



House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny: First Progress Report

First Report of Session 2005–06

Drawing special attention to:

Charities Bill
Consumer Credit Bill
Criminal Defence Service Bill
Identity Cards Bill
Racial and Religious Hatred Bill
Road Safety Bill



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Joint Committee on
Human Rights

Legislative Scrutiny: First Progress Report

First 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

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Lord Bowness
Lord Campbell of Alloway
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Stern

HOUSE OF COMMONS

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Mary Creagh MP (Labour, *Wakefield*)
Mr Andrew Dismore MP (Labour, *Hendon*) (Chairman)
Dr Evan Harris MP (Liberal Democrat, *Oxford West & Abingdon*)
Mr Dan Norris MP (Labour, *Wansdyke*)
Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)

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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.

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), Jackie Recardo (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 considers a number of Bills which have been reintroduced in the new Parliament. In the last Parliament the previous Committee reported its views on the versions of these Bills which were presented in Session 2004–05. In its consideration of these Bills, the Committee has restricted itself to an examination of the human rights implications of any differences in the Bills from the versions considered by the previous Committee, as well as taking into account new representations made on the Bills which were not available to the previous Committee or were made too close to the dissolution of Parliament for that Committee to take them into account.

Charities Bill

The previous Committee expressed one concern about the provisions of the Charities Bill in Session 2004–05, relating to the recognition in clause 2(2)(c) of that Bill of the “advancement of religion” as a charitable purpose. While the catch-all provision of clause 2(2)(l) allowed for the allocation of charitable status to organisations with purposes “analogous” to those listed in clause 2(2)(a) to (k), the previous Committee considered that protection of rights under Article 9 ECHR (freedom of thought, conscience and religion) in conjunction with Article 14 ECHR (prohibition of discrimination) could most effectively be ensured by extending the definition in clause 2(2)(c) to cover all religious and non-religious organisations which promote systems of belief. In the Bill as introduced in Session 2005–06, clause 2(3)(a) makes clear that the definition of religion for the purposes of clause 2(2)(c) includes multi-theistic or non-theistic religions, but it does not address the situation of organisations promoting non-religious ethical belief systems. While welcoming the new definition of religion, the Committee supports the conclusion of the previous Committee that compliance with Article 9 and Article 14 would best be assured by a definition which extended to non-religious belief systems falling within the protection of Article 9 ECHR (paragraph 1.8).

Consumer Credit Bill

The previous Committee had two concerns about the provisions of the Bill as introduced in Session 2004–05. The first was that the OFT's power under the Bill to regulate the conduct of licence-holders gave rise to a significant risk of incompatibility with Article 1 Protocol 1 ECHR (protection of property) because, as drafted, it was too wide and unfettered to satisfy

the requirement of legal certainty and to ensure that it was not used to impose disproportionate requirements in practice. The second was that, in view of the potential size of civil penalties which may be imposed by the OFT under the Bill, the system of civil penalties might require the application of criminal due process standards in order to be compatible with the right to a fair hearing under Article 6(1) ECHR. After considering additional points made by the Government in the Explanatory Notes accompanying the Bill as introduced in this Session, the Committee maintains the previous Committee's concern on these two matters (paragraphs 2.10 and 2.13).

The Committee also considers points raised in a representation, including a Legal Opinion, made to the Government by Lloyds TSB Bank plc, arguing that the Bill's provisions concerning unfair credit relationships may be incompatible with the right to property in Article 1 Protocol 1 ECHR because they fail to provide any guidance as to when a relationship is "unfair" to a debtor. The Committee concludes that while such guidance might be desirable, its absence does not render the unfair credit relationship provisions of the Bill incompatible with Article 1 Protocol 1 (paragraph 2.24).

Criminal Defence Service Bill

In relation to the Bill's provisions to introduce a system of means testing for criminal legal aid and to transfer responsibility for the grant of legal aid from the courts to the Legal Services Commission, the Committee supports the view of the previous Committee, following reassurances provided to it in correspondence by the Government, that the Bill is likely to operate in compliance with Article 6 ECHR (rights to a fair trial) (paragraph 3.2). The Committee also maintains the view of the previous Committee that, although a residual power in the court to grant legal aid in the interests of justice is not essential to the compatibility of the Bill, it would provide a valuable safeguard for the protection of Article 6.3.c rights (right to free legal representation in criminal trials) (paragraph 3.3).

Identity Cards Bill

In its consideration of the Bill, the Committee takes into account an analysis of its human rights compatibility contained in the accompanying Explanatory Notes, several changes in the Bill from the version introduced in Session 2004-05, and evidence submitted to the Committee since the start of this Parliament.

The Committee maintains the view of the previous Committee that the Bill's provision for the retention of extensive personal information on a National Identity Register may lead to disproportionate interference with Article 8 ECHR (right to respect for private and family life) (paragraph 4.11). The Committee welcomes the fact that in the current Bill the power of the Secretary of State by order to designate documents, the issue of which would require entry on the Register, is made subject to an affirmative resolution procedure, but nevertheless maintains the previous Committee's conclusion that the designation of documents unrelated to one of the aims of the Bill could give rise to a risk of disproportionate interference with Article 8 rights, and in some cases to a risk of discrimination in breach of Article 14 read in conjunction with Article 8 (paragraph 4.12). The Committee maintains the previous Committee's concern about the potential for intrusion into privacy arising from clause 2(4) of the Bill, which allows information about an

individual to be entered on to the Register even where that individual has not applied, or been required to apply, for entry on to the Register (paragraph 4.13). The Committee also maintains the previous Committee's concerns about risks of disproportionate and discriminatory interference with Article 8 rights associated with phased-in compulsory registration (paragraph 4.14), about the desirability of setting out further safeguards on the face of the bill in respect of checks against the Register made in order for individuals to access public services or benefits (paragraph 4.15) and in private transactions, where an individual's consent to a check being made may sometimes be essentially involuntary or notional (paragraph 4.16).

In respect of the Bill's provisions on disclosure of information held on the Register, about which the previous Committee expressed concerns, the Committee welcomes important safeguards introduced by revisions to clauses 19 and 22 of the Bill requiring that disclosure of information in accordance with those provisions may only be made when necessary in the public interest for one of the statutory purposes. However the Committee considers that there remains a risk that a number of provisions of the Bill could result in disclosure of information in a way that disproportionately interferes with private life in violation of Article 8 ECHR (paragraph 4.20).

In response to points raised by NO2ID about the civil penalties provided for in the Bill, the Committee concludes that, while the Bill's civil penalties regime is not likely to be contrary to the Convention rights, compliance with Article 6 (right to a fair trial) would best be assured if the procedures for imposition of penalties under the Bill aimed to comply with Article 6 criminal due process guarantees (paragraph 4.29).

Racial and Religious Hatred Bill

The Committee notes the previous Committee's view, in relation to the equivalent clauses of the Serious Organised Crime and Police Bill, that the proposed new offence of incitement to religious hatred was unlikely to give rise to a violation of Convention rights. The Committee concludes, however, that without amendment to make specific reference to advocacy of religious hatred that constitutes incitement to hostility, violence and discrimination, it has concerns about the potential adverse impact of broad offences on freedom of expression, including their compatibility with the principles of legal certainty and proportionality anchored in Article 10 of the Convention, and that as they stand, without amendment, the new offences could arguably have an adverse effect on free speech (paragraph 5.2).

Road Safety Bill

The Committee maintains the previous Committee's concerns about the Bill's provisions increasing the penalty for the offence of failing to provide information about the identity of a driver while the compatibility of that offence is under challenge in the European Court of Human Rights, and disclosure of vehicle licensing and registration information to any foreign authorities with such responsibilities (paragraph 6.4).

Other Bills

The Committee maintains the previous Committee's views that—

- the *National Lottery Bill* raises no significant risk of incompatibility (paragraph 7.2)
- the provisions of the *Crossrail Bill* do not at present appear to give rise to any significant risk of incompatibility (paragraph 8.5)
- the *Transport (Wales) Bill* raises no human rights issues (paragraph 9.1).

In addition, the Committee considers that two Bills introduced for the first time in Session 2005–06, the *Merchant Shipping (Pollution) Bill* and the *Natural Environment and Rural Communities Bill*, raise no human rights issues (paragraph 9.2).

Bills drawn to the special attention of both Houses

Government Bills

1 Charities Bill

Date introduced to the House of Commons	18 May 2005
Date introduced to the House of Lords	HL Bill 1
Current Bill Number	6 th Report of Session 2004–05
Previous Reports	

Background

1.1 This is a Government Bill, which was introduced in the House of Lords on 18 May 2005. A statement of compatibility with the Convention rights under section 19(1)(a) of the Human Rights Act has been made by Baroness Scotland of Asthal. The Charities Bill is a reintroduced Bill, first introduced in the last Parliament,¹ following previous consultation on a Draft Bill.² It reached its Report stage in the Lords on 12 October 2005.

1.2 The main purpose of the Bill is to modernise the legislative and regulatory framework for charities. It includes provisions setting out the objectives and functions of the Charity Commission, establishing a Charity Appeals Tribunal, and a detailed regime for the regulation of charities. The majority of the Bill's provisions do not raise difficulties of human rights compliance.

1.3 Since the Bill was reintroduced, we have received written evidence from the Children's Rights Alliance for England, supporting a change in the law to allow children to become trustees of unincorporated charities.³ Whilst we appreciate the policy arguments advanced in this evidence, we do not consider that the matter raises significant human rights issues, and we do not therefore comment on it in this report.

The Previous Committee's View

1.4 The previous Committee reported on the Charities Bill as a Draft Bill,⁴ and again following its introduction in the House of Lords.⁵ In its final report on the Bill,⁶ the Committee retained one concern as to the Bill's human rights compatibility, relating to the recognition of charities dedicated to the advancement of religion or belief.

1 Introduced in the House of Lords on 20 December 2004, House of Lords Bill 15

2 *Draft Charities Bill*, Cm 6199, Home Office, May 2004. See report of the Joint Committee on the Draft Charities Bill, First Report of Session 2003–04, *The Draft Charities Bill*, HL Paper 167, HC 660.

3 Appendix 1

4 Twentieth Report of Session 2003–04, *Scrutiny of Bills: Eighth Progress Report*, HL Paper 182, HC 1187

5 Sixth Report of Session 2004–05, *Scrutiny of Bills: Second Progress Report*, HL Paper 41, HC 305

6 *ibid*

The advancement of religion

1.5 The Bill recognises the advancement of religion as a charitable purpose,⁷ which allows an organisation to be recognised as a charity where its activities can be shown to be for the public benefit.⁸ Concerns were expressed to the JCHR, as well as to the Joint Committee on the Draft Charities Bill, that “the advancement of religion” was too narrow a category, since it potentially excluded some non-theistic religions, and almost certainly excluded non-religious organisations promoting a system of ethical beliefs, such as the British Humanist Association.⁹

1.6 This differential effect raises an issue of the protection of Article 9 rights to freedom of religion or belief, read in conjunction with Article 14 ECHR (freedom from discrimination). Article 9 affords the same protection to all religious and non-religious belief systems¹⁰. “Belief” under Article 9 refers to a category of “views that attain a certain level of cogency, seriousness, cohesion and importance”.¹¹ The government has taken the view that the impact of the Bill would not in practice be discriminatory since organisations advancing non-religious ethical belief systems would be considered to fall within the catch-all provision of clause 2(2)(l), which allows for the allocation of charitable status to organisations with purposes “analogous” to the purposes listed in clause 2(2)(a)–(k).¹² In response to our concerns on this provision in the Bill, the Home Office stated that it was prepared to consider setting out the position of non-religious belief systems in guidance.¹³

1.7 The previous Committee, whilst accepting that clause 2(2)(l) was capable of application in the way suggested by the government, considered that protection of Article 9 rights on an equal basis could most effectively and clearly be ensured by provision on the face of the Bill, expressly extending clause 2(2)(c) to cover all religious and non-religious organisations which promote systems of belief. It concluded that, at a minimum, guidelines under the Bill must clarify that organisations advancing all forms of both religious and non-religious beliefs protected by Article 9 would be accorded recognition under either clause 2(2)(c) or clause 2(2)(l) on an equal basis.¹⁴

1.8 The Bill as reintroduced goes some way to addressing this problem, since it includes a new definition of religion for the purposes of clause 2(2)(c). Clause 2(3)(a) states that religion includes a religion which involves belief in more than one god, and a religion that does not involve belief in a god. This definition which puts beyond doubt that organisations promoting multi-theistic or non-theistic religions could attain charitable status under the Bill. It does not, however, address the situation of organisations promoting non-religious ethical belief systems. **We welcome the broad definition of religion in clause 2(3)(a), as supporting the Article 9 and Article 14 rights of those promoting non-theistic or multi-theistic religions. However we support the conclusion of the previous**

7 Clause 2(2)(c)

8 Clauses 1 and 3

9 First Report of the Joint Committee on the Draft Charities Bill of Session 2003–04, op cit., para. 50

10 *Kokkinakis v Greece* (1993) 17 EHRR 397

11 *Campbell and Cosans v UK* (1982) 4 EHRR 293

12 EN para. 241

13 Letter from Fiona Mactaggart MP. See Twentieth Report of Session 2003–04, op cit., Appendix 4b

14 Sixth Report of Session 2004–05, op cit., para. 13.15

committee that, whilst compatibility with Article 9 and Article 14 could be achieved in practice by application of clause 2(2)(1) as proposed by the government, such compliance would best be assured by a definition which extended to non-religious belief systems falling within the protection of Article 9 ECHR. We draw this to the attention of both Houses.

