



House of Lords
House of Commons
Joint Committee on
Human Rights

Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights

Sixteenth Report of Session 2006–07



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*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.

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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.

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Contents

Report	<i>Page</i>
Summary	7
1 Parliament's role in relation to court judgments on human rights	9
Introduction	9
Judgments of the European Court of Human Rights	9
Judgments declaring incompatibility under the Human Rights Act	12
Our methodology	13
2 The importance of national implementation measures	15
3 Issues monitored by the Committee	18
Recent Judgments against the UK	18
(1) Lack of a remedy for negligent breaches of privacy	18
(2) Trials of civilians by military tribunals	22
(3) Adequacy of judicial review	24
Issues previously monitored	26
(1) Imprisonment for non-payment of fines/debts	26
(2) Prisoner voting	27
(3) Transfer of prisoners	29
(4) Binding over orders	30
(5) Limits on the right to marry	31
(6) Access to information	31
(7) Delay in criminal proceedings	33
Delays in implementation	34
(1) Investigation of use of lethal force	34
(2) Adverse inferences from silence	35
(3) Corporal punishment of children	35
(4) Security of tenure for Gypsies	36
(5) Consent to medical treatment	37
(6) Rights of the mentally ill	38
4 Declarations of Incompatibility	40
Introduction	40
Is a declaration of incompatibility an effective remedy?	40
Issues monitored by the Committee	43
(1) Appointment and Removal of Nearest Relative	43
(2) Discrimination in access to social housing	44
(3) Nationality and religious discrimination in sham marriages regime	47
(4) Nationality discrimination in early release of prisoners	48
(5) Prisoner voting	48
5 Obstacles to Effective Implementation	49
Introduction	49
Delays in implementation	49

Non-retrospective application of the Human Rights Act	50
Re-opening proceedings following judgments of the ECtHR	50
Overcoming systemic obstacles	51
Annex 1	54
The Importance of Domestic Implementation Measures: Council of Europe Activities	54
Formal Minutes	56
Appendices	57
Appendix 1: Letter dated 23 January 2007 to The Rt Hon Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs	57
Appendix 2: Letter dated 17 May 2007 from Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs	58
Appendix 3: Letter dated 23 January 2007 to The Rt Hon. John Reid MP, Secretary of State for the Home Department, Home Office, re Implementation of Judgments of the European Court of Human Rights	59
Appendix 4: Letter dated 10 May 2007 from Liam Byrne MP, Minister of State, Home Office, re. Implementation of Judgments of the European Court of Human Rights	60
Appendix 5: Letter dated 23 January 2007 to The Rt Hon. Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs	65
Appendix 6: Letter dated 14 March from The Rt Hon. Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs	68
Appendix 7: Letter dated 23 January 2007 to The Rt Hon. Adam Ingram MP, Minister of State for the Armed Forces, re <i>Martin v United Kingdom</i>	76
Appendix 8: Letter dated 22 January 2007 from Derek Twigg MP, Parliamentary Under-Secretary of State for Defence and Minister for Veterans, Ministry of Defence	77
Appendix 9: Information Note prepared for the Committee of Ministers by the Ministry of Defence, on <i>Martin v United Kingdom</i> Application No. 40426/98 for 3-4 April meeting	79
Appendix 10: Letter dated 23 January 2007 to The Rt Hon. Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs	81
Appendix 11: Letter dated 16 June 2006 from John Hirst, re <i>Hirst v UK (No.2)</i>	83
Appendix 12: Letter dated 2 February 2007 to The Rt Hon. Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs, re <i>William Smith v Electoral Registration Officer</i>	84
Appendix 13: Letter dated 27 March from the Rt Hon Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs, re Implementation of judgments of the European Court of Human Rights, Human Rights Act: Declarations of Incompatibility, <i>William Scott v Electoral Registration Officer</i>	85

Appendix 14: Memorandum dated 16 March 2007 from Liberty, re Implementation of Judgments of the European Court of Human Rights and Declarations of Incompatibility	88
Appendix 15: Letter dated 23 January 2007 to The Rt Hon. John Reid MP, Secretary of State for the Home Department	93
Appendix 16: Letter dated 20 February 2007 from Gerry Sutcliffe MP, Parliamentary Under-Secretary of State, Home Office, re Recent Judgments of the European Court of Human Rights	94
Appendix 17: Letter dated 30 May 2007 from Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs	96
Appendix 18: Letter dated 12 July 2006 from Tom Watson MP, Parliamentary Under-Secretary of State for Defence and Minister for Veterans, to the Chairman	96
Appendix 19: Letter dated 23 January 2007 to Tom Watson MP, Parliamentary Under-Secretary for Defence and Minister for Veterans, Ministry of Defence, re <i>Roche v UK</i>	104
Appendix 20: Letter dated 25 January 2007 from Derek Twigg MP, Parliamentary Under-Secretary of State for Defence and Minister for Veterans, Ministry of Defence	105
Appendix 20a: Letter dated 8 February 2007 to Derek Twigg MP, Parliamentary Under-Secretary for Defence and Minister for Veterans, Ministry of Defence, re <i>Roche v UK</i>	112
Appendix 20b: Letter dated 28 February 2007 from Derek Twigg MP, Parliamentary Under-Secretary of State for Defence and Minister for Veterans, Ministry of Defence	113
Appendix 20c: Letter dated 13 March 2007 to Derek Twigg MP, Parliamentary Under-Secretary of State for Defence and Minister for Veterans, Ministry of Defence, re <i>Roche v UK</i>	114
Appendix 20d: Letter dated 27 March 2007 from Derek Twigg MP, Parliamentary Under-Secretary of State for Defence and Minister for Veterans	114
Appendix 21: Memorandum dated 15 March 2007 from the British Irish Rights Watch	120
Appendix 22: Letter dated 14 March 2007 from the Committee on the Administration of Justice (CAJ), re Implementation of Judgments of the European Court of Human Rights and Declarations of Incompatibility	125
Appendix 23: Letter dated 26 February 2007 from The Rt Hon Harriet Harman QC MP, Minister of State, Department for Constitutional Affairs	126
Appendix 24: Note from the Coroners Service for Northern Ireland	127
Appendix 25: Letter dated 23 January 2007 to The Rt Hon. David Hanson MP, Minister of State for Northern Ireland, Northern Ireland Office, re <i>John Murray v United Kingdom</i>	128
Appendix 26: Letter dated 14 February 2007 from The Rt Hon David Hanson MP, Minister of State for Northern Ireland, Northern Ireland Office, re <i>John Murray v United Kingdom in Northern Ireland</i>	129
Appendix 27: Letter dated 23 January 2007 to Yvette Cooper MP, Minister for Housing and Planning, Department for Communities and Local Government, re <i>Connors v United Kingdom</i>	129

Appendix 28: Letter dated 26 March 2007 from Meg Munn MP, Parliamentary Under-Secretary of State, Department for Communities and Local Government, re <i>Connors v United Kingdom</i>	130
Appendix 29: Memorandum dated 12 March 2007 from the Housing Law Practitioners Association, re Implementation of Judgments of the European Court of Human Rights and Declarations of Incompatibility	130
Appendix 30: Letter dated 23 January 2007 to The Rt Hon. Rosie Winterton MP, Minister of State for Health Services, Department of Health, re <i>Glass v United Kingdom</i>	137
Appendix 31: Letter dated 2 March 2007 from The Rt Hon. Rosie Winterton MP, Minister of State for Health Services, Department of Health, re <i>Glass v United Kingdom</i>	138
Appendix 32: Letter dated 1 May 2007 from Tom Strickland, Private Secretary to the Rt Hon. Rosie Winterton MP, Department of Health re Mental Capacity Act	138
Appendix 33: Letter dated 4 January 2006 from the Office of the Solicitor, re Declaration of Incompatibility – Section 82(4)(b) of the Care Standards Act 2000. R (on the application of Wright and others) v Secretary of State for Health [2006] EWHC 2886 (Admin), [2006] All ER (D) 216 (NOV)	139
Appendix 34: Letter dated 23 January 2007 to The Rt Hon. Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs, re Human Rights Act: Declaration of Incompatibility	140
Appendix 34a: Letter dated 17 May 2007 from Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs	141
Appendix 35: Letter dated 11 October 2006 from Fiona Woolf CBE, President of The Law Society	142
Appendix 36: Letter dated 29 June 2006 from Vivien Gambling, Chairman of the Housing Law Practitioners Association	143
Appendix 37: Letter dated 23 January 2007 to Yvette Cooper MP, Minister for Housing and Planning, Department for Communities and Local Government, re Human Rights Act: Declarations of Incompatibility	144
Appendix 38: Letter dated 27 February 2007 from Yvette Cooper MP, Minister for Housing and Planning, Department for Communities and Local Government, re Human Rights Act: Declarations of Incompatibility	145
Appendix 39: Letter dated 22 March 2007 to Yvette Cooper MP, Minister for Housing and Planning, Department for Communities and Local Government, re <i>Morris v Westminster City Council, Gabaj v First Secretary of State</i>	146
Appendix 40: Letter dated 13 April 2007 from Yvette Cooper MP, Minister for Housing and Planning, Department for Communities and Local Government, re <i>Morris v Westminster City Council, Gabaj v First Secretary of State</i>	146
Appendix 41: Letter dated 23 January 2007 to The Rt Hon. John Reid MP, Secretary of State for the Home Department, re Human Rights Act: Declarations of Incompatibility	147
Appendix 42: Letter from the Chairman dated 19 June 2007 to The Rt Hon. Lord Falconer of Thoroton QC, Secretary of State for Justice re Declarations of Incompatibility: <i>R (Clift) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and Another</i> [2006] UKHL 54	147

Reports from the Joint Committee on Human Rights in this Parliament 149

Summary

Parliament, as well as the judiciary, has a central role in protecting human rights in the United Kingdom. The Joint Committee on Human Rights is committed to scrutinising the Government's response to court judgments finding a breach of human rights. This is the Committee's first Report bringing together its monitoring work on judgments of the European Court of Human Rights (ECtHR) and declarations of incompatibility with the Human Rights Act made by courts in the UK (paragraphs 1-3).

When the ECtHR decides that the UK has violated a right under the European Convention on Human Rights (ECHR), the UK has some discretion as to how it amends its law, policy or practice so as to give effect to the judgment. The Committee notes that the importance of Parliament's role in relation to the implementation of judgments of the ECtHR has recently been dramatically increased as a result of a judgment of the House of Lords, *Leeds City Council v Price*. (paragraphs 4-13).

When a court in the UK makes a declaration of incompatibility, Parliament has to decide whether it agrees there is an incompatibility and, if so, how to remedy it. The Committee reports to Parliament only on issues arising from judgments which have become "final" (paragraphs 14-20).

The Committee recommends improvements in the way the Government treats the implementation of judgments of the ECtHR. The Committee notes that the way in which Government departments have responded to its inquiries in the course of its work in this area has varied considerably in quality. The Committee recommends that the Ministry of Justice should adopt a central coordinating role and that this would significantly improve consistency and increase the transparency of the process (paragraphs 21-27).

The Committee considers three issues arising from recent judgments against the UK by the ECtHR in which violations of ECHR were found: (1) the lack of a remedy for negligent breaches of privacy; (2) trial of civilians by military tribunals and (3) the adequacy of judicial review as a mechanism for appeal from administrative decisions. The Committee expresses concerns and makes recommendations about the Government's responses in relation to these significant issues (paragraphs 28-60).

The Committee follows up on some of the recommendations and conclusions in its earlier report, *Thirteenth Report of Session 2005-06, Implementation of Strasbourg Judgments: First Progress Report*, HL Paper 133, HC 954. The Committee continues to monitor a number of issues, including: (1) imprisonment for non-payment of fines/debts; (2) prisoners voting rights, (3) delay in the transfer of prisoners, (4) binding over orders, (5) limits on the right to marry, (6) access to information, and (7) delay in criminal proceedings (paragraphs 60 – 90). The Committee also considers issues where there have been serious delays in implementation, including in cases involving the investigation of the use of lethal force by security forces in Northern Ireland, adverse inferences being drawn from silence of suspects in Northern Ireland, the corporal punishment of children, security of tenure for Gypsies, consent to medical treatment and the rights of the mentally ill (paragraphs 91 – 105).

The Committee considers the record of responses to declarations of incompatibility by domestic courts, draws attention to shortcomings and recommends improvements. The

Committee considers the Government's responses to a number of declarations of incompatibility raising the following issues: (1) the appointment and removal of the nearest relative for the purposes of the Mental Health Act, (2) discrimination in access to social housing, (3) discrimination in the Government's sham marriages regime, (4) nationality discrimination in the early release of prisoners and (5) prisoners' voting rights (paragraphs 109-140).

The Committee recommends measures to overcome obstacles to implementation of court judgments finding breaches of human rights (paragraphs 141-165).

1 Parliament's role in relation to court judgments on human rights

Introduction

1. In many other jurisdictions with constitutional bills of rights, or other legal protections of human rights, court judgments are the single most important source of interpretation of the rights protected. In the UK's institutional arrangements for protecting human rights, however, Parliament, as well as the judiciary, has a central role to play in deciding how best to protect the rights which are considered to be fundamental. This means that in our system, when courts give judgments in which they find that a law, policy or practice is in breach of human rights, there is still an important role for Parliament to play in scrutinising the adequacy of the Government's response to such judgments and, in some cases, deciding for itself whether a change in the law is necessary to protect human rights and, if so, what that change should be.

2. Since its inception this Committee has considered it to be an important part of its role to help Parliament fulfil this function of scrutinising the Government's response to court judgments finding a breach of human rights.¹ In our report last year explaining the work we would be undertaking during this Parliament, we indicated that we intended to integrate our monitoring of the implementation of judgments of the European Court of Human Rights ("ECtHR") against the UK with more proactive scrutiny of "declarations of incompatibility"² given by UK courts under the Human Rights Act.³ This is our first report bringing together our monitoring work in relation to both judgments of the ECtHR and declarations of incompatibility made by UK courts.

3. To appreciate the nature of Parliament's constitutional role following court judgments finding breaches of human rights it is first necessary to be clear about the legal consequences of such judgments.

Judgments of the European Court of Human Rights

4. When the ECtHR decides that the UK has violated a Convention right, that judgment does not take immediate and direct effect in UK law. The Convention system is founded on the principle of subsidiarity: it is for the Contracting States, in the first instance, to decide how best to secure the substance of the Convention rights in their domestic legal system, and also to choose the means by which they comply with judgments of the Court. The Court does not direct States to take any particular steps to give effect to its judgments, or tell them how its judgments are to be applied in practice. The UK therefore has a degree

¹ See e.g. First Report of Session 2004-05, *Protocol No 14 to the European Convention on Human Rights*, HL Paper 8/HC 106, at paras 40-66; Nineteenth Report of Session 2004-05, *The Work of the Committee in the 2001-2005 Parliament*, HL Paper 112/HC 552, at para. 128; Thirteenth Report of Session 2005-06, *Implementation of Strasbourg Judgments: First Progress Report*, HL Paper 133/HC 954.

² A "declaration of incompatibility" is a declaration made by a court under s. 4 of the Human Rights Act 1998 that a provision of primary legislation is incompatible with an ECHR right. Such a declaration is only made where the court finds that it is not possible to interpret the provision in a way which is compatible with the Convention right.

³ Twenty-third Report of Session 2005-06, *The Committee's Future Working Practices*, HL paper 239/HC 1575, at paras 58-63.

of discretion as to the precise means by which it amends its law, policy or practice so as to give effect to the judgment.

5. However, although States have a degree of discretion in deciding how to respond to a finding of a violation, it is important to appreciate that this discretion is not unlimited. There are certain very clear legal obligations which arise following an adverse judgment of the ECtHR. The UK has, in the ECHR itself, undertaken to abide by the final judgment of the Court in any case in which the UK is a party.⁴ This undertaking to abide by the Court's judgments has been held to give rise to the following specific obligations:⁵

- (1) to put an end to the breach (the obligation of cessation);
- (2) to prevent further violations in the future (the obligation of non-repetition);
- (3) to repair the damage caused to the individual applicant by the violation in such a way as to restore as far as possible the situation existing before the breach (the obligation of reparation);
- (4) to pay to the individual applicant any award of "just satisfaction" made by the Court (the obligation to make just satisfaction).⁶

6. Under the terms of the ECHR itself, it is for the Committee of Ministers of the Council of Europe to supervise the implementation of final judgments of the Court.⁷ However, as previous reports of both this and our predecessor Committee have made clear, there is now a renewed focus on the importance of national implementation measures, partly because of concerns about the speed, effectiveness and transparency of the Committee of Ministers process.⁸

7. In our view, Parliament has an important role to play in scrutinising, at national level, the Government's performance of the obligations which arise following a judgment in which the ECtHR has found the UK to be in breach of the ECHR. Parliament, more effectively than the Committee of Ministers, can scrutinise the Government's response to ensure that it acts swiftly to fulfil the various obligations outlined above (cessation, non-repetition and reparation), and that it does so adequately.

8. We aim to advise and guide Parliament in the performance of this important function of national supervision of implementation measures following Court judgments. The

⁴ Article 46(1) ECHR provides: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."

