House of Lords
House of Commons

Joint Committee on Human Rights

Legislative Scrutiny: Fourteenth Progress Report

Twenty-eighth Report of Session 2005–06

Drawing special attention to:

Companies Bill
Education and Inspections Bill

HL Paper 247
HC 1626

House of Lords
House of Commons

Joint Committee on Human Rights

Legislative Scrutiny: Fourteenth Progress Report

Twenty-eighth Report of Session 2005-06

Report, together with formal minutes and appendices

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Joint Committee on Human Rights

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

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

Current Membership

HOUSE OF LORDS	HOUSE OF COMMONS
Lord Bowness	Mr Douglas Carswell MP (Conservative, *Harwich*)
Lord Campbell of Alloway	Mary Creagh MP (Labour, *Wakefield)*
Lord Judd	Mr Andrew Dismore MP (Labour, *Hendon*) (Chairman)
Lord Lester of Herne Hill	Nia Griffith MP (Labour, *Llanelli*)
Lord Plant of Highfield	Dr Evan Harris MP (Liberal Democrat, *Oxford West & Abingdon*)
Baroness Stern	Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)

Powers

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

Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

Current Staff

The current staff of the Committee are: Nick Walker (Commons Clerk), Bill Sinton (Lords Clerk), Murray Hunt (Legal Adviser), Judy Wilson (Inquiry Manager), Jackie Recardo (Committee Assistant), Suzanne Moezzi (Committee Secretary) and James Clarke (Senior Office Clerk).

Contacts

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

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Summary

The Joint Committee on Human Rights examines Bills presented to Parliament in order to report on their human rights implications. 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 comments for the first time on human rights issues arising from the Companies Bill. It also comments again on a point concerning the Education and Inspections Bill, on which it has already reported, and publishes without comment a response received from the Government on points raised by the Committee on the Armed Forces Bill.

Companies Bill
The Committee limits its consideration of the Companies Bill to the single issue of the promotion of respect for human rights by companies as an aspect of corporate social responsibility.

After examination of the relevant human rights standards, the Committee welcomes the amendments to the Bill introduced by the Government during the Bill's passage to strengthen the connection between director's duties and the reporting requirements imposed by the business review included in companies' annual director's report, but urges the Government to consider whether there are any further steps which could be taken within the bounds of the Bill to require companies to take responsibility for minimising the impacts their business activities have on human rights (paragraph 1.15). As an example, the Committee says it would be a positive and desirable step if the Bill were amended to require companies to include a human rights assessment in their annual business review (paragraph 1.16).

Noting that the Bill's reporting requirements will apply to around 1,500 out of the 36,000 large and medium sized firms operating in the UK, the Committee considers that the Government should explain its view that the administrative burdens of the enhanced disclosure provisions would outweigh the benefits, and recommends that unless the justification for exemption is clear, the Bill should be amended to remove the current exemption for medium-sized businesses and to extend the non-financial reporting requirements to large and medium sized firms who are not quoted (paragraph 1.18). The Committee also recommends the Bill be amended to clarify that human rights impacts associated with the running of a company are included in the social and community issues to which a company director must have regard in pursuing his general duties (paragraph 1.19).

Education and Inspections Bill

Following its previous Reports on this Bill, the Committee has received representations from the National Secular Society, the Religious Education Council and the British Humanist Association. The point at issue is whether it is compatible with the UK's human rights obligations to make it compulsory for children at maintained schools who have sufficient maturity and intelligence to make their own decisions to receive religious education and attend collective worship subject only to a parental right to request that their child be excused from either. The Committee concludes that an amendment to the Bill which gave pupils over the age of 16 the right to withdraw from collective worship would reduce the extent of the incompatibility of the present law with the UK's human rights obligations, but to remove the incompatibility altogether it would be necessary to grant a right for pupils to withdraw from religious education as well as collective worship, and to afford that right to any pupil of sufficient maturity, understanding and intelligence to make an informed decision about whether or not to withdraw (paragraph 2.3).

Bills drawn to the special attention of each House

Government Bills

1 Companies Bill

Date introduced to first House	1 November 2005
Date introduced to second House	24 May 2006
Current Bill Number	HC 218
Previous Reports	None

Introduction

1.1 The Companies Bill (then the Company Law Reform Bill) was introduced in the House of Lords on 1 November 2005 and in the House of Commons on 24 May 2006.[1] The Secretary of State for Trade and Industry, Alistair Darling M.P., 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 set out the Government's view of the Bill's compatibility with Convention rights at paragraphs 1647–1668.[2] The Bill had its Committee stage in the House of Commons between 15 June and 20 July 2006.

1.2 This is a Bill of a substantial size that we consider at a late stage in its passage through both Houses. Report stage and Third Reading in the House of Commons is scheduled to take place between 17 and 19 October 2006. We limit our consideration of the Bill to a single issue that we consider to be significant and that has occupied much time in both houses: the promotion of respect for human rights by companies as an aspect of corporate social responsibility.

The Effect of the Bill

1.3 The Bill represents the culmination of the Government's "fundamental review of the framework of core company law", which began in 1998. The Bill is organised under three broad themes: enhancing shareholder engagement and long-term investment culture; making it easier to set up and run a company and ensuring better regulation.[3]

The relevant human rights standards

1.4 We note that there have been a significant number of initiatives in recent decades on a domestic and international level relevant to the issue of corporate social responsibility.[4] These initiatives include:

1 The Bill was originally titled "Company Law Reform Bill", HL 34

2 HC Bill 190 - EN

3 For further background information on the Bill, see House of Commons Library Research Paper 2006/30

4 See Report of the United Nationals High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights, 15 February 2005, E/CN.4/2005/91, paras 7 – 22.

- The promulgation of international instruments aimed specifically at enhancing the role of business in protecting and promoting human rights (such as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises).[5] The OECD Guidelines, for example, are voluntary recommendations to business, but adhering States, including the United Kingdom, are committed to promoting them. The Guidelines include a recommendation that businesses "respect the human rights of those affected by their activities, consistent with the host government's international obligations and commitments".[6]

- Voluntary initiatives such as the United Nations Global Compact (2000). In 1999, the UN Secretary-General asked world business leaders to embrace and enact a Global compact in their individual corporate practices and supporting appropriate public policies. The first principle in the Global Compact asks world business "to support and respect the protection of international human rights within their sphere of influence".[7]

- Moves to impose direct international human rights responsibilities on business entities (for example, see the draft United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises).[8] The Secretary General has appointed a Special Representative on business and human rights who will report, making recommendations for action in December 2006. His mandate includes an obligation to identify and clarify standards of corporate responsibility and accountability for businesses with regard to human rights and to develop materials and methodologies for undertaking human rights impact assessments.

1.5 In his interim report, the Secretary General's Special Representative concluded:

> "The role of States in relation to human rights is not only primary but also critical. The debate about business and human rights would be far less pressing if all Governments faithfully executed their own laws and fulfilled their international obligations. Moreover, the repertoire of policy instruments available to States to improve the human rights performance of firms is far greater than most States currently employ."[9]

1.6 Our predecessor Committee considered the limitations of the horizontal application of the Human Rights Act 1998 in a detailed report on the definition of "public authority". That Report stressed the responsibility of the United Kingdom to secure the protection of human rights within its jurisdiction, regardless of whether an individual's rights were restricted by the actions of a State or a private actor.[10]

5 ILO Official Bulletin 1978, vol LXI, Series A, no 1, Official Bulletin 2000, vol LXXXIII, series A, No 3 (as amended); OECD Guidelines for Multinational Enterprises: Text, Guidelines and Commentary, DAFFE/IME/WPG (2000) 15 Final

6 OECD Guidelines, General Policies, II.2

7 http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html

8 UN Doc. E/CN.4/Sub.2/2003/12/Rev 2 (2003)

9 Interim Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and business enterprises, E/CN.4/2006/97, para 79.

10 Seventh Report of Session2003-04,*The Meaning of Public Authority under the Human Rights* Act, HL Paper 39/HC 382, paras 73 – 74.

