O'Halloran and Francis v UK*, however, the European Court of Human Rights has now communicated to the UK Government[147] two applications which challenge the Convention compatibility of the obligation on a car owner to disclose the identity of the driver.[148] The applicants were the owners of cars caught exceeding the speed limit. They received a notice of intention to prosecute the driver and were asked to provide the name and address of the driver at the relevant time, or to provide information which would lead to the driver's identification. Failure to provide the information is a criminal offence under s. 172 Road Traffic Act 1988. In one case the applicant confirmed that he was the driver and was convicted of speeding on the basis of that admission. In the other case the applicant refused to supply the information and was convicted of failing to comply with the obligation to provide the information under s. 172. The applicants challenge the requirement that they provide information identifying the driver of their vehicle, as being incompatible with the privilege against self-incrimination under Article 6(1) ECHR and the presumption of innocence under Article 6(2) ECHR.

4.18 The compatibility with the Convention of requiring people to provide information identifying the driver of cars registered in their names is therefore likely to be decided by the European Court of Human Rights. Increasing the penalty for an offence the compatibility of which is currently under challenge before the European Court of Human

143 Appendix 4

144 Under s. 172 Road Traffic Act 1988

145 Amending Part 1 of Schedule 2 to the Road Traffic Offenders Act 1988

146 [2003] 1 AC 681

147 Communicating to the Government, under Rule 54(2)(b) of the Rules of Court, takes place following a preliminary examination of admissibility, and means giving the Government notice of the applications and inviting the Government to submit written observations on admissibility and merits.

148 App. Nos. 15809/02 and 25624/02

Rights risks aggravating any incompatibility which may be found. **We draw this matter to the attention of each House.**

Disclosure of information (clauses 38 and 39)

4.19 Clause 38 of the Bill authorises the Secretary of State and the Department of the Environment to make available any vehicle licensing and registration information held by them to any foreign authorities responsible for the regulation of drivers or vehicles for use by them in the discharge of that responsibility.

4.20 According to the Explanatory Notes,[149] this statutory authority will enable the UK to ratify the Treaty on European Vehicle and Driving Licence Information System ("EUCARIS") signed by the UK, Belgium, Germany, Luxembourg and the Netherlands in June 2000, and designed to facilitate the exchange between the central registrars of the Parties of driving and vehicle registration information.

4.21 Disclosure of such information engages the right to respect for private life in Article 8 ECHR, and must therefore be in accordance with the law, serve one or more of the legitimate aims referred to in Article 8(2) and be proportionate in the sense of being demonstrably necessary in a democratic society for the achievement of those aims.

4.22 We accept that interferences pursuant to this clause will be in accordance with the law, but we have reservations about the necessity for and proportionality of the power proposed. The Explanatory Notes cite the need to ratify the EUCARIS Treaty, but do not specify the legitimate aim relied on to justify the power. We assume that the legitimate aims relied upon are public safety, the prevention of crime and the protection of the rights and freedoms of others and we accept in principle that a power to disclose such information to foreign authorities for a specified purpose is capable of being for such legitimate purposes.

4.23 We question, however, why it is necessary for the power to be so wide as to authorise disclosure to *any* foreign authorities. If the object is to enable ratification of the Treaty mentioned, it seems to us that the power need only extend to the relevant authorities of those particular countries. Moreover, if the power is to be as wide as it is currently drafted, in our view the Bill should make provision for safeguards against the improper use of such information by the foreign authorities, for example by requiring that the disclosing authority ascertain the purposes for which the information is sought, satisfy itself that there are sufficient safeguards in the relevant country to ensure that the information will only be used for that purpose, and monitor the use of such information by the foreign authorities. **We draw these matters to the attention of each House.**

4.24 Clause 39 of the Bill empowers the Secretary of State to make regulations providing for the disclosure of vehicle insurance information to the police. The object is to enable the police to have access to information from the insurance industry showing vehicles the use of which has been but no longer is insured. The Explanatory Notes state that the police will

149 EN para. 142

then be able to link the processed data to Automated Number Plate Reader units to help them detect people driving without insurance.[150]

4.25 The disclosure of such information again engages Article 8 ECHR. The contemplated interference is clearly for the purposes of the prevention or detection of crime and the protection of the rights of others, which are within the scope of Article 8(2). We note that the purposes for which such information can be used by the police is left to be determined by the regulations themselves.[151] As we have said before, where powers to disclose information which interfere with Article 8 rights are conferred, the purposes for which the information can be used should be defined on the face of the legislation. Apart from this, the compatibility of the proposed power to disclose insurance information will depend on the content of the regulations to be made by the Secretary of State under this clause. **We draw this to the attention of each House.**

150 EN para. 143

151 Clause 39(3)(b)

5 Child Benefit Bill

Date introduced to the House of Commons	13 December 2004
Date introduced to the House of Lords	4 February 2005
Current Bill Number	House of Lords 23
Previous Reports	None

Introduction

5.1 This is a Government Bill, brought from the House of Commons on 4 February 2005. Lord McIntosh of Haringey has made a statement of compatibility with Convention rights under s. 19(1)(a) of the Human Rights Act 1998. The Explanatory Notes to the Bill state that none of the provisions of the Bill is considered to be incompatible with the Articles of the Convention or at significant risk of legitimate challenge under them.[152]

The purpose of the Bill

5.2 The Child Benefit Bill makes provision for amending the definition of people who are entitled to child benefit, in order to extend entitlement. Under the current law, a person under the age of 16 is treated as a child without condition, but over the age of 16 can only be treated as a child for each week in which they satisfy certain conditions. One of the prescribed conditions is that the person is under the age of 19 and receiving full-time education by attendance at a recognised educational establishment.

The human rights implications

5.3 The Bill is intended to extend financial support to new groups of young people aged 16 and above who are engaged in education and training, including unwaged vocational training. As such it is to be welcomed as a human rights enhancing measure which aims to improve access to education and training for those who might not otherwise be able to afford it.

5.4 Re-defining entitlement to a social security benefit, however, engages Article 1 Protocol 1 and Article 14 ECHR and must therefore be done in a non-discriminatory way. This is the case whether the scope of entitlement is being reduced or extended. Although child benefit is a non-contributory benefit, the case-law of the European Court of Human Rights has recently recognised that such benefits can give rise to a pecuniary right for the purposes of Article 1 Protocol 1.[153]

5.5 An extension of child benefit entitlement to new categories of people is therefore likely to be within the scope of Article 1 Protocol 1, and any differential treatment of people in an analogous position will require an objective and reasonable justification. Although, as the recent case of *Reynolds* demonstrates, the courts will generally be deferential towards any

152 HL Bill 23–EN, para. 25

153 *Koua Poirrez v France* App. No. 40892/98 (30 September 2003)

justification for such differential treatment which is offered, there must nevertheless be such an objective and reasonable justification.[154]

5.6 The Bill itself does not define the new categories of people who are to be entitled to child benefit, but leaves this to be defined by regulations. It provides that child benefit is payable in respect of a child or a "qualifying young person". A person will be treated as a "child" for this purpose if he or she is under 16. Over the age of 16 continuing entitlement to child benefit depends on the person being treated as a qualifying young person. A person will be treated as a qualifying young person if he or she is over 16, has not yet attained an age to be prescribed in regulations, and who satisfies further conditions also to be prescribed in regulations.[155]

5.7 Nothing on the face of the Bill therefore gives rise to a significant risk of incompatibility, but the regulation making power has the potential to be exercised in a discriminatory way. The Explanatory Notes to the Bill explain that the Government's intention is that in the first instance the regulations will extend child benefit entitlement to include young people who are on specified unwaged vocational training arranged by the Government, as well as those in full-time, non-advanced education.[156] It also intends to extend support to 19 year olds completing a course of learning begun before they reached that age. The Notes also explain that the Government has been consulting stakeholders on how to identify unwaged trainees in the proposed regulations.[157] Regulations which extend the benefit to some unwaged trainees but not to others will require justification.

5.8 In addition to justifying any differential treatment of people aged over 16, the Government will also be required to justify the new age cut-off for child benefit which will be prescribed in regulations. In *Reynolds* the main issue was whether there was an objective and reasonable justification for paying a lower rate of jobseeker's allowance to people under the age of 25. Although the Court of Appeal was clearly uncomfortable with the extent to which deciding this question involved the court in an exercise of second-guessing Government policy, it nevertheless scrutinised the justification which was offered for the selection of the particular age at which the level of the benefit increased. The standard of review applied was whether it had been shown that the age selected was "not an available option to a reasonable Secretary of State." The Court of Appeal concluded that the Secretary of State had demonstrated a perfectly reasonable justification for the differential payments of jobseeker's allowance.[158]

5.9 Indicative draft regulations were published by the Government on 10 January 2005.[159] The draft regulations define a "qualifying young person" to include a person over 16 until the 31st August after their 16th birthday, a person over 16 who is undertaking a course of full-time education which is not advanced education, or who is undertaking approved

154 *Carson and Reynolds v Secretary of State for Work and Pensions* [2003] EWCA Civ. 797, [2003] All ER 577 at paras. 75–84. Leave to appeal to the House of Lords was granted by the House of Lords and the case is due to be heard in March 2005.

155 Clause 1(2) of the Bill

156 EN para. 9

157 EN para. 21

158 *Carson and Reynolds v Secretary of State for Work and Pensions* [2003] EWCA Civ. 797, [2003] AllER 577, at para. 84

159 Indicative draft regulations, The Child Benefit (Definition of Qualifying Young Person) Regulations 2005

training not provided through a contract of employment.[160] People who are over 16 and undertaking full-time non-advanced education or approved training must have commenced their course or training before being 19 and must be under the age of 20.[161]

5.10 We note that these draft regulations introduce differentiations, both between people of the same age undertaking different types of education or training, and between people of different ages doing the same education or training, which will require justification by the Government in order to demonstrate their compatibility with Article 1 Protocol 1 in conjunction with Article 14. Since these are indicative draft regulations, we have not conducted a close scrutiny of the justification. However, whether the extension of child benefit made possible by the Bill is Convention compatible will depend on whether there can be shown to be an objective and reasonable justification for any differential treatment to which the new regulations give rise. Those regulations will therefore require careful scrutiny for such justification when they are brought forward. **We draw this matter to the attention of each House.**

160 Draft regulation 3

161 Draft regulation 4

6 Electoral Registration (Northern Ireland) Bill

Date introduced to the House of Lords	9 February 2005
Date introduced to the House of Commons	22 February 2005
Current Bill Number	House of Commons 64
Previous Reports	None

Introduction

6.1 This is a Government Bill introduced in the House of Lords on 9 February 2005. Baroness Amos has made a statement of compatibility with Convention rights under s. 19(1)(a) of the Human Rights Act 1998. It was passed by the House of Lords on 22 February 2005 and will be taken through all of its stages in the House of Commons on 24 February 2005.[162]

The purpose of the Bill

6.2 The purpose of the Bill is to provide a temporary response to the problem of consistently falling numbers of registered voters which has arisen in Northern Ireland as a result of the Electoral Fraud (Northern Ireland) Act 2002.

6.3 The 2002 Act requires the Chief Electoral Officer for Northern Ireland to remove an elector's name from the register if no form is submitted in the annual canvass or if the form submitted does not include all the information required. In the rest of Great Britain, the name of an elector remains on the register after a canvass until the registration officer makes a determination that the elector is not entitled to remain registered (known as the power to "carry forward" names). The effect of the Electoral Fraud (Northern Ireland) Act 2002 is that there is no equivalent "carry forward" of names on the register from year to year in Northern Ireland.

6.4 As a result, the number of registered voters in Northern Ireland has significantly fallen. At the 2004 canvass, 83,000 people who were registered the previous year were removed from the register. The fall in the number of registered voters is now considered by the Government to risk damaging the integrity of the register due to a lack of comprehensiveness.

6.5 The Bill aims to remedy this problem by giving the Chief Electoral Officer the power to re-register former electors (i.e. individuals who appeared on the register published on 1st September 2004 but failed to return the annual canvass form that year or failed to complete it accurately) by 1st April 2005 (in time for Northern Ireland local elections in May). Clause 1(1) provides that the Chief Electoral Officer may enter the name of such former electors in the register in respect of the address at which they were registered the previous year, where he has no information which suggests that the former elector has ceased to be resident at that address or has otherwise ceased to satisfy the conditions for registration.[163]

162 Clause and paragraph numbers in this report refer to the Bill and Explanatory Notes as introduced to the House of Lords (HL Bill 28)

163 Clause 1(1)(c)

The human rights implications

6.6 Registration as an elector is a precondition of exercising the right to vote. The Bill therefore engages the right to participate in free elections and to do so without discrimination, rights which are guaranteed by all of the principal human rights treaties to which the UK is a party, including the ECHR.

6.7 Article 21 of the Universal Declaration of Human Rights provides that "everyone has the right to take part in the government of his country, directly or through freely chosen representatives", and that the will of the people "shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

6.8 Article 25 of the International Covenant on Civil and Political Rights similarly provides that every citizen shall have the right and opportunity, without discrimination, to vote at genuine periodic elections.

6.9 Article 3 of the First Protocol to the ECHR also guarantees the right to free elections—

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

6.10 The Bill is a response to the significant fall in the number of registered voters in Northern Ireland. It has been established by the Electoral Commission that this fall in the number registered is due at least in part to the impact of the Electoral Fraud (Northern Ireland) Act 2002.[164] The main reason for the reduction in names was found to be the removal of the "carry forward" facility which applies to the rest of Great Britain. The Electoral Commission's research also found that the switch from household to individual registration had "tended to have an adverse impact on disadvantaged, marginalised and hard-to-reach groups. Young people and students, people with learning disabilities and other forms of disability, and those living in areas of high social deprivation were less likely to be registered and encountered specific problems with the new registration process."

6.11 **In light of the findings of the Electoral Commission about the impact of the Electoral Fraud (Northern Ireland) Act 2002 on the registration of voters, we welcome the Bill as a measure which positively enhances human rights. The impact of the Electoral Fraud legislation on the right to vote generally, and in particular on the right of disadvantaged and marginalised groups, raises concerns about compatibility with the UK's obligations both under Article 3 Protocol 1 ECHR and Article 14 taken in conjunction with the right to free elections. By providing for the restoration of names to the register the Bill allays the risk of incompatibility with those guarantees**.

6.12 We have one reservation about the way in which the Bill is drafted to achieve its welcome aim. Clause 1(1) of the Bill confers a very wide discretion on the Chief Electoral Officer: he "may" enter the name of former electors in the register where he has no

164 See *The Electoral Fraud (Northern Ireland) Act 2002: An assessment of its first year in operation*, Electoral Commission, December 2003; *The Northern Ireland Assembly Elections 2003: The official report on the Northern Ireland Assembly elections 26 November 2003*, Electoral Commission, April 2004, at paras 2.18–2.19.

information suggesting that the individual is no longer resident at that address or has otherwise ceased to satisfy the conditions for registration. As the Explanatory Notes make clear, this envisages that the Chief Electoral Officer will not automatically restore the 83,000 former electors to the register, but will have the power not to restore "those whom he believes are not entitled to be registered".[165]

6.13 This is a very wide discretion, and it is not structured by anything in the Bill. There is, for example, no requirement that the Chief Electoral Officer take positive steps to satisfy himself or herself that a person has moved, or is otherwise not entitled to be registered. When dealing with such an important right, it would have been preferable, in our view, for the Bill not to have left such a wide discretion to the Chief Electoral Officer, but to have required him to carry forward a registration in the absence of definite information as to change of address, death, or other reason for not being entitled to be registered. In the absence of such a duty, we consider it would be desirable if the Chief Electoral Officer were to publish the criteria on the basis of which he will exercise his discretion, and that he should allow an opportunity to make representations. **We draw this matter to the attention of each House**.