2 Consumer Credit Bill

Date introduced to the House of Commons	18 May 2005
Date introduced to the House of Lords	19 July 2005
Current Bill Number	HL Bill 18
Previous Reports	15 th Report of Session 2004–05

Background

2.1 This is a Government Bill introduced in the House of Commons on 18 May 2005. Secretary of State for Trade and Industry, Alan Johnson MP, has made a statement of compatibility with Convention rights under s. 19(1)(a) of the Human Rights Act 1998.

2.2 The Bill was reintroduced by the Government following the election. It completed its passage through the Commons on 14 July 2005 and is due to receive its Second Reading in the Lords on 24 October 2005. There are no material changes from the previously introduced version.

The previous Committee's view

2.3 The previous Committee's view was that most of the provisions of the previously introduced Bill which engage human rights are compatible with the ECHR.¹⁵ It had two concerns, however.

2.4 First, it concluded that the OFT's new power to regulate the conduct of licensees gave rise to a significant risk of incompatibility with the right to property in Article 1 Protocol 1 ECHR because, as drafted, it was too wide and unfettered to satisfy the requirement of legal certainty and to ensure that it is not used to impose disproportionate requirements in practice.¹⁶

2.5 Second, the Committee pointed out that the system of civil penalties which may be imposed by the OFT might require the application of criminal due process standards in order to be compatible with the right to a fair hearing in the determination of a criminal charge under Article 6 ECHR.¹⁷

2.6 There is no material change in the Bill from the version reported on by the previous Committee. The Explanatory Notes accompanying the Bill as reintroduced, however, contain additional text addressing the points raised by the previous Committee on the previous Bill.

2.7 Since publication of the previous Committee's report, representations have also been received from Lloyds TSB Bank plc, in the form of a copy of a letter dated 20 April 2005 to Department of Trade and Industry and including a legal Opinion,¹⁸ arguing that the Bill's provisions concerning unfair credit relationships may be incompatible with the ECHR because they fail to provide any guidance as to when a relationship is "unfair" to the debtor.

¹⁵ Fifteenth Report of Session 2004-05, *Scrutiny: Seventh Progress Report*, HL Paper 97, HC 496, paras. 1.1–1.35.

¹⁶ *ibid*, paras. 1.23–1.26

¹⁷ *ibid*, paras. 1.29–1.30

¹⁸ See Appendix 2

2.8 We have reconsidered the relevant parts of the Bill in light of the additional text in the Explanatory Notes and the representations received.

Power to regulate conduct of licensees

2.9 The Explanatory Notes state that it is not considered that the scope of the OFT's powers to impose requirements on licence-holders breaches the principle of legal certainty "because of the safeguards which will be in place, namely the duty on the OFT to issue guidance; the duty on the OFT to give reasons; the requirement on the OFT to seek representations from persons upon whom the requirement may be imposed and other affected persons; and the right of appeal to an independent Tribunal".¹⁹

2.10 We recognise the importance of the safeguards mentioned in the Explanatory Notes to the Bill. In our view, however, they do not meet the concerns expressed by the previous Committee about the lack of legal certainty to which a power of this width gives rise. We agree with the previous Committee that the lack of specificity in relation to the conditions on which it is exercisable, the purposes for which it can be used and the definition of what may be required, make this power tantamount to a plenary power in the OFT to impose whatever requirements it may wish. The case-law of the Court is clear, that where discretions are conferred on public authorities, the law must indicate with reasonable clarity the scope and manner of exercise of the discretion.²⁰ **We therefore maintain the previous Committee's concern that this provision as currently drafted, without greater specificity, gives rise to a significant risk of incompatibility with Article 1 Protocol 1 because it fails to satisfy the requirements of reasonable legal certainty and also gives rise to a risk of disproportionate use of the power in practice. We draw this matter to the attention of each House.**

Civil penalties

2.11 The Explanatory Notes to the reintroduced Bill state that "it is not considered that a civil penalty imposed under the new power would amount to a criminal charge within the meaning of Article 6, because a civil penalty may only be imposed on a discrete section of the community (i.e. persons holding a licence under the Consumer Credit Act and persons covered by a group licence), and therefore a civil penalty amounts to a disciplinary or administrative measure necessary for the proper functioning of the licensing system".²¹

2.12 We have considered the Government's argument as to why civil penalties imposed under the Bill would not amount to a criminal charge within the meaning of Article 6. We accept that the nature of an offence or penalty is more likely to be criminal where the rule giving rise to the offence or penalty is of a generally binding character, rather than applicable only to a defined group. Whether proceedings are to be considered civil or criminal under Article 6, however, will depend on three primary factors: the classification of the proceedings in domestic law; the nature of the offence; and the severity of the penalty

19 EN para. 130

20 See for example *Kruslin v France* (1990) 12 EHRR 547 at paras. 32–36

21 EN para. 132

that may be imposed. The second and third elements of the test carry more weight than the first.

2.13 According to the Courts' case-law, the severity of a potential penalty may in itself be enough to establish the criminal nature of the offence, particularly where it is punitive and deterrent in its purpose. **To the extent that penalties of up to £50,000 may be imposed on small lenders for whom a fine of that size is a substantial penalty, we agree with the view of the previous Committee that, in view of the potential size of such civil penalties, there must be a risk that the imposition of such a penalty may in some circumstances be seen as the determination of a criminal charge in Article 6(1) terms, and that the operation of the procedural safeguards should therefore approximate as closely as possible to the standards of criminal due process, including proof to the criminal standard of proof.**

Unfair credit relationships

2.14 We have also considered the representations received from Lloyds TSB Bank plc, including the legal Opinion of Michael Beloff Q.C. and Andrew Hunter, to the effect that it is "strongly arguable" that the unfair credit relationship provisions of the Bill are not compatible with Article 1 Protocol 1 ECHR because, as presently drafted they are not sufficiently precise to enable creditors to regulate their conduct..

2.15 The provisions in question empower the court to make an order in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of:

- a) (a) any of the terms of the agreement or of any related agreement;
- b) (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
- c) (c) any other thing done or not done by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).²²

2.16 In deciding whether to make such a determination that the relationship is unfair, the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matter relating to the debtor).²³

2.17 The Bill also provides the courts with extensive powers in relation to unfair relationships, including requiring repayment of any sums paid under a credit agreement, reducing or discharging any sums payable by the debtor, setting aside any duty imposed on the debtor, and altering the terms of the agreement.²⁴

22 Clause 19 of the Bill, inserting new s. 140A into the Consumer Credit Act 1974

23 New s. 140A(2)

24 Clause 20 of the Bill, inserting new s. 140B into the Consumer Credit Act 1974

2.18 If the debtor alleges, in court proceedings, that the relationship between the creditor and the debtor is unfair, it is for the creditor to prove the contrary.²⁵

2.19 The compatibility concern is said to arise from the absence of any description of the factors to be considered by the court when determining whether a creditor/debtor relationship is “unfair”. Unlike comparable legislation in respect of unfair contract terms or financial regulation, such as the Unfair Terms in Consumer Contracts Regulations 1999, or the current EU Directive on Unfair Commercial Practices, which contain a non-exhaustive list of relevant factors to be taken into account when determining whether a contract term is unfair, the Bill contains no guidance for creditors as to how they should conduct themselves so as to avoid becoming subject to the “unfair relationship” powers. It is said to be “unlikely” that suitable guidance may be obtained from case-law or existing legislation, and the need for greater certainty is said to be enhanced by the fact that there is no limit on the amount of debts which are the subject of these provisions.

2.20 We have given this argument careful consideration. We accept the desirability of more detailed guidance as to the meaning of “unfair” in this particular context, particularly in light of the provision in the Bill which places the onus on the creditor to prove the fairness of a credit relationship where it is alleged by the debtor that it is unfair. On balance, however, we are not persuaded that Article 1 Protocol 1 ECHR positively *requires* such guidance. Three considerations in particular have influenced us in reaching this conclusion.

2.21 First, we note that the Strasbourg case-law expressly acknowledges that some laws are required “by their subject-matter” to be flexible.²⁶ We consider that the subject matter of the present law, namely consumer protection in the context of credit agreements, is such as to require a degree of flexibility. Indeed, we note that the lists of factors contained in other legislative contexts on which Lloyds TSB relies are all non-exhaustive lists, leaving it open to the court to have regard to any other matter which it considers relevant to the question of fairness.

2.22 Second, we consider there to be suitable guidance available to the meaning of “unfair” in the case-law interpreting the same term in other, closely analogous statutory contexts, in particular the Unfair Terms in Consumer Contracts Regulations 1999. The House of Lords in a recent decision gave extensive consideration to the meaning of “unfair” in those Regulations in the specific context of a credit agreement regulated by the Consumer Credit Act 1974.²⁷ Although those Regulations include a list of factors to be taken into account in determining the question of unfairness, Lord Bingham’s judgment contains much guidance of a general nature which is relevant to the meaning of “unfair” in the context of a debtor-creditor relationship.

2.23 Third, we point out that the requirement that the citizen must be able to foresee the consequences of his conduct is subject to the important qualification “if need be with

25 New s. 140B(10)

26 See for example *Esbester v UK*, App. No. 18601/91, Com. Dec. 2 April 1993

27 *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2001] 3 WLR 1297

appropriate advice”.²⁸ We also point out that one of the factors to which the Court in its case-law explicitly has regard in deciding the level of precision required of domestic legislation is “the status of those to whom it is addressed”.²⁹ The Court will therefore have regard to whether those affected by a law can be expected to obtain legal advice in order to clarify the consequences of the law for them. For example, in a case concerning whether a change in a tax law had been sufficiently publicised to satisfy the requirement of accessibility, the Court held that it had, “taking into consideration that the applicant company as a legal entity, contrary to an individual taxpayer, could and should have consulted the competent specialists”.³⁰ In our view, similar considerations apply here: creditors can and should be able to obtain sufficient guidance about the meaning of “unfairness” by seeking legal advice about the meaning of that term in other closely analogous contexts.

2.24 In our view, therefore, although further guidance as to the meaning of “unfair” in this context might be desirable, the absence of such guidance does not render the unfair credit relationship provisions in the Bill incompatible with Article 1 Protocol 1 ECHR.

28 See for example *Sunday Times v UK* (1979) 2EHRR 245 at para. 49

29 See for example *Hashman and Harrup v UK* (1999) 30 EHRR 241 at 256

30 *Spacek v Czech Republic*, App. No. 26449/95, 9 November 1999

3 Criminal Defence Service Bill

Date introduced to the House of Commons	23 May 2005 HL Bill 4 6 th and 15 th Reports of Session 2004–05
Date introduced to the House of Lords	
Current Bill Number	
Previous Reports	

3.1 This is a Government Bill, introduced in the House of Lords on 23 May 2005. A statement of compatibility of the Bill with the Convention rights under section 19(1)(a) of the Human Rights Act has been made by Baroness Ashton of Upholland. This Bill was previously introduced in the last Parliament,³¹ where the JCHR reported on its compatibility with human rights.³² The reintroduced version of the Bill is not materially altered from the version of the Bill reported on by the JCHR in the last Parliament. The Bill reached its Report stage in the Lords on 17 October 2005.