1.7 As yet there is no domestic or international normative framework that places direct responsibility for human rights protection on private bodies, and no overarching positive obligation placed on States to ensure that companies respect human rights guaranteed by the European Convention or any other international human rights instrument. However, the acts of non-state actors may have grave implications for individual human rights that go unchecked unless individual States take positive steps. For example, in a recent article, the Secretary General of the International Commission of Jurists, Nicholas Howen noted:

> "No-one can deny the contribution that companies can make to the well-being of societies. At the same time, however, we must also recognise the sorry catalogue of past and present human rights violations committed by companies or human rights violations committed by governments in which companies are complicit…Evidence has come out in Court cases about how the extractive industry has got into joint ventures knowing that their governmental partner would use forced labour and torture to provide security or to clear needed land for development. Mining companies have admitted buying diamonds from rebels, knowing that this money funded these groups; military activities and serious violence against civilians. The South African Truth Commission documented how mining companies in South Africa under apartheid helped the Government create a discriminatory migrant labour system for their own advantage and how they called the police into factories to brutally disperse striking workers. These are just a few examples from many well-documented cases."[11]

There is clearly a growing trend towards acceptance both internationally and domestically that companies should be required to respect and promote basic human rights.[12]

Human Rights Implications of the Bill

1.8 The Bill reduces the scope of a company director's duties to statute for the first time. It proposes that a director of a company will be under a general duty to "act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole". In the pursuit of this general duty, a director must have regard to the "impact of the company's operations on the community and the environment".[13]

1.9 All companies, except those subject to the statutory regime for small companies, must include a business review in their annual director's report. This review must be a "fair review of the company's business" and must contain "a description of the principal risks and uncertainties facing the company". Any quoted company must incorporate in their business review information about "environmental matters, the company's employees and social and community issues". This should include information "about any policies of the company in relation to those matters and the effectiveness of those policies. The review need only include this information to the "extent necessary for an understanding of the development, performance or position of the company's business". If the review does not include information on environmental and social issues, it must state which kind of

11 Presentation, Corporate Liability, Human Rights and the Modern Business, 12 June 2006, Conference hosted by Sweet and Maxwell, Clifford Chance, London, para 1

12 Ibid, page 1.

13 Clause 173(1)

information is omitted.[14] Medium-sized firms will not be required to provide non-financial information (i.e. information on environmental and social issues) in their business review.[15]

1.10 These provisions update the existing provisions on business reviews introduced by the Companies Act 1985 (Operating and Financial Review and Directors Report etc) Regulations 2005 to implement the EU Accounts Modernisation Directive 2003, creating an additional provision in respect of information on "social and community" issues.[16] The information now included in a business review closely follows that which would have been required for the purposes of the Operational and Financial Review requirements abandoned by the Treasury in 2005 ("OFR").[17]

1.11 We note that detailed briefings have been prepared by the Corporate Responsibility Coalition (CORE) and the Trade Justice Movement, and other NGOs calling for the Bill to be amended to enhance the role which modern company law plays in the protection of the environment, communities affected by business, and human rights. For example, CORE argue:

> "At present the Bill places too much reliance on voluntary corporate social responsibility (CSR). It assumes that market pressures will drive companies to act responsibly and that such responsible behaviour will be in the long-term interests of shareholders. Unfortunately, our evidence shows that this is not always the case.
>
> While many UK companies do take their wider responsibilities to society seriously and seek to minimise the negative impacts of their activities, member organisations of CORE and the Trade Justice Movement have uncovered many examples of UK companies taking shortcuts on health and safety and environmental protection overseas and failing to respect the basic rights of their workers and the local communities affected by their operations. Voluntary measures, such as codes of conduct or voluntary social and environmental reporting have failed to address these issues and deliver real change. Amendments to the Bill are needed to ensure that Companies are:
>
> 1) Transparent: Companies should be legally required to report on their social and environmental impacts.

14 Clause 423

15 Clause 423(7)

16 SI 2005/1011, Regulation 2, implementing Dir 2003/51EC (18 June 2003), Article 1.14.

17 The Companies Act 1985 (Operating and Financial Review and Directors Report etc) Regulations 2005 introduced into the Companies Act 1985 a number of obligations relating to narrative reporting. The Regulations implemented the EU Accounts Modernisation Directive 2003 and proposed a mandatory requirement for directors of quoted companies to prepare an annual operating and financial review (OFR). The OFR required companies to produce an analysis consistent with the size and complexity of the business dealing with the business's development and performance and main trends and factors underlying the development, performance and position of the company or group which are likely to affect it in the future. The OFR included an obligation to deal with information relating to employment matters, environmental, community and social issues. In November 2005, the Chancellor announced that the Government would repeal the requirement for OFR, citing the administrative burdens of "gold-plating" the implementation of the EU Accounts Modernisation Directive. The Department of Trade and Industry explained that this decision was made "in light of the Government's strong commitment to strategic forward-looking narrative reporting and its policy of avoiding imposing unnecessary burdens on UK Companies" (http://dti.gov.uk/bbf/financial-reporting/busines s-reporting/page 27239.html). The decision to withdraw OFR attracted significant criticism and led to a proposed legal challenge of the decision by Friends of the Earth.

> 2) Responsible: Directors should be legally obliged to take reasonable steps to minimise any significant damage done to workers, local communities and the environment.
>
> 3) Accountable: People overseas who are harmed by the activities of a UK company should be able to take action against them in a UK court where remedies at home are inadequate or unavailable."[18]

1.12 An early day motion (EDM) supported by CORE has been tabled by Sarah McCarthy-Fry M.P. on "Modernising Company Law". EDM 697 proposes:

> This House believes companies are critical in achieving the aims of sustainable development and to making poverty history, but that in order to be able to do so their freedom to operate must be balanced with clear responsibilities to society and the environment; and urges the Government to enshrine in new company law a duty for directors to identify, consider, act and report on any negative social and environmental impacts caused by a company's activities in the UK or overseas.[19]

1.13 In both Houses, the Government has resisted arguments that the provisions in the Bill were too narrow to lead to significant practical improvement in corporate social performance.[20] By way of summary, the Government's view is that the provisions in the Bill represent the most appropriate balance between corporate transparency and corporate responsibility based on the principle of the "enlightened shareholder value". The Government rejects any argument that it would be appropriate to impose any wider duties on directors in respect of corporate social responsibility. Resisting an amendment proposed by Lord Avebury, based on EDM 697, the Attorney General explained:

> "It is more than theoretically possible to require directors to serve a wider range of interests not subordinate to or as a means of achieving shareholder value but as valid in their own right. That is essentially what the noble Lord is arguing for. However…the Government have carefully considered the case for a pluralist approach. There are three main reasons why the Government did not consider it the right way forward. First, a pluralist approach would unhelpfully muddy the waters. Directors would lack clarity about what they were meant to be doing and it would be difficult for anyone to hold them to account in practice. Secondly, company law reform is not a suitable vehicle for our wider agenda on corporate social responsibility. Issues such as environmental protection and health and safety are enormously important, and the Government take them seriously. We do not think, however, that they should be addressed through company law reform. Thirdly…we believe that the best way to promote responsible business behaviour is to show how such behaviour leads to business success.[21]

18 Corporate Responsibility (CORE) Coalition/Trade Justice Movement, Parliamentary Briefing for MPs, September 2006.

19 EDM 697

20 See for example, HL Deb, 10 May 2006, cols 845, 912-934, HL Deb, 6 February 2006, GC 255- 264, HC Deb, 11 June 2005, cols 563-570.