165 EN para. 10

Bills not requiring to be brought to the attention of either House on human rights grounds

Bills that raise no human rights issues

7 Government Bills

7.1 The following Government Bill seems to us to raise no human rights issues and does not require to be drawn to the attention of either House on human rights grounds.

a) Railways Bill[166]

Formal minutes

Wednesday 23 February 2005

Members present:

Jean Corston MP, in the Chair

Lord Bowness	Mr David Chidgey MP
Lord Campbell of Alloway	Mr Kevin McNamara MP
Baroness Falkner of Margravine	
Lord Judd	
Lord Plant of Highfield	
Baroness Stern	

The Committee deliberated.

* * * * *

Draft Report [Scrutiny: Fourth 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 7.1 read and agreed to.

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

Ordered, That certain papers be appended to the Report.

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

[Adjourned till Wednesday 2 March at Four o'clock.

Appendices

Appendix 1: Letter from Rt Hon Charles Clarke MP, Secretary of State for the Home Department, re Identity Cards Bill

Thank you for your letter of 26th January with a number of questions relating to the Identity Cards Bill and its compatibility with the European Convention on Human Rights.

I will respond to each of your questions in turn, but before I do it might be helpful if I first make some general comments as to the status of the legislation and the proposed identity cards scheme.

First, of the 25 EU member States, all apart from the UK, Ireland, Denmark and Latvia already have identity card schemes. Some of these schemes are voluntary and others are compulsory including schemes where it is both compulsory to have as well as to carry a card (which goes further than our proposal). Other EU Member States (including Denmark that does not have an ID card), have systems of compulsory registration with requirements for changes of name or address to be notified. Whilst I understand that we need to look at the United Kingdom scheme on its own merits, I do not consider that the principle of a compulsory national registration and identity cards scheme can possibly be in breach of our obligations under the European Convention on Human Rights (ECHR).

Secondly, I must stress that the Identity Cards Bill is enabling legislation. Many of the precise details relating to the application process, the format of the ID card itself and the arrangements for the provision of information from the National Identity Register have yet to be decided. We have therefore not spelt out all the details on the face of the Bill and many of these can only be set out later in secondary legislation which will also have to be compatible with our ECHR obligations. I consider that all the powers in the Bill are capable of being exercised compatibly and its human rights compliance has to be judged ultimately by looking at the Bill and all the orders and regulations made under it. We will be under a duty, under section 6 of the Human Rights Act, to act compatibly in making the subordinate legislation and if we did not do so the courts will have the power to strike it down.

The identity cards scheme which is planned to start in 2008 will operate under the enabling legislation contained in the Bill, together with secondary legislation made under it and other relevant law—in particular the Data Protection Act and Human Rights Act. I believe that this will ensure that the requirements for certainty and proportionality are met.

INFORMATION HELD ON THE REGISTER

Question 1: Why is it considered that the gathering and storage of each of the registrable facts serves a legitimate aim, and is a necessary and proportionate interference with Article 8 rights?

It is accepted that the gathering and storage of information under the Bill may amount to an interference with Article 8 rights, although this will not always be the case. Much of the information will not be personal information protected by Article 8. We consider that any interference there may be will fall to be justified under Article 8.2, generally as in the interests of national security, for the prevention of crime or in the interests of the economic well being of the nation. The Bill sets out clear statutory purposes for the Bill at Clause I and these include national security, the prevention of crime and the enforcement

of immigration controls and controls on illegal working (accepted by your committee in previous reports as aspects of economic well-being).

The information and the purposes for which it is recorded are set out in great detail in the Bill (Clauses I and 3 and Schedule 1). The information held on the Register is limited to that regarded as necessary for the functioning of the scheme. As a general rule, only information of a non-sensitive nature may be recorded. Most of it is the type of information which will already be freely available in telephone directories or other databases. Information such as medical and criminal records cannot be held on the Register.

Applicants for ID cards will be asked for information about current principal address (together with current alternative addresses) and previous addresses (clause 1(5) (b) to (d)). They will not be asked about every address at which they have ever lived although, once an ID card has been issued, historic data of information previously recorded will continue to be held on the Register (at least for a period), but not as part of the current record that could be provided with the consent of the ID card holder under Clause 14.

Current addresses will be required not only to enable the new agency to contact individuals, but also so it is clearly recorded on the Register where someone lives if they need subsequently to provide evidence of address when, for example, seeking access to a service that applies only to people living in a particular catchment area. We will use the Order making power at Clause 43 (10) to specify in detail exactly what will be regarded as a place where a person resides and as a principal place of residence.

We will also use the Order making power under Clause 12 to set out clearly which particular changes of address need be notified and the period within which this must be done. I can offer a reassurance that there will not be a requirement to update addresses every time someone changes their address for a short period of time. Our current thinking is that a person would be required to notify the agency of a change of address for any place where he or she has lived continuously for 3 months or more, but we will consider making exceptions in the case of students or others who have a continuing permanent address. For students with a term-time address it would be possible, though not a requirement, for them to update their entry as frequently as they moved from one place to another if they found that to be of personal benefit. After moving into a new residence there will be a reasonable time limit for notifying the agency of the new address and there will be no requirement for changes to be notified immediately. We will need to ask people for information about second or multiple addresses in order to allow for the most thorough checks before an individual is entered on the Register and to guard against criminals registering an accommodation address whilst in reality using another address. In most instances it is only the principal address where an individual can be contacted that will be used.

Previous addresses will be required from an ID card applicant for two reasons. First if there has been a recent change of address, it will help the individual to ensure that the Register has both addresses available. It might create problems if the Register held only the latest address and a service checking identity has the person recorded as living at their last address. Secondly previous addresses are needed to enable a background check to be carried out to ensure a 'gold standard' of identity is entered into the Register. It is much harder for a fraudster to create false historic records. We will prescribe the period for which we will ask for information on previous addresses as provided at Schedule 1 paragraph 1 (h). Our current thinking is that we will ask all applicants for details of their addresses for the past 6 years and only in the most exceptional case would any earlier details be required.

In a small minority of cases there may be a need to collect further information from an applicant about earlier addresses in order to validate their identity. An example would be the case of a British citizen who has just returned to live in the UK after 6 years abroad. Collecting information on past addresses in the UK from such an applicant could be an important extra piece of information to enable their identity to be validated. However, for the vast majority of ID card applicants we expect to ask for no more than details of addresses over the past 6 years.

Additional information cannot be stored in the Register unless it is consistent with the statutory purposes of the scheme set out in Clauses 1(3) and (4) and is evidence of a registrable fact as defined in clause 1(5). The Bill imposes no restrictions on the rights of the individual to access the information recorded about him on the Register. Data Protection Act rights apply in full as confirmed by clause 14(8).

The Register will hold current information relating to a person's identity and residential status and this current information can be confirmed with the consent of the individual under Clause 14. The Register will also hold historic information relating for example to previous address or previous nationality. Such information would not be available to be provided under Clause 14 but would be available to the individual concerned under existing Data Protection Act subject access provisions. In addition historic information would be available to be provided to intelligence and security agencies under Clause 19 and to the police in relation to the prevention and detection of crime.

The Register will hold information about occasions on which information about a person has been provided from the Register (clause 1(5)(h) and paragraph 9 of Schedule 1). This will serve two purposes. First, it will act as an audit trail of checks made against a person's entry and thus a safeguard against inappropriate disclosure. It would thus be available if there were any complaint about how an ID card had been checked against the Register or about the provision of information from the Register. This information would be available to the individual concerned under the Data Protection Act subject access provisions (subject to any exclusions in that Act). Secondly, in the limited cases provided for in the Bill, this information could be provided to law enforcement agencies, for example, to the police in the case of serious crime.

I believe that this is an entirely proportionate arrangement and does not make any unwarranted intrusion into an individual's private life. Information about alternative addresses and historic information about address, change of name or nationality could be of great importance in relation to a criminal investigation and I see no reason why this should not be held on the Register.

ENTRY ON THE REGISTER OF INFORMATION "OTHERWISE AVAILABLE"

Question 2: Can you clarify the circumstances in which clause 2(4) will allow for information to be entered on the Register? Why it is considered that the recording of information in this way will comply with Article 8 rights?

Clause 2(4) does allow for information to be recorded on the Register, whether or not an individual has applied to be or is entitled to be entered in it, if information capable of being recorded in an entry is otherwise available to be recorded.

One example of how this could be used is to record failed asylum applicants or those who are about to be deported. This would ensure that any further attempts to Register would be flagged. Another example of how this could be used would be where a person applies for, and is issued with a biometric visa in anticipation of coming to the UK. In this case it might be useful to have this information recorded in the Register with the individual's

consent so that if they did exercise their right to stay longer than three months, the process of getting a residence permit/ID card would be made easier.

There are also cases where it would be useful, for national security reasons, to have information recorded on the Register about an individual who would not be entitled to register or who had not yet applied for a card.

In all of these (apart from the last) examples the individual would know that their information has been entered on the register. The vast majority of people will be aware that they are recorded on the Register because they will have applied for and been issued with an ID card. However, the Data Protection Act contains requirements on notification will also apply to the ID cards scheme and wherever practicable individuals will be notified that information is to be recorded on the National Identity Register.

Adding to the Register information which is already held for the convenience and with the consent of the person concerned will not in our view constitute an interference with Article 8 rights. Insofar as the information is recorded for the purposes of the enforcement of immigration controls or national security, we consider any interference there may be will be justifiable in accordance with Article 8.2.

DESIGNATED DOCUMENTS

Question 3: How do the aims of the Bill support a scheme where entry on the Register depends on application for a designated document unrelated to one of these aims, such as a passport? How can an interference with Article 8 rights on this basis can be justified as a proportionate interference with Article 8 rights?

It has always been made clear that the identity cards scheme is being designed to be a compulsory scheme but will be introduced in two phases. The first phase will be to link the issue of ID cards to certain "designated" documents—intended to include passports for British nationals. The second phase of the scheme would involve a requirement to register (either applying generally or on a phased basis) with civil penalties for failure to do so.

The process of designation will indeed mean that those people applying for or to renew a designated document will need to register and obtain an ID card. For a British citizen the process for obtaining an ID card will be combined with that for obtaining a passport and will build on the plans for issuing biometric passports. The information requested will be largely the same as that which would be required-for issue of a biometric passport. ID cards will be issued by a new agency based on the UK Passport Service and working in close conjunction with the Immigration and Nationality Directorate of the Home Office. I consider that it is right to phase in the ID card scheme in this way and that this is a more sensible solution than the alternative of trying to is introduce a compulsory ID card scheme for all UK residents simultaneously. I do not consider that the requirement to obtain an ID card in addition to a passport in itself constitutes an interference with Article 8 rights.

Question 4: Why is it considered that the scheme of designated documents can operate in compliance with Article 14 ECHR, read in conjunction with Article 8?

I do not accept that Article 14 prohibits discrimination "on any grounds". The correct approach to Article 14 is in my view set out in the recent House of Lords judgement in R (S and Marper) v Chief Constable of South Yorkshire ([20041 UKHL 39) where Lord Steyn said—

"The proscribed grounds in Article 14 cannot be unlimited, otherwise the wording of Article 14, including things such as sex, race or colour, would be unnecessary. It would then

preclude discrimination on any ground. That is plainly not the meaning of Article 14. It is therefore necessary to examine whether the ground for different treatment in this case amounts to a status in the sense of a personal characteristic within the meaning of Article 14".

I do not consider that a phased requirement for compulsion as between passport and non passport holders can amount to discrimination on the basis of status. Even if it did, it can be objectively and reasonably justified as a practical way of phasing in a compulsory scheme.

ENTRY ON THE REGISTER BY COMPULSION

Question 5: How, in your view, can a phased introduction of compulsory ID cards, as envisaged by the Bill, be justified as compatible with Article 8 and Article 14 ECHR?

As stated earlier there are other EU member states which already have compulsory identity card schemes none of which have been suggested as being in breach of the ECHR. Clearly it is not practical or technically feasible to require everyone resident in the UK to register simultaneously. Apart from applicants for renewal for UK passports (discussed above), it is possible that non EEA third country nationals may be required to register before other residents. Any discrimination in respect of the introduction of compulsion by nationality would fall to be objectively justified. In the case of third country nationals, I believe it would be justifiable to require those subject to limited or conditional leave to remain to register before the general population. This would be in the interests of enforcing immigration controls and prohibitions on working and restricting access to public services to those entitled to use them. I do not regard exemption from compulsion for the very elderly to be discriminatory but in any event, any such policy would in my view be objectively justifiable in a rolling programme of registration. There may well be a case for saying that the elderly should not be required to provide fingerprints or other biometric data or to be photographed etc if they do not wish to have a travel document.

Clearly the details of any move to compulsion are not yet settled. Nevertheless, I believe the examples given in the Explanatory Notes would be lawful exercises of the power. The Bill provides for full Parliamentary scrutiny of the proposal for compulsory registration under Clause 6 of the Bill and the secondary legislation needed to implement compulsory registration would also have to be compatible with the ECHR obligations.

DISCLOSURE OF INFORMATION, BENEFITS AND PUBLIC SERVICES

Question 6: Why is it considered that the extent of disclosure permissible under clause 17 is justified in relation to Article 8? Will consideration be given to a tighter definition of information that can be accessed under this provision?

No organisations, including public service providers, will have "access" to the Register. Access to the Register itself will be restricted to those employed for that purpose. The Bill, at clause 17, allows regulations to be made enabling a person providing a public service to be provided with information recorded in the Register for the purpose of ascertaining or verifying registrable facts about an individual. The power is limited to cases where regulations have been made under clause 15 allowing or requiring a public service provider to require an identity check before providing a service. Regulations under clause 15 can only be made in relation to benefit entitlements or free services in relation to individuals already the subject of compulsory registration.

The information to be provided to a particular public service provider will depend on the nature of the service. It is not possible to set out the details of each potential case on the face of the Bill. Hence the extensive powers in clause 17(2) and (3) and 41(6). The intention is to limit any information provided to that which is necessary in the particular case, for example, if a public service needs to confirm an individual's age or nationality that information could be provided from the Register. Regulations under clause 17 are subject to affirmative resolution procedure. The Data Protection Act and section 6 of the Human Rights Act will apply to both the Secretary of State and those provided with information. It is not necessary or sensible to replicate those requirements in this Bill.

Question 7: Will consideration be given to including a requirement of authorisation, and a requirement that such authorisation be conditional on relevance to one of the statutory purposes, on the face of the Bill?

It is already intended to establish a system of "accreditation" so that only those organisations that agree to comply with a set of requirements will be provided with any information from the Register. Clause 17(3) and 41(6) give the power to set conditions in regulations that any person seeking information from the Register must first register prescribed particulars and be approved by the Secretary of State. In addition the apparatus used and the method of storage of information would be subject to approval. Any organisation that did not pass the required standards would not be accredited and accreditation would be withdrawn if there was a failure to maintain standards.

DISCLOSURE OF INFORMATION: VERIFICATION OF IDENTITY

Question 8: Will consideration be given to including a requirement of authorisation, and a requirement that such authorisation be conditional on relevance to one of the statutory purposes, on the face of the Bill?

Verification checks under clause 14 can only take place with the consent of the person concerned. An individual will be free to choose where and when to produce an ID card under clause 14. However a similar system of accreditation as proposed under Clause 17 will be established under Clauses 14 (6) and 41(6) to ensure that no information is provided from the Register with the consent of the individual to an organisation that has not been approved.