3.2 The purposes of the Bill are to introduce a system of means testing for criminal legal aid, and to transfer responsibility for the grant of legal aid from the courts to the Legal Services Commission (LSC). The previous Committee raised a number of questions with government requesting clarification on the application of the Bill in accordance with the right to a fair hearing (Article 6.1) and the right to free legal representation in criminal trials (Article 6.3.c). Following correspondence with Mr David Lammy, then Parliamentary Under Secretary of State at the Department of Constitutional Affairs,³³ the Committee was reassured that the Bill was capable of operating in accordance with fair hearing rights under Article 6. In particular, the Committee welcomed Mr Lammy's assurance that the Bill would result in no changes to the interests of justice test for the grant of legal aid.³⁴ **We support the conclusion of the previous Committee that, subject to the reassurances provided by the previous Government, the Bill is likely to operate in compliance with the Convention rights.**

3.3 The previous Committee also asked for clarification as to whether, as had been initially proposed in the Draft Bill,³⁵ there would be a residual power in the court to grant legal aid where an overriding interest of justice imperative exists. Mr Lammy confirmed that, although such a power had originally been considered, "we have since taken the view that the rights of defendants are adequately protected by the existing interests of justice test, supported by the proposed appeals mechanism, and that the residual power for the court to grant legal aid should only be in the interests of third parties in such circumstances." He stated that the question of whether the court should have the power to override the means test, where the grant of legal aid would be in the interests of a third party, remained under

31 Introduced in the House of Commons on 15 December 2004

32 Sixth Report of Session 2004–05, op cit., and Fifteenth Report of Session 2004–05, op cit. The Bill was also subject to consultation and scrutiny as a Draft Bill in the last Parliament. *Draft Criminal Defence Service Bill Consultation Paper and Explanatory Notes*, Cm 6194, Department for Constitutional Affairs, May 2004. Constitutional Affairs Committee, Fifth Report of 2003–04, *Draft Criminal Defence Service Bill*, HC 746-I. The JCHR reported on the Bill in its Draft form in its Seventeenth Report of Session 2003–04, *Scrutiny of Bills: Seventh Progress Report*, HL Paper 157, HC 999.

33 Fifteenth Report of Session 2004–05, op cit., Appendix 2

34 Sixth Report of Session 2004–05, op cit. and Fifteenth Report of Session 2004–05, op cit.

35 Department for Constitutional Affairs, *Government Response to the Constitutional Affairs Select Committee's Report on the Draft Criminal Defence Service Bill*, Cm 6410, p. 8

consideration. The previous Committee considered that a residual right in the court to grant legal aid in the interests of justice would provide a valuable additional safeguard for the Article 6.3.c rights of defendants, as well as, potentially, for the Convention rights of third parties. **We maintain the view of the previous Committee that, although a residual power in the court to grant legal aid in the interests of justice is not essential to the compatibility of the Bill, it would provide a valuable safeguard for the protection of Article 6.3.c rights.**

4 Identity Cards Bill

Date introduced to the House of Commons	25 May 2005
Date introduced to the House of Lords	
Current Bill Number	HC Bill 49
Previous Reports	5 th and 8 th Reports of Session 2004–05

Introduction

4.1 This Bill, previously introduced in the last Parliament, was re-introduced in the present Parliament on 25 May 2005. Its remaining stages in the House of Commons are scheduled for 18 October. A statement of compatibility with the Convention rights under section 19(1)(a) of the Human Rights Act has been made by the Home Secretary. Explanatory notes have been published in respect of the Bill as reintroduced.³⁶ We welcome the inclusion in these explanatory notes of an analysis of the human rights compatibility of the Bill,³⁷ which represents an improvement on the Explanatory Notes to the Bill in the last Parliament.

4.2 The previous Committee reported on the Identity Cards Bill in its sixth and ninth reports of Session 2004–05.³⁸ Although much of the present Bill is in substantially the same form as the Bill considered in those reports, there have been several amendments, the impact of which we consider below. Since the establishment of the Committee in the present Parliament, we have also received a number of written submissions in respect of the Bill.³⁹

The Purpose of the Bill⁴⁰

4.3 The Identity Cards Bill would establish a National Identity Register (“the Register”) to be maintained by the Home Office, which is to contain information capable of establishing the identity of individuals,⁴¹ to allow their identity to be verified where necessary in the public interest, including in the interests of national security, the prevention and detection of crime, the enforcement of immigration controls, the prohibition of unauthorised working and the efficient and effective provision of public services.⁴² Information to be entered on the Register would include biometric information, details of residence, residential status in the UK, and records of occasions on which information from a person’s entry on the Register has been checked by others.⁴³

36 Bill 9-EN

37 *ibid.*, at paras. 241–251

38 Fifth Report of Session 2004–05, *Identity Cards Bill*, HL Paper 35, HC 283 and Eighth Report of Session 2004–05, *Scrutiny: Fourth Progress Report*, HL Paper 60, HC 388

39 See Appendix 3(a) and Appendix 3(b)

40 A more detailed analysis of the practical and human rights implications of the Bill is set out in the previous Committee’s Fifth and Eighth Reports of Session 2004–05, *op cit.*

41 Clause 1(1)

42 Clause 1(4)

43 Clause 1(5), Clause 3 and Schedule 1

4.4 Every person whose details are entered on the Register would be issued with an Identity Card,⁴⁴ which could contain any information recorded about the individual on the Register. The Bill is enabling legislation and would allow either a voluntary ID cards scheme, or a compulsory scheme, with the intention that an initially voluntary scheme would be replaced by phased-in compulsory registration.⁴⁵ Under a voluntary scheme, the Home Secretary could by order identify “designated documents”, such as passports, issue of which would require registration on the National Identity Register.⁴⁶

Human Rights Implications

4.5 A requirement to have or to carry some form of identity card does not of itself raise human rights issues, as has been established by the European Court of Human Rights.⁴⁷ Many Council of Europe countries operate identity card schemes, which are generally considered to comply with the ECHR.

4.6 It is the retention and storage of personal information on a database, such as the National Identity Register, and the disclosure of information from it, that engages the ECHR right to respect for private life (Article 8 ECHR).⁴⁸ “Personal information”, as understood under Article 8, includes any information establishing personal identity, and extends to the systematic storage of identifying information already publicly available.⁴⁹ To be permissible, gathering, storage or disclosure of personal information that falls within the protection of Article 8 must be justified under Article 8.2 as in accordance with law; as serving a legitimate aim, and as necessary for and proportionate to that aim. Where the gathering, storage and disclosure of personal information exclusively or disproportionately affects certain groups, it may also engage Article 14 (freedom from discrimination in the protection of the Convention rights) read together with Article 8.

The previous Committee’s views

4.7 The previous Committee identified risks that the Bill would intrude unjustifiably on privacy rights protected by Article 8 ECHR in a number of respects, through the retention of personal information on the National Identity Register, and the disclosure of personal information from it. The Committee considered that the intrusion into privacy rights would be greatest under a compulsory scheme, which the Bill envisages will be phased in over time. However it considered that privacy as well as discrimination concerns would arise under a nominally voluntary scheme, as such a scheme would be likely to make registration in effect compulsory for some categories of people.

44 Clause 8

45 EN, para. 44

46 Clause 4 and Clause 5(2)

47 *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

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

49 *Amann v Switzerland* (2000) 30 EHRR 843; *Rotaru v Romania* (2000) 8 BHRC 43

4.8 In its final report on the Bill, published following correspondence with the Home Secretary, the previous committee retained a number of specific concerns about the human rights compatibility of the Bill. The Committee concluded:

- that the establishment of the National Identity Register under the Bill was likely to lead to the compulsory retention of large amounts of personal information in respect of large groups of persons;
- that such retention, either under a compulsory scheme or under a scheme requiring registration to obtain designated documents, risked being insufficiently targeted at addressing the statutory aims to ensure proportionate interference with Article 8 rights;
- That the imposition of effective compulsory registration through designation of documents, including documents unrelated to the statutory aims, risked disproportionate interference with Article 8 rights, as well as unjustified discrimination under Article 14;
- That a system of phased-in compulsory registration risked disproportionate interference with Article 8 ECHR, and unjustified discrimination in breach of Article 8 read with Article 14 EHCR;
- That further safeguards should be included on the face of the Bill to ensure that the system of checks on the Register (clause 18) was compliant with Article 8;
- That the wide scope for disclosure of information from the Register (clauses 19–22) risked breach of Article 8 rights, in the absence of sufficient safeguards on the face of the Bill.

Revisions to the Bill since the previous Committee's reports

4.9 In a number of relatively minor respects, the terms of the present Bill differ from those of the Bill reported on by the previous Committee:⁵⁰

- there is now an affirmative resolution procedure for orders by the Secretary of State designating documents under clause 4;
- the power of the Secretary of State to modify by order the age at which persons may be entered on the Register (clause 2(7)) is now subject to an affirmative resolution procedure;
- the provision of information from the Register under orders of the Secretary of State made under clause 19 of the Bill is made subject to a requirement that the provision of information is necessary in the public interest (clause 19(7));
- the order making power in clause 22, by which the Secretary of State may authorise the provision of information on an individual to a public authority without the

⁵⁰ There are also some minor changes to aspects of the Bill which do not raise human rights issues: in particular the Bill now allows some further scope for review by the National Identity Scheme Commissioner (clause 25(4)) by narrowing the grounds on which the Secretary of State may prohibit the Commissioner from publishing a report, to national security or the prevention or detection of crime (where previously they extended to the discharge of the functions of any public authority, or anything contrary to the public interest.)

individual's consent is to be exercisable only where necessary in the public interest (clause 22(2)).

4.10 A Government amendment tabled on 11 October 2005 for consideration at report stage in the House of Commons would amend clause 1(5)(g), which includes within the list of “registrable facts” that may be recorded on the Register information about numbers allocated for identification purposes and about documents to which they relate. The amendment would restrict this provision by stipulating that such information should not extend to any sensitive personal data within the meaning of the Data Protection Act 1998, or anything the disclosure of which would tend to reveal such data.

Nature of the Information held on the Register

4.11 We see no reason to depart from the previous Committee's conclusion that the information held on the Register would be personal information falling within the protection of Article 8. The jurisprudence of the ECtHR clearly establishes that this would be the case.⁵¹ We therefore consider that the extent of the National Identity Register, and the use of information held on it, requires careful justification by the government as necessary for, and proportionate to, the statutory aims. In particular, as the previous committee pointed out, the retention of records of checks against the Register under Schedule 1 Paragraph 9 of the Bill is likely to build up a comprehensive picture of an individual's employment, use of public services and private transactions,⁵² which over time, would amount to a considerable intrusion on the individual's private life.⁵³ **We welcome the Government amendment tabled to clause 1(5)(g) which would restrict the information retained on the Register under that subsection concerning identification numbers and related documents. We maintain the view of the previous committee that the Bill's provision for the retention of extensive personal information relating to all or large sections of the population may be insufficiently targeted to be justified as proportionate to the statutory aims and may lead to disproportionate interference with Article 8 rights. We draw this to the attention of both Houses.**

Designated Documents

4.12 Clause 4 of the Bill allows the Secretary of State by order to designate documents, the issue of which would require entry on the Register.⁵⁴ The previous committee noted that a requirement to enter personal details on the Register on application for a document, such as a passport, which had been designated under clause 4 by the Secretary of State, could in effect make registration compulsory for persons for whom the document concerned (such as, for example, a residence permit) was a necessity. Where the nature of the document designated would mean that registration became effectively compulsory for certain people,

51 See paragraph 4.6 above

52 Including, for example, records of access to healthcare or mental healthcare services, records of checks by employers or prospective employers, records of financial transactions.

53 We also note the additional concern expressed by NO2ID, in their written evidence to us, that, over time, data checks on the Register against information held on private or public service databases could result in a relatively accessible and comprehensive record of information held about an individual across all of the databases involved, creating a “much larger, much less secure, patchily regulated, metadatabase”.