21 HL Deb, 6 February 2006, GC 265-274, at col 273

1.14 CORE argue that the Government's approach has major limitations, that it relies on the "false premise that companies must consider social and environmental issues in order to achieve financial success; in reality, the exact opposite is true for most companies".[22]

1.15 **We welcome the steps taken by the Government to implement the requirements of the EU Accounts Modernisation Directive. We also welcome the amendments introduced by the Government during the Bill's passage to strengthen the connection between director's duties and the reporting requirements imposed by the business review. However, given the wide-ranging scope of this Company law review, we urge the Government to consider whether there are any further steps that could be taken within the bounds of this Bill to require companies to take responsibility for minimising the impacts their business activities have on human rights.**

1.16 **For example, we consider that it would be a positive and desirable step in keeping with the United Kingdom's commitment to human rights, and its commitment to the promotion of the OECD Guidelines, if the Bill were amended to require companies to include a human rights impact assessment in their annual business review. We recommend that Clause 423 be amended to ensure that human rights impacts associated with the running of a company are addressed in the non-financial information on social and community issues which are covered by an annual business review.**

1.17 We note the conclusions of the United Kingdom's submission to the United Nations Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights consultation on transnational and related business and human rights, that human rights impact assessments may "have a place in the future of companies reporting and disclosure obligations".[23] **While the introduction of a specific requirement for a human rights impact assessment goes beyond the enhanced reporting requirements of the EU Accounts Modernisation Directive, and other international instruments, we consider that taking a positive step to mainstream human rights concerns in private enterprises through reporting will ensure transparency and encourage best practice. We do not consider that the Government's concerns about the administrative burdens associated with "gold-plating" regulatory requirements outweigh the potential benefits of introducing a clear human rights based reporting requirement as part of this major modernisation exercise.**

1.18 We note that while the EU Accounts Modernisation Directive permits Member States to waive non-financial reporting requirements for some smaller companies, the United Kingdom is not required to exempt medium sized companies, or non-quoted companies, from these narrative reporting requirements. CORE note that the Bill's reporting requirements will only apply to around 1500 quoted (publicly listed) companies, of the 36,000 large and medium sized firms operating in the UK. They consider that this distinction may lead to an unfair distinction between companies operating in the same sector.[24] They argue that the distinctions in the Bill would mean that major companies such

22 CORE, Right Corporate wrongs – New laws for trade justice", July 2006.

23 "The Responsibilities of Transnational Corporations and Related Enterprises with Regard to Human Rights", United Kingdom, Consultation Process in Response to Commission Decision 2004/116, para 8. http://www.ohchr.org/english/issues/globalization/business/docs/uk.doc

24 Corporate Responsibility (CORE) Coalition/Trade Justice Movement, Parliamentary Briefing for MPs, September 2006.

as ASDA or Virgin Airlines would not be required to report on environmental and social issues.[25] The Explanatory Notes accompanying the Bill do not explain why the Government considers that it would be a disproportionate administrative burden to require non-quoted and medium-sized companies to comply with the extended disclosure provisions. **We consider that it would be helpful if the Government could explain its view that the administrative burdens of the enhanced disclosure provisions would outweigh the benefits of transparency and enhanced corporate social responsibility associated with enhanced disclosure in respect of any company which is not a quoted company. We urge the Government to consider whether the burdens are disproportionate to the benefits associated with full and accurate reporting on wider social issues and specifically, on human rights impacts related to the operation of a company and the running of its business. We recommend that unless the justification for exemption is clear, the Bill be amended to remove the current exemption for medium-sized businesses and to extend the non-financial reporting requirements to large and medium sized firms who are not quoted.**

1.19 **In keeping with our recommendation on reporting and human rights impacts, we recommend that Clause 173 be amended in the first instance to clarify that human rights impacts associated with the running of a company are included in the social and community issues to which a company director must have regard in pursing his general duties.**

25 CORE Briefing, House of Commons Report Stage and Third Reading, October 2006, page 4

2 Education and Inspections Bill

Date introduced to first House	28 February 2006
Date introduced to second House	25 May 2006
Current Bill Number	HL 116
Previous Reports	18th, 21st and 25th Reports of 2005-06

Background

2.1 Since we last reported on this Bill[26] the Government has issued its consultation on whether registered school pupils above compulsory school age should be allowed to withdraw themselves from collective worship[27] and we have received further representations from the National Secular Society,[28] the Religious Education Council[29] and the British Humanist Association.[30] The Government proposes to move an amendment to the Bill dealing with this issue at Report Stage. We have taken into account the representations we have received and the Government's statement of its intention. The purpose of this Report is to set out concisely our views on the human rights compatibility issue so as to inform debate on the Government's amendment. The human rights issue is whether it is compatible with the UK's human rights obligations to make it compulsory for children at maintained schools to receive religious education and attend collective worship subject only to a parental right to request that their child be excused from either.[31]

2.2 Children enjoy the right to freedom of thought, conscience and religion under both Article 9 of the European Convention on Human Rights and Article 14(1) of the UN Convention on the Rights of the Child. The UK is also under an obligation to assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, and to give those views due weight in accordance with the age and maturity of the child.[32] The latter obligation finds expression in UK law in the concept of "*Gillick* competence", according to which a child should be treated as legally competent to make their own decisions if they have "sufficient maturity and intelligence" to understand the nature and implications of their decision.[33]

2.3 **In our view the current legal framework[34] is incompatible with these obligations in so far as it fails to guarantee a child of sufficient maturity, intelligence and understanding the right to withdraw from both compulsory religious education and**

26 Twenty-fifth Report of Session 2005-06, *Legislative Scrutiny: Thirteenth Progress Report*, HL Paper 241/HC 1577 at paras 2.1-2.6.

27 DfES Consultation, 10 August 2006, The right of withdrawal from collective worship of post-16 pupils. The consultation period closed on 25 August 2006.

28 Appendix 1a.

29 Appendix 1b.

30 Appendix 1c.

31 Section 71(1) School Standards and Framework Act 1998.

32 UN Convention on the Rights of the Child, Article 12(1).

33 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, in which the House of Lords held that a girl under the age of 16 had legal capacity to consent to medical examination and treatment, including contraceptive treatment, if she had sufficient maturity and intelligence to understand the nature and implications of the proposed treatment.

34 S. 71(1) SSFA 1998.

collective worship.[35] **An amendment to the Bill which gave pupils over the age of 16 the right to withdraw from collective worship would therefore reduce the extent of the incompatibility of the present law with the UK's human rights obligations, but it would not remove that incompatibility altogether.**

2.4 **To remove the incompatibility, in our view, it would be necessary to go further in two respects: first, by granting a right to withdraw from religious education as well as collective worship; and, second, by affording the right to withdraw from both religious education and collective worship to any pupil of sufficient maturity, understanding and intelligence to make an informed decision about whether or not to withdraw. Schools should be familiar with the concept of the "Gillick competent" child, but in our view could be provided with general guidance as to how to apply it in practice.**

35 In reaching this conclusion, we do not doubt the value of children being taught about spiritual and moral issues as part of a broad, balanced and inclusive curriculum, but, in the absence of a national syllabus for religious education, we do not consider that there are currently sufficient guarantees that compulsory religious education will not infringe a competent child's right to respect for their freedom of thought, conscience and religion.

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

Government Bills

3 Armed Forces Bill

Date introduced to first House	30 November 2005
Date introduced to second House	23 May 2006
Current Bill Number	HL 113
Previous Reports	22nd Report of Session 2005-06

3.1 We reported on this Bill in our Twenty-second Report of this Session. As part of that scrutiny, we wrote to the Minister on 19 July 2006 asking for further information on a number of points.[36] We have now received a response to those questions, in a letter dated 22 September 2006 from Lord Drayson, which, because of the late stage which the Bill has reached, we publish without substantive comment from us.[37]

36 Twenty-second Report of Session 2005-06, *Legislative Scrutiny: Twelfth Progress Report,* HL Paper 233/HC 1547, Appendix.