Question 9: Will consideration be given to including such safeguards [as contained under clause 14(4)] on the face of the Bill, rather than leaving them to regulations, in order to ensure compliance with Article 8 rights?

As stated at the outset, the Bill is an enabling measure. It is intended to start issuing ID cards in 2008 and it would be wrong to attempt to deal on the face of the Bill for all the exceptions that may be required for particular groups or cases of individual. The Bill provides the flexibility to do so at the correct time through secondary legislation. The obligation under section 6 of the Human Rights Act will apply to that subordinate legislation and the operation of the scheme in practice.

EXCHANGE OF INFORMATION

Question 10: Please clarify the range of circumstances in which information could be required to be provided under clause 11.

It is intended that the identity cards scheme should provide the best possible standard of identification and so it is vital that the initial checks to verify an applicant's identity are as thorough as possible. The Cabinet Office study on Identity Fraud (published in July 2002)

recommended greater use of biographical checks on applicants in order to prevent identity fraud. Clause 11 enables these checks to take place.

Whilst the National Identity Register will be a new database, applications will require checks to be made against other databases, such as DVLA's driver information, DWP information on national insurance and birth, marriage and death records to establish a "biographical footprint" and protect against fraudulent applications. In all cases the information sought will be to confirm identity and will not relate to irrelevant information, for example driving record. This data sharing to build up a biographical picture is therefore crucial in establishing that an application to register is genuine and thereby in maintaining the accuracy of the Register.

DISCLOSURE OF INFORMATION

Question 11: Will consideration be given to including, on the face of the Bill, clear limits on the range of bodies to which information can be disclosed, and the range of purposes for which it can be disclosed, in order to ensure that the interference with the right to respect for private life will be in accordance with law as required by Article 8.2?

Disclosure under clauses 19 and 20 is restricted to the specified bodies for their legitimate and lawful purposes e.g. to the police for the prevention and detection of crime. In relation to the order making powers in clause 19(3),(4) and (5) the additional purposes would need to be set out in a statutory instrument and justified to parliament before any information could be provided. The public authorities receiving the information would be obliged to deal with it in accordance with their own common law or statutory powers, including the Data Protection Act and Human Rights Act.

I have reviewed the drafting of clause 22 of the Bill following discussions in Commons committee and tabled amendments for Report stage which will preclude disclosure of "audit trail" information and limit recipients to public authorities. 1 do not think it would be right to attempt to list these on the face of the Bill but any proposal to make an order under clause 22 would be subject to an affirmative resolution procedure.

Question 12: How is it to be ensured that disclosure of personal information under clauses 19–22 would in every case serve a legitimate aim under Article 8.2?

Just as the framework established by the Bill and the secondary legislation made under it needs to be compliant with our obligations, it will also be incumbent upon those operating the scheme to be mindful of these obligations. Furthermore the bill creates a new post of National Identity Scheme Commissioner to oversee and report annually on the way the scheme is operated in practice.

Question 13: Will safeguards requiring authorisation, as well as safeguards requiring a prior assessment of relevance and proportionality, will be included in the Bill?

Authorisation for example at a particular rank of police officer will be required together with any other requirements to be set out in regulations to be made under clause 23, which deals with the rules for the provision of information without an individual's consent. These will vary according to the purposes and structure of the recipient of the information. This is appropriate material for subordinate legislation. The legal obligations of public authorities already referred to require them to act in a proportionate and reasonable matter in exercising their functions. It is neither practical nor necessary to replicate those safeguards here.

Question 14: We are particularly concerned at the potential breach of Article 8 rights in the disclosure of paragraph 9 Schedule 1 information. In light of the potential breach of Article 8 rights, will provision for disclosure of this information will be restricted on the face of the Bill?

As I indicated earlier, I have reviewed the safeguards relating to the provision of "records of provision of information" from the register (paragraph 9 of Schedule 1). This is already constrained by clause 20(4) in relation to crime where there is a higher threshold of serious crime introduced. However, to increase the safeguards I have tabled government amendments for Report which will preclude the provision of this information by way of an order under clause 22.

I hope that I have provided a satisfactory answer to all your questions.

I am grateful to see all the Committee's comments which I have considered very carefully. In view of the comments you have made on clause 22 of the Bill I have tabled Government amendments to remove the possibility of "records of provision of information" (paragraph 9 of Schedule 1) being made available under clause 22 and to limit the order making powers under this clause to public authorities only. I hope you will agree that this provides additional safeguards and in view of what I have said about the more detailed provisions to be set out in secondary legislation that the Committee will accept that the Identity Cards Bill is compatible with our obligations under the European Convention on Human Rights.

If you agree, I think it would be helpful if I were to make this reply available to the House for the remaining stages of the Bill on 10th February.

8 February 2005

Appendix 2a: Letter from Caroline Flint MP, Parliamentary Under Secretary of State, Home Office, re Serious Organised Crime & Police Bill

Thank you for your letter of 17 January to Charles Clarke which covered the Joint Committee on Human Rights' initial examination of the Bill. I am responding as the Bill Minister. I attach a memorandum, that covers the specific questions that you raised.

3 February 2005

MEMORANDUM BY THE HOME OFFICE

1. This memorandum is submitted by the Home Office in response to the request for comments on the Serious Organised Crime and Police Bill in a letter from the Chair to the Joint Committee on Human Rights to the Secretary of State (Charles Clarke) of 17th January 2005.

2. The then Secretary of State made a statement under section 19(1)(a) of the Human Rights Act 1998 when the Bill was introduced, indicating that in his view, the provisions of the Bill are compatible with the Convention rights. The current Secretary of State concurs with that statement. He believes that, where the Convention rights are engaged, the proposals are a balanced and proportionate response to a pressing social need and that the judgements he has made about the balance to be struck between competing rights and responsibilities can be objectively justified.

3. This memorandum is in response to the specific questions on the Bill raised by the Committee. We note the absence of Q.25 in the letter from the chair of the Committee. For convenience, references to clauses and paragraphs are as for the 24 November print of the Bill.

SOCA – GATHERING , STORAGE, USE AND DISCLOSURE OF INFORMATION (CLAUSES 3, 31–34)

4. The Committee's concerns as regards Part 1 of the Bill appear almost entirely to relate to clauses 3 and 31–34, with some reference to clauses 2 and 5. Before turning to the Committee's specific questions regarding these clauses it may be helpful to set out the context of the Government's approach to assist the Committee in reaching its conclusions. Responses to questions relating to the Part have been grouped where convenient.

General

5. SOCA's functions and the information gateway provisions which give them effect are based largely on precedent and are drawn widely to encourage the proper and legitimate free flow of information between SOCA and appropriate bodies which will be the lifeblood for the effective and efficient functioning of SOCA. However, the safeguard of the Data Protection Act 1998 (DPA 1998) which is expressly referred to in the clauses ensures that the actual processing of this information, particularly personal including sensitive personal information, is in line with requirements under ECHR Article 8. In addition to the DPA safeguard, the Human Rights Act 1998 (HRA 1998) does of course continue to apply, in the same way that it applies to all conduct by public authorities, even though it is not expressly referred to in the clauses.

6. Thus clauses 31, 32 and 33 are modelled on sections 435, 438 and 436 respectively of the Proceeds of Crime Act 2002. Paragraph 53 of the Report by the Joint Committee on Human Rights in relation to these sections of the 2002 Act made clear that they "did not

raise any issues relating to human rights which require to be drawn to the attention of either House". Moreover, SOCA is a "public authority" in the meaning of 6(3) (b) of the HRA 1998 and so section 6(1) of that Act makes it unlawful for it to act in a way which is incompatible with a Convention right—in effect the actual legitimate exchange of information relating to SOCA, in any particular case, needs to be ECHR compliant. It is perhaps with this in mind, that in relation to the 2002 Act, paragraph 52 of the Committee's report acknowledged that the powers of "public authorities" within the meaning of the HRA1998 Act are "sufficiently circumscribed to avoid incompatibility" with the rights under ECHR.

7. Furthermore, cl.32(4)(a) and 33(3)(a) expressly ensure that any actual legitimate disclosure of information that consists of "personal data", in the meaning of s.1 of the DPA 1998, must comply with the provisions of that Act. That Act is intended to ensure compliance with ECHR Article 8 regards personal data including sensitive personal data by setting safeguards in accordance with the EC Directive to which it gives effect.

Question 1: What is the justification for conferring such a broad information function, relating to crime generally, on an agency the primary functions of which relate to serious organised crime?

Question 3: What is the explanation for not defining more precisely on the face of the Bill the kind of information which can be the subject of the wide powers conferred on SOCA by clause 3(1) of the Bill?

Question 4: What precisely is meant by "serious organised crime"?

Question 5: What is the explanation for not including a definition of "serious organised crime" on the face of the Bill, bearing in mind the importance of legal certainty in defining the limits of the new agency's powers to interfere with the right to respect for private life?

Question 20: Please identify the evidence on which the Government bases its assessment that conferring such wide powers to interfere with the right to respect for private life is necessary to achieve the aim of preventing and detecting serious organised crime.

Question 21: What justifies giving to an agency created to combat serious organised crime such extensive powers in relation to information relating to ordinary crime?

Question 22: What are the safeguards against abuse of these wide powers?

Question 23: In view of the breadth of the powers to gather, store, use and disclose personal information, and the lack of any overt safeguards against abuse, why does the Government consider that the provisions in the Bill authorising such interferences are proportionate?

8. Whilst the notion of "serious" and "serious crime" is understood from previous enactments[1] this in itself is not satisfactory to define the functional remit of SOCA, for example, it is not envisaged that a serial killer operating in various parts of the country should fall under the direct remit of the Agency unless connected say with the operations of a criminal gang. On the other hand "organised crime" does not neatly fit into the

1 Criminal Justice Act 1987 creating the Serious Fraud Office and section 48(2) and (3) of the Police Act 1997 for the functions of the NCS

recognised law enforcement categories of Level 1 (local), 2 (regional) or 3 (national and international) crime. Neither would the mere fact of organisation around criminal activity be sufficient, for example, the activities of a gang of shoplifters or hooligans should not normally fall under the remit of SOCA unless they were connected say to the intimidation tactics of serious organised criminals. Nevertheless the understanding of serious organised crime as the fundamental functional remit of the Agency is dependant in part on both these expressions. Furthermore, organised criminals and crime groups act, cause harm and effect other criminality at all 3 Levels recognised by law enforcement agencies: Serious organised criminality does not operate in isolation from crime in general—the activities of an international drug trafficking group fuel and inspire those of a local drug pusher.

9. Whatever the understanding of serious organised crime then, it is clear that the function of SOCA in clause 2 relates to crime and criminal matters. Clearly ECHR article 8 is not designed to protect an individual's involvement in crime be it serious, organised or otherwise. It is the government's view that cl. 2 enables SOCA as a statutorily established body corporate to purse serious organised crime and crime in relation to it, legitimately, effectively and efficiently; but it does not legitimise SOCA to overstep the mark regards interfering with the right to respect for private life as its work would be in the pursuance of tackling crime, fundamentally focussed on serious organised crime.

10. Defining serious organised crime in statute would be otiose from this perspective. Indeed to do so would limit the ensuing substantive provisions to this definition, in effect limiting SOCA to considering whether a crime is sufficiently serious and/or organised before it could act.[2] Organised crime is also complex and evolving and to define serious organised crime in statute would also prevent the strategic priorities of SOCA evolving over time to reflect the emerging threats from such crime and those who engage in it.

11. On the other hand, the interconnectivities between organised crime and crime in general necessitate SOCA's involvement in crime which is not only serious and organised. To limit SOCA's functions statutorily to only serious and organised crime would be to require SOCA to ignore crime in general, crippling its effectiveness. At the very least it would run the risk of SOCA having to determine whether the pursuit of any criminal activity for intelligence or enforcement purposes lawfully fell within its scope, significantly hampering its operational efficiency.

12. Thus information relating to serious and organised crime is not necessarily limited or peculiar to serious and organised crime—it is not necessarily readily available headed or identified as such. Often, only upon close analysis of information relating to crime in general can prioritisation and targeting be effected for serious and organised criminality. Specific operations may be informed, for example, by better strategic knowledge and understanding of serious organised crime and criminal activity built up from the analysis of local and regional criminal information around the UK or they may be informed by information relating to the way specific types of crime groups work or what they need to deal in certain products which require general information relating to crime. In both, the information that SOCA will need and use will relate to crime in general rather than specifically serious organised crime.

13. SOCA will also assume the responsibilities of NCS and NCIS to support local policing and other law enforcement. Currently the role of NCIS is to provide information, intelligence and analysis on crime in general to local police forces and other law enforcement for both their level 2 and level 1 work. Clause 3 enables SOCA to continue

2 There is a working definition for operational purposes which is the one used by NCIS for serious organised criminals: "Those involved, normally working with others, in continuing serious criminal activities for substantial profit, whether based in the UK or elsewhere."

this. It is worth noting that this has the added benefit of fostering relationships between the law enforcement communities and encouraging the legitimate yet necessary exchange of information for the efficient and effective discharge of SOCA's functions.

14. Broadly speaking it is envisaged that the type of information that SOCA will typically use and handle will be—

- personal information on individuals in respect of whom there are reasonable grounds to suspect involvement in, or close association with others involved in, serious crime;

- information that enables the identification and profiling of criminals whose activities fall within SOCA's statutory responsibilities—in some circumstances such information may include 'bulk' personal data relating, coincidentally, to members of the public where that information contributes to the gaining of an understanding of criminal business methods or the identification of criminal targets (e.g. passenger lists on which drug couriers or gangsters are believed to be present) and;

- other information of strategic and policy importance relating to the extent of, and changes in the nature of, the harm caused by serious organised crime—data in this category may contain some personal information relating to those affected by serious organised criminal activity, or may contain otherwise sensitive 'community' information.

15. Clearly then SOCA will use and handle a wide range of information including personal information but the information may not be limited to personal information in which case neither ECHR Article 8 nor DPA 1998 are engaged. Where it is, cl. 32(4) (a) and cl. 33(3) (a) ensure the requirements of the DPA and hence in effect ECHR article 8 are satisfied. In other words, any legitimate disclosures of personal data to and from SOCA which are made within the terms of s. 29 (3) of DPA 1998 will fully comply with the disclosing person's obligations under the HRA 1998.

16. It would be impractical though to list comprehensively these kinds of information for SOCA on the face of the Bill and given the complex and dynamic nature of serious organised crime run the risk of constraining SOCA both immediately and in the future. Of course the classifications of data under the DPA 1998 are assumed still to apply and indeed the safeguards on how information is actually handled and used by SOCA under cl. 32 (3) and (4) and cl. 33(3) and (4) underline this. It is also perhaps worth noting that SOCA's intelligence function is designed to mirror that for NCIS under the Police Act 1997 where information categories were also left undefined (and indeed likewise in the POCA 2002). It is the government's view then that both SOCA's intelligence function and the information gateways provisions that give it effect do not contravene ECHR Article 8.2, which it is worth noting is not limited to serious crime; nor indeed is the exemption under section 29(1) of the DPA 1998.

17. It is also the government's view that the powers to process information are entirely proportionate with SOCA's fundamental objective of tackling the harm caused by serious organised crime as outlined in the Organised Crime White Paper. The harm from this form of criminality costs the UK at least £20 bn every year. This comprises not just financial and economic costs but also social costs and the harm caused by fear and concern—communities are blighted by the fear of violent organised crime and even lower order crime such as anti-social behaviour is fuelled by the products of organised criminals (for example, illegal drugs and alcohol).