54 Clause 4 and Clause 5(2)

Article 8 would be likely to be engaged. In assessing the proportionality of the interference with Article 8 rights, it would be relevant to consider whether the document designated bore a clear relation to the statutory aims. In this regard it is not clear that the gathering of personal information of persons applying for a passport, for example, bears any relation to the protection of national security or the prevention of crime or to the other statutory aims listed in clause 1. We note that, since the previous Committee reported on the Bill, the power of the Secretary of State to designate documents has been made subject to an affirmative resolution procedure.⁵⁵ **We welcome this. We nevertheless maintain the previous committee's conclusion that the designation of documents unrelated to one of the aims of the Bill could give rise to a risk of disproportionate interference with Article 8 rights, and in some cases to a risk of discrimination in breach of Article 14 read in conjunction with Article 8. We draw this to the attention of both Houses.**

Information otherwise available to be recorded

4.13 The previous committee drew attention to the potential for intrusion into privacy rights arising from clause 2(4) of the Bill, which allows information about an individual to be entered onto the Register even where that individual has not applied, or been required to apply, for entry onto the Register. The Home Office suggested to the previous committee that information entered under clause 2(4) would include information relating to failed asylum seekers or others about to be deported 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. The Home Office stated that, in accordance with the Data Protection Act, individuals will wherever practicable be notified that information is to be recorded on the National Identity Register. Whilst this is a welcome assurance, the previous committee considered that privacy concerns remained, given the wide scope for information to be gathered and stored under clause 2(4) without consent, and given the likelihood that in some cases it would not be practicable to inform an individual that their details had been recorded. **We maintain this concern, and draw this matter to the attention of both Houses.**

Compulsory Registration

4.14 The previous committee identified a risk of discriminatory intrusion into private life, in breach of Article 8 read with Article 14 under a phased-in compulsory scheme where registration would be required for particular groups, such as non-nationals. It also considered that a scheme which required only certain persons (for example, persons below a certain age) to register could be insufficiently tailored to the statutory purpose to amount to a proportionate interference with Article 8 rights. **We retain the view of the previous committee that phased-in compulsory registration risks disproportionate and discriminatory interference with Article 8 rights. In our view, the imposition of compulsory registration on particular groups under clause 6 should be subject to the condition that such compulsory registration is necessary for one of the statutory**

55 Clause 4(3)

purposes. We also note that concerns have been expressed that compulsory registration for foreign nationals may lead to British citizens from visible minority ethnicities being subject to more frequent demands to produce an ID card or allow checks against the Register.⁵⁶

Checks on the Register

4.15 Under a compulsory registration scheme, regulations may make access to public services or benefits conditional on production of an ID card,⁵⁷ and verification of an individual's identity against information held on the National Identity Register.⁵⁸ The Home Secretary assured the previous committee that information provided under clause 17 would be limited under Regulations to that which was necessary in the particular case and that, under clause 17(3) and 41(6), a system of accreditation would be established for organisations which could be provided with information from the Register. Whilst welcoming these assurances, the previous Committee concluded that these safeguards should be set out on the face of the Bill, rather than left to regulations. **We retain the previous Committee's view that further safeguards should be set out in clause 17, and draw this to the attention of both Houses.** As the previous committee repeatedly stressed, where legislation intrudes on privacy rights protected by Article 8 ECHR, it is important that safeguards be contained on the face of primary legislation, which is subject to much fuller parliamentary scrutiny than secondary legislation.⁵⁹ We maintain the view that reliance on public authorities to implement wide, human rights intrusive statutory powers in accordance with the Convention rights does not provide sufficient assurance to Parliament that the legislation is human rights compliant.⁶⁰

4.16 Checks against the Register may also be a condition of private transactions. Under clause 18, where compulsory registration applies, then an individual 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.⁶¹ 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, as the previous Committee noted, this consent may sometimes 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. The Secretary of State assured the previous Committee that a system of authorisation would be established for organisations to which information is to be provided.⁶² However the previous committee considered that further safeguards should be introduced on the face of the Bill to ensure Article 8 protection, making clear that checks should only be authorised where relevant to a legitimate aim and

56 Legal Opinion of Ramby de Mello of Kings Bench Walk supplied to the Joint Council for the Welfare of Immigrants (not printed)

57 Clause 15

58 Clause 17

59 Nineteenth Report of Session 2003–04, *Children Bill*, HL Paper 161, HC 537, para.109–111; Fifth Report of Session 2004–05, *op cit.*; Eighth Report of Session 2004–05, *op cit.*; Nineteenth Report of Session 2004–05, *The Work of the Committee in the 2001–2005 Parliament*, HL Paper 112, HC 552

60 Nineteenth Report of Session 2004–05, *op cit.*, para. 82

61 Clause 18(2)(c)

62 Under Clauses 14(6) and 41(6)

necessary in the particular case. **We maintain this recommendation, and draw it to the attention of both Houses.**

Disclosure of Information

4.17 In its Eighth Report, the previous Committee considered that the breadth of the powers of disclosure under the Bill risked disproportionate interference with Article 8. It noted that disclosures of information under the Bill were not subject to any requirement that there be an assessment of relevance, necessity and proportionality prior to disclosure. It concluded that, 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 be contained on the face of the Bill.

4.18 The current Bill now requires that regulations under clause 22 may only allow disclosure of information where such disclosure is necessary in the public interest for one of the statutory purposes. A similar requirement has also been applied to orders made under clause 19. We note, however, that the majority of disclosures of information under the Bill are not made subject to the same criterion of necessity. For example, under clause 19(2)(a), information (including Schedule 1 Paragraph 9 information) may be provided to the Director-General of the Security Service “for purposes connected with the carrying out of any of that Service’s functions”, a threshold considerably lower than necessity, and appearing to leave open the possibility of access to the records of large sections of the population. Similar provision is made in relation to the Chief of the Secret Intelligence Service,⁶³ the Director of GCHQ,⁶⁴ and the Director General of the Serious Organised Crime Agency.⁶⁵

4.19 Neither does the criterion of necessity for statutory purposes apply:

- to disclosure of information (excluding Schedule 1 Paragraph 9 information) to a chief officer of police under clause 19 (3)(a) or 19(3)(b), or to the Commissioners for Revenue and Customs under clause 19(4) (a)–(e);
- to disclosure of information (excluding Schedule 1 Paragraph 9 information) to a government department “for purposes connected with the carrying out of any prescribed functions of that department or of a Minister in charge of it” (clause 19(5));
- to disclosure of information to a designated documents authority for purposes connected with its functions (clause 19(6));
- to disclosure under clause 20(4) which allows Schedule 1 Paragraph 9 information to be disclosed from the Register to persons other than UK public authorities, in relation to actual or potential proceedings, either in the UK or abroad, that relate to serious crime.

63 Clause 19(2)(b)

64 Clause 19(2)(c)

65 Clause 19(2)(d)

4.20 We welcome the amendments to clauses 19 and clause 22 imposing requirements of necessity in the public interest, as providing important safeguards in relation to some disclosures of information from the National Identity Register. We consider however that there remains a risk that a number of provisions of the Bill could result in disclosure of information in a way that disproportionately interferes with private life in violation of Article 8. We draw this to the attention of both Houses.

Civil Penalties

4.21 The question of the human rights compatibility of the civil penalties provisions in the Bill, which was not dealt with in the reports of the previous committee on the Bill, has also been raised in evidence from NO2ID.⁶⁶

4.22 The Bill provides that a civil penalty of up to £2500 may be imposed against a person subject to compulsory registration who fails to register his or her details on the National Identity Register⁶⁷ or fails to take required steps to verify information about him or herself entered on the Register by for example, allowing photographs or fingerprints to be taken either on entry onto the Register.⁶⁸ Failure to provide verifying information where this is required subsequent to registration can result in a civil penalty of up to £1500.⁶⁹ Repeated failures to register when required to do so will result in repeated civil penalties of up to £2500.⁷⁰

4.23 Civil penalties of up to £1000 may also be imposed on persons subject to compulsory registration who do not acquire a valid ID card within a specified period⁷¹ or, on application for an ID card, fail to provide verifying information to ensure a complete, up to date and accurate entry on the Register.⁷²

4.24 Any individual to whom an ID card has been issued (under either a voluntary or a compulsory scheme) may be liable to civil penalties of up to £1000 for failure to notify the Secretary of State of any error in his or her record on the Register any relevant change of circumstances (such as a change of name or address) within a prescribed period, or failure to provide verifying information in relation to any such error or change.⁷³ Civil penalties of up to £1000 may also be imposed on anyone who fails to notify the Secretary of State that their ID card has been lost, stolen, damaged, tampered with or destroyed⁷⁴ or anyone who is in possession of an ID card without lawful authority or has failed to meet a request of the Secretary of State to surrender the card.⁷⁵

66 Appendix 3(b)

67 Clause 6(4)(a)

68 Clause 6(4)(b)

69 Clause 6(5)

70 Clause 6(6)

71 Clause 9(5)(a)

72 Clause 9(5)(b)

73 Clause 12

74 Clause 13(6)(a)

75 Under Clause 13(4)

4.25 Civil penalties are imposed by the Secretary of State.⁷⁶ A person given notice that a civil penalty is to be imposed may object to the penalty on grounds that he or she is not liable to it; that in the circumstances the penalty is unreasonable; or that the amount of the penalty is too high.⁷⁷ The Secretary of State in response may cancel, reduce, increase or confirm the penalty.⁷⁸ An appeal to the county court by way of rehearing may be made from any penalty order on grounds of liability, unreasonableness or the amount of the penalty.⁷⁹

4.26 The classification of these penalties as civil penalties in the Bill does not determine their classification as civil or criminal under Article 6 ECHR, which protects the right to a fair hearing both in the determination of civil rights and obligations, and in the determination of a criminal charge, but provides for additional due process guarantees where a criminal charge is determined, including the presumption of innocence under Article 6.2 and criminal procedural rights under Article 6.3. The term “criminal charge” in Article 6 has an autonomous meaning.⁸⁰ Whether proceedings are to be considered civil or criminal under Article 6 will depend on three primary factors: the classification of the proceedings in domestic law; the nature of the offence; and the severity of the penalty that may be imposed.⁸¹ The second and third elements of the test carry more weight than the first.

4.27 The nature of the offence is more likely to be criminal where the rule giving rise to the offence is of a generally binding character, rather than applicable only to a defined group;⁸² where the aim of the law is punitive or deterrent;⁸³ where conviction is dependent on a finding of culpability;⁸⁴ and where proceedings are instituted by a public body with general powers of enforcement.⁸⁵

4.28 The civil penalties imposed under the Bill are likely to be considered to have a punitive and deterrent in seeking to enforce compliance with the ID cards scheme. Although they do not depend on findings of culpability, they are imposed by the Secretary of State. The range of their application would for the most part depend on the extent of application of a compulsory registration scheme, but universal application of these penalties would be a possibility under the Bill. The levels of the penalties are high, particularly since they are likely to apply to members of the general public to whom sums of £1000 or £2500 may be substantial. Although these are maximum figures, the Article 6 jurisprudence makes clear that it is the level of severity of the potential penalty that may be imposed, rather than the penalty actually imposed in a particular case, which is determinative of whether there is a criminal charge.⁸⁶ A substantial penalty, with a punitive and deterrent purpose, may be

76 Clause 33

77 Clause 34(1)

78 Clause 34(3)

79 Clause 35

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

81 *ibid*

82 *Bendenoun v France* (1994) 18 EHRR 54

83 *ibid*

84 *Benham v UK* (1996) 22 EHRR 293

85 *ibid*

86 *Engel v Netherlands*, *op cit*.

sufficient to render the penalty criminal, and attract the criminal procedural protection of Article 6.

4.29 In our view, given the levels of potential penalties and their punitive and deterrent purpose, there is a risk that the civil penalties under the Bill would be seen as criminal in nature and therefore as attracting the protection of Article 6.2 and Article 6.3. There is nothing on the face of the Bill which would prevent the procedures for implementing civil penalties from complying with the criminal standards of due process established by Article 6. Whilst we do not consider the Bill's civil penalties regime is likely to be contrary to the Convention rights, in our view its compliance with Article 6 would best be assured if the procedures for imposition of penalties under the Bill aim to comply with Article 6 criminal due process guarantees.

5 Racial and Religious Hatred Bill

Date introduced to the House of Commons	9 June 2005
Date introduced to the House of Lords	12 July 2005
Current Bill Number	HL Bill 15
Previous Reports	4 th , 8 th and 15 th Reports of Session 2004–05

5.1 The previous Committee's view, in relation to the equivalent clauses of the Serious Organised Crime and Police Bill, was that the proposed new offence was unlikely to give rise to a violation of Convention rights.⁸⁷ There is no material change in the Bill compared to the version reported on by the Committee.