⁵ In a number of judgments of the European Court of Human Rights explaining the nature of the obligation to abide by the Court's judgments: see e.g. *Papamichalopoulos v Greece* (1996) 21 EHRR 439 at para. 34; *Scozzari and Giunta v Italy* (2002) 35 EHRR 12, at para. 249; *Pisano v Italy (Striking Out)* [GC] App. No 36732/97, Judgment, 24 October 2002, at para. 43.

⁶ Under Article 41 ECHR, which provides for the award by the Court of just satisfaction to the injured party "if the internal law of the High Contracting Party concerned allows only partial reparation to be made".

⁷ Article 46(2) ECHR: "The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution." The Convention and the relevant Council of Europe documents all refer to the "execution" of judgments. We refer to "implementation" rather than execution throughout this report because we consider "execution" to sound too legalistic.

⁸ See e.g. First Report of Session 2004-05, *Protocol No 14 to the European Convention on Human Rights*, HL Paper 8/HC 106, at paras 40-66; Nineteenth Report of Session 2004-05, *The Work of the Committee in the 2001-2005 Parliament*, HL Paper 112/HC 552, at para. 128; Thirteenth Report of Session 2005-06, *Implementation of Strasbourg Judgments: First Progress Report*, HL Paper 133/HC 954.

obligations of cessation and non-repetition usually require the State to adopt “general measures” which change the relevant law, policy or practice in a way which puts an end to any continuing breach and prevents any future repetition of the violation. The obligations of reparation and to make just satisfaction require the State to take “individual measures” for the benefit of the individual applicant. The consideration of individual cases is expressly excluded from our remit. We are therefore mainly concerned with the adequacy of the general measures taken by the Government to bring the breach to an end and prevent future repetition. We are not concerned with the adequacy of individual measures in relation to a particular individual. However, we are concerned with whether the overall system of remedies is adequate to provide reparation for such an individual. To the extent that a judgment reveals a systemic deficiency in the domestic scheme of remedies this will therefore be a matter for our attention.

9. Moreover, the importance of Parliament's role in relation to judgments of the ECtHR has recently been dramatically increased as a result of a judgment of the House of Lords which severely restricts the ability of the courts to give effect to judgments of the ECtHR.⁹

10. Under the Human Rights Act, UK courts and tribunals are under a duty to “take into account” any judgment of the Strasbourg Court which the court or tribunal thinks is relevant to the Convention question which it has to determine.¹⁰ They are therefore not strictly required to follow rulings of the ECtHR, although the House of Lords has held that it is ordinarily the clear duty of our domestic courts to follow Strasbourg's interpretation of the Convention rights.¹¹ However, courts, which are “public authorities” for the purposes of the HRA, are also under a duty to act compatibly with Convention rights.¹² A court which acts incompatibly with a Convention right acts unlawfully. There is nothing in the judgment of the House of Lords or domestic rules of precedent which prevents the House of Lords, or the new Supreme Court, from revisiting their earlier decisions in light of a judgment of the ECtHR,

11. In *Leeds City Council v Price* the House of Lords considered what a UK court is required to do where there is an inconsistency between a domestic precedent, by which the court would ordinarily be bound, and a subsequent decision of the ECtHR. Is the UK court bound by the ordinary domestic rules of precedent, or do those rules have to be modified in light of the court's duty to act compatibly with Convention rights?

12. The Government, which intervened in the case, argued that a lower court should be entitled to depart from an otherwise binding domestic decision where there is a clearly inconsistent subsequent decision of the Strasbourg Court on the same point.¹³ It therefore argued for a strictly circumscribed relaxation of the doctrine of precedent in such circumstances. The House of Lords, however, rejected that argument.¹⁴ It held that the duties on courts under the Human Rights Act, to take Strasbourg judgments into account

⁹ *Leeds City Council v Price* [2006] UKHL 10.

¹⁰ Human Rights Act 1998, s. 2(1).

¹¹ *R (Ullah) v Special Adjudicator* [2004] UKHL 26.

¹² HRA s. 6(1).

¹³ *ibid* at para. 41 where the argument of the First Secretary of State, intervening, is summarised in the judgment of Lord Bingham.

¹⁴ *ibid* at paras 42-44.

and to act compatibly with Convention rights, did not require the domestic rules of precedent to be modified. Courts should follow the decision which is binding on them under the domestic rules of precedent, even if there is an unquestionable incompatibility between that precedent and a later decision of the ECtHR. In such circumstances, the House of Lords held, courts should express their view that there is an inconsistency between a binding precedent and later Strasbourg authority, but follow the binding precedent and give permission to appeal to a higher court. The Court of Appeal in the case in question had therefore been right to follow the binding precedent of a House of Lords decision, even though a subsequent Strasbourg decision was “unquestionably incompatible” with that House of Lords authority. There was only one partial exception to this rule that the binding precedent should apply, and that was in the “extreme” case where the domestic precedent was itself the very case in which the European Court had then reached a different view.¹⁵

13. Taken together with the non-retrospectivity of the HRA (which we consider below in Chapter 5), it is likely that the decision in *Leeds v Price* effectively excludes the judicial branch from having any significant role in the implementation of Strasbourg judgments against the UK. We are concerned that, without Parliament becoming involved, responsibility for the effective implementation of the judgments of the ECtHR will remain principally with the Government. If judgments are not given effect domestically and individuals are required to go to Strasbourg in order to gain just satisfaction, this will also contribute to the significant burden faced by the ECtHR as a result of repetitive cases. **The effect of the House of Lords decision in *Leeds v Price* is to make it all the more important that there is effective parliamentary scrutiny of the Government’s response to ECtHR judgments finding the UK in breach of the Convention and places an extra onus on Parliament to ensure that the law is changed as swiftly as possible following a finding of violation.**

Judgments declaring incompatibility under the Human Rights Act

14. Under the Human Rights Act, if a court cannot remove an incompatibility by way of interpretation,¹⁶ it does not have the power under the Act to strike the legislation down. Instead, it has the power to give a declaration of incompatibility.¹⁷ Following such a declaration of incompatibility by a court, it is for Parliament to decide whether it agrees that there is an incompatibility and, if so, how to remedy it. Under the scheme of the Act, the effect of a declaration of incompatibility is not to make the measure concerned unlawful. The Act expressly provides that a declaration of incompatibility “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given.”¹⁸ The Act thereby preserves Parliament’s ability to disagree with domestic courts on questions of compatibility, and, if it agrees that there is an incompatibility, to decide how it should be remedied. However, this role is subject always to the final decision of the ECtHR on compatibility, with which the UK must ultimately comply or withdraw from membership of the Council of Europe.

¹⁵ *ibid.* at para. 45.

¹⁶ Section 3 HRA 1998.

¹⁷ Section 4 HRA.

¹⁸ Section 4(6)(a) HRA 1998. Section 3(2)(b) and (c) similarly provide that the interpretive obligation in s. 3(1) “does not affect the validity, continuing operation or enforcement of any incompatible legislation.”

15. Parliament therefore also has an important role to play in scrutinising the Government's response¹⁹ to a declaration of incompatibility under the Human Rights Act. This role includes ensuring that the Government responds sufficiently swiftly to a final declaration of incompatibility, scrutinising any reasons the Government may put forward for disagreeing with the court's view of compatibility,²⁰ and scrutinising carefully the adequacy of the proposed response. As with judgments of the ECtHR, we are not concerned with the adequacy of individual measures taken in response to declarations of incompatibility, except to the extent that they raise systemic questions about the adequacy and effectiveness of the overall system of individual remedies for human rights violations.

Our methodology

16. We only report to Parliament in relation to issues arising out of court judgments which have become "final", that is, judgments where there is no possibility of any further appeal to a higher court.²¹ As we have sought to explain above, our scrutiny following a final court judgment finding a breach of human rights focuses on two questions: (1) what changes in law, policy or practice are required to bring the breach to an end and to stop it happening again? (2) is the overall system of remedies adequate to ensure that the individual receives reparation for the wrong?

17. To this end we have engaged in correspondence with the Government throughout the year about a number of different issues where courts (both here and in Strasbourg) have found our law, policy or practice to be in breach of human rights. We have asked detailed questions about how and when the Government proposes to remedy an incompatibility which has been identified in a court judgment, and engaged in detailed correspondence about the promptness and adequacy of the Government's proposed or actual response.

18. During this session, we have also sought to make our work in this area more accessible by publishing our correspondence with Ministers on our website and inviting submissions on the effectiveness of the implementation of judgments of the ECtHR by the UK. We welcome the submissions that we have received: they have made an important contribution to our work in this area.

19. In December 2006, in connection with our ongoing work in this area, we visited the Human Rights Directorate of the Council of Europe in Strasbourg, with whom we discussed their issues of concern in relation to the UK. These included the need for legislation to permit the re-opening of judicial proceedings after a judgement of the ECtHR, non-retrospectivity of the ECtHR and the decision not to incorporate Article 13 ECHR as part of the HRA. We also visited the ECtHR in Strasbourg, where we met with two judges of the Court and staff, including lawyers, from the Registry (the secretariat

¹⁹ Because of the scope preserved by the HRA for Parliament to disagree with a UK court about whether there is an incompatibility, it is more appropriate in this context to talk of scrutinising the Government's "response" to a declaration of incompatibility rather than in its "implementation".

²⁰ So far the Government has not taken this course but has always proposed remedial action following a declaration of incompatibility.

²¹ A judgment of the European Court of Human Rights is final if it is a judgment of the Grand Chamber or a judgment of a Chamber which the parties have declared they will not request to be referred to the Grand Chamber, or three months after judgment if no request for a reference to the Grand Chamber has been made, or when a request to refer to the Grand Chamber has been refused: Article 44(2) ECHR. A declaration of incompatibility under the Human Rights Act becomes final when there is no further right to appeal or where the time to appeal has expired or the Government has indicated that it does not intend to appeal.

serving the Court). We discussed with them our legislative scrutiny work and our role in monitoring the implementation of judgments. We also discussed a number of repetitive categories arising in UK cases. These included cases on pension discrimination against widows and discrimination cases brought by gay men and lesbians in the armed forces. We are grateful to those we met for their assistance.

20. In this report we aim to provide Parliament with the product of that monitoring work, to help Parliament perform the important roles we have sought to describe above. We also make a number of recommendations, both about general measures which we consider to be necessary to prevent future breaches of human rights and about improvements which we think can be made to the mechanisms for responding to court judgments finding a breach of human rights. In Chapter 2, we summarise for Parliament's attention some of the most important European developments emphasising the important of implementation at national level, and stressing in particular the role to be played by national parliaments. In Chapter 3, we report our analysis of the implementation measures proposed by the Government in relation to a number of significant human rights issues arising from recent judgments, including follow up on issues monitored in our last Report on implementation and on issues the resolution of which continues to be unacceptably delayed. In Chapter 4, we report on the Government's proposed action on the significant human rights issues raised by declarations of incompatibility made under s.4 of the Human Rights Act 1998 by our domestic courts. In Chapter 5, we consider the structural barriers to the swift and effective implementation of Strasbourg judgments and to prompt and adequate responses to declarations of incompatibility, and make some recommendations aimed at improving the operation of domestic mechanisms for responding swiftly and appropriately to adverse Strasbourg judgments and declarations of incompatibility. We publish as appendices to this Report our recent correspondence with the Government and other submissions.

2 The importance of national implementation measures

21. In previous reports, both we and our predecessor Committee have drawn Parliament's attention to the growing importance attached in the ECHR system to national measures of implementation, including by providing proper redress at national level following a violation, by improving domestic remedies for Convention violations and by improving the implementation of judgments of the ECtHR.²²

22. Over the course of the past year, significant steps have been taken by the institutions of the Council of Europe, including the Council of Ministers and the Parliamentary Assembly of the Council of Europe ("PACE") to stress the importance of effective domestic implementation of judgments of the ECtHR.²³

23. We summarise the recent developments in the work of the institutions of the Council of Europe in the Annex to this Report. Two points are particularly worthy of note. Firstly, the Council of Ministers Steering Committee on Human Rights (known as "CDDH") has been heavily involved in monitoring the effective implementation of judgments as part of its work on ensuring the effectiveness of the implementation of the ECHR at a national level.²⁴ Part of this work has involved a survey of member states. We have examined the summary of the Government's responses to CDDH and we note that the Government refers to the work of the Committee as supporting the UK's compliance with a number of the Directives. **In light of our interest in the issue, and in particular its report on Protocol 14 to the ECHR, we regret that we were not supplied with copies of the UK's submission to the CDDH review. We look forward to receiving any similar Government submissions, which refer to our work, in advance of their transmission to the Council of Europe.**

24. Secondly, the CDDH is currently reviewing its work in this area but only the Northern Ireland Human Rights Commission has responded from the UK.²⁵ **We encourage the Government to publicise this review among their stakeholder groups. We hope that the new Commission for Equality and Human Rights will work closely with the CDDH review from October 2007.**

²² Thirteenth Report of Session 2005-2006, *Implementation of Strasbourg Judgments: First Progress Report*, HL Paper 133/HC 954; Nineteenth Report of Session 2004-2005, *The Work of the Committee in the 2001-2005 Parliament*, HL Paper 112/HC 552

²³ We summarise the recent developments in the work of the institutions of the Council of Europe in an Annex to this Report: Annex 1.

²⁴ In 2004, following the adoption of Protocol 14, the Committee of Ministers issued a declaration on ensuring the effectiveness of the implementation of the ECHR. Following this declaration, terms of reference were issued to the CDDH to conduct a review of the implementation of five Recommendations of the Committee of Ministers geared towards improving the implementation of the Convention. These recommendations are Rec (2002)2 on the re-examination or re-opening of certain cases at domestic level following judgments of the European Court of Human Rights; Rec (2002) 13 on the publication and dissemination in the member States of the text of the ECHR and the case-law of the European Court of Human Rights; Rec (2004) 4 on the ECHR in university education and professional training; Rec (2004) 5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR; Rec (2004) 6 on the improvement of domestic remedies.

²⁵ CDDH(2007)011 Addendum I, "Interim Report, Sustained Action to ensure the effectiveness of the implementation of the ECHR", 13 April 2007, paras 16-17.

25. In light of the recent recommendations of PACE and the ongoing work of the other Council of Europe institutions, we wrote to the Lord Chancellor on 23 January 2007 to confirm that he has ministerial responsibility for co-ordination of the implementation of ECtHR judgments.²⁶ We also asked, in light of increased calls for effective domestic implementation, what steps had been taken within the Department for Constitutional Affairs (“DCA”) to improve or enhance domestic mechanisms for rapid and effective implementation.²⁷ We did not receive the Government’s response until 18 May 2007.²⁸ While we understand that there has been some clear disruption in the work of the Department during the recent reorganisation and establishment of the Ministry of Justice, **we consider a delay of this length entirely unacceptable.**

26. The response that we received from the Lord Chancellor was not encouraging. He explained that in his view the need for a formal co-ordinating authority is most acute in coalition governments, and that the Government did not consider that Ministerial or departmental co-ordination of responses to judgments was necessary in the UK as a result of collective Cabinet responsibility. We accept that a central co-ordinating body for the rapid implementation of ECtHR judgments may be even more necessary in systems where coalition Government is common. However, in practical terms, we consider that the formal establishment of central mechanisms for coordination of implementation of judgments would greatly improve the capacity of the UK to execute judgments rapidly and consistently. The conduct of our review work over the past year has confirmed our view that a coordinating role for the Ministry of Justice is essential.²⁹ The responses we received from individual Departments, varied vastly in their quality. A number of responses were received months after our original requests for further information. **We consider that central coordination by the Ministry of Justice could significantly improve the current domestic mechanism for the implementation of judgments.**

27. The Lord Chancellor accepts that if a co-ordination role was required, it would be his responsibility. Currently, the responsibility for implementation of a judgment of the ECtHR remains with the relevant Departmental Minister. The lead Department will interact with the Committee of Ministers through the Foreign and Commonwealth Office and “advice and assistance may be given as necessary by officials in the Ministry of Justice and the Attorney General’s office”.³⁰ In light of the responsibility of the Human Rights Division within the Ministry of Justice for the delivery of the Government’s human rights policy, we consider that their essentially passive and *ad-hoc* involvement in Departmental implementation of ECtHR judgments is inadequate to ensure that all Departments take their responsibilities for implementation seriously. **We recommend that the Government create a formal role for the Ministry of Justice in coordinating the implementation of Strasbourg judgments. The Department currently undertakes a cross-Government role in monitoring declarations of incompatibility for the purposes of the HRA and publishes regular tables noting progress. We consider that the creation of a similar**

²⁶ Appendix 1.

²⁷ Appendix 1.

²⁸ Appendix 2.

²⁹ Working within the devolution settlement, the Ministry for Justice has overall responsibility for the Government’s policy on human rights and monitoring the UK’s compliance with the ECHR, Nineteenth Report of Session 2004-05, paras 235-237.

³⁰ Appendix 2.

database for the implementation of outstanding ECtHR judgments would greatly increase transparency.