37 Appendix 2.

Bills not reported on

Government Bills

4.1 Since publication of our Twenty-second Report of this Session,[38] a further four Government bills on which we have not reported our views have received Royal Assent. These are—

- the Consolidated Fund (Appropriation) (No.3) Bill which received Royal Assent as the Appropriation (No.2) Act 2006
- the Finance (No.2) Bill which received Royal Assent as the Finance Act 2006
- the Housing Corporation (Delegation) etc. Bill
- the Northern Ireland (Miscellaneous Provisions) Bill.

As we said in our previous Report, we see no purpose in scrutinising Bills and reporting to Parliament on their human rights implications once they have been passed by both Houses, and we will not therefore be reporting our views on these Bills. In any future legislative scrutiny progress reports which we publish in this Session we will again draw attention to any other Government bills, passed by both Houses, on which we will not be reporting.

38 Twenty-second Report of Session 2005-06, op.cit.

Formal minutes

Monday 9th October 2006

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Judd	Mr Douglas Carswell MP
Lord Lester of Herne Hill	Nia Griffith MP
Lord Plant of Highfield	Mr Richard Shepherd MP
Baroness Stern	

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Draft Report [Legislative Scrutiny: Fourteenth 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 1.17 read and agreed to.

Paragraph 1.18 read, as follows:

". We note that while the EU Accounts Modernisation Directive permits Member States to waive non-financial reporting requirements for some smaller companies, the United Kingdom is not required to exempt medium sized companies, or non-quoted companies, from these narrative reporting requirements. CORE note that the Bill's reporting requirements will only apply to around 1500 quoted (publicly listed) companies, of the 36,000 large and medium sized firms operating in the UK. They consider that this distinction may lead to an unfair distinction between companies operating in the same sector. They argue that the distinctions in the Bill would mean that major companies such as ASDA or Virgin Airlines would not be required to report on environmental and social issues. The Explanatory Notes accompanying the Bill do not explain why the Government considers that it would be a disproportionate administrative burden to require non-quoted and medium-sized companies to comply with the extended disclosure provisions. **We consider that it would be helpful if the Government could explain its view that the administrative burdens of the enhanced disclosure provisions would outweigh the benefits of transparency and enhanced corporate social responsibility associated with enhanced disclosure in respect of any company which is not a quoted company. We urge the Government to consider whether the burdens are disproportionate to the benefits associated with full and accurate reporting on wider social issues and specifically, on human rights impacts related to the operation of a company and the running of its business. We recommend that unless the justification for exemption is clear, the Bill be amended to remove the current exemption for medium-sized businesses and to extend the non-financial reporting requirements to large and medium sized firms who are not quoted**."

Amendment proposed, in line 20, to leave out from the word "**business.**" to end of line 23.—(*Mr Richard Shepherd.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 1	Not Content, 6
Mr Richard Shepherd MP	Mr Andrew Dismore MP Nia Griffith MP Lord Judd Lord Lester of Herne Hill Lord Plant of Highfield Baroness Stern

Paragraph agreed to.

Paragraphs 1.19 to 4.1 read and agreed to.

Summary read and agreed to.

Resolved, That the Report, as amended, be the Twenty-eighth Report of the Committee to each House.

Several Papers were ordered to be appended to the Report.

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

******

[Adjourned till Monday 16 October at 4pm.

Appendices

Appendix 1(a): Copy of a letter from Keith Porteous Wood, Executive Director, National Secular Society to Rt Hon Alan Johnson MP, Secretary of State for Education and Skills, Department for Education, re Education and Inspections Bill

Mandatory Collective Worship – enforcement and Human Rights concerns

1. Thank you for your letter of 4 August on collective worship in maintained schools and advising me that the National Secular Society would be consulted as an "interested group" over a proposed change to the law. I have now received the consultation document which strongly implies the position that the Government propose to take. We have some serious concerns about the proposed changes not going nearly far enough in Human Rights terms. The consultation document (shown in the Appendix) itself appears to me to be so seriously flawed by the omission of some key information as to render responses to be of little value. This aspect of the letter (paras 7–12) needs an urgent response as it relates to a consultation that has just started and will close shortly. The consultation's wording and references also raises some questions about the attitude of senior personnel in the Department where Human Rights and religion are in conflict. All these issues are dealt with in more detail below.

Scope of Government's proposed amendment

2. I had spoken to Baroness Walmsley at some length before Baronesses Walmsley and Sharp's amendment to the Education and Inspections Bill was tabled, and after consulting our lawyers. As you know, the amendment covered both Collective Worship and RE, and when moving the amendment Lady Walmsley, speaking for the LibDems, referred to Human Rights and said there was a case for self-withdrawal to apply to "a young person [who] becomes competent to make a decision for himself."[39] I noted Lord Adonis' stated intention to encapsulate "most of the spirit"[40] of Lady Walmsley's amendment.

3. Since then, what Lady Walmsley proposed in the amendment and her reference to "a young person [who] becomes competent to make a decision for himself." has been validated by the Twenty-Fifth Report of the Joint Committee on Human Rights (JCHR) published on 24 July 2006 (Section 2[41] and Appendix 2[42]).

4. Based on the text of the consultation document sent out by the Citizenship and RE Team on 10 August, the Government's proposed response to this appears to be to extend self-withdrawal only to pupils of 16 or over, and only to Collective Worship (CW). The remainder of this letter is predicated on this assumption. If we have interpreted the Government's intentions incorrectly, please let us know.

39 Lords Official report 18 July 2006, Column 1203

40 Lords Official report 18 July 2006, Column 1204

41 http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/241/24106.htm

42 http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/241/24112.htm

5. This proposed response by the Government, which is a rather ungenerous interpretation of Lord Adonis' undertaking, seems to us to show scant regard for the Government's Human Rights obligations. It essentially ignores the passage in the JCHR's report which invites the Government *"**to amend the Bill so as to reduce the risk of this potential incompatibility, for example by amending the School Standards and Framework Act to make the right to withdraw from religious instruction and worship exercisable not only by parents but by pupils who are old enough to make informed decisions for themselves."***

6. Given the JCHR report, I would be grateful to know why the Government's proposal for self withdrawal does not extend to both RE and (for both RE and CW) to pupils younger than 16 deemed old enough to make informed decisions for themselves.

Consultation Document – non-Human Rights aspects

7. I note that the consultation (reproduced in the Appendix) is similarly restricted to 16+ pupils' self-withdrawal from CW. This was presumably why the consultation referred, rather economically, to just part of Lady Walmsley's amendment, the part dealing with Collective Worship, but conspicuously avoided making any reference to the part dealing with Religious Education. The consultation referred to part of the Education and Inspections Bill debate in the Lords on 18 July, but the column numbers given avoided most of Lady Walmsley's speech, and most of what she said about pre-16s.

8. I recognise that religious groups have a right to be consulted on these matters, but I hope that nothing they could say would cause the Government to draw back from the unduly modest – nevertheless welcome – commitment it has made to reduce HR incompatibility. It would however have seemed more in the spirit of Lord Adonis' statement and the JCHR report to regard post-16 CW as an irreducible minimum with representations being invited about RE and pre-16 self-withdrawal, in particular in relation to the practicalities. We request that the consultation be extended in this way, or even consult again. Would the Department please confirm whether it is prepared to do this, please, and if not, we would appreciate the Department sharing with us their rationale.

9. Would you please let us know whether the Cabinet Office Code of Practice on Consultation is applicable to this consultation. If so, is the consultation being carried out under the terms of the Code, please? In particular we have in mind paras. 2.3 on the openness of consultations and 5.1 on a consultation co-ordinator. We request contact details for the nominated consultation co-ordinator for the Department. If the Code is applicable, we can discuss these concerns further with the appropriate person.