18. The actions by SOCA to tackle the serious organised criminality causing this harm must be authorised and tasked. Legitimately processed, good quality information and

intelligence shared in a timely and focused manner is key to driving this activity. Indeed without such information there is a risk of less discriminate and disproportional activity taking place against wider sections of the population. SOCA's clear intent is to focus upon those causing the greatest harm and to employ all legitimate methods to defeat and disable their organisations to prevent or reduce the harm they cause. SOCA will remain accountable to the Secretary of State, to Parliament, to the courts of the UK and elsewhere for that activity.

19. All intrusive investigations, including directed and technical surveillance, are already closely and carefully monitored and accountable through the provisions and resulting mechanisms under Part III of the Police Act 1997 (as amended) and RIPA 00 (as amended), both of which are considered to be compliant with the HRA 1998 and ECHR Article 8. All such surveillance authorities require the Office of Surveillance Commissioners to oversee and, in cases of major intrusion into private life, to receive the prior authority of the OSC. This will continue within SOCA.

Question 2: What precisely is meant by the "reduction of crime in other ways" and "the mitigation of its consequences"?

Question 16: Which of the purposes specified in Article 8(2) ECHR is relied upon as the legitimate aim justifying the powers in clauses 3(1)(b), 31, 32(2)(c), 33(1) and 34(1) of the Bill to interfere with Article 8 rights in order to mitigate crime's consequences?

Question 17: What evidence is relied upon to demonstrate that the power in those clauses will in fact serve that purpose?

20. The Organised Crime White Paper made it clear that SOCA's fundamental objective will be to reduce significantly the harm caused by serious organised crime to the UK. Clause 2(1)(b) together with (a) provides the statutory basis for SOCA as a statutory body corporate to deliver that objective by encapsulating the multi-facetted approach envisaged for it to do so. This approach, in looking not only at preventing and detecting serious organised crime which defines the classic enforcement paradigm of investigation and prosecution, but contributing to the reduction of such crime in other ways sees a step change away from this. Namely to more innovative, proportionate and targeted activities based on effective intelligence sharing, early prosecutorial involvement and prioritisation of options to achieve maximum harm reduction. On occasion, this will mean intervention by SOCA that will lead not to prosecutions, but to disruption and dismantlement of organised crime networks. On the other hand, it may be as proportionately effective for SOCA to be involved in crime which in itself is not serious or organised, say level 1 and level 2 crime such as the theft of vehicles, which might underpin serious organised crime.

21. Moreover, intimidation and the general fear and concern that surrounds serious organised crime are important weapons for serious organised criminals. In the context of harm reduction it is clearly important to tackle both as part of the mitigation of the consequences of serious organised crime. Action here might include increasing public awareness of organised crime and the dangers of its consequences; institutional and systemic target hardening and dissemination of best practice around consequence management; encouraging support networks and limiting the effects of serious organised crime on public and communities by encouraging them to be less susceptible to organised crime and their products. In effect SOCA will also see the mitigation of the consequences of serious organised crime as a key responsibility provided under cl. 2 (1) (b).

22. These activities will serve to make the UK one of the hardest places for serious organised criminals to operate and so needless to say have a positive feedback in

preventing crime—they are then ultimately related to crime fighting and prevention. Moreover, in light of the type of work envisaged under these functions we consider it unlikely that "the reduction of crime in other ways" and the "mitigation of its consequences" will involve the transfer of information about individuals. In our view, it is unlikely then that Article 8 ECHR or the DPA 1998 will be engaged by these functions. In any case on the off-chance were they to actually involve the processing of personal (or sensitive personal data) the requirements of the DPA 1998 must be satisfied.

Question 6: What is the justification for including government departments in the definition of law enforcement agency in clause 3(4) (a)?

Question 7: Given that government departments have many functions other than law enforcement, what is the justification for not qualifying the power to disclose to them in the same way as the power to disclose to other persons in cl 3(2) (d) is qualified, by reference to the disclosure being "in connection with any of the matters mentioned in subsection (1) (a) or (b)"?

Question 8: If it is the Government's intention to confine the disclosure of such information to information required by such departments for the purposes of law enforcement, will this be made explicit on the face of the Bill?

23. Clearly the inclusion of Government departments under the definition of law enforcement agencies, indicates departments which are likely to have a law enforcement role themselves. These would include DTI (e.g. insolvency matters), DWP (e.g. fraud), and DeFRA. Regulatory or legislative changes for the more effective pursuance by SOCA of its functions may also be required in the future. In both instances SOCA would need to be able to disclose information—cl. 3 makes provision in statute for SOCA as a statutory body corporate to do so. It is also worth noting that "government departments" include the Security Service, the Secret Intelligence Service, GCHQ, and the Assets Recovery Agency, bodies which SOCA will work closely with in legitimately exchanging information for its functions.

24. Once again 3(1) does not disapply compliance with s. 6(1) of the HRA 1998, nor indeed the DPA 1998, so the actual legitimate processing and dissemination of information by SOCA to government departments remains governed by the requirements in those Acts. Accordingly there is no need to restrict the disclosure of information to government departments by SOCA—where the information is not personal ECHR Art 8 is not engaged; where it is, compliance with DPA 1998 and HRA 1998 ensure legitimacy. By contrast, even though compliance with DPA 1998 and HRA 1998 continue to apply, it would be inappropriate for SOCA to be able to disclose information to other persons based solely on whether it felt them appropriate recipients of that information—the issue here is one of the appropriateness of the recipient rather than the propriety of the disclosure. Accordingly, in relation to disclosure by SOCA to other persons, clause 3(2)(d) restricts this power to ensure that only those persons other than the Police, special police forces and law enforcement agencies who are connected with the prevention, detection investigation or prosecuting of offences or the reduction of crime in other ways or the mitigation of its consequences can legitimately have information disseminated to them by SOCA.

Question 9: What is the justification for not specifying the "other persons" referred to in clause 3(2)(d), to whom SOCA may disseminate information, bearing in mind the requirement in Article 8(2) that interferences be "in accordance with the law"?

Question 10: To what sorts of "other persons" is it envisaged that such information may be disclosed?

Question 11: Why cannot the addition of other persons be achieved by conferring an order making power on the Secretary of State to extend the list in clause 3(2)?

Question 12: In view of the breadth and vagueness of the definition of SOCA's functions, and the extremely broad discretion conferred on the Secretary of State by clause 32(2)(f), why does the Government consider that SOCA's power in clause 32, to disclose information obtained by it in connection with the exercise of its functions, is "in accordance with law"?

25. In terms of its information function, the disclosure by SOCA to other persons under cl.3(2)(d) would only be to those who are considered connected with the functions under 3(1), namely with matters fundamentally related to crime, and the disclosable information would itself need to be relevant to those same functions under 3(1). ECHR article 8 is not intended to protect an individual's involvement in crime but rather the unlawful interference in private life. Insofar as the Agency's function relates to the pursuance of criminal matters then, this is in accordance with the law. Needless to say the actual disclosure by SOCA to other persons under cl. 3(2)(d) would still need to comply with DPA 1998 (and further under HRA 1998 because SOCA is a public authority in the meaning of that Act). The processing of information regards disclosure to other persons then is also in accordance with the law.

26. Accordingly it is the Government's opinion that in relation to ECHR Article 8 further specification of "other persons" under cl. 3(2(d) would be otiose. In any event, to identify expressly a list of such persons is both impractical as any such list would need to be comprehensive and so likely to be extensive and subject to frequent change as it would need to include a very broad spectrum of agencies and persons both in the UK and elsewhere who and are involved in preventing crime or the facilitation of crime.

27. The Committee's Report implies that this could be overcome by conferring an order making power on the Secretary of State to add to the list in 3(2). This overlooks the fact that such an order making power would still need to identify a statutory function which as they stand, in the opinion of the Committee, may be too broadly and vaguely constituted. Otherwise the Secretary of State would, in effect, be able to extend in secondary legislation the information provision function set in statute. Notwithstanding that this would clearly be a significant and improper addition to the Secretary of States' powers to interfere at the functional level of SOCA, this approach is at odds with the Committee's consideration that the order making power in cl. 32(2)(f) [disclosure by SOCA for the function of public nature] is too broad. This consideration again overlooks the point that to the extent that personal data are disclosed, DPA 1998 and HRA 1998 already apply to disclosure in any particular case.

Question 13: In view of the importance of the limits to broad discretions and procedural safeguards against abuse being set out on the face of primary legislation, in the interests of legal certainty, is the Government prepared to include on the face of the Bill provision covering each of the matters identified above?

Question 14: Does the Government consider that the codes of practice envisaged by clause 11(1) will supply the deficiencies of the Bill and satisfy the requirements of Article 8 ECHR?

Question 15: If so, why does it consider this in light of the discretionary power to issue them, the lack of any guidance in the enabling provision as to the matters to be included in the codes of practice, and the fact that the Secretary of State

has a discretion to withhold even from Parliament anything the publication of which in the Secretary of State's opinion could prejudice the prevention or detection of crime or the apprehension or prosecution of offenders?

28. It is the Government's view that the Committee's proposals to provide on the face of the Bill for matters that are relevant to ascertaining whether applicable legal rules satisfy the requirements of foreseeability are otiose. The DPA 1998 already regulates the processing of personal data consistent with ECHR Article 8 and it would be inappropriate to tread the same ground in this Bill. Indeed clauses 32(4)(a) and 33(3)(a) expressly provide that the 1998 Act applies to the processing of information disclosed by and to SOCA respectively, and the Explanatory Notes to the clauses further clarify the exemptions under that Act.

29. It follows that in our opinion there is no strict requirement to rely on a code. However, in light of Sir Michael Bichard's Report, we recognise the useful significance of clearly setting out the practical management procedures and systems relating to information management. Accordingly we would envisage that SOCA will develop and publish a clear codification of how it will process information. Indeed we would take this opportunity to point out that in order to secure further the Agency's observance of Article 8 and the DPA1998, a Statement of Information Management Practice which outlines the standards for the identification of the Agency's information needs, its handling, storage, processing and dissemination of data has already been prepared and will be deposited in the House libraries before Report stage of the Bill.

30. It is the Government's opinion that it is perfectly appropriate that all of SOCA's codes of practices, should be available to the public, but there should be a reserve power to ensure that sensitive material or material that could be used by serious organised criminals to avoid detection or enforcement does not fall into their hands.

Question 18: Which of the purposes specified in Article 8(2) ECHR is relied upon as the legitimate aim justifying the power conferred by clause 32(2)(b)?

Question 19: What is the evidence relied upon to demonstrate that the power in clause 32(2)(b) will in fact serve that purpose?

31. UK law clearly does not see criminal behaviour and activities as necessarily sanctioned by criminal penalties alone. The raft of legislation surrounding civil orders, including for example Anti-Social Behaviour Orders, bear testimony to this. SOCA will as part of its responsibilities that it will take over from NCIS, share intelligence and information with local police forces for their level 1 and level 2 crime work which will include investigations enforced and sanctioned by such penalties. This clause ensures that this is permitted. The provision also covers information around asset seizure under civil powers, i.e. by the Assets Recovery Agency and other bodies overseas. By removing assets, legitimately, that will disrupt and disable organised crime, so that their ability to commit crime and cause harm to the UK and its citizens is reduced or defeated. Clearly then, it is the Government's view that cl.32(2)(b) is consistent with "the prevention of disorder or crime" under ECHR Article 8(2). Moreover, depending on the information disclosed, the reference in ECHR Article 8.2 to "the protection of the rights and freedoms of others" may in more limited circumstances serve as a justification.

Question 24: What steps will be taken to ensure that the people who exercise these powers are (a) trained sufficiently well, and (b) subject to appropriate control and disciplinary systems, to ensure that they are at least as well able as constables to protect the human rights of the people who will be affected by their activities?

32. The Government has consistently recognised that only those who are suitably trained in powers, whether they have or held them in the past or have them designated to them afresh, should have the powers designated to them. To underline this commitment we will be bringing forward an amendment at the Report stage of the Bill in the Commons, which will require the Director General, before designating a member of SOCA's staff with the powers of a constable etc., to be satisfied that that person is a suitable and capable person to exercise the powers to be conferred on him and has received adequate training. As to discipline, SOCA will have its own disciplinary systems—this is not unusual take for example police forces. Moreover, clause 50 and the associated Schedule 2 provides that the Independent Police Complaints Commission and the Northern Ireland Ombudsman (in Northern Ireland) are responsible, by agreement with SOCA, for investigating complaints and misconduct by SOCA staff. These mechanisms will provide independent oversight not only in respect of investigations around the misuse or abuse by SOCA staff of their delegated powers or any complaints against SOCA staff, but also in the interest of safeguarding against such misconduct. This will ensure that there is a high level public confidence in the way SOCA staff exercise their considerable powers.

FINANCIAL REPORTING ORDERS

Question 26: What safeguards exist against the making of disproportionate financial reporting orders?

33. The first safeguard is that, in each case, the threshold contained in clause 69(2) must be passed. This requires the court to be satisfied that "the risk of the person's committing another offence mentioned in subsection (3) is sufficiently high to justify the making of a financial reporting order". The Committee is right that article 8 is engaged by the making of an order; but in a case where the court assesses the offender's risk as being sufficiently high to justify the making of an order, such article 8 interference as arises is justified in the interests of crime prevention. (See article 8(2)).

34. The Committee points out that the clauses leave the duration of an order at the discretion of the individual sentencer, subject to a maximum in a magistrates' court of 5 years and in the Crown Court of 15 years, or 20 years in the case of a life sentence prisoner. These maxima were chosen as being broadly proportionate to the sentence maxima applicable to the offences listed in clause 69(3). The Committee will be aware that in every sentencing exercise, the court is required to have regard to the overall proportionality of the sentence passed. In imposing a financial reporting order, the court will need to ensure that the length of the order is proportionate to the risk of re-offending posed by the individual offender. These considerations are similar to those that will apply to the sentencing exercise as a whole, and we are confident that courts will exercise their discretion appropriately. However, if it is felt that further guidance is needed on any aspect of the new provisions, financial reporting orders could be the subject of a new guideline on the part of the Sentencing Guidelines Council. If a guideline is produced, it would apply to all courts in England and Wales. Finally, in an individual case, the offender will have a right of appeal against any part of his sentence, including a financial reporting order.

Question 27: In light of the importance of legal certainty in the protection of the right to respect for private life, will the Government consider inserting explicit safeguards against disproportionate orders on the face of the Bill?

35. We are confident that courts will be able to sentence in a way that is proportionate to individual circumstances and risks before them and believe that the safeguards set out above (in answer to your question 26) are sufficient. However, we will consider whether to further clarify the requirement for proportionality on the face of the Bill.

POLICE POWERS

Question 28: Please inform the Committee why the Government considers that the proposed changes mentioned in the previous two paragraphs would be compatible with Articles 5.1 and 8 of the ECHR.

36. Article 5(1)(c) of the ECHR provides allows "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on a reasonable suspicion of having committed an offence or when it is reasonably considered necessary to do so to prevent his committing an offence or fleeing after having done so."

37. Under the powers of summary arrest conferred upon a constable by clause 101, they will only be able to carry out an arrest if they have reasonable suspicion that an offence has been or might be committed. Article 5 does not impose any restriction on what can constitute a criminal offence provided that it is "concrete and specified" (see *Guzzardi v. Italy* (1980) 3EHRR 333).

38. Clause 101(4) provides that a constable may effect an arrest **only** if he has reasonable grounds for believing that an arrest is necessary for one of the reasons set out at clause 101(5). Those reasons are largely derived from the existing provisions in s. 25 of the Police and Criminal Evidence Act 1984.

39. As the Committee have noted one reason relates to the need to prevent the suspect harming himself. The police, as a public authority, have a duty to protect life, including the suspect's life, under article 2 of the ECHR and this will be relevant in cases of self-harm. The use of arrest to prevent self-harm is considered a reasonable and proportionate action.