5.2 However, without amendment to make specific reference to advocacy of religious hatred that constitutes incitement to hostility, violence and discrimination, we have concerns about the potential adverse impact of broad offences on freedom of expression, including their compatibility with the principles of legal certainty and proportionality anchored in Article 10 of the Convention. As they stand, without amendment, the new offences could arguably have an adverse effect on free speech. We draw this matter to the attention of both Houses.

⁸⁷ Eighth Report of Session 2004–05, op cit.

6 Road Safety Bill

Date introduced to the House of Commons	24 May 2005 HL Bill 5 8 th and 13 th Reports of Session 2004–05
Date introduced to the House of Lords	
Current Bill Number	
Previous Reports	

Background

6.1 This is a Government Bill introduced in the House of Lords on 24 May 2005. Lord Davies of Oldham has made a statement of compatibility with Convention rights under s. 19(1)(a) of the Human Rights Act 1998.

6.2 The Bill was reintroduced by the Government following the election. It is still in Committee in the Lords.

The previous Committee's view

6.3 The previous Committee drew the attention of each House to human rights concerns arising from increasing the penalty for the offence of failing to provide information about the identity of a driver while the compatibility of that offence is under challenge before the European Court of Human Rights, disclosure of vehicle licensing and registration information to any foreign authorities with such responsibilities, 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.⁸⁸ It was also of the view that the power to detain a person at a police station until it seems to a police constable that they are fit to drive risks incompatibility with the right to liberty in Article 5 ECHR.⁸⁹

6.4 The Bill as reintroduced no longer contains provisions concerning power to detain until fit to drive,⁹⁰ nor the disclosure of vehicle insurance information to the police.⁹¹ There is no material change, however, in relation to the other provisions which the Committee drew to the attention of each House: the increased penalty for the offence of failing to provide information about the identity of a driver, and disclosure of vehicle licensing and registration information to any foreign authorities with such responsibilities. **We have no reason to disagree with the previous Committee's views on those matters and we draw them to the attention of each House.**

88 *ibid*

89 Thirteenth Report of Session 2004–05, *Scrutiny: Sixth Progress Report*, HL Paper 87, HC 470

90 This provision is now found in s. 153 of the Serious Organised Crime and Police Act 2005, in a form which addresses the previous Committee's concerns.

91 This provision is now found in s. 154 of the Serious Organised Crime and Police Act 2005, in a form which does not address the previous Committee's concerns.

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

Bills that raise no significant risk of incompatibility

Government Bills

7 National Lottery Bill

Date introduced to the House of Commons	24 May 2005
Date introduced to the House of Lords	
Current Bill Number	HC Bill 6
Previous Reports	18 th Report of Session 2004–05

7.1 The previous Committee's view was that two provisions of the Bill engaged human rights, but did not give rise to any significant risk of incompatibility.⁹² There is no material change from the version reported on by the previous Committee.

7.2 We agree with the previous Committee's view that the Bill raises no significant risk of incompatibility.

*Hybrid Bill***8 Crossrail Bill**

Date introduced to the House of Commons	18 May 2005
Date introduced to the House of Lords	
Current Bill Number	HC Bill 1
Previous Reports	13 th Report of Session 2004–05

8.1 This is a Hybrid Bill promoted by the Government, introduced in the House of Commons on 18 May 2005. The Secretary of State for Transport, Alastair Darling MP, has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998.

8.2 The previous Committee's view was that nothing in the broad framework established by the Bill appeared to give rise to a significant risk of incompatibility with human rights.⁹³ There is no material change in the Bill from the version previously reported on by the Committee.

8.3 However, a representation was received towards the end of the last Parliament from Woodseer and Hanbury Residents' Association together with Spitalfields Community Association, arguing that the Bill is incompatible with various Convention rights, in view, in particular, of various alleged inadequacies in the consultation process. The representation was published by the previous Committee without analysis due to the imminence of dissolution.⁹⁴

8.4 We note that the substance of the representations mainly concerns the adequacy of the consultation process prior to the drawing up of the Bill. We do not consider this to be an appropriate matter on which we should report to Parliament when scrutinising the substance of the Bill.

8.5 We have therefore found nothing to cause us to disagree with the previous Committee's conclusion that the Bill's provisions do not at present appear to give rise to any significant risk of incompatibility with Convention rights.

93 Thirteenth Report of Session 2004–05, op cit.

94 Eighteenth Report of Session 2004–05, op cit.

Bills that raise no human rights issues

9 Government Bills

9.1 The previous Committee reported on the Transport (Wales) Bill introduced in Session 2004–05.⁹⁵ The Committee’s view was that the Bill raised no human rights issues and did not require to be drawn to the attention of either House on human rights grounds. The Transport (Wales) Bill⁹⁶ introduced in this Session has no material change from the version reported on by the previous Committee. **We agree that the Bill raises no human rights issues.**

9.2 In addition, the following Bills seem to us to raise no human rights issues and do not require to be drawn to the attention of either House on human rights grounds:

Merchant Shipping (Pollution) Bill⁹⁷

Natural Environment and Rural Communities Bill⁹⁸

95 Fifteenth Report of Session 2004–05, *op cit.*, para. 7.1

96 HC Bill 4

97 HL Bill 8

98 HC Bill 3

Formal Minutes

Monday 17 October 2005

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	Mary Creagh MP
Lord Campbell of Alloway	Dr Evan Harris MP
Lord Judd	Dan Norris MP
Lord Lester of Herne Hill	
Lord Plant of Highfield	
Baroness Stern	

The Committee deliberated.

* * * *

Draft Report [Legislative Scrutiny: First 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 9.2 read and agreed to.

Summary read and agreed to.

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

Ordered, That several 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 Monday 24 October at 4 pm.]

Appendices

Appendix 1: Submission from the Children’s Rights Alliance for England, re Charities Bill

The Children’s Rights Alliance for England (CRAE) is a children's human rights organisation. With our 280+ member organisations, we promote the fullest implementation of the UN Convention on the Rights of the Child, which the UK Government ratified in 1991.

THIS SUBMISSION FOCUSES ON THE ISSUE OF TRUSTEES AGED UNDER-18

The Children’s Rights Alliance for England, the National Council for Voluntary Organisations and many other children and youth charities support a change in the law that would allow under-18s to become trustees of unincorporated charities.

We believe that the Charities Bill provides an excellent opportunity to allow those children and young people who understand their duties and responsibilities as a trustee to be involved directly in the management of charities.

Legislation passed 80 years ago prevents under-18s from being a trustee of an unincorporated charity (a charity that is not a company limited by guarantee). Section 20 of the Law of Property Act 1925 provides that: “the appointment of an infant to be a trustee in relation to any settlement or trust shall be void.” Section 1 of the Family Law Act 1969 defines an ‘infant’ as someone under-18 years.

The view of the Charity Commission is that, because the property of an unincorporated charitable association is held in trust, the management board are trustees of that trust. Consequently, no one under 18 years can serve as trustee of an unincorporated charity.

Legislation from 1925 is out of step with today’s thinking. In 1991, the UK Government ratified the UN Convention on the Rights of the Child (CRC). Article 12 of the CRC states that all children¹ have the right to express and have their views taken into account and given due weight, in all matters that affect them.

The principle of children’s participation has been accepted across the public, private and voluntary sector for many years, and is now widely accepted within government: In 2001, the Government published its *Core Principles for the Involvement of Children and Young People* for Government departments; in 2004 the Department for Education and Skills established a Children and Youth Board (CYB) to advise the Department and the Children’s Minister; the children and young people on the CYB were directly involved in recruiting England’s first Children’s Commissioner. Law and public policy increasingly supports children’s participation rights; The Children Act 1989, for example, requires that social workers always consult a child or young person who is in care, or who might come into care, before making any decision about them; regulations passed by Parliament in 2003 allow children and young people to become ‘associate members’ of a committee of a school governing body. There is no minimum age for a person becoming an associate member;² and the Children Act 2004 requires that children’s wishes and feelings be given due consideration in child protection procedures and children and need assessments.

In May 2004, for the first time, the Charity Commission allowed an incorporated charity (a charitable company) to register articles of association allowing trustees under-18 years-of-age.³

1 Article 1 of the CRC defines a child as ‘every human being under the age of eighteen’

2 The School of Governance (Constitution) (England) Regulations 2003

3 In May 2004, Funky Dragon, the Welsh Youth Parliament, was registered as a charity by the Charity Commission, with four of the eight trustees being under 18 years-old

It is perfectly legal for under-18s to be trustees of incorporated charities because the directors of a charitable company are also its trustees. There is no minimum age limit for being a company director in England and Wales under Section 293 of the Companies Act 1985.

In December 2004, the Charity Commission issued a statement on young trustees, saying:

For some youth organisations it will be appropriate for young people under-18 to be on the board, and the Commission is supportive of the wishes of youth organisations who wish to have some people under-18 on the board to ensure appropriate user representation.⁴

Company and charity law has developed separately. Whilst it is perfectly legal for children and young people to be a trustee of a charitable company, they cannot be a trustee of an unincorporated charity. This is illogical.

Furthermore, Clause 32 of the Charities Bill creates a new legal status of charity – Charitable Incorporated Organisations (CIOs). Schedule 6 of the Bill, which refers to the new CIOs, does not specify an age limit for trustees. Therefore it appears that under-18s will be able to be trustees of incorporated charities and CIOs, but not unincorporated charities.

In October 2002, the UN Committee on the Rights of the Child—the international treaty monitoring body for the Convention on the Rights of the Child—issued its concluding observations on the UK. It recommended that the UK Government: “take further steps to consistently reflect the obligations of both paragraphs of article 12 in legislation” and “to take further steps to promote, facilitate and monitor systematic, meaningful and effective participation of all groups of children in society...”.⁵

Allowing children and young people to be trustees of charitable companies and unincorporated charities would help to take forward this important recommendation.

Children and young people can and should be involved in charities in many different ways, for example, in helping to recruit staff, volunteering, or being on advisory boards. Of course not all children and young people have a desire to be a trustee, just like adults. However, having children and young people on the management board would allow them to have a real stake in a charity that works for them. It would show that the charity is committed fully to taking children and young people’s views seriously.

Creating more opportunities for young people to become trustees would also be in line with the recommendations recently made in the Russell Commission’s National Framework for Youth Action and Engagement.⁶

At Lord’s Committee on July 12 2005, Lord Best tabled an amendment which proposed to exclude unincorporated charities from the definition of ‘trust’ in the Law of Property Act 1925, to allow under-18s to be trustees of unincorporated charities.

Lord Bassam, speaking on behalf of the Government, described Lord’s Best’s amendment as a “cool concept” adding that the Government would “take it away and give it fair consideration”.⁷

While very much we welcome Lord Bassam’s positive comments and his promise of “fair consideration”. However, we are disappointed to hear of the Government’s proposal to

4 Charity Commission and NCVYS Press Release (10 December 2004) Charity Commission statement on young trustees

5 Committee on the Rights of the Child (2002) Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, paragraph 30

6 Russell, M., I., (2005) A National Framework for Youth Action and Engagement

7 House of Lords, 12 July 2005, Col. 1064

amend company law so that a minimum age for company directors would be set at 16 years.⁸

We feel that this is a retrograde step that sees children and young people as less capable than adults. It would also affect charitable companies who already have young trustees under 18 years—in line with article 12 of the CRC—who are not necessarily aged over 16, for example CRAE has four trustees who are under-18 and Funky Dragon, the Welsh Youth Parliament, has four.

We disagree with Lord Bassam's statement made during the debate that Lord Best's amendment "would allow the appointment of a person who was too young to understand the duties of the office or to take responsibility for the consequences of his actions. That is what the proposed change to company law aims to prevent".⁹

There is currently no minimum age limit for being a company director under section 293 of the Companies Act 1985, although the person *must* understand their duties and responsibilities as a director. We think that this is the best way forward as children and young people develop maturity at different times, as recognised by the Gillick principle.

The JCHR should support the case for legislative change to enable under-18s to become trustees of unincorporated charities. This would be in line with article 12 of the CRC and recommendations made by the Committee on the Rights of the Child.