28. We note the Lord Chancellor's observation that our staff are in "regular contact" with officials at the Ministry of Justice. We welcome the often-invaluable assistance of the officials in the Human Rights Division. However, co-ordination on these issues has generally been on an ad-hoc basis and is without any real consistency. This is most likely as a result of the current arrangements, as the Human Rights Division will only become involved in the implementation of a judgment if specifically asked to assist.

29. It would also greatly assist our work if the Information Notes provided by the Government to the Committee of Ministers for the purpose of supervising the implementation of judgments of the European Court of Human Rights could be provided to us as and when they are produced. Currently, these Notes are prepared by individual Departments and transmitted to the Committee of Ministers by the Foreign and Commonwealth Office. Unless asked for advice, the Ministry of Justice has no formal input into their preparation. **In light of its responsibility for maintaining human rights policy across Government, we recommend that the Ministry of Justice should have a formal role in the preparation of these Information Notes, and in monitoring and collating information about the effectiveness of the implementation of judgments across Government.**

3 Issues monitored by the Committee

Recent Judgments against the UK

30. The Council of Europe figures for January 2006 to December 2006 show 1461 new applications were lodged against the United Kingdom. 928 applications were declared inadmissible or struck off the Court's list during the same period. During that period, 27 judgments were delivered in applications against the United Kingdom.³¹

31. We have considered the issues arising out of four judgments against the UK delivered by the Court between March 2006 and January 2007 in which the Court found a violation of one or more provisions of the Convention.³² In each of these cases, our initial consideration indicated that some change in law, policy or practice might be needed to avoid the risk of further breaches of the Convention in future.

(1) Lack of a remedy for negligent breaches of privacy

32. Two cases against the UK raise the important issue of the lack of a remedy in UK law for negligent breaches of privacy, first in the context of police powers to enter and search premises and secondly in the context of strip searches of visitors to prison.

33. In the case of *Keegan v UK*, the ECtHR found that UK law failed to provide a remedy in respect of interferences with the right to respect for home and private life arising out of the negligence of the police in applying for a search warrant.³³ In 1999, before the Human Rights Act 1998 had been brought into effect, the police forced entry to the applicants' home in the mistaken belief that an armed robber lived at the address. This action was taken on the basis of a warrant obtained without it being properly verified that there was a connection between the address in question and the offence. The applicants' civil proceedings against the police for the tort of maliciously procuring a search warrant failed in the UK courts because it was necessary to prove malice to succeed, and although the courts found that if proper enquiries had been made there would have been no reasonable or probable cause to apply for a search warrant, they also found that the requirement of malice was not made out. Incompetence or negligence was not sufficient.

34. The ECtHR found that they had suffered breaches both of their right to respect for their home in Article 8 ECHR and of their right under Article 13 ECHR to an effective remedy in respect of that breach. To be compatible with Article 8 ECHR, the entry into the applicants' home needed to be necessary and proportionate. While there might have been relevant reasons in this case to undertake a search, the Court concluded that in the circumstances "they were based on a misconception which could, and should, have been avoided with proper precautions".³⁴ The fact that the police did not act maliciously was not

³¹ Figures and other information on applications to the court are available on the Council of Europe website: www.coe.int.

³² In a fifth case, *Saadi v UK*, App. No 13229/03, Judgment, 11 July 2006, the ECtHR found a violation of the right in Article 5(2) ECHR to be informed promptly of the reasons for detention, where an asylum seeker was not told of the reasons for his detention until 76 hours after he had been detained. However, this judgment is not final, because the case has been referred to the Grand Chamber, and we therefore do not deal with it in this report.

³³ App No 28867/03, Judgment, 18 July 2006.

³⁴ *ibid.* para 33.

decisive in Convention terms. The exercise of powers to interfere with home and private life must be confined within reasonable bounds to minimise the impact of such measures on the personal sphere of an individual's private life. In a case where such basic steps as the verification of the connection between an address and the offence under investigation were not carried out, the resulting police action could not be regarded as proportionate and the Court therefore found that there had been a breach of the right to respect for home and private life in Article 8. In so far as the applicants' only means of redress was limited to circumstances in which malice could be shown, the domestic courts were unable to examine issues of proportionality or reasonableness and the applicants therefore did not have an effective remedy, in violation of Article 13 ECHR.³⁵

35. We wrote to the Home Secretary on 23 January 2007, asking, amongst other things; whether, had this case occurred after 2 October 2000, when the HRA came into force, sections 7 and 8 HRA would have provided the applicant with an effective remedy for such negligent, but not malicious, searches. If not, we asked whether the Government had considered the introduction of a new remedy for individuals adversely affected by negligent searches.³⁶

36. We received a reply dated 10 May 2007, from Liam Byrne, Minister for State at the Home Office.³⁷ The Minister told us in response that any breach of the PACE Codes governing the entry and search of premises may render evidence inadmissible; that a breach of the Codes could render individual officers subject to disciplinary proceedings; and that it would be "open to any aggrieved party to consider civil proceedings". According to the Minister, these remedies were available both prior to and since the introduction of the HRA. In addition, an HRA claim would now provide an adequate remedy.

37. We agree with the Minister that, in principle, sections 7 and 8 HRA could provide a remedy for a negligent police search in breach of Article 8 ECHR conducted after 2 October 2000. A person suffering harm as a result of a similar negligent search after that date would be able to bring a free-standing claim for damages for breach of Article 8 under s. 7 of the HRA. In our view, however, the Government's response that adequate remedies were available in respect of negligent searches even prior to the introduction of the HRA entirely fails to understand the significance of the finding by the ECtHR that there was a breach of Article 13 ECHR. The applicants in this case pursued civil proceedings but did not have a remedy in domestic law. Pre-2000, the only civil remedy available to the applicants, in malicious procurement of a warrant and trespass, required them to prove malice. As the search had been performed negligently, the applicants had no effective remedy.

38. We also asked for information on the steps taken to draw the judgment of the ECtHR to the attention of police authorities and to ensure that appropriate efforts are made in future to avoid disproportionate, unnecessary or negligent searches in breach of Article 8 ECHR. The Minister in his response of 10 May told us that as the foundation for the breach in this case was negligence, there was no need to draw this judgment specifically to the attention of police authorities. He explained that as the police service is required to

³⁵ *ibid.* para 43.

³⁶ Appendix 3.

³⁷ Appendix 4.

carry out all of their activities in a fair, proportionate and lawful manner, there would be little to be gained from “sending out a notification to forces telling them not to be negligent”.

39. We are concerned that this response again underestimates the significance for police forces of the finding that there was a lack of an effective remedy against the police in respect of their negligent search. Prior to this decision of the ECtHR, the police were only liable in damages for the harm caused by searches where malice could be proved. They could not be liable in damages even if they negligently failed to take reasonable and available precautions before applying for a search warrant. The judgment therefore establishes a significant new head of liability for the police arising out of operational matters, where they result in interferences with Convention rights. In our view, this significant broadening of the police’s potential liability in damages in respect of their power to enter and search premises, beyond the tort of maliciously procuring a search warrant, is sufficiently significant to be drawn specifically to the attention of police authorities. **We recommend that the Government specifically draw the attention of all police forces to the judgment in *Keegan v UK*, pointing out that they now risk liability in damages if they negligently use their power to enter and search premises.**

40. We are also concerned that the Government’s response makes light of the fact that, despite the detailed provisions in the Police and Criminal Evidence Act and the associated PACE Codes of Practice on which the Minister relies, the officers in this case were shown to have breached the right to respect for private life and home by failing to act in a fair, proportionate and lawful manner. **We consider that where a finding of a breach of the ECHR is the result of a departure from existing law, procedure, Guidance or Codes of Practice, the Government should consider whether the relevant law, procedure, Guidance or Codes of Practice are adequate, and, if so, whether it would nevertheless be appropriate to remind the relevant authorities of their obligations to act in accordance with the relevant law, procedures, Guidance or Codes of Practice** We recommend that **the Government take the opportunity to remind police forces of the importance of compliance with the relevant provisions of PACE and the relevant PACE Codes of Practice at the same time as it points out the new potential liability in damages for negligently failing to comply with the limitations on the scope of their powers to enter and search.**

41. In *Wainwright v UK*, the applicants were each subject to a strip search while visiting a relative in prison.³⁸ In 2003, the House of Lords concluded that as the searches took place before 2 October 1998, the Human Rights Act did not apply.³⁹ The House of Lords indicated that, in any event, had Article 8 ECHR applied, in their view, the Convention would not treat a negligent invasion of privacy as a breach of Article 8 ECHR for which the applicant could recover damages. Although one of the applicants was able to recover damages for battery, neither he nor his mother, the other applicant, were able to secure redress for the distress associated with the search, or any alleged breach of their Article 8 rights before the domestic courts.⁴⁰

³⁸ App No 12350/04, Judgment, 26 September 2006.

³⁹ *ibid.* paras 23-25; [2003] UKHL 53.

⁴⁰ *ibid.*

42. The ECtHR held that the searches were in breach of the right to respect for private life because they did not comply with prison guidance on their conduct, effective consent was not secured and they were not proportionate to a legitimate aim in the manner in which they were carried out. It also found a breach of the right to an effective remedy in Article 13 ECHR because in the circumstances the applicants had no means of securing an adequate remedy for the breach of the right to respect for privacy which it had upheld.

43. We wrote to the Lord Chancellor on 23 January 2007 and asked for further information on the steps the Government intended to take to give effect to this judgment; and whether the Government had considered the introduction of any legislative protection for privacy in light of the distinct approaches of the House of Lords and the ECtHR to the requirements of Article 8 ECHR. We also asked for details of the steps taken to disseminate the judgment to prison and police authorities and to the judiciary.⁴¹

44. In his response, the Minister explained that the Government considered that the breach of the Convention in this case arose from “specific failures arising from the circumstances of the case, rather than existing policy”.⁴² If established policy had been applied, and the correct procedures operated, the searches would have been carried out in compliance with Article 8 ECHR. In any event, the HM Prison Service Policy in relation to visitor searching is now “very different to 1997” and “more use is made of closed or closely observed visits, with strip searching only occurring rarely”.⁴³

45. We accept that the breach of Article 8 in this case was as a result of a failure to follow existing procedures and guidance. We welcome the steps taken by the Government to disseminate the judgment to prison staff, reminding prison staff of the appropriate policy on strip searching, following correct procedures and maintaining full and accurate records. We note that the amended policy on searches, dealing with the issues raised in this case, was not expected until April 2007, some time after the decision of the ECtHR.⁴⁴ Officials at the Ministry of Justice have recently informed us that this policy has not yet been published. We regret this delay and hope to receive a draft copy as soon as one is available.

46. As far as the lack of an effective remedy is concerned, the Government do not consider that a new statutory tort of invasion of privacy is “appropriate or necessary”. The Lord Chancellor explained that since the HRA came into force, victims of unlawful action can bring a case under the Act and “the Court must, under section 2, take into account the jurisprudence of the ECtHR, including the decision in *Wainwright*”.

47. Despite the ability of an individual to bring a claim for damages under Sections 7 – 8 HRA, we consider that there remains some doubt as to whether the applicants would have access to an effective judicial remedy if they brought their case today. The House of Lords decision in *Wainwright* gives strong, albeit non-binding, guidance that a negligent invasion of privacy would not give rise to a breach of Article 8 ECHR, and so, could not give rise to a claim under the HRA:

⁴¹ Appendix 5.

⁴² Appendix 6.

⁴³ Appendix 6.

⁴⁴ Appendix 6.

Although Article 8 guarantees a right of privacy, I do not think that it treats that right as having been invaded and requiring a remedy in damages, irrespective of whether the defendant acted intentionally, negligently or accidentally.⁴⁵

48. The ECtHR in *Wainwright* did not comment on whether Sections 7 - 8 of the Human Rights Act could afford an effective remedy for the purposes of Article 13 ECHR, without the realistic availability of damages. However, we consider that references to civil liability and the need for “redress” in the judgment of the ECtHR in *Wainwright* are clear authority that the possibility of financial compensation would be necessary to provide an effective remedy in this case. We think it likely that, following the House of Lords decision in *Price v Leeds*, domestic courts would be bound to follow the domestic authority, despite the implications for Article 13 ECHR should an action for damages under Sections 7 – 8 ECHR be ruled out.

49. In light of these concerns, we do not share the Government’s confidence that the Human Rights Act entirely removes any risk that our Courts may be incapable of providing an effective remedy for the purposes of a breach of the right to respect for private life, in breach of Article 13 ECHR. We consider that, in each case, the Government will need to undertake a fuller analysis of the likelihood that damages will be considered necessary for the purposes of Article 13 ECHR and whether domestic courts are either a) likely to be bound to follow inconsistent domestic authority on the substantive application of the Convention and/or b) whether the domestic courts are likely to consider that damages are recoverable under Sections 7 – 8 HRA. Where a remedy under the Act is uncertain, we consider that it would be the responsibility of the Government to consider whether a statutory remedy is necessary to implement the judgment of the ECtHR and to avoid repeat violations of Article 13 ECHR.

(2) *Trials of civilians by military tribunals*

50. In *Martin v UK*, the applicant complained of a violation of Art.6(1) ECHR. He had been charged with murder in Germany, and as a civilian member of a British military services family living there, was subject to military law.⁴⁶ Germany waived jurisdiction and a court-martial was convened. Four members of the court-martial bench were senior officers subordinate to the president and the convening officer, and one of them was within the latter’s chain of command. Two more were civilian civil servants there solely for the trial and under the same command while in Germany. The applicant protested that a court-martial was unfair and oppressive and that a simple majority vote would be enough to convict him, whereas trial by jury would require a majority of ten votes to two. These submissions were rejected and the House of Lords dismissed his appeal.⁴⁷

51. The ECtHR stressed that while the Convention did not absolutely exclude the jurisdiction of military courts over civilians, extremely careful scrutiny was required. Only in very exceptional circumstances could the determination of criminal charges against civilians by military courts be compatible with the right to a hearing by a fair and impartial

⁴⁵ App. No 12350/04, para 24, per Lord Hoffman. Later cases have taken a similarly restrictive view of the recoverability of damages under Sections 7 – 8 ECHR. See for example *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, para 66; *Greenfield v Secretary of State for the Home Department* [2005] UKHL 14, paras 9 and 19.

⁴⁶ *Martin v UK*, Application No 40426/98, 24 October 2006.

⁴⁷ *ibid.* paras 19-20.

tribunal. In this case, the composition, structure and procedure of the court-martial were themselves sufficient to raise a legitimate fear as to its lack of independence and impartiality. There were essential safeguards lacking. Specifically, all six members of the tribunal were subordinate in rank to the Convening Officer; although there were two civilian members of the Court-martial, those members did not have sufficient influence over the Court-martial as a whole, including over the military members to satisfy the need for independence and impartiality guaranteed by Article 6(1).⁴⁸

52. Since this case was considered, a number of reforms have been made to the legislative framework for armed forces' discipline. The latest reforms, in the Armed Forces Act 2006 provide for a single disciplinary system for all three branches of the forces.⁴⁹

53. We wrote to the Minister on 23 January 2007 to ask whether the Government considered that the provisions of the Armed Forces Act 2006 were compatible with the requirement that the determination of criminal charges against civilians by military courts could be justified only in "very exceptional circumstances".⁵⁰ In reply, the Minister explained that it was the Government's view that the judgment of the ECtHR does not prevent the use of courts established under legislation dealing with the armed forces, but rather that any courts dealing with civilians must meet the requirements of a civilian court. The Minister explains that s155 of the armed forces Act 2006 enables the Government to make special provision as to the member of any court martial where the defendant is a civilian. The Minister explains that the Government intend to use this power to provide for all of the members of a court martial to be civilians when the defendant is a civilian. We note that the Government is still considering whether there may be some "exceptional circumstances" where lay members of the court might be members of the armed forces.⁵¹

54. The Government provided us with a copy of the Information Note prepared for the Committee of Ministers in this case, dated 28 February 2007. This explains that during the period before the Armed Forces Act 2006 comes fully into force, the Government intends to use regulation making powers to amend the existing Service Discipline Acts in order to ensure that where civilians are tried in the court martial system, they will generally be tried by a panel entirely consisting of civilians, unless there are "compelling reasons" to justify one or more military members. This note indicates that the Government intend that the necessary amendments should be in place by the end of 2007.⁵² **We welcome the decision to provide us with a copy of this information, which has assisted our analysis of the Government's views in this case.**

55. In so far as the decision of the ECtHR in *Martin* is based on the structural deficiencies of the court martial in this case, we agree that the reforms which took place after his trial have significantly reduced the risk that a trial of a civilian within either the existing armed forces legislation or under the Armed Forces Act 2006 would be considered structurally lacking in independence or impartiality. However, the ECtHR in *Martin* gives a very strong

⁴⁸ *ibid.* paras 43-54.

⁴⁹ We reported on the Armed Forces Bill, but did not expressly consider the trial of civilians. Twenty-second Report of Session 2005-06, *Legislative Scrutiny: Twelfth Progress Report*, HL Paper 233/HC 1537

⁵⁰ Appendix 7.