40. Another reason in clause 101(5) is "to allow the prompt and effective investigation of the offence or of the conduct of the person in question". The investigative process is an integral part of the criminal justice system. Detention for the purposes of securing evidence by way of interview is permissible under article 5(1)(c).

41. Moreover, whatever reason is the basis for the arrest, the arrest still falls within article 5(1)(c) as it will, if the person is charged, result in the person being brought a magistrate who is a competent lawful authority. Of course the person may be also released without charge in appropriate circumstances.

42. It is possible to conceive of circumstances where arrest for a very trivial offence might interfere with the rights protected by article 8. However the power of arrest in clause 101 has a number of important safeguards. These include the provisions at clause 101(4) and (5) described above. In addition guidance on the power of arrest will be given in a new statutory Code of Practice to be issued under s. 66 of PACE.

43. For these reasons we consider the provisions of clause 101 to be fully compatible with articles 5 and 8 of the ECHR.

44. The Committee has questioned the substitution of "indictable offence" for "arrestable offence" or "serious arrestable offence" as the trigger for the availability of a number of police powers. We consider that, in principle, there could be circumstances in which it was proportionate to use the powers in respect of a non-summary offence that at present is not an arrestable offence.

45. Each of the various police powers contain safeguards which limit their use to appropriate cases. These include the involvement of both senior police officers and magistrates or judges to authorise the use of powers. These safeguards are clearly set out

in PACE and the associated Codes of Practice and are an effective way of ensuring the powers are used in a way which is compatible with article 8.

46. The proposals in relation to intimate samples strengthen, rather than weaken, the safeguards in PACE. The Bill proposes that swabs from a person's external genitalia (in practice these are likely to be penile swabs), like all intimate samples can only be taken with the individual's written consent. The PACE Codes of Practice for the Identification of Persons by Police Officers (Code D) sets out in detail the process to ensure that intimate samples are taken with due consideration of the rights of the individual under article 3 of the ECHR.

Question 29: Please inform the Committee why the Government considers that the provisions identified above could, in their operation, be relied on to be compatible with rights under Article 8 of the ECHR.

47. A search of premises would constitute an interference with rights protected under Article 8. However, the interference pursues the legitimate objective of detecting and preventing crime in a proportionate manner.

48. We see no reason why a magistrate would now be considered to be a lesser safeguard in consideration of applications for multiple or all premises warrants, or for multiple entry under a warrant. Under current practice a magistrate would issue a number of individual warrants. The administrative change to allow "multiple premises warrants" would reduce bureaucracy. The "all premises warrant" builds on these arrangements but recognises the increasing complexity and organisation of criminals. The responsibility is on the police to justify the need for such a warrant on the circumstances of the investigation and the evidence they reasonably believe will be found. Comparison can be made between "all premises warrants" and "writs of assistance" which are used by HM Customs and Excise. They are issued once at the start of the monarch's reign (expiring six months after the end of the reign), in circumstances where the identity of the individuals whose premises will be searched is unknown. They are thought to be compatible with the ECHR. Search warrants have judicial involvement at the time of issue, when the identity of the individual whose premises are to be searched is known.

49. We believe that the investigation should not be unnecessarily delayed by the need to apply to a judge for an additional warrant when the basis for the search remains the same. We also consider that the authority of a justice of the peace is sufficient to ensure that the actions of the police are appropriate and proportionate.

50. The decision of the investigating officers to enter further premises not specified on the warrant and the authority of an Inspector granting permission to enter them will be endorsed on the warrant in accordance with s. 16 of the Police and Criminal Evidence Act 1984 and PACE Code B, paragraph 8.2.

51. PACE in its present form limits the exercise of this power to serious arrestable offences. It does not follow that it is disproportionate to reformulate the power bearing in mind the margin of discretion in this area. The provision only creates a power that must be exercised in a way which complies with Convention rights. The purpose of the proposed changes to search warrants is to simplify the process and reduce bureaucracy and it is not necessarily the case that the powers will be used in a wider range of situations than at present. It has not been suggested that the existing powers contain inadequate safeguards, and we do not consider that these existing safeguards will be weakened merely because the power is in principle extended to a new category of cases.

52. We believe that the proposals are proportionate and with the existing and new safeguards, that they are compatible with Article 8.

Question 30: Please inform the Committee why the Government considers that this power would be justified under ECHR Article 8.2, taking account of any safeguards to prevent the image from being held longer than necessary or used for an unauthorised purpose.

53. Taking a photograph or moving image elsewhere than at a police station engages article 8 of the ECHR. The circumstances in which a photograph can be taken are clearly set out in PACE and so meet the requirement that that they are prescribed by law.

54. A photograph can be taken away from a police station when a person is either arrested, subject to a requirement to wait by a Community Support officer or issued with a notice in relation to a fixed penalty offence. The measure is aimed at dealing with the suspect or offender primarily without the need to take the person into custody and to be detained for identification purposes. However in these circumstances problems have arisen where a person subsequently disputes that they were the person arrested, subjected to the requirement to wait or issued with the penalty notice. Without definitive evidence of identity, which the photograph would provide, these disputes can be hard to resolve. The use of a photograph is a proportionate response to this problem.

55. The use of photographs taken in these circumstances is governed by the same safeguards applicable as though there were taken at a police station. In particular s. 64A(4) of PACE limits use or disclosure save "for any purpose related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution". Further guidance on the taking of a photograph in the street will be contained in a revision to PACE Code D when the clause is brought into force. That will focus on maintaining privacy and discretion where practicable to do so.

Question 31: Please inform the Committee what steps would be taken to ensure that civilian staff who take over the functions of police officers under the above provisions of the Bill are properly trained and are subject to the appropriate modes of discipline.

56. The Police Reform Act 2002 sets out the criteria for chief officers to designate any person as a Community Support Officer or designated investigating, detention or escort officer. The Serious Organised Crime and Police Bill will add staff custody officer to that list.

57. S. 38(4) of that Act in terms of police authority employees and s. 39(4) in relation to contracted-out staff, place a requirement on the chief officer to be satisfied that the person is suitable, capable and has received adequate training to carry out the functions and exercise the powers and duties to be conferred on him by virtue of the designation. In terms of discipline of civilian staff, these would come under the normal disciplinary arrangements of their home force. Moreover, the issue of complaints and misconduct which is intermeshed with this matter is provided for under part 2 of the Police Reform Act, wherein designated staff come under the jurisdiction of the Independent Police Complaints Commission.

58. Currently, there is no formal qualification required before a police officer can take on the role of custody sergeant. CENTREX have developed a national training programme for

custody officers.[3] It is a matter for individual force policy on training required before the appointment of police officers to this role.

59. National Occupational Standards for the Police Sector developed by Skills for Justice[4] set out the competencies and skills required for authorising and managing police detention and form an Integrated Competency Framework. In terms of the custody officer, the competency framework focuses on the key areas of making detention decisions; managing the detention of individuals; and authorising and reviewing continued detention.

60. In addition, further work is currently underway with stakeholders and the National Centre for Policing Excellence on developing guidance on how these standards are to be achieved.[5] This will be published later this year. Combined with the competency framework, we will have in-place definitive standards for police and police staff employed in the custody suite.

61. With regard to the new powers for Community Support Officers contained in Schedules 8 and 9, CENTREX recently completed a comprehensive National Learning and Development Programme for CSOs, which will support forces in meeting their training obligations for CSOs. The Programme, which has been piloted in Sussex and Lincolnshire and overseen by a stakeholder project board, is linked to National Occupational Standards and the Integrated Competency Framework and covers the range of skills that CSOs need to be effective in their roles. The programme will be updated by CENTREX to reflect any changes to the powers of CSOs in order to support forces in training CSOs in the use of new powers.

PUBLIC ORDER

Question 32: please inform the Committee how the Government expects that the offence would be prevented from operating in a way that disproportionately interferes with rights under ECHR Articles, 9, 10 and 11.

62. The Government believes that the proposed new offence will not operate in a way that disproportionately interferes with rights under ECHR Articles 9, 10 and 11.

63. We accept that the provision will cover situations beyond the targeting of bioscience companies by animal rights extremists: the Protection from Harassment Act 1997 Act covers harassment whatever its motivation. We are however very conscious of the need to ensure that legitimate protest is not restricted in any way.

64. Moreover, we do not share the Committee's concerns about the wide formulation of the offence. In order to prove a course of conduct, the following will need to happen: harassment of 2 or more individuals which the person(s) knows or ought to know involves harassment of those individuals, **on separate occasions,** by one or more persons and

3 Centrex - the Central Police Training and Development Authority, defines, develops and promotes excellence. It does so by providing a centre of policing excellence and support, and by creating and implementing the means to develop competence through policing careers. As an international centre of excellence, Centrex connects with the best in the world and shares collegiate learning.

4 Skills for Justice is the Sector Skills Council for the Justice Sector. As part of the Skills for Business network, Skills for Justice is charged with raising skill levels and improving performance under a five-year licence granted on 1 April 2004, issued by the Secretary of State for Education and Skills, the Lifelong Learning Ministers in the three devolved administrations and the Sector Skills Development Agency (SSDA).

5 NCPE is the centre of excellence for all aspects of operational policing, promoting evidence-based practices that have been professionally validated. It provides a national training and development resource for crime and operations, and national facilities in relation to high-tech crime, scientific support, and specialist work involving other agencies

where the common intent of that harassment is to persuade any person, including the person harassed, to refrain from doing something they are legally entitled to do or to do something they are not obliged to do.

65. The committee is concerned that political demonstrations would be inhibited by the new provision on the basis that a single episode of harassment towards each of a number of different people would be treated as a course of conduct. This is not the case. The new provision still requires at least two episodes of harassment, but not necessarily towards the same individual.

66. Conceivably, a regular protest by activists protesting outside an MP's constituency office, for example, might already be caught under section 1 of the Protection from Harassment Act 1997 if the police had evidence that specific individuals, for example, the MP or his/her staff, had been harassed on at least 2 occasions by specific protestors. The difference with the proposed provision, means that protestors might be caught if a protestor harassed the MP on one occasion and then on another occasion harassed the MP's secretary, for example. In practice, in public order situations, where a larger group of protestors are gathered, the police are more likely to use other powers, for example under the Public Order Act to deal with disorder.

67. We shall of course issue guidance for the police and others on the use of the new provisions before they are brought into effect.

Question 33: Please inform the Committee why the Government considers that the provisions as currently drafted are likely to be regarded as a proportionate response to a pressing social need so as to justify the interference with ECHR Article 10.

68. The Government considers that clause 119 and Schedule 10 are a justifiable interference with Article 10 of ECHR. Clause 119 and Schedule 10 extend the current offence of incitement to racial hatred under Part III of the Public Order Act 1986 to cover hatred against persons on the basis of their religious beliefs or lack of religious beliefs.

69. It is widely accepted that individuals in our society are stirring up hatred against particular religious groups. This may take the form of publications distributed by extremist groups which equate a particular religion with mass murder or rape, or speeches at public meetings that use inflammatory language and exhort people to make life unbearable for those of a certain religion. Although, the Government does not believe that incitement to religious hatred is commonplace, it does exist and where it exists it has a disproportionate and corrosive effect on communities, creating barriers between different groups and encouraging mistrust and suspicion. At an individual level this can lead to fear and intimidation and a sense of isolation. It can also indirectly lead to discrimination, abuse, harassment and ultimately crimes of violence against members of our communities. It is legitimate for the criminal law to protect citizens from such behaviour.

70. This behaviour is not always covered by existing offences. The existing law on incitement will apply where a particular criminal offence is incited. However, it would not cover stirring up hatred, without inciting people to commit crimes. Offences under Part I of the Public Order Act 1986 can be religiously aggravated but only catch behaviour that is or is likely to cause harassment, alarm or distress to persons likely to see or hear it. These offences do not cover, for example, situations where a person stirs up in his supporters or followers hatred of group of persons defined by religion where no one from that religion is present to be harassed, alarmed or distressed. Furthermore, whilst the existing offence of incitement to racial hatred can protect mono-ethnic religious groups such as Jews and

Sikhs, it is clear that it does not extend to other religious groups that are ethnically diverse such as Muslims, Christians and Hindus.

71. The Government believes that Clause 119 and Schedule 10 are a proportionate response to the needs identified above. In this regards we note the following—

- The offence is modelled on the existing offence of incitement to racial hatred in Part III of the Public Order Act 1986. This already covers mono-ethnic religious groups such as Jews and Sikhs. The offence applies irrespective of whether hatred is stirred up against these groups by reference to race, religion or otherwise. The Government is not aware of any Court decisions that suggest this offence is incompatible with Article 10. The offence is prosecuted rarely with only 44 convictions since the commencement of 1986 Public Order Act until the end of 2004. It is accepted as a necessary measure that helps combat racism in our society.

- The Government notes that the Committee concluded in 2001 that measures similar to those proposed in this Bill were likely to be compatible with Convention Rights. The Government is not aware of any significant developments in the Article 10 case law since that date. The Committee's reference to the 1994 case of Jersild suggests that neither are they.

- As with the existing offence of incitement to racial hatred, it is proposed that any prosecutions in relation to religious hatred will require the consent of the Attorney General. In taking this decision the Attorney General as a public authority is obliged by the Human Rights Act 1998 to consider the ECHR. Similarly, in a prosecution for religious incitement the Court itself would be required by the Human Rights Act 1998 to act in a way that is compatible with Convention rights and interpret legislation as far as is possible compatibly with such rights. The Government considers that the offence and, in particular, the term "hatred" can, and will, be interpreted by the Courts in a way that respects Convention rights.

- In considering the offence the Attorney and the Court would also have regard to Article 9 (freedom of religion) and Article 17 (prohibition on abuse of rights) as well as Article 10. Article 9 includes a right to manifest ones religion. This includes the right to proselytise which the Government considers can be carried out without stirring up hatred. Moreover, it includes the right to manifest ones beliefs without fear of hatred. The purpose of the offence is to prevent such hatred being stirred up and to that extent it seeks to protect Article 9 rights.

- The purpose of Article 17 is to prevent a person with totalitarian aims exploiting in their own interests the protections of the Convention. For example, in Norwood v UK (Second Section Decision of 16th November 2004) it was held that a person who displayed a poster associating Muslims with terrorism was an act within the meaning of Article 17 because it was "incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination". It was therefore held that the Applicant did not enjoy the protections of Articles 10 or 14. In that case the Applicant was prosecuted under section 5 of the Public Order Act which carries a much lower penalty than incitement to racial hatred and requires something to be done within the sight or hearing of a person likely to be caused harassment, alarm or distress. Accordingly, it will not cover the stirring up if hatred of, for example, ones followers or supporters. Nevertheless, it shows that there are circumstances in which the protections of Article 10 do not apply. In the Government's view many instances in which the new offence of incitement to religious hatred might apply would fall into this category.

72. In light of these factors the Government considers that the proposed offence is a proportionate response to a pressing social need so as to justify the interference with ECHR Article 10.

Question 34: Please inform the Committee why the Government considers that such a wide power to designate sites under clauses 120 to 124 and the power to give directions for the purposes of clauses 123 and 124 would be prescribed by law, serve a legitimate aim, and be proportionate to that aim for the purposes of ECBR Articles 10.2 and 11.2.

73. The government does not believe that the power in clauses 120 to 122 confers "a very wide discretion". In any event, clearly the crux of the matter is that any order made in exercise of the power complies with the ECHR. In exercising these provisions full account will be taken of any ECHR issues which will be balanced against the security and operational needs of the site, as well as other issues such as the co-operation of the "appropriate person" with regard to notices.