16 September 2005

8 House of Lords, 12 July 2005, Col. 1063

9 House of Lords, 12 July 2005, Col. 1063

Appendix 2: Copy letter from Head of Public Policy and Regulation, Lloyds TSB to Department of Trade and Industry, together with Legal Opinion of The Honourable Michael J Beloff QC and Andrew Hunter of Blackstone Chambers, re: Consumer Credit legislation

We appreciate that the future of the Consumer Credit Bill is yet to be decided, but following Commons Stages we sought an Opinion from Michael Beloff, QC on the Unfair Relationships test given the widespread concern among lenders over the imprecise definition of the test.

We will be able to send a full copy of the Opinion should the Bill resume, but in summary Counsel concluded that:

1. The test as drafted breaches the Human Rights Act's requirement of legal certainty (Art 1, First Protocol). This has been enunciated in several cases as meaning that the law must be adequately accessible: people must be able to have an indication of the legal rules applicable to a given case. As the court put it in *Harrup v UK* in 1999, "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able —if need be with appropriate advice—to foresee, to a degree what is reasonable in the circumstances, the consequences which a given action may entail".
2. The Bill contains no guidance for creditors on how they should conduct themselves to avoid becoming subject to the "unfair relationship" powers. Unlike comparable legislation in respect of unfair contract terms or financial regulation, there is not even a non-exhaustive list of relevant factors.
3. It is unlikely that suitable guidance may be obtained from case law. Since the proposed provisions are new, there is no existing case law. Whilst some case law will doubtless develop, this is likely to be piece-meal and will take some considerable time, because since the vast majority of cases will be of relatively small value, they will be litigated predominantly in the lower Courts and are likely to be largely unreported. There is therefore a serious risk of inconsistent decisions.
4. It also breaches the common law principle that people, before committing themselves to any course of action, should be able to know in advance what the legal consequences that will flow from it are. Although the proposed clauses will constitute primary legislation, and could not therefore be invalidated by reference to this doctrine alone, nonetheless the legislature ought to avoid departure from or breach of this principle in the absence of compelling necessity. In Counsel's opinion, "We detect no such necessity here in any of the arguments advanced in the course of the Parliamentary process in favour of these clauses."
5. Comparable legislation demonstrates that it is quite possible to give significant guidance to creditors by means of a non-exhaustive list of the factors which are relevant to an assessment of "fairness". This is the approach taken in the Unfair Contract Terms Act 1977 and in the Unfair Terms in Consumer Contracts Regulations 1999. In addition Draft Article 5 of the proposed EU Directive on Unfair Commercial Practices, which sets a general prohibition on unfair commercial practices, defines "unfair" by setting out two cumulative tests which must be satisfied by the claimant (that the practice is contrary to the requirements of "professional diligence" and that it materially distorts or is likely to materially distort the economic behaviour of the average consumer). A legally enforceable blacklist of examples of unfair commercial practices is given in Annex 1. Practices not on the list will be presumed to be fair until they are shown to be unfair.

We would maintain that unclear law is bad law. As drafted, the test will leave all parties in ignorance of the law. We hope DTI will reconsider the need for a more precise test

following, as Counsel has suggested, existing and proposed UK and EU legislation using the word "unfair".

You will also be aware that the Joint Committee on Human Rights, in its Fifteenth Report of Session 2004–05, *Scrutiny: Seventh Progress Report*, expressed concerns regarding the power of the OFT contained within the Consumer Credit Bill to impose requirements on licence holders. In particular, the Committee concluded that the "unfettered scope of this power fails to satisfy the requirements of reasonable legal certainty". Accordingly, I am copying this letter to the Legal Adviser of the Joint Committee on Human Rights for information.

20 April 2005

Annex: Advice of The Honourable Michael J Beloff QC and Andrew Hunter of Blackstone Chambers, dated 14 March 2005 re:

The Consumer Credit Bill/
Article 1 of the First Protocol to the ECHR

1. Our Instructing Solicitors act for Lloyds TSB Bank PLC ("Lloyds TSB"). Lloyds TSB and other banks are concerned about Clauses 19 to 22 of the Consumer Credit Bill currently before Standing Committee E in the House of Commons. These Clauses propose to introduce new Sections 140A and 140B into the Consumer Credit Act 1974. The purpose of these new Sections will be to grant Courts a wide range of powers to intervene with any credit agreement (including the power to avoid or vary the agreement) where it determines that the relationship between creditor and debtor is "unfair to the debtor". The particular concern of Lloyds TSB is that there is no guidance as to when a relationship will be considered "unfair to the debtor" nor as to what factors may lead to a finding of unfairness.

2. In light of this concern, we have been asked to consider (1) whether the proposed Clauses are compliant with the European Convention on Human Rights ("ECHR"), specifically Article 1 of the First Protocol, now domesticated by The Human Rights Act 1998 ("HRA"); and (2) whether there are any other objections of a legal or constitutional character which can properly be levelled at those clauses.

BACKGROUND

3. The Consumer Credit Bill is the culmination of a three year review of consumer credit law. It is intended to reform the Consumer Credit Act 1974 by creating a fairer and more competitive credit market and ensuring that under-used measures, such as the provisions on extortionate credit agreements are replaced with effective provisions.

4. The proposed legislation in issue is contained in clause 19 and 20 of the Bill. These provide as follows:

"Unfair relationships

19 Unfair relationships between creditors and debtors

After Section 140 of the 1974 Act insert

"140A Unfair relationships between creditors and debtors

(1) The court may make an order (under section 140B) in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following:

- (a) any of the terms of the agreement or of any related agreement;*
 - (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;*
 - (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).*
- (2) In deciding whether to make determination under the section 140A the court shall have regard to all matter it thinks relevant (including matters relating to the creditor and matters relating to the debtor (section 140A(2))).*

...

20 Powers of the Court in relation to unfair relationships

After Section 140A of the 1974 Act (inserted by Section 19 of this Act) insert

"140B Powers of the Court in relation to unfair relationships

(1) An order under this section in connection with a credit agreement may do one or more of the following:

(a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);

(b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;

(c) reduce any sum payable by the debtor or by a surety by virtue of the agreement of any related agreement;

(d) direct the return of a surety of any property provided by him for the purposes of any security;

(e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;

(f) alter the terms of the agreement or of any related agreement;

(g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.

(2) An order under this section may be made in connection with a credit agreement only:

(a) on an application made by the debtor or by a surety to the court;

(b) at the instance of the debtor or a surety in any proceedings to which the debtor and the creditor are parties, being proceedings to enforce the agreement or any related agreement; or

(c) at the instance of the debtor or a surety in any proceedings where the amount paid or payable under the agreement is relevant."

5. The proposed legislation also includes (Clause 22(4) of the Bill introducing a new Section 171(8) into the 1974 Act which would provide:

“(8) If, in proceedings referred to in Section 140B(2) the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary.”

6. The following points may reasonably be made about these proposed provisions:

(1) There is no description of the factors to be considered by the court when determining, under Section 140A, whether a creditor/debtor relationship is “unfair to the debtor” (nor as to what factors a creditor may rely upon in order to prove that it was fair). In particular the proposed Section 140A(1)(c) and 140A(2) allow any conduct of the creditor or any other “matter” to be taken into account.

(2) The proposed powers of the court listed in Section 140B are comprehensive and far reaching. A Court exercising these powers would be able to order to forfeiture of all of a creditor’s entitlements under a credit agreement.

(3) The “unfair relationship” part of the proposed new legislation will affect all credit agreements entered into after commencement of the Act and will also retrospectively affect pre-existing agreements if they still subsist 12 months after commencement (paragraph 14 of Schedule 3). In other words all such contracts will become subject to the supervisory power of the Court under Sections 140A and 140B even though they were made at a time when such powers did not exist.

IS ARTICLE 1 OF THE FIRST PROTOCOL ENGAGED?

7. Article 1 of the First Protocol to the ECHR provides as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

8. In its landmark judgment in *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, ECtHR, para 61 the European Court of Human Rights held that Art 1 of the First Protocol comprises three distinct rules. The first rule (to be found in the first sentence) is the general principle that everyone is entitled to peaceful enjoyment of their property. The second and third rules are aspects of this general rule (this point is emphasized in *SA Dangeville v France* [2003] STC 771). The second rule (in the second sentence) provides that a person may only be deprived of their possessions under certain conditions. The third rule (the third sentence) means that the State’s right to control the use of property is also subject to certain conditions.

9. In our view, Article 1 of the First Protocol is “engaged” by (Clauses 19 to 20) the proposed Consumer Credit Bill (i.e. it constitutes a potential interference with creditors’ property rights and must therefore comply with the conditions for interference set out in Article 1). We have reached this view for the following reasons:

9.1. It is axiomatic that debts due under credit contracts are property rights (or “possessions”) which are protected by Article 1 of the First Protocol (see e.g. *Agnessens v Belgium* (1988) 58 DR 63; *Wilson v First County Trust* [2003] IJKHL 40 (“*Wilson*”) per Lord Nicholls at para 39: “Possessions in article 1 is apt to embrace contractual rights as much as

personal rights"). Article 1 is also the only Article in the Convention which expressly envisages the protection of rights of 'legal persons' as well as natural persons. Therefore debts due to corporate bodies, such as Lloyds TSB, are expressly protected (see e.g. *Yarrow v United Kingdom* 30 DR 155 (1983) ECom HR at 185).

9.2. Article 1 of the First Protocol applies to legislation or other measures which affect legal relations between private individuals. This was recognised in *Bramelid and Malmstrom v Sweden*, 29 DR 64 (1982), E Com HR.

9.3. The Bill proposes to affect existing debts under existing credit contracts by making them subject to the "unfair relationships" regime. This is not of itself a "deprivation" of property. However it is a power to interfere with the quiet enjoyment of property (including the power to effect a deprivation of property). In our view, it is properly regarded as a type of "control of use" of property.

10. It follows from the premise that the provisions of the Bill referred to "engage" Article 1 of the First Protocol that they must therefore comply with the conditions for interference set out in Article 1 of the First Protocol.

THE CONDITIONS FOR LAWFUL INTERFERENCE WITH PROPERTY RIGHTS UNDER ARTICLE 1 OF THE FIRST PROTOCOL

11. Where there is interference with property rights (or potential interference arising from a power to interfere), this can be justified by the State if the conditions set out in Article 1 of the First Protocol are met. There are three of these:

11.1. That the interference is in the public or general interest;

11.2. That it is proportionate to the interest pursued;

11.3. That it satisfies the requirements of legal certainty.

IS THE BILL LIKELY TO BE FOUND TO BE IN THE PUBLIC INTEREST AND PROPORTIONATE?

12. In our view it is likely that the Bill will satisfy the first two conditions for lawful interference with property rights.

13. First, it seems to us that the Bill clearly pursues a legitimate public aim, namely creating a fairer and more competitive credit market. We note that in *Wilson*, the House of Lords reached the same conclusion in respect of the Consumer Credit Act 1974.

14. Secondly, it seems to us likely that Clauses 19 to 22 of the Bill would be viewed as a proportionate way of achieving the aim of creating a fairer and more competitive credit market:

14.1. As a matter of general principle, a State is afforded a wide margin of appreciation to determine what the proportionate way to address a legitimate aim. The fact that there may be other methods of achieving the State's objective does not necessarily mean that the chosen method is disproportionate (see e.g. *Mellacher v Austria* (1990) 12 EHRR 391 par 53). Particularly in the sphere of consumer protection, there is a broad freedom allowed to a State (see e.g. *Mellacher* at par 51

"[I]n remedial social legislation ... it must be open for the legislature to take measures affecting the further execution of previously concluded contracts in order to attain the aim of the policy adopted."

14.2. The provisions will create a wide-ranging judicial power to intervene in consumer credit agreements. Since the power to interfere rests with the Courts (and the Courts themselves must always comply with Article 1 Protocol 1 on the facts of individual cases), it

can properly be said that there are safeguards against unfairness. Undoubtedly there might have been other ways of pursuing the same aim, but in our opinion it cannot be said that the approach adopted by the Bill is outside the parameters of what is reasonable or accordingly disproportionate.

DOES THE BILL SATISFY THE REQUIREMENTS OF LEGAL CERTAINTY?