⁵¹ Appendix 8.

⁵² Appendix 9.

indication that the case-law of the Court dealing with the trial of military personnel by military courts must be distinguished from the trial of non-military personnel by military courts. The Court explains that the power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so, only on a clear and foreseeable basis. The existence of compelling reasons must be substantiated in each specific case and it is not adequate for national legislation to allocate certain categories of offence to military courts. Although the ECtHR did not have to decide whether compelling reasons were present in this case, it had considerable doubts whether practical or utilitarian considerations would be sufficiently compelling to justify the trial of a civilian before a military tribunal.⁵³

56. The Government considers that, provided the composition of the Court, namely, the Standing Civilian Court or the Court Martial, is appropriately constituted when they deal with civilians, that the ECtHR will not consider these courts to be “military courts”. The Minister does not explain this view, but explains that the provision for trial in legislation dealing with the Armed Forces is inevitable “because of the Service context in which the jurisdiction is required”. This justification echoes the general practical or utilitarian arguments for trial in a military context which the ECtHR in *Martin* warns against. **We consider that it is likely that the amendments to the Service Discipline Acts since 1994 meet the structural reasons for the breach of Article 6 ECHR identified in Martin. However, we do not share the Government’s confidence that, provided the composition of the Court is adequate, trial of civilians in a military context, pursuant to either the existing Service Discipline Acts or the Armed Forces Act 2006, will not give rise to a risk of incompatibility with Article 6 ECHR in future.**

57. We are particularly concerned by the proposals of the Government to allow for trial of civilians by a military panel in “exceptional circumstances”. The Minister gives an example of a contractor accused of a crime, but working in a dangerous area where an inadequate number of civilians are available to form a Court. This example appears to be based upon precisely the same utilitarian arguments that *Martin* calls into doubt. **We look forward to receiving further details of the Government’s proposals in draft as soon as they are available.**

(3) Adequacy of judicial review

58. The case of *Tsfayo v UK* involved an appeal against decisions on council tax and housing benefits.⁵⁴ The ECtHR held that the Housing Benefit Review Board (“HBRB”) was not an independent and impartial tribunal compatible with the requirements of Article 6(1) ECHR. The HBRB (which no longer exists), had comprised five elected councillors from a local authority, and had rejected the applicant’s appeal against that local authority’s refusal to pay backdated council tax and housing benefits. The applicant unsuccessfully sought judicial review of the board’s decision. The Government submitted that although the board did not satisfy the requirements of Art.6 since it included five elected councillors from the same local authority that would be paying the benefit, the High Court on judicial review had sufficient jurisdiction to ensure that the proceedings as a whole complied with Art.6(1) ECHR.

⁵³ *Martin v UK*, para 45.

⁵⁴ App No 40426/98, Judgment, 24 October 2006.

59. The ECtHR stressed that judicial review of administrative decisions will only be able to satisfy the requirements of Article 6(1) ECHR in circumstances where the issues to be determined in the decision making process require a “measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims”, or where the assessment of the facts in a particular case are “merely incidental” to a broader judgment on policy which it would be appropriate for a democratically accountable authority to take. The ECtHR decided that the issue to be determined by the Board in this case, namely whether there was a “good cause” for the applicant’s delay in making a claim for housing benefit was a simple question of fact, and therefore required determination by an independent and impartial tribunal with full jurisdiction to rehear the evidence and to substitute its own views. **As the Housing Benefit Review Boards have been replaced by Tribunals established under the Child Support, Pensions and Social Security Act 2000 general implementation measures are not needed in order to change the offending decision-making process considered in this case.**

60. However, this case engages with a recurring point of law on which the Committee has cause to disagree with the Government, namely when recourse to judicial review of the reasonableness of administrative decision making will be adequate to satisfy the requirements of Article 6(1) ECHR for a hearing by an independent and impartial tribunal. Relying on earlier case-law of the House of Lords and the ECtHR, the Government appears to consider that Article 6(1) ECHR will be satisfied in any case where an “executive” or “administrative” decision is subject to judicial review. For example, the Explanatory Notes accompanying the Legal Services Bill, explain the Government’s view that there is a line of authority “to the effect that it is not necessary for an appeal to lie to a court where judicial review is possible”.⁵⁵

61. We have consistently questioned the Government’s assertion that such a line of authority exists and consider that the decision in *Tsfayo v UK* confirms our position.⁵⁶ Judicial review of an executive or administrative decision may, in some circumstances, satisfy the requirements of Article 6(1) ECHR. This will however depend on a number of factors, including: a) the type of decision being taken; b) the nature and characteristics of the decision maker; and c) whether the decision is a first instance decision or the applicant has access to some intermediate form of appeal to another decision maker. We wrote to the Lord Chancellor on 23 January 2007 to ask whether the Government considered that the decision in *Tsfayo* required them to change their position. We also asked what steps, other than recourse to judicial review, the Government considered were necessary in order to ensure that an individual had access to an independent and impartial tribunal where an administrative or executive decision stood to determine their civil rights and obligations.⁵⁷

62. The Lord Chancellor’s response repeats the Government’s view that many “administrative decisions are subject to full appeal. In other cases, the Government’s position is that judicial review provides an adequate review process.”⁵⁸ We will continue to scrutinise any legislative proposals which provide administrative or executive decision

⁵⁵ Application No 60860/00, Judgment, 14 November 2006.

⁵⁶ See for example our recent report on the Legal Services Bill and on the Concessionary Bus Travel Bill, Third Report of Session 2005-06, HL Paper 39/HC 287, paras 2.17-2.18 and 1.04-1.16.

⁵⁷ Appendix 10.

⁵⁸ Appendix 6.

making powers for compliance with Article 6(1) ECHR. **We are concerned that the Government's blanket approach to decision making powers and the Convention may create an unnecessary risk to the right to an independent and impartial hearing.**

Issues previously monitored

63. In this section, we follow up progress made on implementation in relation to issues raised by judgments considered in our previous report. We do not propose to set out the facts in each of these cases at any length and this section should be read together with our previous report.

(1) Imprisonment for non-payment of fines/debts

64. In our last Report, we noted that guidance on the issues arising from certain cases concerning the non-payment of fines/debts was being prepared.⁵⁹ The Magistrates Association published a Guidance Note on this issue in September 2006.⁶⁰ We wrote to the Minister to ask for an explanation of the Government's view that this Guidance Note is adequate to execute the judgments in these cases effectively.⁶¹ The Lord Chancellor explained that the decisions in these cases were based on shortcomings in the procedures adopted by magistrates' courts and that the Guidance Note "reminded magistrates of some of the pitfalls which could be encountered when considering imprisonment of defendants for non-payment of fines and civil liabilities." The Government considers that the inclusion of a checklist in the Guidance Note adequately implements these judgments.

65. The Guidance Note correctly explains that the ECtHR considered that imprisonment for non-payment was a "remedy of last resort". It accurately identifies the shortcomings identified by the ECtHR in the procedures adopted by the magistrates in those cases. It includes a short checklist for magistrates considering imprisonment for non-payment of fines. Several of the items identified in this checklist are to be commended. Magistrates are prompted to give consideration to all other enforcement options before committing an individual to custody and are reminded that they must advise defendants of the availability of legal aid; Justices Clerks are reminded to keep an accurate record of each element of the judicial decision.

66. The Guidance Note does not remind magistrates and justices clerks of the importance of acting within the scope of their powers and the need to comply with any statutory or other conditions before proceeding to commit a person to custody (and where required, to make an appropriate assessment of a defendant's means). We consider that the inclusion of this additional guidance could have improved the clarity of the Guidance Note. **We are concerned that a significant part of the guidance refers to the need for magistrates, or justices clerks, to avoid any acceptance that their actions have been "unlawful"; "in excess of jurisdiction" or "not properly carried out", in order to avoid any "adverse bearing" on any potential civil claim for compensation (paras 8 – 10).** However, we

⁵⁹ *Beet v UK, Lloyd and others v UK*, Thirteenth Report of Session 2005-06, paras 36 – 40.

⁶⁰ A copy of the guidance note is available online:
http://www.magistratesassociation.org.uk/branch_information/noticeboard%20attachments/imprisonment-for-non-payment-of-fines-guidance.doc.

⁶¹ Appendix 5.

accept that if Magistrates act within their powers, and follow the checklist identified in the Guidance, it is unlikely that their actions will lead to a breach of the Convention.

(2) Prisoner voting

67. In *Hirst v UK*, the Grand Chamber of the ECtHR noted that the current blanket ban on prisoners voting in the UK applied to a wide range of offenders, and did so in a way which was indiscriminate, applying irrespective of the length of sentence, gravity of the offence or individual circumstances. The general, automatic and indiscriminate nature of the ban fell outside the State's margin of appreciation and was incompatible with the right in Article 3, Protocol 1 ECHR.

68. On 2 February 2006, the Secretary of State for Constitutional Affairs announced that a consultation document on the implementation of the *Hirst* judgment was in preparation and would, he hoped, be available in a "few weeks time". We welcomed the announcement of this consultation in our last Report. Mr Hirst wrote to us in 19 June 2006 highlighting the delayed introduction of the consultation paper and expressing dissatisfaction at the Government's dilatoriness in this matter.⁶²

69. The DCA finally published their consultation paper on the Voting Rights of Convicted Prisoners on 14 December 2006.⁶³ The Government envisages that this consultation – which is presented as "Stage 1" – will be followed by a further "Stage 2" process involving proposals for legislation and a Partial Regulatory Impact Assessment. Stage 1 of the consultation process "sets out the principles behind the arguments for and against convicted prisoners retaining the right to vote whilst they are detained in prison, and aims to ascertain whether any form of enfranchisement should be taken forward". When the consultation paper was published, it was clear that any necessary reforms would not be in place in time for the Northern Irish Assembly elections in March 2007 and the Scottish Parliament, National Assembly for Wales, and local government elections in England and Scotland in May 2007.

70. In the Consultation Paper, the Government expressed its "firm belief" that "individuals who have committed an offence serious enough to warrant a term of imprisonment, should not be able to vote while in prison" and the consultation does not offer total enfranchisement of all prisoners as an option for change. It asked respondents to comment on retaining total disenfranchisement, despite this being the only option that the Government accepts is incompatible with the judgment of the Grand Chamber.⁶⁴

71. In January, we wrote to the Lord Chancellor to ask for further information on the significant delay involved in the launch of the consultation process; for a timetable for the completion of the consultation stage and justification of the decision to hold a two-stage consultation process; the Government's reasons for consulting on the maintenance of a

⁶² Appendix 11.

⁶³ <http://www.dca.gov.uk/consult/voting-rights/condoc.htm>.

⁶⁴ Consultation Paper, paras 57-58.

total ban in light of the ECtHR ruling and for refusing to consult on lifting the existing ban entirely.⁶⁵

72. While we were waiting for the Government's response, the Court of Session sitting as the Registration Appeal Court Scotland made a declaration of incompatibility in respect of section 3 of the Representation of the People Act 1983, concluding that, in light of the judgment in *Hirst v UK*, the then forthcoming elections for the Scottish Parliament would "take place in a manner which was not "Convention-compliant".⁶⁶ We wrote to the Lord Chancellor to ask whether the Government agreed there was a need for urgent action to remedy the incompatibility identified in *Hirst* and to ask whether the Government had considered using the Remedial Order procedure to provide a remedy.⁶⁷

73. On 2 March 2007, the Court of Appeal of Northern Ireland refused to make a declaration of incompatibility in similar terms.⁶⁸ In April 2007, the Joint Committee on Statutory Instruments considered the terms of the draft Scottish Parliament (Elections etc) Order 2007. An Explanatory Memorandum was presented with this Order, in which, the relevant Minister explained that he could not certify that the proposals were compatible with the Convention, as a result of *Hirst*. That Committee drew this incompatibility to the attention of both Houses, as an "unusual and unexpected use of powers".⁶⁹

74. The Lord Chancellor replied to our letters on *Hirst* and the Court of Session declaration of incompatibility on 27 March 2007, some time after the Government consultation closed. The Lord Chancellor repeated the Government's view that prisoner enfranchisement is a "complex and difficult issue" with "considerable opponents". The new timetable for the implementation of the judgment in *Hirst v UK* expects Stage 2 of the consultation process to begin in July 2007. A legislative solution is not expected until at least May 2008.⁷⁰

75. The Lord Chancellor explained that the consultation paper invites views from people who consider that it is "right in principle" that prisoners should remain disenfranchised, "in order that they can be taken into account in considering the extent of any future reform". The Lord Chancellor accepts that retaining the blanket ban is not an option. The Government has excluded the option of "full enfranchisement" from the options for change "so as to clearly indicate that it is not an option for reform that we would feel able to adopt".

76. Liberty are concerned that the consultation paper proposes only minor reforms and explicitly rules out full enfranchisement as an option. They consider that the Government's consultation "seems designed to do little more than ensure that...the UK's approach would be considered to be within its 'margin of appreciation'".⁷¹

⁶⁵ Appendix 5.

⁶⁶ *William Smith v Electoral Registration Officer* [2007] CSIH 9 XA33/04 (24 January 2007), paras 55 – 56.

⁶⁷ Appendix 12.

⁶⁸ *In the matter of an application by Toner and Walsh for leave to apply for judicial review*. Appendix 13.

⁶⁹ Joint Committee on Statutory Instruments, Ninth Report of Session 2006-07, HL Paper 55/HC 82-ix, paras 1.1-1.11.

⁷⁰ Appendix 13.

⁷¹ Appendix 14.

77. We acknowledge that many people will question why prisoners should be entitled to vote in elections and that the Government would be taking a generally unpopular course if it were to enfranchise even a small proportion of the prison population. Nevertheless, the current blanket ban on the enfranchisement of prisoners is incompatible with the UK's obligations under the European Convention and must be dealt with.

78. We consider that the time taken to publish the Government's consultation paper and the time proposed for consultation is disproportionate. While the issues involved give rise to political controversy, they are not legally complex. The continued failure to remove the blanket ban, enfranchising at least part of the prison population, is clearly unlawful. It is also a matter for regret that the Government should seek views on retaining the current blanket ban, thereby raising expectations that this could be achieved, when in fact, this is the one option explicitly ruled out by the European Court.

79. We recommend that the Government bring forward a solution as soon as possible, preferably in the form of an urgent Remedial Order. We strongly recommend that the Government publish a draft Remedial Order as part of its second stage of consultation. We would be disappointed if a legislative solution were not in force in adequate time to allow the necessary preparations to be made for the next general election.

(3) Transfer of prisoners

80. The case of *Blackstock v UK* concerned delays in reviews of the applicant's detention and in his transfer to a lower category prison. The ECtHR considered that in this case, there had been a lack of reasonable expedition and a breach of Article 5(4) ECHR. In our last Report, we noted that the Home Secretary acknowledged the impact of prisoner overcrowding on reviews of detention and transfers of prisoners and pointed to steps taken by the Home Office and the National Offender Management Service to increase and manage prison capacity. We expressed our concern that increasingly overcrowded prison conditions may continue to result in delays. The recent crisis in the prison estate has been widely reported. We wrote to the Home Office to ask for further information on delays in putting into effect Parole Board advice on transfers; whether the Home Office was aware of any cases of delay in putting into effect transfer orders; and what action had been taken to reduce the impact of prison overcrowding.⁷² The Minister told us that 78% of decisions to accept the advice of the discretionary lifer panel were taken within 6 weeks. These figures did not however include any delay in transfer time after this decision was taken. We are concerned that the Minister was unable to provide comprehensive figures on delays or to say whether the Home Office was aware of any specific cases of delay in putting into effect transfer orders since the decision in *Blackstock*. It is impossible to assess whether the administrative actions of the Home Office have been successful in reducing the risk that transfers are delayed by a significant period of time when the relevant figures are not collected or analysed, or even available to the responsible Government department. **We recommend that the Ministry of Justice consider introducing a more effective mechanism to monitor the time taken to effect these transfers, taking into account each stage of the decision making and transfer process.**

⁷² Appendix 15.