74. The Committee also notes that clause 123 makes no provision for notice of the designation to be given to people likely to be affected by it. The Government does not accept that this means that it would not be sufficiently accessible to those people to be "prescribed" by law: The designation will be made by way of order by the Secretary of State, and as all secondary legislation will be available on the HMSO website. It will also be published in a Home Office circular and we expect the Metropolitan Police to have details of the designation on their website.

75. The Government understands the Committee's concern with "spoiling the visual aspect, or otherwise spoiling the enjoyment of members of the public." That is why we are proposing to table new clauses to deal with protests in the vicinity of Parliament. The Committee will no doubt wish to comment on those clauses.

Question 35: Please inform the Committee what steps the Government would take to ensure that the provisions of the Articles 3.1 and 40.1 of the Convention on the Rights of the Child will be brought to the attention of courts when considering, in the light of the proposals in clause 127, whether or not to restrict reporting.

76. The Government understands the Committee's concerns about the need to balance the rights of the child or young person with the interests of the community and will explore different avenues to take for ensuring that courts are aware of the provisions of Articles 3.1 and 40.1 of the Convention on the Rights of the Child when considering whether or not to restrict reporting. We will ensure that guidance is given to courts and will be discussing the possible options for doing so with both the Department for Constitutional Affairs and the Judicial Studies Board. These could include issuing guidelines for magistrates and Justices' Clerks or highlighting the provisions in the next publication of the Youth Court Bench Book. The Government will also raise the matter when discussing editorial content with the Sentencing Guidelines Council who are planning to consider sentencing guidelines in respect of both juvenile offenders and breaches of orders during 2005."

Question 36: Please inform the Committee—

(a) Whether the Government considers that people to whom functions in relation to ASBOs are contracted out would be public authorities within the meaning of section 6 of the Human Rights Act 1998?

77. At present no firm view has been taken as to the types of bodies which may be specified by order under the proposed section 1F of the Crime and Disorder Act 1998 (CDA). However an Arms Length Management Organisation (ALMO) has been identified as an example of a body which would be well placed to exercise ASBO functions. By virtue of section 27 of the Housing Act 1985, an ALMO is an approved body with whom a local housing authority has agreed should exercise, as its agent, such of the authority's housing management functions as are specified. In carrying out housing management functions, ALMOs will be in the operational driving seat and are therefore likely to encounter incidents of anti social behaviour in relation to the housing stock they manage.

78. It is our view that provided the ALMO is entirely dedicated to performing local authority housing management functions, such an organisation would fit the profile of a public authority within the meaning of section 6 of the HRA 1998. However, the Government acknowledges that other types of organisations which might potentially be specified in the order e.g. private security companies or voluntary community groups, may not fall within the section 6 definition. Much would depend upon their constitution, purposes and objects, and the nature of the functions that they are ordinarily discharging.

(b) How would the Government ensure that any body to which a local authority is permitted to contract out its functions in relation to ASBOs would be informed of relevant human rights standards and would act in a manner compatible with Convention rights and will take into account the United Kingdom's obligations under the Convention on the Rights of the Child?

79. In so far as any contracting body may not be a public authority for the purposes of section 6 HRA then by virtue of section 72(2) of the Deregulation and Contracting Out 1994 Act (effect of contracting out), (section 1F(7)(a) applies section 72 for the purposes of section 1F(1)) would provide a safeguard. The local authority effectively would assume accountability for any breaches of the ECHR committed by the said contractor whilst exercising contracted out ASBO functions. The acts or omissions of the contractor in connection with the exercise of the function are treated as the acts or omissions of the authority.

80. Under amended section 1F(9) of the Crime and Disorder Act 1998, contracting bodies are required to have regard to any guidance issued by the Secretary of State for the purposes of this section. This will provide the opportunity to make Convention rights and obligations under the Convention on the Rights of the Child, known to contracting bodies.

81. Furthermore, the order making power under section 1F(2) includes power for the contracting out arrangements to be subject to conditions which could either be on the face of order itself or under the terms of arrangements between the authority and the contracting body.

82. So for example it would be possible to impose a condition say requiring the local authority to produce a written specification of the activities which it considers will be required to be performed by the contractor, including output specifications relating for example, to the processes of investigating and handling incidents of anti-social behaviour. The specification would be the vehicle that establishes what is required from the contractor so that they are in turn able to discharge the function in a HRA compliant way.

83. Finally, an order cannot be made under section 1F unless the Secretary of State first consults with representatives of local government and such other persons as he thinks appropriate. As part of the consultation process the proposed specified contracting bodies will effectively be scrutinised to determine not only their ability to discharge ASBO

functions, but part and parcel of that process will also determine their awareness of ECHR obligations and the need to discharge their functions accordingly.

Appendix 2b: Memorandum from The European Law Students' Association

PRELIMINARY MATTERS

ELSA (Cambridge) Human Rights Committee

This draft submission was prepared by members of the Human Rights Committee of the Cambridge branch of the European Law Students' Association (ELSA (Cambridge)). The group was established in September 2004, with the aim of fostering human rights discussion and awareness in Cambridge and beyond. The ELSA (Cambridge) Human Rights Committee is constituted by postgraduate students at the University of Cambridge, many of whom have practical experience in human rights advocacy and policy in the United Kingdom and abroad.

Scope of this Draft Submission

This draft submission is in response to the portion of the recently amended Serious Organised Crime and Police Bill ("the Bill"), as tabled in the House of Lords on 8 February 2005, covering behaviour in the vicinity of Parliament (clauses 129–135 of the Bill) and the offence of trespassing on a designated site (clause 125). The submission covers the following matters—

1. the requirement for authorisation for demonstrations;
2. the period of notice required prior to authorised demonstration;
3. the lack of a definition of 'demonstration';
4. the scope of the conditions which may be imposed under the Bill;
5. the power to impose additional conditions and to vary existing conditions 'on the spot';
6. problems relating to challenging conditions on the demonstration; and
7. problems relating to the proposed offence created by clause 125 of the Bill.

Michelle Bradfield, Bronwyn Byrnes, Claire Murray, Peter Nicholas, Elisabeth Passmore and Edward Santow, on behalf of the ELSA Cambridge Human Rights Group.

THE REQUIREMENT FOR AUTHORISATION

A: Justifiable interference?

While the scheme for regulating behaviour in the vicinity of Parliament has changed, the comments of the Joint Committee on Human Rights contained in its Report in relation to the original Bill[6] remain relevant and bear repeating. The provisions are clearly "aimed at an area of London that is much used, for very good reasons, by people bringing entirely

6 Joint Committee on Human Rights, Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224

legitimate political views and campaigns to the attention of members of the country's principal legislature".[7] To demonstrate without authorisation is a criminal offence; thus the clauses in the current bill, like those in the original "allow an immediate and direct interference with the right to freedom of expression and freedom of peaceful assembly under ECHR Articles 10.1 and 11.1. The question is whether the interference can be justified under Articles 10.2 and 11.2".[8]

B: Problems with requirement of authorisation

The exercise of the freedoms contained in Articles 10(1) and 11(1) of the European Convention "may be subject to formalities, conditions, restrictions or penalties" where this is justified under Articles 10(2) and 11(2). Sub-clause 129(1) makes it a criminal offence to demonstrate in a designated area without authorisation from the Commissioner of Police. When notice is duly given as required by clause 130, the Commissioner *must* give authorisation for the demonstration (sub-clause 131(2)). As authorisation is apparently to be given in every case, it appears that the requirement for authorisation is intended primarily as a mechanism for the imposition of conditions. In our submission, this mechanism is problematic and unnecessary. Our concerns include the following—

(i) Arguably, this is not simply a formality, condition, restriction or penalty (which would be capable of justification under Articles 10(2) and 11(2)). Rather, by criminalising all exercises of the relevant freedoms in designated areas except those conducted with State authorisation, the scheme may amount to a prohibition. The fact that authorisation is apparently to be given as a matter of course does not alter this position; the scheme still imposes a blanket prohibition by criminalising the relevant conduct but then provides a mechanism by which persons can have that prohibition lifted. It is strongly arguable that such a prohibition is not permitted by Articles 10(2) and 11(2). The Convention, through the *Human Rights Act 1998*, provides statutory (and, arguably, constitutional) recognition of the rights to freedom of speech and assembly. Citizens should not require the permission of the state for each instance in which they wish lawfully to exercise these rights in a particular geographical area.

(ii) The requirement for authorisation has the potential to engender a severe, detrimental impact on the exercise of the relevant freedoms, despite the fact that the Bill provides that the Commission must give authorisation. In its current form, the Bill does not impose a requirement on the Commissioner to give this authorisation within a set period of time, or even a reasonable period of time. This has the potential to strip the freedoms of speech and assembly of meaningful content. For example—

- An organiser of a demonstration wishes to conduct a protest involving 1,000 people outside Parliament. Two months prior to the protest, she provides notice as required by clause 130. Under the current Bill, there is nothing explicitly preventing the Commissioner from withholding authorisation until the day before or even the day of the protest. By the Commissioner so acting, this would have the practical effect of imposing added limitations on how the protesters could exercise their fundamental Convention rights because, self-evidently, sufficient time is needed to organise a large (but lawful) demonstration.

7 ibid. at 44

8 ibid. at 44

- It is also conceivable that the Commissioner could fail to authorise the demonstration at all. The organiser would, of course, possess the right *after the proposed demonstration was scheduled to occur* to seek mandamus and/or a declaration in court proceedings against the Commissioner for a failure to fulfil his or her functions. However, the entire *raison-d'etre* of many demonstrations is to manifest a particular view-point at a particular moment in time so as to contribute to public debate on an issue of current importance. It would be of no practical benefit to the organiser of the demonstration to be 'vindicated' in court proceedings after the proposed demonstration was intended to take place because their intention will in any event already have been thwarted and the moment will likely have passed for them to contribute to the debate. Moreover, if the demonstrators simply proceed without having obtained authorisation, they would leave themselves open to criminal liability despite the fact that they will have acted unimpeachably.

C: Proposed changes to the authorisation scheme

A scheme requiring authorisation which is to be granted in every case is artificial and has the potential to cause undesirable side-effects, as outlined above. In our submission, the most preferable solution is to establish a scheme whereby only *notification* rather than authorisation is required. Conditions could then be imposed after notification, but the default position would be that in the absence of any conditions being received within a stated time period or a reasonably time, the demonstration may occur without any conditions, provided that the demonstrators otherwise comply with the law.

If the scheme requiring authorisation is to be retained (and we submit that it should not), we propose the following mechanism—

(i) The Commissioner should be required to provide authorisation (setting out any conditions) within three clear days of having received the request for authorisation.

(ii) If the Commissioner fails to provide authorisation within the prescribed period, the demonstrators will be able to proceed on the basis that the proposed demonstration is deemed to be authorised without any attendant conditions.

(iii) In the event of proposed demonstrations for which, by reason of time factors outside the control of the organisers, it is not possible for either the demonstration organiser(s), the Commissioner or both to comply with the time requirements, there should be a means by which urgent authorisation can be sought.

We also note that the Bill does not specifically provide for authorisation to be *communicated* to the demonstrator or organiser in question; the Bill should be amended in this regard.

THE REQUIREMENT TO GIVE SIX DAYS' NOTICE

As set out above, it is our submission that the requirement of authorisation should be discarded in favour of a requirement of notification only. However, if the current scheme is to be retained, we submit that the requirement of a notice period of six clear days should be amended. This requirement does not account for the fact that in certain situations, to be effective, the right to freedom of expression and assembly may need to be exercised quickly and spontaneously as a timely reaction to a particular event or

circumstance. For example, it may be necessary to facilitate this form of public debate in the case of Parliament announcing that it is to introduce urgent legislation on a particular subject. The imposition of a "waiting period" of six days for *all* demonstrations is not a justifiable interference with the relevant Convention rights. One solution may be to provide a means by which an urgent application may be made in circumstances where the trigger for the demonstration was not reasonably foreseeable.

THE LACK OF A DEFINITION OF "DEMONSTRATION"

A: No definition of 'demonstration' in the Bill

There is no definition of the word 'demonstration' in the Bill. Under the ordinary rules of interpretation, the term must therefore be given its ordinary meaning, with the guidance provided by an attempt to interpret the term, not only so as to be consistent with the objects and purposes of the Bill, but also compatibly with the *European Convention on Human Rights*[9] and the UK's commitment to its obligations more generally under international human rights law.[10] In the absence of clear words to the contrary, it is assumed that Parliament intended to legislate conformably with human rights.[11]

In this light, we submit that the absence of a clear, statutory definition of 'demonstration' is highly problematic. When interpreted in context with the other provisions in Part 4 of the Bill, it would not be illogical to construe the term 'demonstration' very broadly (given, for example, that it clearly is intended to include an event involving merely one person, as demonstrated by clause 129(1)(c)). However, when the courts are inevitably called upon to construe the relevant statutory provisions, it will be necessary to balance this with the important human rights considerations already mentioned. The result may well be some confusion in the state of the law as to the proper meaning of 'demonstration'. Given that, under the Bill as currently drafted, a person is required to seek authorisation if planning to hold a demonstration; given the breadth of the conditions which may be imposed on that demonstration; and, given that it is a fundamental right recognised in, inter alia, the *European Convention on Human Rights* to conduct a demonstration, the potential confusion as to the basic question of what constitutes a 'demonstration' is highly unsatisfactory.

Currently, the term "demonstration" could cover a very wide variety of situations. If, for example, a politician was giving a press conference outside Parliament and a passer-by stopped and began shouting out questions to the politician, would this amount to a "demonstration"? Surely the Bill is not intended to criminalise such conduct. Yet this could well fall within the definition of "demonstration": the passer-by is manifesting a feeling in relation to some public question. So as to be consistent with the relevant human rights considerations to which we have already adverted, we submit that the definition should make clear that it only covers significant protests rather than sporadic acts of individual free speech.

9 Human Rights Act 1998, s 3

10 See Lord Steyn's extra-judicial article in which he sets out the legal basis for this principle including the relevant jurisprudence: Steyn, J "Dynamic Interpretation Amidst an Orgy of Statutes" (2004) 3 European Human Rights Law Review 245 especially at 251 et seq.

11 *R v Secretary of State for the Home Department Ex parte Simms* [2000] 2 A.C. 115 at 131 per Lord Hoffmann:

"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words."

B: Definitions of 'demonstration' from other sources

The *Oxford English Dictionary* relevantly defines 'demonstration' as—

> 7. A public manifestation by a number of persons of interest in some public question, or sympathy with some political or other cause; usually taking the form of a procession and mass-meeting.

The term, 'public demonstration', has been judicially considered in *British Airports Authority v Ashton and Others* [1983] 3 All ER 6. That decision adopted the *Shorter Oxford English Dictionary* definition which was a "public manifestation of feeling; often taking the form of a procession and mass meeting". The case also decided that a single picket was not significant enough to be within the scope the term. However, this decision may not be followed in the context of the present Bill which explicitly refers to an individual who 'carries on a demonstration by himself' in clause 129(1)(c). We believe that, for the reasons set out above, 'demonstration' should be defined in the Bill.

SCOPE OF CONDITIONS

A: Trigger for conditions

We submit that the trigger conditions in sub-clause 131(3) are too broad and therefore open to abuse and need to be tightened. What degree of risk is necessary before a condition may be imposed restricting the right to freedom of speech? Surely such a risk must be more than negligible or purely hypothetical. It is arguable that an individual demonstrator occupying space on a public footpath could pose a "risk", albeit negligible, "to the safety of members of the public" who wished to use that footpath. And yet, it could not possibly be Parliament's intent to criminalise such behaviour.