15. An interference with property (or a power to interfere) must also satisfy the requirement of legal certainty.

16. This requirement is expressly stated in the second sentence of Article 1 of the First Protocol (where it is provided that a deprivation of property must be 'subject to the conditions provided for by law'). However it also applies to the other parts of Article 1 and it has been held to be inherent in the ECHR as a whole (see *Winterwerp v Netherlands* (1979) 2 EHRR 387, ("*Winterwerp*") para 45). At its heart is the principle, an intrinsic and fundamental element in the rule of law, that all laws should be sufficiently clear to allow individuals to govern their future behaviour.

17. In ECHR jurisprudence, the principle of legal certainty has been analysed as follows:

17.1. In *Winterwerp* the European Court of Human Rights stated (in the context of the right to liberty) that: 'In a democratic society subscribing to the rule of law, no determination that is arbitrary can ever be regarded as lawful.' (para 39). The Court stated that the concept of legal certainty implied qualitative requirements, notably those of precision, accessibility and foreseeability.

17.2. In *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at 270 ("*Sunday Times*"), the Court again examined the meaning of the expression "prescribed by law". It identified 3 sub-principles:

17.2.1. That the interference in question must have some basis in domestic law (para. 47).

17.2.2. That "the law must be adequately accessible: the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case" (para. 49)

17.2.3. That "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" (para 49)

17.3. However, in *Sunday Times* the Court also recognised the impossibility of attaining absolute certainty in the framing of laws and the risk that the search for certainty may entail excessive rigidity. At p. 271 it stated: "Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice".

17.4. It is the aspect of "legal certainty" which requires a law to be articulated sufficiently precisely but not with "excessive rigidity" which is relevant for present purposes. There have been a number of cases which have explored this aspect. The following principles may be derived from these:

17.4.1. Wholly general, unfettered discretion will not satisfy the Convention, no matter what the formal validity of the rule, eg *Kruslin v France* (1990) 12 EHRR 547 (phone tapping);

17.4.2. The more severe the sanction or important the right is, the more important it is that the law should be unambiguous and precise *Kruslin v France supra*.

17.4.3. The need for the law to be flexible may justify less precision, if guidance may be obtained from case-law See e.g. *Müller v Switzerland* (1988) 13 EHRR 212 at 226 (obscenity); *Wingrove v UK* (1996) 1 BHRC 509 (blasphemy).

17.4.4. However where case-law was inconsistent a breach of the Convention has been found. In *Belvedere Alberghiera SRL v Italy* [20001 ECHR 31524/96 (“Belvedere”), the rule on constructive-expropriation had evolved through judicial interpretation and been applied inconsistently, therefore in consequence was unforeseeable.

17.4.5. The division between acceptable flexibility and unacceptable vagueness depends on the content of the law, the field it is designed to cover and the number and status of those to whom it is addressed. See *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241. In that case the European Court of Human Rights held that the power of magistrates to bind-over a person to be of good behaviour was insufficiently legally certain, as it failed to give sufficient guidance to the applicants as to what was appropriate conduct. The Court stated at 256:

“A norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. At the same time, whilst certainty in the law is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. The level of precision required of domestic legislation—which cannot in any case provide for every eventuality—depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.”

18. Accordingly the key question which arises in respect of the “unfair relationship” provisions of the Bill is whether they are sufficiently precise to enable creditors to “regulate their conduct”.

19. In our view it is strongly arguable that the Bill as presently drafted is not sufficiently precise to do enable creditors to do this. We have reached this conclusion for the following reasons:

19.1. First, the content of the Bill (the first factor identified as relevant in *Hashman*) contains no guidance whatsoever for creditors as to how they should conduct themselves so as to avoid becoming subject to the “unfair relationship” powers. Indeed, it seems from the record of the Parliamentary debates on the Bill that this lack of guidance reflects a deliberate decision “not to restrict the conditions of the test” (see e.g. the remarks of the Under-Secretary of State for Trade and Industry at the meeting of Standing Committee E on 25 January 2005). Yet we note that unlike comparable legislation in respect of unfair contract terms or financial regulation, it is not even proposed that there should be a *non-exhaustive* list of relevant factors.

19.2. Secondly, we consider that it is unlikely that suitable guidance may be obtained from case-law or existing legislation. Since the proposed provisions are new, there is no existing case-law. Whilst some case-law will doubtless develop, this is likely to be piecemeal and will take some considerable time (possibly many years before there is a body of reported appellate decisions). Moreover since the vast majority of cases will be of relatively small value, they will be litigated predominantly in the lower Courts and are likely to be largely unreported. There is therefore a serious risk of inconsistent decision. In *Belvedere* the fact that case-law was inconsistent led to a finding that there was no legal certainty.

19.3. Thirdly, we have considered the other factors referred to in *Hashman* i.e. “number and status of those to whom [the Bill] is addressed” and the “field it is designed to cover”. It seems to us that there is nothing in these factors which removes the need for creditors

to require guidance from the legislature as to their conduct. The consumer credit market involves over £700 billion of debt and the credit card sector alone over 1,300 cards. There is no universally applied or recognized code of conduct. Whilst the size of the market means that it would not be possible to formulate a law to cover every eventuality, we note that an even larger scale and scope has not prevented definitions and guidance being given by the EU in the current draft Directive on Unfair Commercial Practices.

19.4. Finally, the case law states that the degree of precision required is dependant upon the severity of the sanction. (*Kruslin*). Under the proposed new Section 14C (set out in Clause 21 of the Bill) all lending to “individuals” (including private individuals, small partnerships and unincorporated associations of any size), whether for business or consumer purposes will be subject to the new unfair relationship provisions—irrespective of the amount lent. As a necessary consequence very large business loans to individuals (e.g. to Lloyd’s Syndicates) will be caught by the new provisions. Accordingly, there is now no limit on the debts which are subject to the potentially draconian powers of the new Section 140B. As drafted, the Bill will expose some creditors to very severe financial penalty in respect of conduct which is wholly undefined.

It seems to us that this requires a greater rather than a lesser degree of precision. Indeed, we note the observation of Lord Nicholls in *Wilson* supra (at paras 76, 77 and 78) on a similar provision under the 1974 Act. He said the provision, which also deals with Court powers, but currently only affects consumer credit agreements for less than £25,000, would be far more susceptible to challenge under Article One of the First Protocol if it was extended to consumer credit agreements for any amount.

20. For these reasons, it is our opinion that it is strongly arguable that the “Unfair relationship” provisions of the Bill do not satisfy the requirement of legal certainty under Article 1 of the First Protocol to the European Convention on Human Rights.

CONCLUSION ON THE ECHR

21. It follows from the above analysis that we consider that the “Unfair relationship” provisions of the Bill engage Article 1 of the First Protocol, and that it is strongly arguable that the provisions do not comply with that Article. In consequence we consider that it is strongly arguable that the Bill as presently drafted does not comply with the European Convention on Human Rights, notwithstanding the statement made on 15 December 2004 by the Secretary of State for Trade and Industry pursuant to Section 19(1)(a) of the URA.

OTHER OBJECTIONS TO THE PROPOSED CLAUSES

Legal certainty as a constitutional principle

22. Legal certainty is also a basic principle of English constitutional law. See e.g. *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591, HL per Lord Diplock at 638: ‘The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.’. Although the proposed clauses will, if enacted, constitute primary legislation, and could not therefore be invalidated by reference to this doctrine alone, nonetheless, in our view, the legislature ought to avoid departure from of breach of this principle in the absence of compelling necessity. We detect no such necessity here in any of the arguments advanced in the course of the Parliamentary process in favour of these clauses.

FLOODGATES

23. It seems to us that it is highly likely that the consequence of the “unfair relationship” provisions as presently drafted will be to encourage a very large number of defaulting debtors to allege an unfair relationship. The lack of guidance will lead to many misconceived allegations, with which it will also be necessary for lenders to deal. Since the

consequence of a debtor alleging an unfair relationship is that the creditor must then prove that the relationship is fair, the debtor will be able to achieve delay in enforcement of the debt by this expedient. The fact that such allegations are raised may in many cases prevent debt recovery actions being determined summarily under CPR Part 24. At present, a large number of the civil commercial cases in County Courts are debt recovery actions. Most of these will be dealt with swiftly using the summary judgment procedure. It seems to us that one obvious likely consequence of the presently drafted provisions will be an immediate increase in the number of small debt recovery actions which have to proceed to trial, and consequently a potentially massive increase in County Court business (and in the legal costs of lenders).

INCONSISTENCY WITH THE OVERRIDING OBJECTIVE IN CIVIL LITIGATION

24. The Civil Procedure Rules state at Rule 1(1) that the Overriding Objective is dealing with cases "justly". An aspect of that is "allotting to [each case] an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases". It follows that any legislation which creates a situation inconsistent with this Objective is contrary to the public interest as recognized in those Rules. The factors to which we have referred in paragraph 19.2 above (risk of inconsistent decisions) and in paragraph 23 above (unnecessary multiplicity of trials) are manifestly inconsistent with that Objective because they will impose upon Courts, already under pressure, further burdens which could be avoided were the Clauses to be more precisely drafted.

A BETTER WAY

25. Comparable legislation demonstrates that it is quite possible to give significant guidance to creditors by means of a non-exhaustive list of the factors which are relevant to an assessment of "fairness". This is the approach taken in the Unfair Contract Terms Act 1977 and in the Unfair Terms in Consumer Contracts Regulations 1999. In addition the EU Directive on Unfair Commercial Practices is currently having its second reading in the European Parliament. This is intended to create a pan-European ban on unfair advertising, marketing and other commercial practices used by businesses in their dealings with consumers. It therefore has even wider scope than the Bill. Draft Article 5 sets a general prohibition on unfair commercial practices. It defines "unfair" by setting out two cumulative tests which must be satisfied by the claimant (that the practice is contrary to the requirements of "professional diligence" and that it materially distorts or is likely to materially distort the economic behaviour of the average consumer). In addition, a legally enforceable blacklist of examples of unfair commercial practices is given in Annex 1. Practices not on the list will be presumed to be fair until they are shown to be unfair. We see no reason why the Bill could not at least empower the Secretary of State to issue guidance regarding unfair relationships in one of these forms.

CONCLUSION

26. We have attached an Executive Summary of our conclusions.

EXECUTIVE SUMMARY

We have considered the unfair relationships provisions in Clauses 19 to 22 of the Consumer Credit Bill, which can result in very severe financial penalties on lenders. In our opinion:

- (I) They are drafted so vaguely that they are unlikely to comply with the Human Rights Act 1998.
- (II) For similar reasons, they violate the constitutional principle of legal certainty.
- (III) They open the floodgates to capricious claims by debtors and will lead to a poor use of court resources.

(IV) They do not meet the basic standards of draftsmanship in comparable consumer protection legislation (both domestic and European).

The problems can be remedied by, for example, making the Bill more prescriptive or providing for statutory guidance to be made at a later date.

Appendix 3(a): Submission from the Law Society, re: Identity Cards Bill

Reintroduction of the Identity Cards Bill has resulted in very few changes to the original Bill despite various recommendations and concerns raised by the Joint Committee on Human Rights. The Bill has been marginally strengthened in its order-making provisions, there has been a slight expansion in the scope of the oversight body and some disclosure from the National Register has been limited. However, of the 62 recommendations made by the Home Affairs Committee about the first Bill, only 2 have been fully and 3 partially adopted in the second .

The Law Society's concerns with the Identity Cards Bill have been outlined in previous submissions and they still remain current. We believe that the Bill provides Government with unnecessary and undesirably wide powers to record, retain and disseminate personal data, and do not believe that adopting an identity card scheme is a proportionate response to the challenges which the Government is trying to address. In addition, we believe adopting the scheme would increase the administrative burden on those delivering public services and put a heavy financial burden on government and members of the public.

21 September 2005

Appendix 3(b): Submission from NO2ID, re Identity Cards Bill

A: INTRODUCTION

1. BASIS FOR THIS SUBMISSION

This submission to the Joint Committee on Human Rights (JCHR) has been prepared by members of the national campaign against ID cards and a National Identity Register, NO2ID. It follows the reintroduction of the Government's Identity Cards Bill on 25th May 2005 and the call for evidence issued by the JCHR by press notice on 20th July.

NO2ID volunteers have examined the detailed provisions and practical implications of the Bill, discussing it with and where appropriate taking advice from security and legal experts, organisations representing sections of society that may be particularly affected, and concerned members of the public. This submission therefore represents a distillation of the views from a significant and informed sample of the public.