81. The Minister told us that new “arrangements” for the allocation and transfer of life prisoners had been introduced in September 2006, with a view to enabling moves to take place more quickly. Unfortunately, the Minister did not explain what these arrangements were, nor did he explain whether they had led to more efficient transfers. **We look forward to receiving further information from the Ministry of Justice on the potential impact of prison overcrowding on the transfer of prisoners in due course and on whether the “arrangements” introduced by the Home Office have led to more speedy transfer times.**

82. In our last Report, we recommended that consideration should be given to whether it would be possible, in cases where there have already been delays in reviews of detention, such as may breach Article 5(4) ECHR, in a particular case to reduce the amount of time a prisoner will be required to spend in a lower category prison (that is, to alleviate the risk of a breach of the Convention due to delay).⁷³ The Minister re-iterated the Government’s view that decisions on the period of risk assessment required must be made on a case by case basis. The Minister suggested that the extent to which a reduction in time for risk assessment, and between reviews, might contribute to the rising number of life licensees recalled or reconvicted might be appropriate.⁷⁴ **We did not previously suggest that a blanket policy would be appropriate without consideration of the facts in any individual case. We recommend that the Ministry of Justice reconsider whether, in cases where there has been significant delay leading to a risk of incompatibility with the right to liberty, consideration should be given to our proposal that where the circumstances of an individual case justify a reduction, the time the affected prisoner is required to spend in a lower category prison before release on licence could be reduced.**

(4) Binding over orders

83. The case of *Hooper v UK* concerned the use of binding-over orders requiring the applicant to keep the peace and “be of good behaviour”.⁷⁵ The ECtHR had previously held that the process of “binding-over” is insufficiently certain and accompanied by insufficient safeguards to protect the rights of the individual guaranteed by Articles 5 and 6 ECHR (See for example, *Hashman and Harrup v UK*).⁷⁶ In our last Report, we welcomed plans by the Home Office to issue a practice direction on bind-over Orders, including on rights to make representations and to provide for legal representation where necessary. The Home Office indicated that a Practice Direction would be published in 2006. In 2006, the Government told the Committee of Ministers that this Practice Direction would ensure that a) the terms of binding-over orders are more specific; b) adequate notice is given to allow time to prepare representations and c) legal representations are heard, as required by Article 6 ECHR.⁷⁷ We wrote to ask the Minister for further information on 23 January 2007. We were provided with a copy of the draft practice direction on 14 March 2007. We note that the relevant amendments to the consolidated criminal practice direction were published on

⁷³ Thirteenth Report of Session 2005-06, *Legislative Scrutiny: Sixth Progress Report*, HL Paper 105/HC 538, para 64.

⁷⁴ Appendix 16.

⁷⁵ App No 42317/98, Judgment, 16 November 2004.

⁷⁶ 30 EHRR 241.

⁷⁷ Cases pending as appeared on the Annotated Agenda; Update: Information Presented for the Committee of Ministers Deputies 982nd meeting; December 2006, page 239.

HM Courts website on 27 April 2007.⁷⁸ The Lord Chancellor wrote to us on 30 May 2007 enclosing a copy of the new Practice Direction.⁷⁹

84. **We welcome the publication of the new Practice Direction, but regret the delay in this case. We consider that the Practice Direction is likely to reduce significantly the risk of a breach of Article 6 ECHR. However, we note that the practice direction does not specifically refer to the question of legal representation or to the need to afford adequate notice and time for the preparation of representations in relation to the making of a binding over order (as opposed to situations where the Court is considering committal as an alternative to binding over). We consider that the quality of the Guidance would have been improved by the inclusion of such clear, practical information on the need to ensure the right of the defendant to participate effectively in the decision to bind-over.**

(5) Limits on the right to marry

85. The case of *B and L v UK* concerned the prohibition on marriage between father-in-law and daughter-in-law, which prevented the applicants from marrying. In our last Report, we noted that the Government intended to implement this judgment using a Remedial Order. In our Report on the Government's proposals for a draft Marriage Act 1949 (Remedial) Order 2006, we commended the Government for the promptness of their action and the clarity of the information provided to Parliament in relation to the draft Remedial Order.⁸⁰ We return to the issue of delay in the implementation of judgments and the use of remedial orders below, in Chapter 5. **We consider that the Marriage Act 1949 (Remedial) Order 2007 removes the incompatibility identified in *B and L v UK*.**

(6) Access to information

86. The case of *Roche v UK* involved a decision of the ECtHR that inadequate arrangements for access to information about the tests performed on the applicant at Porton Down Chemical and Biological Defence Establishment in 1962 breached the right to respect for private life. At the time of the Committee's last progress report, the Minister acknowledged that there were practical difficulties involved in implementing the judgment, but that it was being "taken very seriously". On 5 April 2006, the Government submitted an Action Plan for the implementation of the general measures required to implement the ECtHR judgment in this case to the Committee of Ministers. That Action Plan has three objectives:

- *The First Objective*: to clarify the responsibilities of persons handling requests for access to information. Work had commenced on the distribution of internal MoD guidance and this was expected to be completed by 31 July 2006;
- *The Second Objective*: to make it easier for applicants to make and pursue a request for information about their actual or possible hazardous exposure by revising the relevant

⁷⁸ Amendment No 15 to the Consolidated Criminal Practice Direction, Schedule 2 (Consolidated Criminal Practice Direction, Part III.31).

⁷⁹ Appendix 17.

⁸⁰ Sixteenth Report of Session 2005-06, HL paper 154/HC 1027, para 33; see also Twenty-ninth Report of Session 2005-06, HL Paper 248/HC 1627.

pages on the MoD website; by disseminating information via the internet to groups representing potential applicants; by revising leaflets available to the public and by clarifying the application procedure for applicants with Article 8 ECHR rights. The target date for implementation was 31 October 2006.

- *The Third Objective*: to improve public availability of information about the tests at Porton Down. The target date for the completion of this objective was 31 July 2006.

87. The Minister wrote to the Committee on 12 July 2006, enclosing a copy of the Action Plan and an explanatory note.⁸¹ On 14 July 2006, the Minister made a statement to the House of Commons announcing the publication of the historical survey of the Service Volunteer Programme at Porton Down (part of the third objective). **We welcome the decision of the Minister to provide us with a copy of the Action Plan. The Ministry of Defence has generally taken a helpful, open and engaging approach to the involvement of the Committee in the supervision of their implementation of the judgment in Roche. Subject to one reservation, which we consider below, we consider their conduct as an example of good practice, recommended to other Departments.**

88. The Minister previously told the Committee that it was his view that any similar request for access to information would be dealt with more effectively in light of the Freedom of Information Act 2000. He expressed his concern however that the judgment imposed an onerous duty of disclosure “which was not subject to any express limits as to the cost of locating the information”. The Explanatory Note accompanying the Government’s Action Plan indicates that when the “actions” in the plan have been completed, “focal points and subject matter experts” will be aware of the extra steps in addition to those required by the Freedom of Information Act that will need to be taken in order to comply with Article 8 ECHR. This will include an inquiry over and above the cost limits of any Freedom of Information inquiry.

89. We wrote to the Minister on 23 January 2007 to ask for an update on the implementation of the Action Plan.⁸² This letter crossed with an update with the Minister had decided to provide on his own initiative. He confirmed that, in the Government’s view, the first and third Objectives of the Action Plan had been achieved by 31 July 2006. The Third Objective had been achieved by 31 October 2006. The Minister explained that the First Objective had been achieved by the publication of internal Guidance on the Department’s intranet and the Third Objective had been achieved through publication in July of a historical survey of the Service Volunteer Programme. The Third Objective was achieved by introducing a Special Subject Access Request procedure and promoting this both on the Department’s website and by writing to groups representing potential applicants. We were provided with the updated Action Plan sent to the Committee of Ministers.⁸³

90. We noted that the Action Plan and Progress Report provided to the Committee of Ministers provided a short summary of this Guidance, but did not provide a copy of the Internal Guidance. We consider that the achievement of the First Objective of the Action

⁸¹ Appendix 18.

⁸² Appendix 19.

⁸³ Appendix 20.

Plan, ensuring that those handling requests understand the requirements of the Convention and how the obligations imposed by Article 8 ECHR differ from those imposed by the Freedom of Information Act, is central to the effective implementation of this judgment. We asked the Department to provide us with a copy of the Guidance to assist our scrutiny of the effective implementation of the ECtHR judgment in *Roche*. The Department agreed to provide us with a redacted version, which we publish, and a confidential version for scrutiny.⁸⁴ **We consider that the Internal Guidance issued by the Department will significantly reduce the risk of any incompatibility with Article 8 ECHR in processing requests for information of the type considered in *Roche v UK*. We regret that this Guidance has not been made publicly available, even if only in a redacted form to protect any legal advice provided to the Department. We are concerned that a copy of this internal guidance may not have been provided to the Committee of Ministers for the purposes of their supervision of this judgment's implementation. We recommend that the Government provide the Committee of Ministers with a full copy if one has not already been provided.**

(7) Delay in criminal proceedings

91. The case of *Massey v UK* concerned delay in criminal proceedings. The ECtHR specifically highlighted the relevance of the investigative period to cases involving delay and allegations of a breach of Article 6 ECHR (the right to a fair hearing). In our last Report, we urged the Home Secretary to adopt guidance on the issue of delays in police investigations.⁸⁵ We wrote to the Home Secretary to ask for further information on this Guidance and welcome the decision of the Government to introduce specific guidance on delays in investigations.⁸⁶ The Minister told us that this guidance would be published shortly in the ACPO/CPS Prosecution Manual of Guidance under the heading "Avoidance of Delay – ECHR Considerations", but gave no timetable for publication.⁸⁷ The Government have explained that the Guidance will explain the "relevant period" to be taken into account in relation to the right to a fair and public hearing of any criminal charge within a reasonable time, with "particular reference to the *Massey* case", but have not provided us with a draft copy of the Guidance.

92. We welcome the decision to publish guidance on delay in criminal investigations and the implications for Article 6 ECHR. We regret the decision of the Government not to provide us with a draft copy of the Guidance to assist in our scrutiny of its ability to implement effectively the judgment of the ECtHR. We look forward to receiving a copy of the Guidance when it has been published.

93. The case of *Yetkinsekercki v UK* also involved delays in criminal procedures. In our last Report, we welcomed the progress that had been made in respect of average waiting times. The Criminal Appeals Office predicted that waiting times would continue to decrease. We welcome the figures provided to us by the Lord Chancellor, which indicate that there has been a further fall in the average time taken to deal with appeals against conviction (from

⁸⁴ Appendices 20a, 20b, 20c and 20d.

⁸⁵ Thirteenth Report of Session 2005-06, *op. cit.*, paras 73 – 76.

⁸⁶ Appendix 15.

⁸⁷ *ibid.*

13.2 months in December 2005 to 11.5 months in December 2006) and against sentence (from 5.6 months in December 2005 to 4.8 months in December 2006).⁸⁸ **We look forward to receiving regular updates on the average, mean and longest times taken to deal with criminal appeals and look forward to further progress in this regard.**

Delays in implementation

94. In our last Report, we criticised delays in the implementation of judgments by the United Kingdom, citing certain cases as particularly unfortunate examples.⁸⁹ We reviewed each of these cases and re-iterate our view that it is highly unsatisfactory that successful applicants in Strasbourg cases, as well as persons in similar situations who continue to be affected by law, policy or practice in breach of the ECHR, are left in a position of considerable uncertainty as to how their application to Strasbourg has helped to secure their rights in the UK.

(1) Investigation of use of lethal force

95. The first of this group relates to a well-known series of cases concerning the use of force by the security forces in Northern Ireland, *Jordan, McKerr, Finucane, Kelly, Shanaghan, and McShane*.⁹⁰ We noted in our last Report that there had been considerable delay in agreeing appropriate implementation measures in each of these cases. British Irish Rights Watch and the Commission for the Administration of Justice have stressed that there are a number of general, as opposed to individual, measures that need to be implemented in order to execute these judgments effectively.⁹¹ One of the outstanding issues arising for consideration by the Committee of Ministers are the steps being taken to ensure that inquest proceedings are commenced promptly and with reasonable expedition. We asked the Department for Constitutional Affairs to provide us with the statistics requested by the Committee of Ministers. While we note that the Coroners system in Northern Ireland is different to the system in England and Wales, we are concerned that there appears to be a stark contrast between the average time taken to conclude an inquest in both parts of the UK: being 23 weeks in England and Wales in 2005 and approximately 105 weeks in Northern Ireland.⁹²

96. We have consistently raised our concerns about the considerable delay involved in the implementation of these cases.⁹³ We reiterate those concerns here. In this regard, we note the recent report of the Police Ombudsman into the circumstances surrounding the death of Raymond McCord Junior⁹⁴ and the recent decisions of our domestic courts in relation to

⁸⁸ Appendices 5 and 6.

⁸⁹ Thirteenth Report of Session 2005-06, *op. cit.*, paras 8 – 14.

⁹⁰ *Ibid.* para 10.

⁹¹ Appendices 21 and 22.

⁹² Appendix 23; See also Northern Ireland figures provided by the Ministry of Justice, Appendix 24.

⁹³ See for example, in Nineteenth Report of 2005-06, *The UN Convention Against Torture (UNCAT)*, HL Paper 185/HC 701, paras 134-144.

⁹⁴ Statement by the Police Ombudsman for Northern Ireland on her investigation into the circumstances surrounding the death of Raymond McCord Junior and related matters, 22 January 2007.

the scope of coroners' inquests in Northern Ireland in the cases of *Jordan* and *McCaughey* and *Hurst*.⁹⁵

(2) Adverse inferences from silence

97. Another Northern Ireland case where there has been significant delay in implementation is *Murray v UK*.⁹⁶ This case is one of a series of Northern Ireland cases on the right to silence, the right not incriminate oneself, and the right to legal advice during the first 48 hours of detention. In 1996, the ECtHR held that it was incompatible with Article 6 ECHR to permit adverse inferences to be drawn from the silence of defendants who had not had the benefit of legal advice. The Government previously indicated that the relevant statutory provisions necessary to implement the judgment, Section 36, Criminal Evidence Order (Northern Ireland) 1999 (on non-permissible inferences from silence) would not enter into force until a review of the application of police and criminal evidence legislation in Northern Ireland was completed. An interim remedy was in place during this time (which we note that the recent Report of the Parliamentary Assembly Rapporteur on the Implementation of Judgments of the ECtHR concluded were operating effectively).⁹⁷ After the completion of this review, we asked the Minister of State for an updated timetable for the commencement of these provisions.⁹⁸ **We welcome the decision by the Government to bring into force the relevant provisions of the Criminal Evidence (Northern Ireland) Order 1999 on 1 March 2007, but regret the considerable delay between the decision of the ECtHR and the provision of an enduring remedy.**⁹⁹

(3) Corporal punishment of children

98. In our last Report, we noted that the Committee of Ministers was not yet fully satisfied with the implementation of the Children Act 2004 as a means of executing the judgment of the Court in *A v UK*.¹⁰⁰ The Secretariat of the Committee of Ministers has noted that the provisions of the Children Act 2004 are in principle, in conformity with the requirements of the Convention. However, the Committee of Ministers have not as yet considered whether the provisions of the Children Act 2004 are adequate to ensure effective deterrence.¹⁰¹ Both the Committee of Ministers and the Parliamentary Assembly have expressed their concern as to whether the judgment had been effectively executed in Northern Ireland and in Scotland.¹⁰² On 23 January 2007, we wrote to the Minister to ask for further information on the implementation of the Children Act 2004 and on the protection of children in Scotland and Northern Ireland. We asked whether the Government could provide us with up to date statistics on the use of the reasonable

⁹⁵ [2007] UKHL 14; [2007] UKHL 13.

⁹⁶ (1996) 22 EHRR 29, Appendix 25, para 7.

⁹⁷ Doc 11020, 18 September 2006, "Implementation of Judgments of the European Court of Human Rights", Committee on Legal Affairs and Human Rights, Mr Erik Jurgens (*The Jurgens Report*).

⁹⁸ Appendix 25.

⁹⁹ Appendix 26; See the Criminal Evidence (1999 Order) (Commencement No 5) (Northern Ireland) Order 2007.

¹⁰⁰ Thirteenth Report of Session 2005-06, *op. cit.*, para 11.

¹⁰¹ Information presented for the meeting of the Ministers Deputies, 17-18 October 2006 (Last published update); http://www.coe.int/t/e/human_rights/execution/02_documents/PPcasesExecution_Nov%202006.pdf

¹⁰² *ibid*; and the Jurgens Report, Appendix III, part 1, para 3.

chastisement defence has been used since the Children Act 2004 was enacted.¹⁰³ We note the information provided by the Minister on the investment made to support parents and to encourage the use of “confident, positive and resilient” parenting.¹⁰⁴ On 15 June 2007, the Government announced its intention to conduct a review of the operation of Section 58 of the Children Act 2004.¹⁰⁵ This review will include a public consultation exercise that “seeks the views of parents on physical punishment and evidence of those working with children and families on the practical consequences of the changes in the law brought about by Section 58 of the Children Act 2004.” The Government envisages that a summary of responses and the outcome of the review will be published in the autumn.

99. We agree with the assessment of the Secretariat of the Committee of Ministers that, although the legislative provisions in place may provide a remedy in principle to the incompatibility identified in *A v UK*, it is important to monitor how the provisions of the Children Act 2004 (and the respective provisions in Northern Ireland and Scotland) operate in practice in order to ascertain whether they represent an adequate deterrent against future breaches of children’s rights. With this in mind, we were surprised that the Government was unable to provide statistics on the application of the defence contained in the Children Act 2004. We welcome the research project currently being undertaken by the CPS on the application of the Children Act 2004 and look forward to receiving the results as soon as they are available. We also look forward to receiving copies of the results of the Government’s review of the operation of Section 58 of the Children Act 2004. We consider that the results of the CPS research project could help inform the views of those participating in the review. We hope that the conduct of the review will not prevent the publication of the results of the CPS research project as soon as they are available.