We suggest the addition of the words highlighted below in sub-clause 131(3)—

"(a) **substantial** hindrance to any person wishing to enter or leave the Palace of Westminster,

(b) **substantial** hindrance to the proper operation of Parliament,

(c) serious public disorder,

(d) serious damage to property,

(e) **serious** disruption to the life of the community,

(f) a security risk in any part of the designated area,

(g) **significant/serious** risk to the safety of members of the public (including any taking part in the demonstration)".

Additionally, the concept of 'disruption to the life of the community' is extremely broad and open to abuse. Judicial interpretation of this phrase in the past has not imposed a great deal of limitation on how it should be exercised (see *Re Murphy,* Court of Appeal (Civil Division) 11 July 1991)

Moreover, sub-clause 131(3) could be altered more explicitly to recognise the necessity than any conditions must be only minimally disruptive of the right to freedom of assembly. For instance the sub-clause could read (changes highlighted)—

> In giving authorisation, **taking into account the importance of freedom of assembly and the right to lawful protest,** the Commissioner may impose on the persons organising or taking part in the demonstration such conditions specified in the authorisation and relating to the demonstration as in the Commissioner's reasonable opinion are necessary for the purpose of **and proportionate to** preventing any of the following […]

B: Types of conditions

The types of conditions available go beyond what is proportionate to protecting the objects in sub-clause 131(3) when considered in light of the value of freedom of assembly. For instance, it is generally unrealistic for demonstrators to know exactly how many people will attend a demonstration and it is unclear why the number of demonstrators need be limited and how an organiser is realistically supposed to turn away persons who arrive to join in a demonstration. We also submit that the size of banners and placards can have little relevance to protecting any of the objects in sub-clause 131(3).

THE POWER TO IMPOSE ADDITIONAL CONDITIONS AND TO VARY EXISTING CONDITIONS 'ON THE SPOT'

The application of conditions in combination may amount to a form of censorship by the executive in public places, disproportionately interfering with Articles 10 (freedom of expression) and 11 (peaceful assembly) in the *European Convention on Human Rights*.

We are concerned by the powers conferred by clause 132 upon senior police officers at the scene of the demonstration to impose further conditions and to vary existing conditions 'on the spot'. We are concerned by the extensive increase of power to the executive in that an ad hoc imposition of conditions, followed by a violation can lead to a criminal charge. Lawful interference with Articles 10 and 11 must be 'foreseeable' with sufficient clarity to enable those likely to be affected by it to understand and regulate their conduct accordingly: *Steel and Others v United Kingdom* (1999) 28 EHRR. 603. The ad hoc nature of the variation and imposition of further conditions could arguably amount to a restriction upon the relevant freedoms which is not 'prescribed by law' as required by Articles 10(2) and 11(2) of the *European Convention on Human Rights*. It may also be inconsistent with the requirement that the criminal law be reasonably certain and not made retrospectively (Article 7).

As the conditions in clause 131 can relate to the number of people, noise and number of placards, the power may be construed widely to allow the imposition of conditions amounting to an order that the demonstration end immediately or in the next fifteen minutes, all signs to be put away or reduced to one and the crowd be reduced to twenty people. It is unclear how the imposition of additional conditions is to be communicated to demonstrators; at a very large demonstration the effective imposition of new or varied conditions would be unworkable. While we note that clause 132(4) provides a defence that the violation is due to factors outside the accused's control, we consider that the practical operation of this provision shifts the burden of policing the public space from the police to the citizens wishing to exercise their protected right of freedom of expression in Article 10.1. The State has a positive obligation under Article 10.1 to ensure that its citizens can safely exercise their right to freedom of expression, which may require the provision of police services (*Platform "Arzte fur das Leben v Austria* (1988) 13 EHRR 204). While organisers of demonstrations must co-operate with police, it is not their duty to control the crowd in a manner akin to policing the area punishable by criminal charge, nor is it likely to be practically possible in the heat of the moment.

We are deeply concerned that the imposition of further and varying conditions, which have the potential to change the entire nature of the demonstration at the last minute, with no notice to the demonstrators, shifts the presumption in favour of public order rather than freedom of expression and peaceful assembly. This amounts to a disproportionate and potentially unlawful interference of Convention rights and we ask that the Government give due regard to the freedom of expression when balancing these competing interests.

CHALLENGING CONDITIONS IMPOSED ON THE DEMONSTRATION

A: The relevant provisions of the Bill

Sub-clause 131(3) of the Bill provides that any conditions imposed prior to a proposed demonstration, must "in the Commissioner's *reasonable* opinion [be] necessary" (emphasis added) in terms of purpose (sub-clause 131(3)) and effect (sub-clause 131(4)). Similarly, clause 132(1) imposes a requirement that "the senior police officer *reasonably* believes that it is necessary" (emphasis added) to impose any supplementary conditions in the manner set out in clause 132. The imposition of a test of reasonableness on the Commissioner and senior police officer has the potential to create an important safeguard, allowing the organiser(s) of the demonstration—

(i) to challenge the decision of the Commissioner or senior police officer in judicial review proceedings prior to or after the proposed demonstration;[12] and/or

(ii) to proceed with the demonstration as planned and to challenge the reasonableness of the conditions after the event[13].

Nevertheless, in practice, these safeguards may prove illusory and, therefore we submit that the provisions remain problematic for the three reasons set out below.

B: Problems with the Bill

First, in many instances the mere fact of having to challenge conditions which have been imposed unreasonably will subvert the entire purpose of the demonstration. Take the following hypothetical example: on 1 February, X complies with the Bill in every relevant way in seeking authorisation to conduct a demonstration on 10 February. On 9 February, X duly receives authorisation from the Commissioner but the conditions imposed are manifestly unreasonable. There would simply not be time for X to instruct a lawyer, seek and obtain urgent judicial review and to update the other people who are planning to take part in the demonstration. Although X would in one sense be vindicated in the judicial review proceedings, any victory would be Pyrrhic because the time of the proposed demonstration would already have passed. In summary, the mere fact of having to seek judicial review would serve indirectly to subvert the demonstrators' enjoyment of their rights under Article 9–11 of the *European Convention on Human Rights*.

Secondly, the alternative to seeking judicial review—namely, that the demonstrators ignore conditions which they believe to have been imposed unreasonably—is, in reality, highly disadvantageous for all concerned. For the demonstrators, they will have committed

12 This is under the so-called 'Wednesbury principle' as set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 and the subsequent line of jurisprudence. The application of this principle in the context of discretionary police powers is discussed in Wade, HWR and Forsyth, CF (2004) Administrative Law, 9th ed., Oxford: Oxford University Press at 359–361. See also: *R v Metropolitan Police Commissioner ex parte Blackburn* [1968] 2 QB 118 wherein the Court of Appeal held that the Commissioner's discretion was subject to review.

13 *Police v Reid* [1987] Crim LR 702

an offence if their belief as to the unreasonableness of the conditions is later found to be incorrect. The authorities (in particular, the police) will be well within their rights (and, arguably, duty-bound) physically to prevent the demonstrators from breaching the impugned conditions. Moreover, the situation for the authorities is no better. This approach sets a dangerous precedent by encouraging people who subjectively believe that the authorities have acted unreasonably to ignore the authorities' orders.

Thirdly, other than simply through disobedience of "supplementary directions" imposed by the senior police officer at the time of the demonstration (under clause 132), the demonstrators would have no practical means of challenging the reasonableness of the imposition of those further conditions. There would, self-evidently, not be time to seek judicial review on the day of the demonstration or after it has commenced. In this sense, the imposition of a test of reasonableness on the senior police officer provides only an illusory protection of the demonstrators' rights under Articles 9–11 because they would have no practical means of enforcing those rights. Again, even if the demonstrators have irrefutable grounds to challenge the reasonableness of the conditions imposed by the senior police officer, the fact that they will be forced to do so *after* the demonstration has finished will mean that either the demonstrators would not have standing to bring the claim,[14] or, even if the court hears the matter and the demonstrators' challenge is upheld, this will be of no practical significance because their (legitimate) purpose will already have been subverted. Existing powers are sufficient to control any demonstration which has already commenced. The problem caused by the relevant provisions of the Bill is that they have the potential to introduce a measure of arbitrariness in the manner in which the authorities can exercise their power, something which is inimical to the *Human Rights Act*[15] and the rule of law more generally.[16]

C: Proposed solutions

We have already recommended that the Bill ought not to require that demonstrators obtain *authorisation* from the authorities, but rather they should be required only to *notify* the authorities prior to a demonstration (see Part 1 above). We submit that an approach founded on this principle would go some way to obviating the problems identified above. That is, the Bill should recognise that the default position, consistently with Articles 9, 10 and 11 of the *European Convention of Human Rights*, is that people have the right to demonstrate or protest peacefully. Any "conditions" imposed by the authorities are, self-evidently, restrictions on this right and must be subjected to very close scrutiny because the breadth of the conditions is such that they may be used to criminalise conduct which, in any other situation, would be lawful. In light of this, we propose the following solutions—

(i) Any conditions which the Commissioner seeks to impose under clause 131 should be scrutinised in advance by a judge, using a mechanism analogous to that by which search warrants are granted under the *Police and Criminal Evidence Act* 1984.

14 That is, as the demonstration will have already occurred, the demonstrators could be denied standing on the ground that their complaint amounts to a purely academic question and would thus arguably fail the test set out in *Gouriet v Union of Post Office Workers* [1978] AC 435 at 484 per Lord Wilberforce:

"[T]he jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of any one else."

15 See, especially, Articles 7, 9, 10 and 11 of the European Convention of Human Rights.

16 For a classic exposition of the principle, see Locke, J Two Treatises of Government (1690), II, xi, para 136:

"the legislative or supreme authority cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorised judges".

(ii) For the reasons already stated above, clause 132 (regarding "supplementary directions") should be removed from the Bill on the grounds that the powers conferred are unnecessary (given that the authorities already possess significant powers in respect of controlling demonstrations already in progress) and that, in a practical sense, the reasonableness of the conditions imposed thereunder cannot be adequately challenged.

(iii) The requirement in clause 129 that demonstrators obtain authorisation should be removed and, in its place, the Bill should impose a requirement that demonstrators notify the relevant authorities. The Bill should also make clear that, in the absence of any conditions lawfully imposed, people retain the right to conduct a demonstration subject to any other restrictions prescribed by law.

CHALLENGE TO CONTENT OF THE PROPOSED OFFENCE CREATED BY CLAUSE 125

A: The relevant provisions of the Bill

Clause 125 of the Bill creates an offence of trespassing on a "designated site". The Secretary of State has power to designate a site for the purposes of this clause if it is Crown land, or land belonging to the Monarch or the Heir to the Throne in their private capacity, or it appears to the Secretary of State that it is appropriate to designate the site in the interests of national security. Sub-clause 125(3) provides a defence to a defendant who can "*prove* that he did not know, and had no reasonable cause to suspect, that the site in relation to which the offence is alleged to have been committed was a designated site" (emphasis added).

We believe the clause to be objectionable on human rights grounds both in substance and in structure.

B: Problems with the Bill

We would reiterate the problems with the substance of the new offence highlighted by Liberty and by the Joint Committee on Human Rights in their consideration of the first draft of the Bill. Clearly the criminalisation of trespass in certain circumstances has implications for the exercise of rights as set out in Articles 10 and 11 of the *European Convention on Human Rights*. Such criminalisation must therefore be justified by reference to Articles 10(2) and 11(2) respectively. Specifically, as set forth in the text of the Convention and in the jurisprudence of the European Court of Human Rights, the measure must be prescribed by law and it must be necessary in a democratic society to meet a prescribed legitimate aim. This requires proportionality between the aim pursued and the means chosen to achieve it.

The Secretary of State's power to designate land for the purposes of the provision is problematic on these criteria. Land falling within sub-clause 125(3)(c) need only be subject to a risk of national security according to the subjective belief of the Secretary of State. We submit that this encompasses a much broader range of situations than that envisaged by the text of Articles 10(2) and 11(2) of the Convention which require the objective existence of relevant threats in order for the aim pursued to be a legitimate one. In any case, the width of discretion accorded to the Secretary of State would almost certainly allow for disproportionate measures to be taken. Furthermore, the power to designate land falling within paragraphs (a) and (b) of sub-clause 125(3) is broad enough to cover land on which trespass would present no risk to national security or indeed any other legitimate aim as set out in Articles 10(2) and 11(2). It is not required that the Secretary of State even hold a subjective belief to this effect. As a result it seems highly likely that, even if the clause can be said broadly to pursue a legitimate aim, the test of proportionality would not be met.

We submit that any designation of an area should at the very least require an objectively reasonable belief on the part of the Secretary of State, thereby allowing members of the public to challenge the reasonableness of the decision in judicial review proceedings. Similarly, we propose that the Crown lands amenable to designation should be significantly narrowed in scope and should be explicitly required to engage a national security interest.

We are also concerned about the way in which the offence itself is structured. The substantive offence, as set out in its entirety in sub-clause 125(1), contains no mens rea element. That is to say, the prosecution need not prove any particular set of circumstances as regards the defendant's mental state in order to make out the commission of the offence. The guidelines set out by Lord Nicholls in *B v DPP* [2000] 2 AC 428 say that a mental element must be read into a statutory offence unless, by necessary implication, Parliament did not intend there to be one. Such an implication may be gleaned, as in the case of the Bill in question, by the provision elsewhere in the Bill of a defence addressing the defendant's mental state. The offence described by clause 125 is therefore one entirely of strict liability. Although a defence regarding the defendant's mental state is available under sub-clause 125(3), the burden of proof rests with the defendant. Similarly worded statutory defences (i.e. where a statute required a defendant "to prove" a state of affairs) were challenged as inconsistent with the requirement in Article 6 of the Convention that the defendant be presumed innocent until proven guilty: *R v Lambert* [2002] 2 AC 545; *L v DPP* [2002] 1 Cr App R 32 and *R v Drummond* [2002] 2 Cr App R 25. In *Lambert* the House of Lords held, in obiter, that the court's interpretative obligations under ss 6 and 3(1) of the *Human Rights Act* required them to read such a burden as an evidential one only. That is to say, the defendant is required by the statute to raise evidence of the existence of the state of affairs set out in the defence, after which time the burden of proof passes to the prosecution to disprove that this was the case. In *L v DPP* it was held that interpreting the statutory language as requiring the defendant to make out the defence on the balance of probabilities was not inconsistent with his rights under Article 6 of the Convention.

It is far from clear, then, exactly how onerous the burden of proof contained in this defence would be on a defendant charged with an offence under sub-clause 125(3). Given the clear implications for a defendant's Article 6 rights created by such statutory defences, the government should make clear in the legislation how onerous it intends the burden to be and, more importantly, its reasons for including the mental element in the defence element at all. In *L v DPP*, for example, the defendant was required to prove under s 139 of the *Criminal Justice Act 1988* that he had a good reason for carrying a knife, as it was strongly in the public interest that he be deterred from doing so without good reason. In situations arising under the present Bill, however, there would be no such immediate or direct threat to the public; on the contrary, the defendant may well be in the course of exercising his or her Article 10 and 11 Convention rights. Furthermore, the Secretary of State is under an obligation to make his or her designation known. In any case, compelling the defendant to prove an *absence* of knowledge, either evidentially or on the balance of probabilities, seems a prohibitively difficult task. In this context, then, we would strongly urge that the offence include a mental element, so that it falls to the prosecution to prove its subsistence at the time of the alleged offence. At the very least, for the sake of certainty, the drafting of the clause should seek to make clear that the *Lambert* interpretation of the defence should be applied.