Consultation Document - Human Rights aspects

10. The consultation document, sent by the Citizenship and RE Team on 10 August, invited responses from recipients on "an amendment which would allow registered school pupils above compulsory school age to withdraw themselves from collective worship". While this statement is not technically incorrect, no reference was made in the amendment or debate to compulsory school leaving age. The basis for the

amendment was clearly stated to be a Human Rights one, but the consultation omits reference to a key HR document (see para 12) and contains no reference to Human Rights whatsoever; indeed the wording seems to have been drawn up with great care to avoid doing so. Incidentally, we had also informed senior officials in the Department at a meeting with them on 23 January 2006 (before you joined) of our legal advice that the inability of pupils over 16 to withdraw themselves from RE was incompatible with the ECHR. They did not disagree with our contention but they were not prepared to act on this. We are disturbed by this – presumably inadvertent – demotion of human rights where they conflict with religion, and request that whoever is responsible for it be made more aware of the Government's HR obligations.

11. It may have been that the Department felt that there was no point in mentioning Human Rights to the consultees, the majority of which would be religious organisations, as to have done so might have been adjudged to make no difference or even to have generated greater hostility to the proposed change. Certainly, the bishops made energetic attempts in the Lords during the passage of the Human Rights Act to have religions exempted.

12. Whatever the reason for the omission of any reference to Human Rights, I cannot see how any informed comment could be made on the question posed in the consultation without referring to the JCHR report. Furthermore I do believe that it is fair to consultees to invite responses without making them aware that opposition to the amendment would at the same time be resisting a move towards reducing the UK's incompatibility with the European Convention (ECHR). I therefore ask you at the very least to request that your officials send consultees a supplementary document pointing out the Human Rights aspects and providing them with Section 2 and Appendix 2 of the Report, or access thereto.

(Outside the consultation) Attempts to override withdrawal/excusal from RE and/or CW

13. We are becomingly increasingly concerned on Human Rights grounds at attempts to circumvent the rights of withdrawal/excusal from RE and/or CW under Section 71 of the School Standards and Framework Act. An example, drawn from the current entry guidelines of a VA CofE school[43], reads: "Parent(s)/carer(s) applying for an open place should note that the school aims to provide an education based on Christian principles as outlined in the prospectus and that applicants would not wish to exercise their right to withdraw their child from worship and attend religious education lessons."

14. We would be grateful to know in respect of the issues raised in para 13 whether the Department:

a) has considered whether any requirements imposed on behalf of the school or undertakings given on behalf of the pupil could ever have the effect of overriding the rights under Section 71 (and if so its conclusions) , and

b) has any current guidance forbidding attempts to override Section 71 and what that guidance says, and

43 http://www.ealing.gov.uk/services/education/schools/high_schools/twyford_church_of_england_high_school

c) has considered whether current practice in some schools could have the effect of circumventing Section 71, and

d) will consider investigating whether current practice in some schools could have the effect of circumventing Section 71 and if this appears to be the case to introduce guidance:

(i) forbidding attempts to override Section 71, (ii) requiring all maintained schools to refer in their prospectuses to the statutory rights under Section 71, and making clear that any undertakings given on behalf of pupils in this respect can be rescinded at any time, and

e) will consider amending Section 71 to make clear that it cannot be overridden/contract out of in such ways

15. I request responses to the questions posed in para 6, 9 and 14 and confirmation of whether the Department will do as requested in paras 8 and 12.

Keith Porteous Wood
Executive Director

DfES Consultation 10 August 2006

The right of withdrawal from Collective Worship of Post-16 pupils

Dear All,

As you may be aware, an Opposition amendment was tabled at the Committee Stage of the Education and Inspections Bill which would allow pupils who are older than compulsory school-age to choose to withdraw from daily acts of collective worship. In debate on 18 July, Lord Adonis accepted the sprit of the amendment and said that the Government would consult faith communities with a view to bringing an appropriate Government amendment at Report Stage. See col 1204 in the attached link. http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60718-1008.htm

The Government realises it is always a fine balance to judge when young people are best able to make such decisions. However, we can see merit in terms of recognising the right for an individual over 16 to exercise choice on collective worship participation rather than it being a parental decision.

We are therefore consulting the main faith groups, RE professional bodies and other interested organisations. We would be grateful for your views on whether you are supportive in principle of an amendment which would allow registered school pupils above compulsory school age to withdraw themselves from collective worship. We would welcome any other views you have on the matter. In order that your views can inform preparations for Report Stage of the Bill, we would be grateful for your comments by **noon on Friday 25th August 2006**. Please send your comments to me by replying to this email.

Appendix 1(b): Letter from The Religious Education Council of England & Wales, re Education and Inspections Bill

It was with considerable disappointment that I read the response of the Joint Committee on Human Rights to the letter from the National Secular Society. It showed little evidence grasp of the nature of Religious Education, either in law or practice.

Legally the term Religious Instruction was abolished by the 1988 Education Reform Act. This was to ensure that the words use din law matched reality. Even in 1944 when the term Religious Instruction was used no indoctrinatory connotation was intended, but precisely because that interpretation was commonly perceived in the lingering legal usage it was changed. In practice it had not been widely used since the 1960s and most Agreed Syllabuses had for long been using 'RE' to describe their subject matter.

More worryingly, the Committee appeared to show no recognition of the vital contribution which RE makes in the education of young people. In equipping tem for living as national and global citizens, a school's focus on beliefs and values is critical . Students of all ages need the opportunity to clarify and understand the meaning and implications of different sources of belief and value surrounding them in the contemporary world. They also deserve assistance in openly developing their own sense of purpose and faith to live by.

This priority, important at all times but now especially so, has been woefully neglected for 16-19 year olds. The majority are in 6t Form or FE Colleges, and therefore not under school regulations. Accordingly, RE is rarely provided, nor effective alternatives, for most of this age range.

The issue was triggered by the letter from the National Secular Society. This organisation may indeed represent the views of a significant minority in our society. But its membership is not known for its direct involvement in education. It is part of their deliberate apologetic technique to use the language of 'RI'. The British Humanist Association, which is much more extensively involved in education on the ground, supports the provision of RE post 16.

The matter of 'Gillick competent' discretion in respect of attendance at Collective Worship for 16-19 year olds is well worth consideration. However, the context deserves some unpacking:

- 'Collective Worship' itself is different from 'Corporate Worship' (particular to a singular faith community), in that it is intended as an open educational experience ("sensitive to age, aptitude and family background" according to the 1988 ERA).

- Far from being a daily occurrence in 11-18 schools, even a weekly pattern of provision is rare for the 6th formers, and even more so in other 16-19 establishments.

- The tradition in voluntary-aided establishments is different, and in respect of separate 16-19 institutions these are more Roman Catholic than Anglican. The

> decision of parents and Gillick competent students to attend such institutions may arguably be seen as indicative of a readiness to embrace the tradition and ethos found there.

Were this whole subject now to be directly addressed by the Religious Education Council of England & Wales, I am in no doubt about what all the member organisations (some fifty faith communities and professional associations, including the BHA) would agree on . They would welcome any positive interest in RE on the part of your Committee. They would go on to ask that the woeful under-provision of RE for 16-19 year olds be tackled as itself a human rights issue, in that their entitlement to a meaningful engagement with spiritual and moral issues in education is at risk.

Professor Brian Gates
Chair

1 September 2006

Appendix 1(c): Letter from the British Humanist Association, re Education and Inspections Bill

The British Humanist Association is a long-standing and active member of the Religious Education Council of England and Wales (REC), where we work for the continuing improvement of the subject, and for the fuller inclusion of the humanist tradition within it.

We fully support the provision of good quality RE as one part of every child and young person's entitlement to an education that will assist them in understanding cultures, beliefs and traditions different from their own, and which will further their own spiritual and moral development.

We regard this as a matter separate from the question of collective worship, where the BHA advocates the abolition of the requirement on schools to provide it, and supports instead inclusive assemblies where there is no religious practice.