(4) Security of tenure for Gypsies

100. Our last Report re-iterated our regret that inadequate provision was made in the Housing Act 2004 to remedy the incompatibly raised by the judgment in *Connors v UK*.¹⁰⁶ In *Connors*, the ECtHR found that the summary eviction of a family from a local authority gypsy caravan site, without reasoned justification or sufficient procedural safeguards, breached the right to respect for private life and the home under Article 8 ECHR. The Government told our predecessor Committee that the issue of security of tenure would be considered as part of the Law Commission’s wholesale review of rented tenure. The Law Commission’s Final Report “Renting Homes”, published in May 2006, does not deal with the issue of security of tenure for Gypsy and Traveller residents on caravan sites.¹⁰⁷ In July 2006, a group of members of the House of Commons introduced a Private Members’ Bill, the Caravan Sites (Security of Tenure) Bill, that would have provided a remedy, by providing for security of tenure to be acquired only after an introductory tenancy, and lost by means of demotion when abused.¹⁰⁸

¹⁰³ Appendix 5.

¹⁰⁴ Appendix 6, paras 3 – 12.

¹⁰⁵ Department for Education and Skills, Section 58 of Children Act Review (Consultation), Launch date 15 June 2007.

¹⁰⁶ Thirteenth Report of Session 2005-06, *op. cit.*, para 13.

¹⁰⁷ No 297, Reports, Law Commission, Cm 6781.

¹⁰⁸ HC Bill 206.

101. We wrote to the Minister to ask what steps the Government intended to take in light of the Law Commission's failure to deal with this issue, and for the Government's views on the Caravan Sites (Security of Tenure) Bill.¹⁰⁹ We also asked whether the Government had considered using the remedial order procedure to provide a remedy. Although the Minister's reply reiterated the Government's commitment to implement this judgment, as soon as parliamentary time allows, the Government has been unable to give a firm timetable for the introduction of legislation on this issue.¹¹⁰ We welcome the Minister's commitment to the publication of a consultation paper on improving the rights and responsibilities of Gypsies and Travellers on local authority sites – including the security of tenure issues raised by this judgment – to align them more with those of tenants in social housing. The Minister explained that as there will be legislative proposals on this package of rights and responsibilities, that it would be inappropriate to implement this judgment by means of a remedial order. The Housing Law Practitioners Association told us that:

“[T]he issues identified by the ECtHR in the *Connors* case are too important to remain unresolved pending the more comprehensive reform of housing law advocated by the Law Commission.”¹¹¹

102. We look forward to receiving a copy of the Government's consultation paper on the rights and responsibilities of Gypsies and Travellers. However, we consider that any further delay in the implementation of the judgment in *Connors* is unacceptable. We are not persuaded by the Government's arguments that a remedy should wait for the preparation of a wider legislative package dealing with these issues. This argument has been deployed time and time again in relation to the implementation of the judgment in *JT v UK* and the Mental Health Bill (which we consider in detail below). Primary legislation for the wider package will need significant time in the parliamentary timetable and may be delayed or defeated by considerations unrelated to the remedial clauses. We recommend that the Government reconsider using a remedial order to provide a remedy in this case.

103. We welcome the decision of the Government to include interim Guidance to Local Authorities on summary possession and the implications of the *Connors* judgment in their draft Guidance on the management of Gypsy and Traveller sites.¹¹² We may consider the substance of this draft Guidance in due course.

(5) Consent to medical treatment

104. In response to concerns we expressed in our last Report about *Glass v UK*, the Government told us that Department of Health Guidance on consent would be revised to take account of new legislation and “court judgments”. The Government informed the Committee of Ministers that this Guidance was awaiting the enactment of the Human Tissue Bill and the Mental Capacity Bill.¹¹³ Significant parts of the Mental Capacity Act and the accompanying Code of Practice came into force in April 2007. We wrote to the

¹⁰⁹ Appendix 27.

¹¹⁰ Appendix 28.

¹¹¹ Appendix 29.

¹¹² This draft Guidance was published for consultation on 17 May 2007.

¹¹³ Thirteenth Report of Session 2005-06, *op. cit.*, para 14.

Minister to ask for an update.¹¹⁴ **The Minister indicated that as the parts of the Mental Capacity Act dealing with consent comes into force in October 2007, the relevant guidance will be revised “in line with this timetable”.**¹¹⁵ Officials have since clarified that the relevant Guidance will be published before October 2007.¹¹⁶ We regret that there has been such a significant delay between judgment in *Glass* and the publication of revised Guidance on consent. We look forward to receiving draft copies of this Guidance shortly.

(6) Rights of the mentally ill

105. We have repeatedly expressed our concern about the significant delay in the implementation of the judgment of the ECtHR in *JT v UK*, concerning the “nearest relative” provisions of the Mental Health Act and in *HL v UK*, which related to the so-called “Bournewood Gap”.

106. In our last Report we noted that the domestic courts had also declared the relevant provisions incompatible in *M v Secretary of State for Health*. We noted that “continuing delays and controversies” surrounding the draft Mental Health Bill – in which the Government proposed to deal with *JT v UK* – meant that that legislation had not yet been produced. In Spring 2006, the Government announced that it would not proceed with the Mental Health Bill as it had envisaged, but would introduce a smaller more streamlined Bill. We considered that the delay in this case was unacceptable. Our predecessor Committee commented consistently on the implementation of the judgment in *HL v UK* in the course of their legislative scrutiny of the Mental Capacity Act.¹¹⁷

107. The Mental Health Bill is now in its final parliamentary stages. In our legislative scrutiny, we have expressed our doubts about the adequacy of the proposals to implement both of these judgments.¹¹⁸ The inadequacies in the Bill, and its amendment as it progressed through Parliament clearly illustrate the problems we anticipated in using primary legislation to implement the judgment in *JT v UK*. **We deeply regret the Government’s decision not to pursue an urgent Remedial Order to implement the judgment in *JT v UK*, as it had originally indicated. We consider that the current provisions of the Mental Health Bill are adequate to meet the terms of *JT v UK*. We have, however, raised concerns that these provisions raise additional human rights concerns and create a further risk of incompatibility with the Convention.**¹¹⁹

108. While we accept that the issues in *HL v UK* are very complex, we consider that the delay in the implementation of this case is outstanding. We understand the Government’s willingness to pursue an overarching reform of mental health law in one statute, but we are not persuaded that any benefits of administrative convenience, or future legal certainty,

¹¹⁴ Appendix 30.

¹¹⁵ Appendix 31.

¹¹⁶ Appendix 32.

¹¹⁷ Fourth Report of Session 2004-05, *Legislative Scrutiny: First Progress Report*, HL Paper 26/HC 224, paras 4.1-4.71; Fifteenth Report of Session 2004-05, *Legislative Scrutiny: Seventh Progress Report*, HL Paper 97/HC 496, paras 4.1-4.3.

¹¹⁸ Fifteenth Report of Session 2006-07, *Legislative Scrutiny: Seventh Progress Report: Drawing Special attention to the Mental Health Bill*, HL Paper 112/HC 555; Fourth Report of Session 2006-07, *Legislative Scrutiny: Mental Health Bill*, HL Paper 40/HC 288.

¹¹⁹ *ibid.*

could outweigh the need to execute the judgment in *HL v UK*, with efficacy and speed. **We are concerned that the proposals now before Parliament do not yet provide an effective and enduring solution for detention which is compatible with Article 5 ECHR.**

4 Declarations of Incompatibility

Introduction

109. The Ministry of Justice reports that between the Human Rights Act coming into force on 2 October 2000 and 23 May 2007 a total of 24 declarations of incompatibility have been made by domestic courts under the Human Rights Act. Of these, 6 were overturned on appeal; 1 remains subject to appeal;¹²⁰ 10 have been addressed by new primary legislation; 1 is being addressed by a Bill currently before Parliament; 1 was addressed by remedial order; leaving a total of 5 in which the Government is considering how to remedy the incompatibility.¹²¹

Is a declaration of incompatibility an effective remedy?

110. The importance of swift and comprehensive Government responses to declarations of incompatibility under the Human Rights Act was recently highlighted by the European Court of Human Rights in its judgment in the case of *Burden v UK*.¹²² It is a requirement of the ECHR that an applicant to the Court in Strasbourg must first exhaust all their domestic remedies.¹²³ Unless a domestic remedy is considered “effective”, however, it need not be exhausted before pursuing an application to Strasbourg.

111. In *Burden*, the ECtHR confirmed that applicants may not be required to pursue their claim in the domestic courts if the only possible remedy is a declaration of incompatibility under the Human Rights Act. As it is for the Government to decide whether or not to amend the legislation which has been declared to be incompatible, and whether to change the law in a way which provides an adequate remedy for the individual applicant, the ECtHR concluded that the declaration of incompatibility cannot be considered an effective remedy for the purposes of the requirement that domestic remedies be exhausted.¹²⁴ The ECtHR accepted that should evidence emerge at a “future date” of a “long-standing and established practice” of Ministers giving effect to courts’ declarations of incompatibility, this might support a different conclusion.¹²⁵ In our view this decision makes even more important Parliament’s role in scrutinising the promptness and adequacy of the Government’s response to declarations of incompatibility. If the Government can demonstrate to Parliament’s satisfaction that it consistently responds promptly and adequately to such declarations, the ECtHR may in time come to regard a declaration of incompatibility as an effective remedy which must first be exhausted before an individual can apply to Strasbourg.

¹²⁰ *Wright and Others v Secretary of State for Health* [2006] EWHC 2886 (Admin), in which the “preliminary” inclusion of health workers on a list of individuals unsuitable for work with vulnerable adults was held to be procedurally unfair and incompatible with Article 6(1) ECHR. The Department of Health has recently written to the Committee to confirm the Department’s intention to appeal: Appendix 33.

¹²¹ <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf>.

¹²² Application No 13378/05, Judgment, 12 December 2006.

¹²³ ECHR Article 35(1).

¹²⁴ *Op. cit* at paras 39-40.

¹²⁵ *ibid*.

112. Our predecessor Committee, in their report on the Making of Remedial Orders,¹²⁶ set out a recommended timetable for Government action in respect of declarations of incompatibility and adverse judgments of the ECtHR. In the case of Strasbourg judgments, our predecessors recommended that the Government provide us with a copy of the judgment within a month, and within three months of a final judgment should inform us of the steps which it had taken or intended to take to ensure that similar violations did not occur in future. For declarations of incompatibility, they recommended that Ministers inform us of the Court's decision within 14 days, providing full text of the declaration and the court's judgment. A declaration of incompatibility becomes final only when the relevant avenues of appeal have been exhausted or time to appeal has expired with no appeal having been lodged. Our predecessors asked that Ministers, within a month of the decision, should inform us of the result of any appeal, together with the Government's preliminary view on the most appropriate way to proceed in remedying the incompatibility.¹²⁷ Our predecessors recommended that final decisions about how to remedy incompatibilities should be made by the Government no later than 6 months after the relevant legal proceedings.

113. The Government accepted these recommendations in principle,¹²⁸ but argued that in some cases, sticking to a rigid timetable might be a "little ambitious". The Minister explained that a Department may need to consult widely before it can take a view on how they intend to respond to a declaration of incompatibility. The Minister hoped that the Committee would accept that, in some cases, "research and consultation may mean a longer timescale".

114. We accept that there may be cases where research and consultation may mean a longer timescale. However, we are concerned that in the small number of cases outstanding, which we consider below, that the time taken to consider a response to the relevant declaration of incompatibility has been significantly longer than six months. We consider that the timetable set by our predecessors, and accepted in principle by the Government, is not unrealistic. Given the Government's acceptance in principle of our predecessor's recommendations, subject to the qualification noted above, we consider that the Government should be able to provide us with a reasonable justification for any delay, for example by explaining in detail why remedying a particular incompatibility requires a longer than usual period of research or consultation.

115. The Government also indicated in response to our predecessor's report on the making of remedial orders that it intended to include the Committee's recommendations in a revised version of the Guide for Whitehall Departments on the Human Rights Act.¹²⁹ Although this commitment was given in July 2002, to date no new guidance has been issued.

116. Against this background we wrote to the Lord Chancellor on 23 January 2007 to ask whether there had been any change in the Government's general policy towards

¹²⁶ Seventh Report of Session 2001-02; *Making of Remedial Orders*, HL Paper 58/HC 473.

¹²⁷ *ibid.* Part 2, Annex C.

¹²⁸ Nineteenth Report of Session 2004-05, *The Work of the Committee in the 2001-2005 Parliament*, HL Paper 112/HC 552, Appendix 2, paras 5 – 8.

¹²⁹ *ibid.*

declarations of incompatibility since 2002 and whether there was any intention in Government to change that policy in light of the judgment in *Burden v UK*. We also asked the Lord Chancellor to explain the reasons for the delay in publishing the updated Guidance for Whitehall Departments, promised in 2002.¹³⁰

117. In a letter dated 17 May 2007, the Lord Chancellor told us that the Government saw no reason to change its policy on declarations of incompatibility as a result of the decision in *Burden*. He explained that it was the Government's view that this decision was greatly encouraging.¹³¹

118. In our view the Government may be placing a rather positive gloss on the judgment in this case. It confirms that at present the ECtHR does not consider a declaration of incompatibility for the purposes of the HRA to be an effective remedy for a breach of Convention rights. The Government refers to the admissibility decision in *Hobbs* and to other subsequent cases. However, the ECtHR has now given a strong indication of the action that the Government needs to take to ensure that declarations of incompatibility are considered an effective remedy. **We consider that, in light of the judgment in *Burden v UK*, the Government should now adopt a much clearer policy on systematically responding to declarations of incompatibility, capable of providing evidence of “a long-standing an established practice of Ministers giving effect to the courts’ declarations of incompatibility”.**

119. **We recommend that the Government take a number of steps with a view to persuading the ECtHR - and aggrieved parties who might otherwise spend significant resources on an application to Strasbourg - that a declaration of incompatibility might provide an effective remedy. These include:**

- **Implementing the original recommendations of our predecessor Committee (to which we return below);**
- **Clearly stating that it is the Government's policy to take steps to remedy any incompatibility as soon as possible after a declaration has become final;**
- **Consistently following the clear and transparent timetable set by our predecessor Committee;**
- **Making greater use of Remedial Orders and, where appropriate, urgent remedial orders, to implement declarations of incompatibility rapidly; and**
- **Ensuring that any legislative solution makes the necessary provision to afford a remedy to those applicants affected by the identified incompatibility.**

120. We also asked the Lord Chancellor about the Guidance offered to Departments who are tasked with formulating a response to any declaration of incompatibility. We note that the Lord Chancellor considers that the recent handbook for public authorities, *Human Rights: Human Lives* supersedes the earlier DCA Guide to Whitehall Departments on the Human Rights Act. However, the Lord Chancellor has also told us that this document is

¹³⁰ Appendix 34.

¹³¹ Appendix 34a.

principally aimed at public authorities dealing with the public on a daily basis and helping them to take decisions in a Convention compatible way.

121. We have already expressed our enthusiasm for the publication of the new Handbook.¹³² However, we do not consider that the guidance in *Human Rights: Human Lives* provides enough detailed guidance on the application of the HRA and the Convention in order to allow departmental officials to respond effectively to declarations of incompatibility. In our view much more specific guidance is required to guide departments in responding promptly and adequately to declarations of incompatibility. **We welcome the Lord Chancellor's decision to reconsider whether further guidance is necessary and urge the Ministry of Justice to produce clear guidance for departments on declarations of incompatibility and remedial orders. We look forward to being consulted on a draft of this guidance.**

Issues monitored by the Committee

(1) Appointment and Removal of Nearest Relative

122. On 16 April 2003, provisions in the Mental Health Act 1983 governing the appointment and removal of a nearest relative¹³³ were declared incompatible with the right to respect for private life in Article 8 ECHR, because the patient concerned had no choice over the appointment or legal means of challenging the appointment of her nearest relative.¹³⁴ The operation of the statutory provisions in question meant her adoptive father was designated as her nearest relative even though he had abused her as a child, and she had no means of removing him. This case dealt with the same issue raised in the judgment of the ECtHR in *JT v UK* (considered above).

123. In April 2005, our predecessor Committee described the delay in this case, then expected to take over two years to remedy the incompatibility, as “highly regrettable”.¹³⁵ We note that in October 2004 the Government agreed to remedy the incompatibility by way of a remedial order using the urgent procedure,¹³⁶ but then failed either to keep the Committee closely informed of its intentions or to explain satisfactorily its reasons for changing its mind and deciding instead to remedy the incompatibility by way of a provision in the Mental Health Bill.

124. We consider that it is highly regrettable that an urgent Remedial Order was not used to remedy this incompatibility long before the introduction of the wider Mental Health Bill. Having now seen the precise way in which that Bill proposes to remedy the incompatibility, we are confirmed in our view that this incompatibility could have been remedied much more swiftly by an urgent remedial order. We consider that the delay in this case was not justified by the complexity of the issues involved and resort to the remedial order procedure was more than merited by the seriousness of the human

¹³² Thirty-second Report of Session 2005-06, The Human Rights Act: the DCA and Home Office Reviews, HL Paper 278/HC 1716, para 57.

¹³³ Sections 26 and 29 Mental Health Act 1983.