ELSA (Cambridge) Human Rights Committee, 19 February 2005

Appendix 3: Letter from Rt Hon Lord Falconer of Thoroton QC, Secretary of State for Constitutional Affairs and Lord Chancellor, Department for Constitutional Affairs re Inquiries Bill

Thank you for your letter of the 17th January about the Inquiries Bill. I am sorry for not replying by 27th January and I am grateful for the slight extension for responding. The extension enables me to reply with reference to a number of amendments that the Government has tabled, following debate in Grand Committee, which I hope will help address some of the concerns you may have with the Bill.

You raise a number of concerns about whether an inquiry, held under the Bill into a death that engages Article 2, will comply with the criteria of an independent, transparent and effective investigation.

It is key to note that inquiries will rarely discharge an Article 2 obligation alone. The obligation is much more likely to be met through other methods such as criminal proceedings, inquests or other types of investigation (see *McCann)*[17], perhaps together with an inquiry if it is needed. Inquiries are one of a range of mechanisms that assist the state in implementing its obligation and it should not be thought that this is the primary mechanism for discharging an Article 2 obligation.

The powers in the Bill will apply to a wide range of inquiries, the majority of which are not likely to engage Article 2. I think it is important to understand that because it is theoretically possible for a power to be exercised incompatibly with Article 2 rights, does not mean the power itself is incompatible with Article 2. It is also important to bear in mind that both the Government and the inquiry panel will be public authorities for the purposes of the Human Rights Act 1998 (the HRA), and will therefore be under a duty to exercise their powers under the Bill in a way that is compatible with Article 2 by virtue of section 6 of the HRA. The important issue is that where an inquiry is established to comply with an Article 2 obligation i.e. in a "wrongful death" case, the powers will have to, and are able to, be exercised in accordance with Article 2 jurisprudence.

I think it is also worth underlining, in relation to all the areas that you highlight, that any improper or unreasonable decision of the inquiry, or of the Minister who sets up the inquiry, will be open to challenge in the courts through application for judicial review.

POWER TO END AN INQUIRY

You requested clarification about how the power to end an inquiry may be used. This provision is intended for use in exceptional circumstances, when it is clear that the inquiry is no longer required. This situation may arise out of evidence being presented that clearly shows there is no further need for any further inquiry, or that the matter should be dealt with by another process (for example criminal or civil proceedings). This provision will allow the Minister to intervene and bring an inquiry to a close, so that there is no wastage of public money and resources.

You were concerned that the Bill did not contain any restrictions on when the Minister could exercise the power to end the inquiry. This concern was raised during the Grand Committee debate of the Inquiries Bill on 19th January. For the reasons set out above, we do not think that this in itself results in incompatibility with Article 2 of the ECHR. However, in any event, the Government has brought forward an amendment at report

17 (1996) 21 EHRR 97

stage that will require the Minister to consult the chairman before issuing a notice to end the inquiry and for the notice to set out the reasons for exercising the power.

RESTRICTION NOTICES

You requested further information as to why the Minister was able to continue to issue restrictions notices throughout the inquiry. The aim of enabling both the Minister and the chairman to impose restrictions is to allow for a wide range of situations. In general, as in the past, decisions about restrictions on individual pieces of evidence will naturally rest with the chairman, whereas decisions about the overall form of the inquiry will be for the Minister establishing it. In practice, it will depend on the type of restriction and the reasons for it.

It is important that once the inquiry is underway proceedings are, and are seen to be independent of Government. A Minister would be able to issue a restriction notice during the course of an inquiry only if required to do so by law or if he or she was satisfied that it was in the public interest to do so, having particular regard to whether issuing that restriction notice could inhibit the allaying of public concern and any risk of harm or damage that might arise if the material were not withheld. In many cases, a Minister might well consider that issuing a restriction notice once an inquiry was underway would be too damaging to public confidence in the inquiry, and that any restrictions should be left to the chairman to consider. However, it is necessary to have the power to issue restrictions, for both the chairman and the Minister, to ensure that they can comply with any duties placed upon them to safeguard information or to prevent a risk of harm. For example, one of the reasons for having restriction notices is to enable information to be withheld if disclosure could put individuals in danger and threaten their rights to life under Article 2.

If an inquiry had been set up to comply with an obligation under Article 2 to conduct an effective and independent investigation, then both the Government and the inquiry panel would be obliged to ensure that the requirements of Article 2, as set out in the jurisprudence, were met, and this would include the exercise of their powers under clause 17.

PUBLICATION OF REPORTS

You requested further information on the circumstances in which the power for the Minister to withhold information from the final report would be used and how this power would be exercised in accordance with Article 2.

It will only be possible to withhold information in very limited circumstances. Clause 23(4) makes it clear that information could be withheld in certain, limited circumstances, namely, where it is required as a matter of law or where it is considered necessary in the public interest, giving particular consideration to whether disclosure would cause "harm or damage" or breach confidentiality undertakings. Clause 23(6) emphasises that the type of harm or damage envisaged is that which is very serious in nature, namely threats to life, national security, international relations, the economy and the commercial markets. These risks arise rarely but they are very serious. Information has justifiably been withheld from the public domain in recent inquiries for these types of reasons. Subsection (5) of this clause also ensures that reasons for withholding information have to be balanced against the extent to which withholding information might inhibit the allaying of public concern, which will usually weigh heavily in favour of publication. To ensure that these powers cannot be used inappropriately, the Government has tabled an amendment that material in the inquiry report cannot be withheld from publication if a person would have a right of access to it under the FOI Act.

I am satisfied that the powers to withhold information from publication do not prevent Article 2 obligations from being met. Indeed, they are necessary to ensure that the Government can meet other obligations under Article 2, to protect the lives of any individuals who could be put at risk by the publishing of certain details in an inquiry report. As I have explained above, the Government (and the chairman, if he is publishing the report) must exercise the powers under clause 23 in a way that is compatible with Article 2. I therefore do not consider it is necessary to make separate provisions for reports where Article 2 is engaged.

WITHDRAWAL OF FUNDING

You requested further information about how the provision which allows funding to be removed where the inquiry is believed to be operating outside its terms of reference is compatible with Article 2. The provision is not intended to, and does not, create a means whereby Article 2 obligations can be evaded. If an inquiry is established to fulfil Article 2 obligations and the inquiry subsequently works outside the terms of reference, then the inquiry itself might be failing in its aim to satisfy Article 2. This clause provides a mechanism for ensuring the inquiry remains on track.

As the Minister would only be intervening to ensure the inquiry keeps within the remit agreed at the outset in the terms of reference, I do not consider that this clause undermines the role of the chairman or affects compatibility with Article 2.

The withdrawal of funding would only occur in exceptional circumstances and the chairman would have the opportunity to address any concerns raised by the Minister. It may be temporary and funding may resume if the Minister is satisfied the inquiry has returned to performing the task set out in its terms of reference.

INDEPENDENCE OF THE PANEL MEMBERS

You were concerned that the provision enabling the Minister to appoint panel members, who may have some link to the subject matter of the inquiry, called into question the ability of the legislative provisions to ensure the impartiality required of Article 2 investigations. Once again, I would remind you that the Minister, as a public authority, must exercise the power to appoint panel members in a way that is compatible with the requirements of Article 2.

In some areas of investigation it may be difficult to find a panel member who did not have some form of association or, at some level, an interest in the events under investigation. The purpose of this provision is to ensure potential panel members are not automatically ruled out due to an association that will in no way affect their impartiality. The clause requires the Minister to use their judgement when determining whether an individual could be expected to act impartially. A Minister will of course be highly unlikely to appoint a panel member whose impartiality was doubted by the public. To do so would be to risk critically damaging the public confidence in both the inquiry and its findings.

Clause 8 was discussed in detail during Grand Committee, and the Government has tabled an amendment to clarify the intention behind clause 8(1) to ensure that appointments could not be made if they would damage public confidence in the impartiality of the inquiry. This amendment, alongside provisions on suitability and an obligation on the panel members to declare any interest that may call into question their impartiality, ensures the requirement under Article 2 relating to independence is met.

EFFECTIVENESS AND PUBLIC SCRUTINY

You ask whether further safeguards are to be introduced on the face of the Bill in order to ensure that inquiries will be conducted where necessary in accordance with Article 2. I do believe that the provisions as they are currently drafted are consistent with Article 2 obligations. The case law on investigations carried out to meet the Article 2 obligations includes recognition that it may not be possible for the investigation to be entirely in public (see *McKerr).*[18]

The Bill sets out more stringent criteria for restricting access than does some of the current legislation on inquiries. In certain cases, for example under the Children Act 1989, public access is entirely at the discretion of the Minister setting up the inquiry. This clause goes further than the current legislation, which is mostly silent on inquiry reports. Clause 23 requires all inquiry reports to be published, and sets strict tests that have to be met before any information can be withheld.

The Bill creates a clear structure in which decisions about public access or withholding sections of the report can be made. There is a presumption in favour of both public hearings and publication of the report. The Bill makes clear in what circumstances restrictions can be imposed, and what factors should be taken into account in deciding whether a restriction or amendment to a report is justified. For these reasons I do not consider it necessary to include any further safeguards either on the face of the Bill or in guidelines.

On the issue of legal representation, inquiries are not trials and it has been the practice of many recent inquiries to keep legal representation to a minimum. Only those participants who are considered to have a direct interest in the inquiry are normally permitted representation. In Article 2 cases, next-of-kin would fall within this definition.

You ask whether legal aid will be provided to family members for cases where Article 2 is engaged. The Government has an established policy according to which it exercises its discretion to pay costs. The Government will normally agree to meet the costs of participants who are considered to have such a direct interest in the inquiry that they require representation but who may be unable to meet representation themselves. Family members would be included in this group. Large organisations, considered interested parties, would not normally have their costs paid. It is under these sorts of conditions that the chairman will be given the responsibility to make awards on legal representation. Legal aid is not therefore needed as the sponsoring Government department is committed to paying for representation where it is considered necessary.

6 February 2005

18 [2001] ECHR 28883/95

Appendix 4: Letter from the Chair to Rt Hon Alistair Darling MP, Secretary of State for Transport, Department for Transport re Road Safety Bill

The Joint Committee on Human Rights has considered the human rights compatibility of the Road Safety Bill and will be reporting its views shortly. There are two points in relation to which we have concerns about the compatibility of the Bill's provisions and I would be grateful for your response to the questions below to assist the Committee in reaching a final view.

The first point concerns the power in the Bill to arrest and detain until fit to drive. Clause 11(9)–(12) amends the current power to detain at a police station a person who has been required to provide a breath specimen. The current law provides that a person required to provide a breath specimen may afterwards be detained at a police station until it appears to the constable that, were that person then driving or attempting to drive a vehicle on a road, he would not be committing a drink driving offence (the power to detain "until fit to drive").[19] This power to detain at a police station does not apply, however, if it appears to a constable that there is "no likelihood" of the person driving or attempting to drive a vehicle whilst he or she is over the limit.[20]

Clause 11(10) of the Bill adds a new power, in relation to people who provided the specimen other than at a police station (for example, at the roadside), enabling them to be arrested, taken to and detained at a police station until it seems to the constable concerned that they are fit to drive.[21] As the Explanatory Notes put it, although the police may complete the evidential breath testing procedure satisfactorily at the roadside "they may need in some circumstances to arrest the person and detain him at a police station until he is fit to drive".[22]

The Committee has considered whether this power of arrest and detention following the giving of a breath specimen is compatible with the right to liberty in Article 5(1) ECHR, which provides that no one shall be deprived of their liberty save in certain strictly defined circumstances and in accordance with a procedure prescribed by law.

The new power to arrest and detain in clause 11(10) is conferred by amending an existing power to detain at a police station. The underlying power to detain at a police station until fit to drive in s. 10 Road Traffic Act 1988 is very broadly worded. On its face it appears to authorise detention until the police officer is subjectively satisfied that the person who has given the breath specimen is fit to drive, unless the police officer is subjectively of the view that there is no likelihood of them driving or attempting to drive whilst still over the limit.

The Committee accepts that the existence of a power to detain where there is a risk of a person committing another offence is necessary in order to protect public safety, and that this is explicitly recognised in Article 5(1)(c) ECHR which provides that one of the exceptions to the right to liberty is "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent

19 Section 10(1) Road Traffic Act 1988

20 Section 10(2)

21 Amending s. 10(1).The new power is still subject to s. 10(2): the power to arrest or detain a person who gave a specimen at a place away from the police station does not apply if it appears to the constable that there is no likelihood of their driving or attempting to drive whilst still over the limit.

22 EN para. 43

his committing an offence". However, such a power must be strictly defined so as to ensure that it is only used where it is strictly necessary to achieve that purpose.

The Committee's concern is that s. 10 of the Road Traffic Act 1988, as amended by clause 11(10) of the Bill, does not satisfy that test. It purports to authorise detention of a person who has been found to be over the limit until such time as a police officer, in their subjective view, considers them fit to drive, unless in the officer's view (again subjective) there is no likelihood of the person driving or attempting to drive. This seems on the face of it to give rise to the possibility of routine detention of individuals who have been breathalysed and found to be over the limit until they are judged to be fit to drive, which is likely to be several hours. The Committee sees no reason why a person who has been breathalysed and been found to be over the limit should not be released unless there are reasonable grounds to believe that they will try to drive their vehicle again whilst still over the limit. A person who has been breathalysed and found over the limit at the roadside could be released from the police station.

It therefore appears to the Committee that, in order to be compatible with Article 5(1)(c) ECHR, s. 10 of the Road Traffic Act 1988 should be amended to provide that a person who has provided a specimen may only be detained if the police officer has reasonable grounds for suspecting that he or she will commit a further offence if released.

Why, in light of the above, does the Government consider that the power to detain until fit to drive, as presently drafted, is compatible with Article 5(1) ECHR?

Will the Government now consider introducing an amendment to s. 10 of the Road Traffic Act 1988 which would require the police constable to have reasonable grounds for suspecting that another offence will be committed if the person is released?

The second point concerns the power in clause 11(2) of the Bill to arrest without warrant a person who has given a breath specimen at the roadside if the constable who imposed the requirement has reasonable cause to believe that the device used to analyse the specimen has not produced a reliable indication of the proportion of alcohol in the breath of the person.

Why does the Government consider this power to be compatible with Article 5(1) ECHR?

I would be grateful if you could provide answers to these questions by 7 March. I apologize for the short deadline but as you will appreciate we are working to tight deadlines ourselves in our scrutiny of legislation.

23 February 2005

Public Bills Reported on by the Committee (Session 2004–05)

* indicates a Government Bill

Bills which engage human rights and on which the Committee has commented substantively are in bold

BILL TITLE	*REPORT NO*
Charities [*Lords*]*	**6th**
Child Benefit*	**8th**
Clean Neighbourhoods and Environment *	**7th**
Commissioners for Revenue and Customs*	**6th**
Constitutional Reform [*Lords*]*[1]	**7th**
Criminal Defence Service*	**6th**
Disability Discrimination [*Lords*]*	**6th**
Drugs *	**7th**
Electoral Registration (Northern Ireland) [*Lords*]*	**8th**
Gambling *[2]	**7th**
Identity Cards*	**5th & 8th**
Inquiries [*Lords*] *	**4th & 8th**
International Organisations [*Lords*] *	**4th & 7th**
Mental Capacity *[3]	**4th**
Railways	8th
Road Safety*	**8th**
School Transport *[4]	4th
Serious Organised Crime and Police *	**4th & 8th**

1 Bill carried over from previous Session. Previously reported in 23rd Report of 2003–04.

2 Bill carried over from previous Session.

3 Bill carried over from previous Session. Previously reported in 15th Report of Session 2002–03 (on the draft bill) and 23rd Report of Session 2003–04

4 Bill carried over from previous Session. Previously reported in 17th and 20th Reports of Session 2003–04 on the draft Bill