It is also our long-standing policy that, until the law on school worship is reformed, competent children should have (in line with their evolving capacities) the right to excuse themselves rather than rely on the right of their parent to excuse them. In this we believe we are supported by the ECHR, the CRC, and the precedent of Gilick. In line with our commitment to the rights of the child, we also believe that, for as long as there is a parental right of excusal from RE, the same right should be held by the competent child.

I hope this will have cleared up any misunderstandings you may have as to BHA policy, but if you have any enquiries about the position of the BHA on this or any other matter, please do get in touch.

22 September 2006

Appendix 1(d): Letter from the British Humanist Association, re Education and Inspections Bill

Please find enclosed a submission made by the British Humanist Association (BHA) to the DfES' mini-consultation on the right of pupils to excuse themselves from collective worship.

I wish to bring this submission to the attention of your committee in the hope that it will be useful to you in your current discussions, and also should you wish to scrutinise the Government's eventual actions in this matter at a future date.

Collective worship

We believe that the best way in practice to ensure the right of children to freedom of conscience, religion and belief, would be for the current law requiring collective worship to be repealed and for reformed inclusive assemblies not to contain any religious practice.

We note that, in 1998, many organisations stated their preference for such a reform, including all the major teaching unions, the major professional bodies for RE and Christian, Jewish and Sikh groups, as well as the BHA.

This would not remove the possibility for schools to allow separate and unrelated acts of religious worship to take place on school premises on a purely opt-in basis. Although we believe this would certainly be the best context for the child's rights to see full application, we do however realise that this is more a matter of policy than human rights law. In connection with the rights-based question at hand, the BHA believes that the law should provide for competent children *of whatever age* to have the same rights to excuse themselves from aspects of the curriculum connected with religion that their parents have, as you will see from the enclosed document.

RE AND COLLECTIVE WORSHIP: THE RIGHT TO WITHDRAW
Submission from the British Humanist Association

1. Current policy of the BHA:
We realise that is not immediately relevant to the present consultation, but an understanding of our policy will inform our comments on the current right of withdrawal that follow. (We use the term 'withdraw' as it is commonly used in this context while noting that the law is cast in terms of 'excusal'.) Our policy on RE and collective worship is set out in *Better Way Forward*, available at http://tinyurl.com/c44qh, and is summarised below.

o All maintained schools, in place of current RE, should be required to teach a National Curriculum subject of beliefs and values education, which should never be in the nature of religious instruction and which should be broad, balanced and inclusive of a wide a range of worldviews and philosophies;

o All maintained schools, in place of the current requirement to provide daily acts of collective worship, should be required to provide assemblies which contribute to the

spiritual and moral development of pupils and in which religious practices such as worship play no part;

o These *educational* activities would require no right of withdrawal to be provided to pupils or parents;

o All schools should provide places for optional (as in *pupils* may opt-into it) religious practices (prayer or meditation etc);

o All schools should provide places where pupils may receive optional (as in *pupils* may opt into it) religious instruction outside of the school timetable
and curriculum.

In relation to collective worship, we would note that our concern about the current law is not unique and that, contrary to the consensus in support of the current law claimed by Lord Adonis in committee, all the teaching unions, many professional bodies of RE practitioners and some faith groups believe that the current requirements for worship should be reformed.

2. **Rights of the child in relation to RE and collective worship**
In our note that follows, we refer to the following rights of the child. They are all relevant to the question of the right to withdraw.

a. *Article 9(1) of the European Convention on Human Rights (ECHR):*
'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance.'
b. *Article 12 (1) of the Convention on the Rights of the Child (CRC):*
'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

c. Article 14 of the CRC:
'(1) States Parties shall respect the right of the child to freedom of thought, conscience and religion.

(2) States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

(3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.'

d. 'Gillick competency'

Following Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402 (HL), the child should be treated as legally competent to make their own decisions if they have 'sufficient understanding and intelligence' to do so. This is in line with the evolving capacities of the child and sets no minimum age for competence.

3. Collective worship

It is clear that the forced participation of anyone in any form of religious observance violates his right to freedom of religion or belief as protected by article 9 (1) of the ECHR. The collective worship required in *all* maintained schools and Academies, as well as any additional worship or religious observance required or provided in maintained 'faith' schools or Academies certainly fall into this category and, currently, the child in school (right up until the age of 18) is compelled by law to participate in such worship, unless withdrawn by a parent. We believe that the law compelling the child to participate in collective worship violates the child's right to freedom of thought, conscience and religion as protected in 9 (1) of the ECHR and 14 (1) of the CRC. We believe that the fact that only the parent may withdraw the child, and the child may not withdraw himself, violates the right of the child to self-determination as protected by 12 (1) and 14 (2) of the CRC, and by *Gillick*.

4. Religious Education

In many maintained religious schools, RE is confessional religious instruction and certainly falls into the category of religious activities from which the competent child should be able to withdraw themselves, in accordance with the same rights enumerated above in (3). In other maintained schools, RE is generally broader (though many local syllabuses still exclude secular philosophies such as Humanism) and more balanced but, in the absence of a national syllabus compulsory for all schools, there is no way to be sure that teaching in all schools is of such a sort that would not constitute a violation of the rights of the child. The same considerations should apply here as apply to collective worship and to RE in religious schools, as it cannot be guaranteed that RE in non-religious schools will not constitute an infringement of the child's freedom of religion or belief.

5. The question of competency

Whether or not compulsory RE or collective worship in any sort of maintained school actually does violate the rights of the child in the ways suggested above (and we strongly believe that they do), the fact remains that a right of withdrawal does currently exist in UK law, but that it is a right held by the parent and not the child.

All other concerns aside, it should be clear that article 12 (1) and the question of 'Gillick competency' are certainly relevant to any situation in which the child, right up to the age of 18, has no legal right to self-determination, but all the control is held by the parent. In any situation, and certainly in one where fundamental rights are engaged, this would be prima facie incompatible with the right of the competent the child to determine these matters for himself.

6. What should the Government amendment provide for?

For as long as RE and collective worship in their current forms are compulsory in all maintained schools, whether with a religious character or not, it is incompatible with the human rights of a competent child to deny him the right to withdraw.

Any amendment should therefore cover RE as well as collective worship and should be worded in such a way as to catch any competent child, whatever his age. The test of having "sufficient understanding and intelligence" which is taken to constitute 'Gillick competency' seems suitable to be written into law through an amendment to the SSFA 1998 and we strongly recommend this. Not only do we believe that such a wording is preferable as the best guarantee of the human rights of individual pupils, we also believe that litigation, if any age limit is set, would in any case inevitably lower that age in due course.

August 2006

Appendix 2: Letter from Lord Drayson, Minister for Defence Procurement, Ministry of Defence, re Armed Forces Bill

Thank you for your letter of 19 July. I recognise that a Bill which sets out a whole system of criminal justice requires the closest attention to Human Rights, and I greatly appreciate the close scrutiny which the Joint Committee has accordingly given to the Armed Forces Bill.

Your letter raises a number of important questions about the Bill, and I hope to provide below a full answer to each question in order.

Explanatory Notes

I should begin with an apology. The Explanatory Notes should have provided a note of the main ECHR points considered and the decisions taken in relation to each of them. I hope that this letter will go some way to redressing this shortcoming. Such considerations were at the forefront of our consideration in creating a single system of service law.

Civilian status of Judge Advocates

Question 1: Is it intended that Judge Advocates will be civilians? Will this be stated expressly on the face of the Bill?