¹³⁴ *R (on the application of M) v Secretary of State for Health* [2003] EWHC 1094.

¹³⁵ Nineteenth Report of Session 2004-05, *op. cit.*, para 234.

¹³⁶ *ibid.* Appendix 9.

rights concerns involved in these cases. We recommend that in future the Government keep us much more closely informed of its proposed timetable for remedying an incompatibility and of its precise reasons for not proceeding by way of a remedial order.

(2) *Discrimination in access to social housing*

125. In two cases the courts have found a provision of the Housing Act 1996 to be in breach of the Human Rights Act because it discriminates against a person in their access to social housing on the basis of the nationality of a member of their household. *Morris* concerned an application for housing assistance by a single mother, who was a British citizen, but whose child was subject to immigration control.¹³⁷ The Court of Appeal held that the relevant provision of the Housing Act 1996¹³⁸ was incompatible with the right not to be discriminated against in the enjoyment of the right to respect for family life and home (Article 14 taken together with Article 8 ECHR) to the extent that it requires a dependent child who is subject to immigration control to be disregarded when determining whether its family has priority need for housing. In *Gabaj* the Administrative Court, in a logical extension of the reasoning in *Morris*, held that the same statutory provision was similarly incompatible to the extent that it requires a pregnant member of a household to be disregarded where that person is a person from abroad and ineligible for housing assistance.¹³⁹

126. The Minister wrote to us on 20 April 2006, shortly after the decision in *Gabaj*. She told us that “the Secretary of State has not yet come to a decision whether to repeal or amend section 185(4). This matter raises some important policy issues and consequently further consideration and consultation with other Government departments will be necessary before a final decision can be made.”¹⁴⁰ The Law Society and the Housing Law Practitioners Association (“the HLPAs”) wrote to us in 2006, stressing the need for the Government to take urgent action to address these declarations of incompatibility. HLPAs has conducted a survey amongst its members, which shows that the factual situation that led to these declarations regularly continues to occur.¹⁴¹

127. We wrote to the Minister on 23 January 2007 to ask for further information on how the Government intended to remedy the incompatibility identified in these cases, statistics on the application of s.185(4) Housing Act 1996 since the decision in *Morris* and the reasons for the continued delay in proposing a remedy. We also asked whether the Government would consider using a Remedial Order in this case.¹⁴²

128. The Minister replied on 27 February 2007 explaining that the Government had found it “very difficult to identify a compatible solution that will continue to deliver the

¹³⁷ *R (on the application of Sylviane Pierrette Morris) v Westminster City Council and First Secretary of State* [2005] EWCA Civ 1184 (upholding a declaration of incompatibility given by the High Court).

¹³⁸ Section 185(4) Housing Act 1996.

¹³⁹ *R (Gabaj) v First Secretary of State* (unreported).

¹⁴⁰ Twenty-third Report of Session 2005-06, *The Committee’s Future Working Practices*, HL Paper 239/HC 1575, Appendix 4. See also, Written Answer, HC Deb, 3 July 2006, 769W.

¹⁴¹ Appendix 35, and Appendix 36.

¹⁴² Appendix 37.

Government's policy on access to social housing."¹⁴³ By this time, the Government had identified an "appropriate solution" and was considering whether to take forward that solution by primary legislation or remedial order (we consider this solution, below). The Minister told us that the Government was not aware of any new cases raising similar issues, but did not collect statistics on the continued application of s185(4).

129. We are concerned that the Government does not collect statistics on the application of the incompatible provisions of the Housing Act 1996.¹⁴⁴ We recommend that where a legislative provision has been declared incompatible with the Convention, the Government should closely monitor the application of that provision and its potential impact on individuals affected by its continuation in force. We consider that it is unacceptable that measures which have been judicially declared to be incompatible with Convention rights should continue to be applied on a day to day basis by public authorities without any analysis of the continued impact of these provisions on individual rights. In order to improve transparency and to allow effective public and parliamentary scrutiny of the urgency of the need for a remedy, we recommend that part of these monitoring arrangements should include the collection of relevant statistics on the impact of maintaining the incompatible law in force.

The HLPAs told us that:

Perhaps the most common situation in which section 185(4) applies is that in which a British Citizen, or a person who is settled in this country is joined by his or her children from another country. On entry, the children, assuming they are not themselves British Citizens, will normally be granted two years' leave to enter. At the end of the two year period, the parent can apply to the Home Office for them to be granted 'settled status' or indefinite leave to remain.

What may happen is that the parent is able to support and accommodate the family at first, but unforeseen problems may occur, for example, employment may be curtailed by illness or the landlord may require possession of the family's rented accommodation. The parent's efforts to find alternative accommodation come to nothing, and he or she is compelled to make a homelessness application to the council. At that stage, the council will call upon s. 185(4) and refuse to assist, because the children are effectively invisible to it.

The process under s.185(4) not only causes undue hardship and distress to families caught in these changes of circumstances. Its operation is also unfair because it amounts to a lottery of gender and birth.

They told us that the only acceptable way to remedy the incompatibility identified by the Court of Appeal was to repeal the relevant provisions of the Housing Act 1996.¹⁴⁵

130. We wrote to the Minister again on 22 March 2007 to ask for further information on the solution proposed by the Government.¹⁴⁶ On 13 April 2007, the Minister explained that

¹⁴³ Appendix 38.

¹⁴⁴ *ibid.*

¹⁴⁵ Appendix 29.

¹⁴⁶ Appendix 39.

the Government intended to meet the incompatibility of the provision in the Housing Act 1996 with Article 8 ECHR by amending Part 7 of the Act to place housing authorities under:

“a new interim duty to secure accommodation for the applicant and all household members for a temporary period in order to give them an opportunity to regularise their immigration status”.

After the “immigration status was regularised, further consideration of the housing application would proceed and the interim duty to secure accommodation would end”. The Minister explained that in any case where it was compatible for leave to remain to be refused, the Government considered it would also be compatible for a housing authority to decide that there was no substantive duty to secure accommodation.¹⁴⁷

131. In *Morris*, the justification offered by the Government was based largely on the need to meet the immigration policy needs identified (i.e. preventing benefits tourism). The Court of Appeal considered that:

[J]ustification has to start...not from Art 14 but from Art 8....[T]he question is whether it is justifiable to make a measure designed to accord respect to family life dependent not on the nationality of the claimant but on the immigration status of her dependent child (para 47).

The Court focused on the implications for the principal applicant for accommodation assistance:

Except for those (not likely to be many) who have simply neglected to take the necessary steps, the effect is not an encouragement to regularise...but a penalty...for being unable to do so (para 45).

The Court concluded that any provision having this effect would need “solid” justification. The Court considered the assumptions underlying s185(4) Housing Act:

“[T]hat the parent is both lawfully here and habitually resident here, and that the child, albeit subject to immigration control, is also here and is dependent on the parent. To exclude such a family, does not correspond with even the limited policy objective I have described.” (para 48).

132. In light of the Court’s focus on the rights of the principal applicant for housing assistance, who will usually be a parent, or a person providing support for the dependant non-national, we do not share the Government’s confidence that the proposal identified by the Minister will remedy the incompatibility identified by the Court of Appeal in *Morris*.

133. No draft legislative proposals have been produced and no decision has yet been taken on how to implement the Government’s proposed remedy. We have had no explanation of how long the interim duty on local authorities is expected to last and whether or not the interim duty proposed will last throughout the time taken by the Home Office to consider the immigration status of the relevant person in the applicant’s household.

¹⁴⁷ Appendix 40.

134. We are concerned about the significant delay in taking a decision on how to remedy the Convention incompatibility identified in these cases. We recommend that the Government now provide us with a detailed draft of their proposed remedy, together with the detailed reasons for their view that treating the immigration status of dependent children or other dependents as relevant to the priority status of an applicant for housing assistance is compatible with Articles 8 and 14 ECHR. Although we have been unable to assess the detail of the proposals concerned, we consider that the already substantial delay in this case, and the vulnerability of the persons affected by the incompatibility, are significant factors which the Government should take into account in deciding whether to use a Remedial Order to remedy the incompatibility in this case.

(3) Nationality and religious discrimination in sham marriages regime

135. A provision of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 requires a person subject to immigration control to obtain a certificate of approval from the Secretary of State before entering into a civil marriage.¹⁴⁸ The scheme effectively excludes marriages which take place within the Church of England, but includes any marriage entered into subject to any other religious rites. The High Court concluded that the legislative scheme was incompatible with both the right to marry in Article 12 ECHR, in that it was disproportionate, and with the right not to be discriminated against on grounds of nationality and religion in the enjoyment of the right to marry (Article 14 ECHR in conjunction with Article 13).¹⁴⁹ The distinction between those who wished to marry in the Church of England and those who wished to marry in other religious ceremonies was not justifiable as there was no evidence that those who married outside the Church of England were any more likely to engage in sham marriages than those who married in Church of England ceremonies. The new regime constituted unfair and unjustifiable discrimination based on the personal characteristics of religion and nationality.

136. The Home Office wrote to us on 19 September 2006 indicating that while they intended to appeal the decision on Article 12 ECHR and other issues, that they intend to extend the scheme to marriages within the Church of England, in order to remove the incompatibility with Article 14 ECHR. We wrote to the Minister on 23 January 2006 to ask for further information.¹⁵⁰ At the time of drafting we have received no response. On 23 May 2007 the Court of Appeal upheld the decision of Silber J that the scheme to deal with sham marriages was in breach of the right to marry in Article 12.¹⁵¹ The Home Office is considering whether to appeal. The finding that the provision in question was unjustifiably discriminatory on grounds of nationality and religion, however, was not appealed to the Court of Appeal. **We expect to receive the response of the Home Secretary shortly.**

¹⁴⁸ Section 19(3) Asylum and Immigration (Treatment of Claimants) Act 2004.

¹⁴⁹ *R (on the application of Baiai) v Secretary of State for the Home Department* [2007] IWL 693, [2006] EWHC 823.

¹⁵⁰ Appendix 41.

¹⁵¹ [2007] EWCA Civ 478.

(4) Nationality discrimination in early release of prisoners

137. In December 2006, the House of Lords declared certain statutory provisions governing the early release of prisoners¹⁵² to be incompatible with the right not to be discriminated against in the enjoyment of personal liberty (Article 14 ECHR taken together with Article 5 ECHR) because they discriminated against foreign prisoners on the grounds of national origin. As a result of these provisions, certain foreign prisoners who are liable for deportation are treated differently from other prisoners for the purposes of early release. The Parole Board has no power to recommend the early release of these prisoners and this decision remains entirely with the Secretary of State.¹⁵³

138. These provisions have already been repealed and replaced by provisions of the Criminal Justice Act 2003, but they continue to apply to offences committed before 4 April 2005. The Home Office were initially responsible for considering how to remedy the incompatibility in relation to offences falling within this transitional category. In light of recent Departmental changes, we have recently written to the Lord Chancellor to ask what steps the Government considers necessary to ensure that the relevant transitional measures do not discriminate on the basis of nationality.¹⁵⁴ We look forward to receiving the Minister's response, in due course.

(5) Prisoner voting

139. In March 2007, the Court of Session in Scotland sitting as the Registration Appeal Court declared s3 Representation of the People Act 1983 incompatible with the Convention. This declaration of incompatibility is considered in the context of the *Hirst* decision above.

¹⁵² Sections 46(1) and 50(2) of the Criminal Justice Act 1991.

¹⁵³ *R (Hindawi) v Secretary of State for the Home Department* [2006] UKHL 54.

¹⁵⁴ Appendix 42.

5 Obstacles to Effective Implementation

Introduction

140. In our last report on the implementation of Strasbourg judgments we highlighted a number of outstanding obstacles to effective implementation of court judgments finding a breach of human rights, including a lack of transparency in the process of implementation, lengthy delays in implementation, the lack of a domestic law requirement that remedial orders or legislation provide a remedy to the individual who established the violation, the judicial interpretation of the Human Rights Act as having no retrospective effect, and the inability to reopen domestic proceedings in certain circumstances following a finding of a violation by the European Court.¹⁵⁵ In this chapter of our report, we return to consider some of these systemic obstacles to effective implementation, before making some recommendations designed to overcome some of these obstacles.

Delays in implementation

141. During our visit to Strasbourg in December 2006 we were told by lawyers in the Department for the Execution of Judgments in the Human Rights Directorate of the Council of Europe that delay in implementation of Strasbourg judgments was one of the main concerns in relation to the UK. We heard that there were 46 cases relating to the UK where implementation was under the Committee of Ministers' supervision, almost all requiring some changes in legislation or practice. A number of examples were cited: the 6 year delay between the friendly settlement in the case concerning a mental patient's right to displace her nearest relative and the introduction of the remedial provision in the Mental Health Bill; the almost 8 year delay between the judgment that binding over to be "of good behaviour" was too imprecise and the introduction of a new practice direction for courts giving them guidance drawing on the judgment; and the outstanding cases relating to the investigation of killings in Northern Ireland. The fact that the Government was still consulting on how to proceed after the Court's judgment on the voting rights of convicted prisoners was also mentioned in this context.

142. We note from our work on the Government's responses to declarations of incompatibility that a similar lack of urgency is apparent, as we have commented above in relation to specific issues.

143. Our systematic work monitoring the progress made by the Government in addressing and, if necessary, remedying human rights breaches identified by courts has revealed a distinct lack of urgency on the part of the Government in responding to court judgments and a disconcerting tolerance for ever-lengthening delays in relation to a significant number of issues where the incompatibility was established several years ago. We recommend that the Government remedy human rights breaches identified by courts with more urgency in future, and we make a number of more specific recommendations below as to how it might achieve this.

¹⁵⁵ Thirteenth Report of 2005-06, *Implementation of Strasbourg Judgments: First Progress Report*, HL Paper 133/HC 954, chapter 2.

Non-retrospective application of the Human Rights Act

144. In our last Report, we reiterated our predecessor Committee’s concern about the impact of the judgment in the case of *McKerr*,¹⁵⁶ which held that the HRA does not apply retrospectively to require the Government to remedy any breach that occurred prior to the coming into force of the Act in October 2000.¹⁵⁷

145. We note that the House of Lords in *Hurst v Commissioner of Police of the Metropolis* recently rejected attempts by the Court of Appeal to limit the implications of that judgment, confirming their earlier decision in *McKerr*.¹⁵⁸ The Court of Appeal in *Hurst* had accepted that in *McKerr*, the House of Lords gave no guidance on the interpretative obligation in Section 3 HRA, which required the court to give effect to the international obligations in the Convention. Although those “Convention rights” are scheduled to the HRA, they were international obligations that bound the UK before 2000. The House of Lords rejected this approach, principally because it would require a different interpretation to be given to Convention rights for different purposes under the HRA.¹⁵⁹

146. We remain concerned about the implications of the non-retrospectivity of the HRA for the effective and speedy implementation of judgments of the ECtHR. This approach greatly reduces the ability of our courts to assist in the implementation of judgments of the ECtHR and leaves responsibility for pre-2000 breaches of the Convention squarely with the Government. We note the Government’s acceptance, in correspondence with our predecessor Committee, that it had no lesser obligation under the ECHR to implement judgments arising out of pre-HRA events. In light of these judgments we consider that priority should be given by the Government to the speedy implementation of ECtHR judgments arising from pre-2000 events. We note with continuing concern the increasing delay in the implementation of the judgment in *McKerr v UK* and other similar cases.

Re-opening proceedings following judgments of the ECtHR

147. In our last report on the implementation of Strasbourg judgments, we noted that in certain circumstances UK law does not allow for the re-opening of criminal proceedings following judgments of the ECtHR, for example where a conviction has been the result of primary legislation which is itself in breach of the ECHR or where the violation arose from the substantive criminal law rather than a procedural breach.¹⁶⁰

148. This remains one of the principal barriers to effective domestic implementation of judgments identified by the institutions of the Council of Europe. It is obviously a significant legal obstacle where the ECtHR finds that a conviction has been obtained in breach of the Convention right to a fair trial, because the Strasbourg Court is usually not in a position to tell whether the outcome would have been different if the trial had been fair.

¹⁵⁶ *In re McKerr* [2004] UKHL 12.

¹⁵⁷ Thirteenth Report of Session 2005-06, *Legislative Scrutiny: Sixth Progress Report*, HL Paper 87/HC 470, paras 16 – 18.

¹⁵⁸ See also *Jordan v Lord Chancellor and Another; McCaughey v Chief Constable of the Police Service Northern Ireland* [2007] UKHL 14, para 35.

¹⁵⁹ [2007] UKHL 13, paras 42 – 47.

¹⁶⁰ Thirteenth Report of Session 2005-06, paras 19-23.