2. ABOUT NO2ID

NO2ID is a national, non-partisan campaign opposing ID cards and a National Identity Register.

NO2ID was founded in 2004 in response to the Government's stated intention to introduce the compulsory registration and lifelong tracking of UK citizens by means of a centralised biometric database, and constituted as an unincorporated association in September 2004. NO2ID brings together individuals and organisations from all sections of the community and seeks to ensure that an informed case against state identity control is put forward in the media, in national institutions and among the public at large.

NO2ID is supported by a growing number of parliamentarians of all parties and more than 70 organisations, including trades unions, political parties, local authorities and special interest groups have made formal statements supporting the campaign. More than 20,000

individuals have registered their support. We are funded by membership fees, merchandise sales and fundraising events, as well as grants from the Joseph Rowntree Reform Trust Ltd, the Andrew Wainwright Reform Trust Ltd and individual and corporate donations.

The campaign is staffed entirely by volunteers and we have a growing network of local groups across the UK, currently in around 80 towns and cities.

B: SCOPE OF THIS SUBMISSION

1. THE BILL AS A WHOLE

NO2ID welcomed the considered response of the Committee in the 2004–05 session (Fifth Report, HL35/HC283, and Eighth Report, HL60/HC388). We do not believe that the case has been made for compulsory registration of the entire population, and do not accept the Government's use of the term 'voluntary' when millions of people will be de facto compelled to be registered from the very outset of the scheme. We concur with JCHR's judgement that the National Identity Register is the most troubling aspect of the scheme. We are very concerned that all significant details of the scheme are to be left to regulations and orders emanating from the Home Office that will not be subject to amendment by parliament.

2. GOVERNMENT RESPONSE TO PREVIOUS JCHR REPORTS

NO2ID notes that the Secretary of State's response (set out in the Eighth Report) to the Joint Committee's expressed concerns consisted of little more than a succession of assertions about his department's requirements and assurances about the future intent and future conduct of his successors. No substantive further justifications have been offered, and no evidence adduced to support the assertions.

The Government had the opportunity in bringing forward a new bill in the new parliament to address the Committees' concerns, but chose not to do so. It has made no relevant changes in the text of the "new" bill, and so far accepted no amendments to that bill. We submit that the Committee has in effect been brushed aside in the same way as, though with a little more courtesy than, have other critics of this aspect of the scheme, and we reiterate that we continue to entertain those concerns.

Focus of discussion

While we entirely support the Committee's previous conclusions concerning the danger presented to article 8 rights by the unprecedented collection and sharing of personal data through the National Identity Register, and the problem of applying administrative provisions in a non-discriminatory fashion, we do not wish to add to the Committee's observations on matters of which it has evidently already clear sight. The purpose of this submission is to draw the Committee's attention to other potential threats to human rights in the Identity Cards Bill. Though we refer to the articles of the convention, we venture to suggest that the Committee is not bound closely to the text of the Human Rights Act and the convention it partly embodies, and that there are some changes that the Identity Cards Bill and the device of identity registration would make to common law personal rights and natural justice that are fundamental in nature, and affect human rights in Britain in a broader sense.

C: MATTERS OF CONCERN

1. ARTICLE 5 – THREATS TO SECURITY OF PERSON

To the extent that information recorded in the National Identity Register (and elsewhere) is of use to a criminal or personal enemy it presents a significant risk to the security of person. As we explain below in relation to the "metadatabase", even without breaches in security in or misuse of the National Identity Register, a working national identity system is

certain to make the computerised records available about individuals more coherent and easier to trace. This presents personal threat to all those with something legitimate to hide, by way of example only: those fleeing domestic abuse; victims of “honour” crimes; witnesses in criminal cases; those at risk of kidnapping; undercover investigators; refugees from oppressive regimes overseas; those pursued by the press; those who may be terrorist targets.

Making ID cards and registration a key part of one’s civic existence also means that the seizure of ID cards offers a means of extortion to gangsters—like holding benefit-books and passports now but offering a far greater degree of control. This is a significant threat to the personal security of the poorest and most vulnerable.

2. ARTICLE 6 – CRIMINAL PUNISHMENT WITHOUT TRIAL ON A PRESUMPTION OF GUILT

We submit that the Government is playing with procedural categories in order to evade having to enforce the identification regime through the criminal courts, but that the scale of “penalties” involved for failures in compliance is clearly intended to be punitive. The former Home Secretary Mr Blunkett appeared to glory in this cleverness, in “not creating martyrs”. (See Select Committee on Home Affairs minutes of evidence for 30 July 2004, Q674) To avoid martyrs in its rather specialised sense, the Government seeks to allow severe punishments to be imposed by the Home Office without a trial process. It will then be for those punished to prove they should not be, in the first place before an appeals body that will be a creature of the Home Office. Guilt will be assumed.

3. ARTICLE 8 – INTERACTION WITH OTHER STATUTES

The Home Office has gone to considerable lengths to assure the Committee that the administration of the National Identity Register would be subject to the Data Protection Acts. We observe that the data in it would also be subject to various forms of legal discovery, and in particular to the Regulation of Investigatory Powers Act 2000.

4. ARTICLE 8 – THE METADATABASE

Discussion of the disproportionate risk to privacy has itself been disproportionately concerned with direct official and other access to the information held on the National Identity Register. This, while it is important, is only a small part of the threat.

The Government has suggested that “verifying information” using the Register is very different from providing information from the Register, or allowing access to it. But in practice they can amount to the same thing. Data appears in the second place in the same verified form whether it is supplied or merely “checked”. Correcting someone’s guess is as good as telling them.

Quite apart from official data-sharing, use of the Register for verification by third parties (as well as official data-sharing) will necessarily involve two databases, one containing the information to be verified. In order to verify data, (which one assumes will typically be a name and address) it will need to be checked against one or more unique official numbers recorded for the person on the Register. That verification transaction and the index number will naturally be recorded at both ends.

So whatever the function of the second database: medical records in the case of health service use; financial transactions and purchases in the case of a bank account or credit card; telephone records in the case of a telephone purchase; internet usage in the case of an ISP contract; hotel bookings, library borrowings, etc... the personal record for that person in that database will be indexed permanently to the relevant National Identity Register. And it will also be permanently indexed to any other database referencing the same official unique identifier number.

This means that, provided the National Identity Register acts to maintain their indexes in good order, such databases are then as readily searched to obtain personal data linked to a verified and located individual as the National Identity Register itself. Their security would vary widely and would not be assured in the same way. Public sector databases using information provided by the Secretary of State for official purposes would stand in the same relationship to the National Identity Register, indexed using it, but not subject to the same protections.

Together all these collections of personal data would form a much larger, much less secure, patchily regulated, metadatabase. In theory all the databases so linked could then be searched as one, provided a technological link. In practice, it is likely to be possible for both official and unofficial investigators to work through several of them successively and build a deeper personal dossier than that contained in the National Identity Register audit trail.

While personal data on us all already exists in vast quantities, without a verified index, much of it is orphaned, and unconnected with a person. Every system uses its own unique identifier, unconnected with others, and identifying an account, a relationship, not a person. The inconsistency of names and addresses (with a multiplicity of possible spellings and forms) is the biggest obstacle to tracing individuals through the current data jungle. But if that (or anything else) is verified or connected by reference to the National Identity Register, then the problem disappears, and with it much of our privacy.

5. ARTICLE 11 – RISKS TO FREEDOM OF ASSOCIATION

Just as people may have legitimate things to hide for reasons of personal safety, there is reason to believe that freedom of association can be imperilled by the possibility of surveillance by data. Individuals and groups may wish to keep their involvement in some lawful activities private, fearing or knowing it may prejudice others against them. Part of the present administration's motive and rationale for extending the Data Protection Act to paper records was its concern about blacklist files then being kept on trades union activists. Given vast collections of information kept for one purpose, but—thanks to the identity system—searchable for quite different purposes, then a vast range of analogous situations arise where individuals may feel themselves under suspicion by reason of association with a group.

6. ARTICLE 13 – LACK OF EFFECTIVE REMEDY FOR VIOLATION OF RIGHTS

We suggest that the Identity Cards Bill and accompanying Home Office documents show up a defect in the Human Rights Act 1998. This did not incorporate article 13 of the convention, because the Act itself was to provide such remedies. But the creation of a National Identity Register implies also the possibility of a category of people, whether by technological failure or by official action in withdrawing their card or altering the register (in error or otherwise), who are deemed to have no official existence, or who will be held to be something other than they have good reason to believe themselves to be.

Since it is the avowed intention of the system to deny services and civil functions to those who cannot be identified, and solicitors in particular already have a duty to identify a client before receiving instructions, how are such people to obtain redress? Those not recognised by the system will have difficulty even getting their own money, never mind earning or claiming any. How would the right to legal representation and access to justice be assured to those who are in disagreement with the Home Office about who they are or whether they exist at all?

7. ARTICLE 14 — INHERENTLY DISCRIMINATORY EFFECTS OF UNIVERSAL BIOMETRICS

The Government has made much of the value of biometric technology in ascertaining individual identities. However, if this is to be widely used, it will create inherent discriminations in individuals' access to their civil rights for different groups depending on

the biometrics chosen. UK Passport Service trials last year indicated the scale of these problems, though they are now described as ergonomic trials only.

Not all biometrics will work equally well for all people. Plenty are missing digits, or eyes, or have physical conditions that render one or more biometrics unstable or hard to read. All systems have error. Deployment on a vast scale, with variably trained operators and variably maintained and calibrated equipment, will produce vast numbers of mismatches, leading to potentially gross inconvenience to millions, but this will be worse for some than others.

Iris scanning is best on blue eyes, poor for black eyes. Fingerprints are often unreliable for manual workers, and those with skin diseases or naturally thinner/softer skin such as the elderly or oriental women. Facial recognition technology is also calibrated on a "normal" pattern, and copes poorly with those who have odd-shaped faces, or belong to unusual ethnic groups.

The biometrics industry admits difficulties with "outlying populations". Those suffering from certain medical conditions, e.g. eye disorders, and the aged may have particular difficulty registering or matching a biometric and would at the very least require special treatment or equipment. Were this not available at every location where such individuals would be expected or required to be scanned, they would be consistently discriminated against.

8. PROTOCOL – ARBITRARY DEPRIVATION OF PROPERTY

To the extent that the identification system controls normal exercise of civil functions, as seems from Home Office papers (particularly the Regulatory Impact Assessment), any defect in or misuse of the technology—failure of a scanner or link at a bank, say—or the Home Secretary's use of his power to confiscate or cancel a card, has scope to deny private property to an individual, by removing his access to his funds or capacity to deal in his property without due legal process.

9. COMMON LAW RIGHTS – NAMES IN SOCIAL USE

The Identity Cards Bill also extends Home Office power over our names. By making any name by which you are or have been known a registrable fact, this curtails (as does an universal verification process) the well-established right to be known by whatever name one chooses for any lawful purpose. Since "name" is undefined, this could extend to any identifying personal tag, alias, nickname or call-sign. It is hard to imagine a more intrusive power.

Mr Carmichael made something of this in standing committee and was told (6th July Col.75) "The hon. Gentleman should not worry; we will tell him in the end what his name is." We do not find the joke very funny.

10. COMMON LAW RIGHTS – FREEDOM OF MOVEMENT

The Committee may also wish to consider the question of the extraordinary official functions implied in cl.40 of the Bill, which creates a classification for both a passport and an identity card, of "travel authorisation". It used to be clear that travel by British residents was not subject to authorisation by Her Majesty's Government. Perhaps the Committee will be able to extract the intention behind this obscure provision.

D: FURTHER INFORMATION

We have tried to indicate the human rights problems we believe have not yet been examined by the Committee. We will naturally provide what further information we can or suggest expert witnesses if requested.

14 September 2005

Public 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

<i>BILL TITLE</i>	<i>REPORT NO</i>
Charities Bill*	1st
Consumer Credit Bill*	1st
Criminal Defence Service Bill*	1st
Crossrail Bill*	1 st
Identity Cards Bill*	1st
Merchant Shipping (Pollution) Bill*	1 st
National Lottery Bill*	1 st
Natural Environment and Rural Communities Bill*	1 st
Racial and Religious Hatred Bill*	1st
Road Safety Bill*	1st
Transport (Wales) Bill*	1 st