As now, all Judge Advocates will be civilians. This is not stated expressly in the Bill, as the requirement is already clearly established by the courts (in particular by the **Grieves** case referred to in your letter). There is often a difficult question whether a matter which is settled by the courts should then be repeated in legislation. In this case, it was decided that doing so would neither clarify nor add to the clear judgement of the European Court of Human Rights in **Grieves** in 2003. Judge Advocates in all Army and RAF Courts Martial have long been civilians. The **Grieves** case dealt with the Royal Navy Courts Martial, in which Judge Advocates had been naval officers. The practice of appointing naval uniformed Judge Advocates stopped with effect from the judgment.

Briefing notes provided to members of the Court Martial

Question 2: Is it intended that the briefing notes currently provided to members of the Court Martial will be likewise provided under the new arrangements?

Yes. Updated Briefing Notes which, among other things, draw attention to the importance of independence and impartiality, will continue to be issued. Their importance in ECHR terms is fully recognised.

Reporting procedures for participants in the Court Martial

Question 3: Is it intended that this requirement will be stated on the face of the Bill?

I agree that both domestic courts and the European Court of Human Rights have examined reporting procedures in relation to various participants in courts-martial. The Courts Martial Appeal Court in **R v Stow (2005)** considered the reporting procedures for the Naval Prosecuting Authority. The European Court in **Morris** considered the practice of reporting on service members of courts-martial. But in all these cases, this was part of the consideration of the more general issue, whether objectively the court-martial offered sufficient guarantees to exclude any legitimate doubt about its impartiality. In **Morris**, for example, the European Court considered such matter as the training of service members of the court-martial, their rank and the fact that they were subject to reports. In **Stow** the CMAC looked at such matters as the rank of the Naval Prosecuting Authority, whether he was in a final post and the reporting procedures. The courts will no doubt continue to look, when appropriate, at all aspects of how each element of the system works. But we did not think it necessary or appropriate to take one element of the system (reporting procedures) and deal with it by legislation. What we will have to ensure is that in practice all aspects of the system provide the necessary guarantees of independence and impartiality, including, as now, a prohibition on all reporting on the performance of relevant participants.

Clarity in wording of offences

Question 4: meaning of "utmost exertions" in Clause 2(3)

Under Clause 2 of the Bill members of the Armed Forces are guilty of an offence if they fail to use "utmost exertions" to carry out lawful commands, where they are, or are likely to be, in action against an enemy. The words "use…utmost exertions" have no technical meaning. They are intended to mean simply "do their very best". They were adopted from the existing offence (for example in section 24(2)(a) of the Army Act 1955) under the Service Discipline Acts.

The words are needed to protect the members of the services. In the situations covered by the clause, it may be impossible for them to carry out the command they are given. Troops may be ordered to take an enemy position. They may fail, but they cannot be charged with this offence, if they had tried their very best. We think it essential to provide this limitation on the offence and do not see that the Court Martial would have difficulty in applying it.

Question 4: meaning of "disrespectful" in Clause 11

All members of the Armed Forces are given careful training in the way to address, and on behaviour in relation to, their superiors. The purpose is to ensure that respect, which is essential to service discipline, is maintained. Accordingly, in relation to a superior officer, we think what amounts to disrespectful behaviour would be clear.

We also think that "disrespectful" is preferable to "insubordinate", which is used in Section 33 of the Army Act 1955 (and equivalent provisions of the other Service Discipline Acts). Members of the Armed Forces should be able to state an unwillingness to obey an order where there is legitimate reason for doing so and they do so respectfully. We think "disrespectful" makes this clearer than the existing offence of "insubordinate" behaviour.

Question 4: Clause 23: please provide examples of the behaviour which this clause is intended to refer to

While it would be for the Court Martial to interpret the offence, examples of what we have in mind are as follows:

a) in relation to cruel and disgraceful conduct: in a rage a dog handler deliberately kills his dog.

By contrast, trapping animals for food needed for survival, even if by means that might be regarded as cruel, would not in our view be disgraceful and so not an offence under this clause.

b) in relation to indecent and disgraceful conduct: sexual activity to offend members of a local civilian population.

Question 4: please confirm whether it is possible to define these offences more clearly on the face of the Bill

For the reasons stated above in relation to each of the clauses referred to, we do not consider it necessary or helpful to define these offences more fully.

Question 4: to the extent that the Bill replicates or renews existing offences under the Service Discipline Acts, has the wording of the above offences been clarified by previous case law

There is considerable, relevant case law from civilian courts on indecency. In the case of **R v Walsh (1980)** the Courts-Martial Appeal Court held that the test of disgracefulness is an objective one, and not a matter of subjective, personal opinion.

Restrictions on freedom of expression

Question 5: please explain the justification for the wide ranging restriction contained within Clause 2(5)

As you mention, the right to freedom of expression under Article 10 of the ECHR may be restricted in the interests of national security. We believe that Clause 2(5) is a necessary and proportionate restriction. The offence applies only where, broadly speaking, members of the Armed Forces are, or are likely to be, in action against an enemy. This is provided for by Clause 2(2). Moreover a communication contrary to the clause must be one made to another member of our, or cooperating Armed Forces or to civilians subject to service law who are accompanying members of our Armed Forces near, or in action against, an enemy. The communication must be intentional and likely to cause the person to whom it is made to become despondent or alarmed. Lastly, the communication must be made "without reasonable excuse".

We also consider that Clause 2(5) represents a significant clarification and limitation of the existing equivalent offence (in the case of the Army Act 1955, under its Section 24(2)(d)). Under the existing offence there is no defence of "reasonable excuse" and the offence is committed if the serviceman's words are likely to cause despondency or unnecessary alarm to any person.

Restriction on right to freedom of association

Question 6: In view of the right of freedom of association in Article 11 ECHR please explain the justification for the current restriction on trade union membership for members of the Armed Forces

Article 11 specifically provides that it does not prevent the imposition of lawful restrictions on the exercise of those rights by members of the Armed Forces. We consider that the current restrictions on trade union membership is justified because of the incompatibility between, on the one hand, practices of collective bargaining and possible industrial action and, on the other hand, service discipline and service values and ethos. The concepts of respect, loyalty, trust and authority are essential to the Armed Forces. They underpin the relationship between all ranks and so sustain team and unit cohesion and the highest possible morale which are essential for operational effectiveness. A key part of this, reflected for example in Queen's Regulations for the Army, are the responsibilities of the chain of command, and in particular of Commanding Officers, not only for command and discipline, but also for training, safety, security, education, health, welfare and morale of those under their command.

We also recognise the need to have robust systems to respond to complaints by members of the Armed Forces. In particular, therefore, the Bill already provides for a more streamlined and effective system of redress of particular complaints with an independent element in appropriate cases. And we announced on 13 June, in response to the Blake report, we will be proposing further changes to the Bill to provide for a statutory Service Complaints Commissioner.

Challenging the legality of a pre-condition of an offence

Question 7: What is the justification for the difference between Clause 12 which allows a challenge to the legality of a command, and Clauses 3 and 8, which allow no such challenge to the legality of operations or relevant service? Is it intended that "lawful" will be inserted in to Clauses 3 and 8?

Clause 12 makes it an offence to disobey a lawful command. It means essentially that commands which would require the person commanded to commit a criminal or disciplinary offence need not be obeyed. An obvious example would be a command to kill a prisoner. Clause 12 does not permit disobedience on the basis that a command relates to operations which may be contrary to International Law where the person commanded would have no personal criminal liability.

Clause 3 (obstructing operations) relates broadly speaking to intentionally or recklessly impeding the operations of our Armed Forces. You ask by implication whether a person should be permitted to impede such operations if the operations are unlawful. There has been intensive debate during the passage of the Bill about this issue. We have considered it with great care. My conclusion is:

a) it is right that members of the Armed Forces should be able to refuse to obey orders which would make them criminally liable. But they should not be able to do so on the basis that an operation is contrary to International Law where it carries no personal criminal liability. Issues of International Law are not clear cut, and members of the Armed Forces should not be expected to try to decide whether or not each

operation is in accordance with International Law. The decision whether to go to war is essentially for the Government of the day;

b) if members of the Armed Forces believe that an operation will be against International Law, they should not impede the operation, putting at risk the success of the operation and the lives of their comrades.

The issues on Clause 8 (desertion) are in my view essentially the same. While members of the Armed Forces should refuse to obey an order to commit a criminal act, it is not for them to judge whether operations are contrary to International Law, where they would have no personal criminal liability. If they are concerned that an operation may not be in accordance with International Law, it is not right for them to respond by deserting their unit and their comrades.

We believe that this approach is consistent with that of the House of Lords in **Ayliffe and Others (2006).** In that case the House of Lords considered cases of criminal damage to military property by certain civilians. The appellants said that they had acted to obstruct a crime of aggression by the UK or the USA, and that this should be a defence. The House of Lords rejected the argument. Aggression was a crime under International Law, but not under domestic law. Moreover, the decision whether to go to war (as Lord Bingham put it) "falls squarely within the discretionary powers of the Crown". It was not for the individual citizen to commit otherwise criminal acts on the basis that his purpose was to obstruct action contrary to International Law. Clearly the Armed Forces should be in the same position here as all other citizens.

Detention without charge

Question 8: what is the justification for the time limit on pre-charge detention in a Clause 99(6) being 48 hours rather then 36 hrs as in Section 42(1) of PACE?

Under Section 42(1) of PACE the initial period for which a person may be held without charge is 36 hours "after the relevant time". The "relevant time" is generally the earlier of the time the person "arrives at the relevant police station" and "24 hours after the time of the person's arrest". The maximum initial period may therefore be as much as 60 hours after the time of arrest. Under the Bill the initial period is 48 hours after the arrest. It is therefore less than the maximum initial period under PACE. The reason for the difference in provisions is practical. For example, the service police on operations do not work from police stations.

Involvement of next-of-kin in investigation

Question 9: what guarantees are there that the family of the deceased will be sufficiently involved in the investigation by the Military Police?

The importance of the involvement of next-of-kin where required by Article 2 of ECHR is recognised. I think that you may also have in mind here the recommendations in the

Blake Report (Recommendations 28 and 29) that there should be full and prompt disclosure of information to the nominated next of kin of the fact of, and circumstances known about, the death of any soldier, and that a military liaison officer should be appointed to explain to next of kin about the progress of any service police investigation. The Government responded to those recommendations on13 June 2006 (Cm. 6851).

As we said in that response, a policy is already in place for the prompt and full disclosure of information to nominated next-of-kin. There may be some necessary restrictions on information because of the need to assess possible criminal charges, but in such a case Police Family Liaison Officers will explain this and keep nominated next of kin informed of progress. If there are no potential criminal charges, the current practice is already to appoint a military Visiting Officer who explains about progress in the investigation. In other cases this is the function of the Family Liaison Officer from the relevant police force.

By way of example, a memorandum giving details of the support provided to families by the Army following a Service death was submitted to the Select Committee on the Armed Forces Bill and published with their report on 9 May 2006 (HC 828-II).

Inquests

Question 10: please confirm whether it is intended that inquests will be held as recommended by the Blake Report?

As we said in our response to the Blake Report published on 13 June (Cm 6851), legislation dealing with inquests in England and Wales is the responsibility of the Department for Constitutional Affairs (DCA). MoD officials have had detailed discussions with officials from DCA, responsible for the draft Coroners Bill which is currently subject to consultation. Our aim is to ensure that this recommendation from the Blake Report is taken into account with respect to proposed changes to the law governing coroners. Responsibility for the relevant legislation in Scotland covering fatal accident inquiries lies with the Scottish Executive, and for inquests in Northern Ireland it currently lies with the Northern Ireland Office. Discussions will be held with them.

Question 10: if it is intended that inquests will be held as recommended by the Blake Report, will this be stated on the face of the Bill? If not, and in the light of the Government's procedural obligations under Article 2 ECHR, please explain the justification for this

As explained above, the legislation dealing with inquests is not a matter for the MoD and we do not therefore propose to deal with inquests in the Armed Forces Bill. However, the MoD are involved, and will hold further discussions as necessary, with those who do have responsibility for the relevant legislation.

Random drug testing

Question 11: please explain the justification for a random drug testing programme among members of the Armed Forces which involves the requirement to provide a sample without the need for consent

The provision in the Bill for random drug-testing closely reflects that in the Service Discipline Acts, as amended by the Armed Forces Bill 2001. When that Act was in preparation, and again during the preparation of the Bill, careful consideration was given to the possible ECHR implications, and most importantly those of Article 8 (the right to respect for private and family life). We recognised that the requirement to provide a sample involves some intrusion. However, Article 8.2 provides for such intrusions if necessary (among other grounds) in the interests of national security, public safety, the prevention of crime, the protection of health and the protection of the rights and freedoms of others. We believe that each of these is relevant to the provision for compulsory, random drug-testing. Nationality security, for example, requires the highest standards of readiness and discipline and the fact that member of the Armed Forces use weapons and control or direct vehicles, aircraft and ships demand that reasonable measures be taken to ensure the safety of the public and of the members of the Armed Forces themselves.

The steps we have taken are necessary and proportionate. The samples that may be required under the random testing provisions are limited to samples of urine (Clause 303(1)). Moreover the results of a test cannot be used as evidence in proceedings for any service offence. We consider that this strikes a proper balance between the rights of the individual and the need both to ensure the safety of others and to maintain the high standards required for national security.

Conclusions

I hope that the answers in this letter will give the Committee assurance as to the care with which we have sought to address all issues which go to human rights. I believe that the Bill will equip the Armed Forces with an up-to-date system of service law which will combine fairness and safeguarding the rights of the individual with the needs of operational effectiveness and the high level of discipline, trust and morale, which are essential to sustain it.

22 September 2006

Bills Reported on by the Committee (Session 2005–06)

* indicates a Government Bill

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

BILL TITLE	*REPORT NO*
Armed Forces Bill*	**22nd & 28th**
Charities Bill*	**1st**
Children and Adoption Bill*	**5th & 15th**
Civil Aviation Bill*	**7th, 14th & 21st**
Commissioner for Older People (Wales) Bill*	**6th**
Commons Bill*	**15th & 21st**
Companies Bill*	**28th**
Compensation Bill*	**20th & 21st**
Consumer Credit Bill*	**1st & 14th**
Corporate Manslaughter and Corporate Homicide Bill*	**27th**
Council Tax (New Valuation Lists for England)*	5th
Criminal Defence Service Bill*	**1st**
Crossrail Bill*	1st
Education and Inspections Bill*	**18th, 21st , 25th & 28th**
Electoral Administration Bill*	**11th**
Equality Bill*	**4th & 11th**
European Union (Accessions) Bill*	5th
Fraud Bill*	**14th**
Government of Wales Bill*	14th
Health Bill*	**6th & 11th**
Identity Cards Bill*	**1st**
Immigration, Asylum and Nationality Bill*	**3rd, 5th & 11th**
Legislative and Regulatory Reform Bill*	**17th & 21st**
London Olympic Games and Paralympic Games Bill*	**15th**
Merchant Shipping (Pollution) Bill*	1st
National Insurance Contributions Bill*	14th
National Lottery Bill*	1st
Natural Environment and Rural Communities Bill*	1st
NHS Redress Bill*	15th
Northern Ireland (Offences) Bill*	**7th**
Police and Justice Bill*	**20th & 21st**
Racial and Religious Hatred Bill*	**1st**
Regulation of Financial Services (Land Transactions) Bill*	5th

Road Safety Bill*	**1st**
Safeguarding Vulnerable Groups Bill*	**25th**
Terrorism Bill*	**3rd**
Terrorism (Northern Ireland) Bill*	11th
Transport (Wales) Bill*	1st
Violent Crime Reduction Bill*	**5th**
Work and Families Bill*	15th