149. Harriet Harman, Minister for State at the DCA in her previous role as Minister with responsibility for human rights, undertook to give further consideration to the re-opening of domestic proceedings and the provision of effective remedies after an adverse decision of the ECtHR.¹⁶¹ We asked the Lord Chancellor what steps had been taken as a result of this undertaking, and whether any further consideration had included the re-opening of proceedings in civil and administrative cases.¹⁶² His response, dated 17 May 2007, almost five months after our request for further information, is disappointing.¹⁶³

150. In particular, the Lord Chancellor considers that the powers of the Criminal Cases Review Commission ensure that there is “no lacuna” in respect of re-opening criminal convictions in the UK. In our view, this entirely fails to take into account the decision of the House of Lords in *R v Lyons and Saunders*, which limits the ability of the Court to re-consider convictions referred to the Court of Appeal by the Criminal Cases Review Commission where the incompatibility arises as a result of primary legislation¹⁶⁴ or as a result of the substantive criminal law rather than a procedural breach.¹⁶⁵ In such cases the Criminal Cases Review Commission does not have jurisdiction to refer the case back to the Court of Appeal. It is therefore impossible for the UK to fulfil its obligation to take individual measures to redress, so far as possible, the effects of the violation for the injured party in such cases, because there is simply no mechanism in national law for reviewing the safety of the conviction in light of the finding of violation. **We repeat our recommendation that the Government should introduce the necessary amendment of the law to allow for the re-opening of proceedings in appropriate cases following judgments of the ECtHR. What is required is not an automatic right to have proceedings reopened following a finding of a violation of a Convention right by the Strasbourg Court, but a procedural mechanism for deciding whether proceedings should be reopened to review the safety of the conviction in the light of that judgment.**

Overcoming systemic obstacles

151. Our predecessor Committee made a number of recommendations intended to provide a framework and timetable which would allow us, acting on behalf of Parliament, to hold the Government to account for their actions following a Strasbourg judgment against the UK or a declaration of incompatibility made by a UK court.¹⁶⁶

152. We consider that, should the Government follow each of our predecessor Committee's recommendations, that this would go some considerable way to improving the domestic mechanism for the implementation of judgments and the implementation of the Convention. Unfortunately, during the course of our work during this session the engagement of responsible Government Departments has not generally been very rigorous or systematic, but rather more *ad-hoc*. Information is often provided only when chased by us. When responses have been provided to our questions, they have varied greatly in their

¹⁶¹ *ibid* at para. 23.

¹⁶² Appendix 5.

¹⁶³ Appendix 2.

¹⁶⁴ [2002] UKHL 44.

¹⁶⁵ Eg. *ADT v UK* (2001) 31 EHRR 33.

¹⁶⁶ Seventh Report of Session 2001-02, *Making of Remedial Orders*, HL Paper 57/HC 472.

quality. In a significant number of cases we have had to ask for further information and a better explanation of the Government's views.

153. This is the first Report where we have attempted to take a systematic approach to both judgments of the ECtHR and domestic declarations of incompatibility. We consider that this is an opportune time to revisit these recommendations in order to ensure that both we and the Government commit to an improved and systematic mechanism for responding promptly and appropriately to court judgments finding a breach of human rights.

154. We consider that a central point of contact for the implementation of Strasbourg judgments and Government responses to declarations of incompatibility would not only increase the effectiveness of our work, but would increase the public transparency of the system for those affected by Convention incompatibilities and those who represent them. We note that Committee on the Administration of Justice, British Irish Rights Watch and Liberty in each of their submissions highlight the difficulty involved in accessing the political process for implementation of judgments.¹⁶⁷

155. We recommend that the Human Rights Division in the Ministry of Justice take a central co-ordinating role.

156. We recommend that, in addition to their helpful database monitoring the making and implementation of declarations of incompatibility, the Ministry of Justice should maintain a database of outstanding ECtHR judgments against the UK and the general measures considered necessary to rectify the Convention incompatibility identified.

157. We recommend that the Ministry of Justice provide us with copies of any ECtHR judgment within one month and any declaration of incompatibility within 14 days.

158. We recommend that if a case is subject to appeal or to a decision of the Grand Chamber, the Government should inform us of the results within a month of the decision of the final appeal court or the Grand Chamber.

159. In addition, we recommend that once a judgment is final, the Ministry of Justice should write to us to explain:

- Any “general measures” or any legislative solution the Government considers necessary to implement the judgment or remedy the declared incompatibility; and
- Whether the Government intends to use the remedial order process.

160. We consider that it would assist consistency and transparency if this information could follow a standard format and should, at least contain the following detail:

- If the Government does not consider any remedial action necessary, it should provide an explanation of its reasons;

¹⁶⁷ Appendices 22, 21, 14.

- If the Government considers that legislative reform is necessary but does not propose to use a Remedial Order, the Government should explain why it considers that there are no compelling reasons to use a remedial order;
- If the Government does propose to use a remedial order, it should indicate whether it intends to use the urgent or non-urgent procedure and should give its reasons for this decision.

161. We recommend that the Government should have reached a detailed decision on how to implement a judgment of the ECtHR within three months and how to respond to a declaration of incompatibility, within six months. The Government accepted the recommendation of our predecessor Committee, but was unwilling to commit absolutely to the timetables which we proposed. We accept that in some complex cases, the Government may need additional time to consult with relevant stakeholders and to formulate effective legislative or other solutions. However, we recommend that where the Government considers that the timescales we propose are inadequate or would restrict the Government's ability to implement an effective response, the Ministry of Justice should provide an explanation for any delay within the timetable proposed.

162. We take seriously the role of Parliament in the effective domestic implementation of ECtHR judgments and the remedying of declared incompatibilities. We consider that, in order to advise Parliament effectively and to ensure that we provide Parliament with regular and accurate information, we too should commit to a more coherent approach to our scrutiny work in this area. We aim to write to the Ministry of Justice and the lead Department in relation to any particular judgment within 3 months of a final judgment having been handed down. If the Government has provided us with no information on a particular judgment by this stage, we will proceed to recommend any general measures that we consider necessary and may ask the Government to justify the obvious delay. If the Government has provided us with information on their proposals, we may ask for further information and will explore any concerns we have about its substance or whether the remedial order procedure could be used. We will aim to publish our correspondence with Government and our views within 6 months of a final judgment. If we have received no information from Government we will Report on our views and any relevant delay without waiting for their response. In these circumstances, unless there is some substantial reason for this exceptional delay, we would expect to Report to both Houses that this delay is unacceptable.

163. We also recommend that the Government updates its guidance for Whitehall departments in this respect and look forward to being consulted on a draft.

Annex 1

The Importance of Domestic Implementation Measures: Council of Europe Activities

164. In October 2006, the Parliamentary Assembly of the Council of Europe (“PACE”) urged a number of States, including the United Kingdom, to give political priority to the resolution of outstanding implementation issues. They:

- Invited all national parliaments to introduce specific mechanisms and procedures for effective parliamentary oversight of the implementation of the Court’s judgments by the responsible governmental ministries;
- Called upon Member States to set up domestic mechanisms for the rapid implementation of the Court’s judgments and to ensure that a decision-making body at the “highest political level in Government takes full responsibility for and co-ordinates all aspects of the domestic implementation process”;¹⁶⁸
- Reserved the right to take appropriate enforcement action, including by challenging the credentials of any defaulting State’s delegation to the Assembly.¹⁶⁹

165. PACE also urged the Committee of Ministers to intensify political pressure on Member States to implement Strasbourg judgments effectively and to take more robust measures against defaulting States.¹⁷⁰

166. In 2006, the Committee of Ministers adopted a new declaration on sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels; the Committee adopted new rules for the supervision and implementation of judgments of the ECtHR and this declaration renewed and intensified the commitment of the Committee to “improve and accelerate” the implementation of the ECtHR’s judgments. They have initiated the preparation of a new recommendation to all Member States on domestic capacity for the rapid implementation of the Court’s judgments.¹⁷¹

167. In March 2007, the Committee of Ministers formally replied to the recommendations of PACE on effective implementation of judgments:

- They welcomed the recognition of the role of national parliaments in the implementation of judgments. They consider that this role should be two-fold: “they should establish appropriate procedures to ensure rapid adoption of legislative changes required by judgments and exercise parliamentary oversight of the implementation process conducted by other national authorities.”

¹⁶⁸ Our predecessor Committee made a similar recommendation to the Lord Chancellor in their report on the Work of the Committee during the 2001-2005 Parliament. See Nineteenth Report of Session 2004-2005, paras 235 – 237.

¹⁶⁹ Resolution 1516 (2006), 2 October 2006.

¹⁷⁰ Recommendation 1764 (2006).

¹⁷¹ Declaration of the Committee of Ministers on sustained action to ensure the effectiveness of the implementation of the European Convention on Human Rights at national and European levels, Adopted by the Committee of Ministers on 19 May 2006 at its 116th Session.

- The Committee of Ministers praised national efforts and initiatives to overcome structural barriers to effective implementation;
- They reiterated their commitment to domestic implementation measures, noting their instructions to the Steering Committee on Human Rights (CDDH) to prepare a special recommendation to member states to improve their domestic capacity for the rapid implementation of ECtHR judgments (a project which they hope to be complete during the first half of 2008).¹⁷²

168. In April 2007, the CDDH published an interim report on its work in this area. The second stage of the CDDH review of domestic implementation of the five Recommendations involves a survey of national human rights institutions and NGOs, asking for information on member states implementation of the Convention.¹⁷³

169. In their preparation of the draft Recommendation requested by the Committee of Ministers, CDDH have been gathering information on, specifically, domestic arrangements for a) monitoring the implementation process at a national level; b) the existence of a Department or official with central coordinating responsibility for the implementation of judgments; and c) the ways and means to accelerate implementation if necessary.¹⁷⁴

170. A Group of Wise Persons appointed to report on ensuring the long-term effectiveness of the ECtHR reported in November 2006. Their report stressed that the principal mechanism for the protection of human rights in Europe was effective implementation of the Convention by each member state:

Since the convention forms part of the national law of the member states, the remedies available at national level must be effective and well known to their citizens. Indeed, they constitute the first line of defence of the rule of law and human rights. Initially, it is for the national courts to protect human rights within their domestic legal systems and to ensure respect for the rights safeguarded by the Convention. The principle of subsidiarity is one of the cornerstones of the system for protecting human rights in Europe.¹⁷⁵

171. The Group also stressed that the role of member states included enhancing the dissemination and authority of the Court's case-law:

The credibility of the human rights protection system depends to a great extent on the execution of the Court's judgments. Full execution of judgments helps to enhance the Court's prestige and the effectiveness of its action and has the effect of limiting the number of applications submitted to it.¹⁷⁶

¹⁷² CM/AS(2007)Rec1764 final, 30 March 2007.

¹⁷³ See our recommendations in paragraphs 23-24, above.

¹⁷⁴ *ibid*, para 4.

¹⁷⁵ Report of the Group of Wise Persons to the Committee of Ministers, CM (2006) 203, 15 November 2006, para 16.

¹⁷⁶ *ibid*, para 25.

Formal Minutes

Monday 18 June 2007

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Judd	Nia Griffith MP
Lord Lester of Herne Hill	Dr Evan Harris MP
The Earl of Onslow	Mr Richard Shepherd MP
Lord Plant of Highfield	Mark Tami MP
Baroness Stern	

Draft Report [Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights], proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 163 read and agreed to.

Annex read and agreed to.

Summary read and agreed to.

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

Several Papers were ordered to be appended to the Report.

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

[Adjourned till Monday 25 June at 4.00pm.]

Appendices

Appendix 1: Letter dated 23 January 2007 to The Rt Hon Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs

The Joint Committee on Human Rights is continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR).

We note that the Parliamentary Assembly of the Council of Europe (PACE) has recently called upon member states of the Council to “set up, either by legislation or otherwise, domestic mechanisms for the rapid implementation of the Court’s judgments, and that a decision-making at the highest political level within the government takes full responsibility for and co-ordinates all aspects of the domestic implementation process”.¹⁷⁷

In light of the responsibility of the DCA Human Rights Division for the operation of the Human Rights Act and the delivery of human rights policy generally, I would be grateful if you could:

a) confirm that you have ministerial responsibility for the co-ordination of the domestic implementation of judgments of the European Court of Human Rights; and

b) tell us what the steps have been taken within Government, and specifically within the Human Rights Division, in light of PACE Resolution 1516 (2006), to improve or enhance domestic mechanisms for the rapid implementation of judgments of the European Court of Human Rights.

In the course of our work, we have been reviewing the activities of the Council of Ministers’ Deputies on the execution of judgments of the European Court of Human Rights. In the progress of this work, we have found the summaries of the information provided to the Committee of Ministers by the United Kingdom a useful, but basic, source of information on the Government’s proposals for general measures to implement the judgments of the Court.

In the past, the Government has voluntarily provided us with copies of the information that it provides to the Committee of Ministers on an ad hoc basis. For example, in relation to the case of *Roche v UK*, the Ministry of Defence provided us with a copy of the Action Plan they submitted to the Committee of Ministers. Although this information was provided to us some months after it was submitted to the Committee of Ministers, we found it useful to have the Government’s plan of action explained to us by the relevant Minister.

Having this information allows us to have a full and up to date picture of the Government’s views on implementation of individual judgments, and on the steps that it is taking to meet the concerns of the Committee of Ministers. When these notes are provided, they help inform our work on the scrutiny of the implementation of judgments and may reduce the time spent, both by the Committee and individual departments, on correspondence.

¹⁷⁷ Resolution 1516 (2006).

We would be grateful if the Government could provide us with copies of any information notes provided to the Committee of Ministers for the purposes of supervising the execution of judgments of the European Court of Human Rights, if possible, as and when they are produced.

In our last progress report, we drew attention to the difficulties in re-opening domestic criminal proceedings in certain cases where the ECtHR had found a conviction to have been obtained in breach of Convention rights. We noted that the Minister of State, in evidence to the JCHR gave an undertaking to give further consideration to the question of re-opening proceedings following judgments of the ECtHR.¹⁷⁸ The institutions of the Council of Europe continue to stress consistently the importance of the ability to re-open proceedings, whether criminal, civil or administrative, in light of an adverse Strasbourg judgment.¹⁷⁹

What steps have the Government have taken further to the Minister's undertaking to give further consideration to the question of re-opening proceedings following judgments of the ECtHR?

Has this further consideration included the question of re-opening proceedings in civil and administrative cases? If not, why not?

Appendix 2: Letter dated 17 May 2007 from Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs

Thank you for your letter of 23 January on the above subject. I am sorry for the delay in responding.

The minister responsible for a policy area to which a judgment of the European Court of Human Rights relates is also responsible for the implementation of that judgment. Execution of judgments is overseen by the Committee of Ministers at the Council of Europe, to whom the lead department provides updates through the agency of the Foreign and Commonwealth Office. Advice and assistance may be given as necessary by officials in the Ministry of Justice and the Attorney General's Office. Insofar as a co-ordination role may be required at ministerial level in addition to this established and effective mechanism, it would be my responsibility.

I have taken note of the resolution of the Parliamentary Assembly of the Council of Europe (PACE)¹⁸⁰ to which you refer. I believe that we already have a robust and effective mechanism for the implementation of judgments. In particular, I would suggest that the need for a formal co-ordinating authority is most acute in coalition governments in which ministries may be acting autonomously under the control of ministers from different political parties; by contrast, the nature of collective responsibility under our system of Cabinet government obviates the need for such a mechanism to be established.

I understand that my officials are in regular contact with the Committee's staff, and furnish them with information about the execution of judgments as it becomes available.

¹⁷⁸ Thirteenth Report of Session 2005-06, para 23.

¹⁷⁹ See for example, Steering Committee for Human Rights, Activity Report, "Reform of the European Convention on Human Rights" – Declaration of the Committee of Ministers "Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels", CDDH (2006) 008, Addendum I, pages 1-10.

¹⁸⁰ Resolution 1516 of 2006.

It is in the context of criminal cases that the issue of the reopening of proceedings following a judgment of the European Court of Human Rights has largely been considered in Strasbourg. It is of course possible to ask the Criminal Cases Review Commission, and its Scottish equivalent, to review a conviction in the light of changed circumstances, including a judgment of the Strasbourg court. There is therefore no lacuna in this respect in the United Kingdom. Similarly, in respect of cases to which the Government was party in domestic proceedings, which have then been the subject of a decision of the Strasbourg court against the United Kingdom, the Government would be expected to take such specific measures as necessary to rectify the position as part of the implementation of the judgment.

In respect of cases – usually civil cases – between private parties, I do not believe that it would be appropriate to make general provision for the reopening of proceedings following a successful application by one party to the Strasbourg Court. An application by an unsuccessful litigant in domestic proceedings could take some years to be resolved finally; the other parties to the domestic litigation would not ordinarily be party to the case in Strasbourg. During the time that the application to the European Court of Human Rights is being considered, other parties to the domestic litigation who wish to rely on the conclusion of the domestic case would not be able to do so, thus adversely affecting their rights. I understand from the discussions in which my officials have been involved in Strasbourg that this is a concern shared by other states of the Council of Europe.

Appendix 3: Letter dated 23 January 2007 to The Rt Hon. John Reid MP, Secretary of State for the Home Department, Home Office, re Implementation of Judgments of the European Court of Human Rights

The Joint Committee on Human Rights is continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR). I am writing to inquire about the Government response to two recent judgments.

Saadi v United Kingdom (App No 13229/03)

In this case, the European Court of Human Rights (ECtHR) decided that detention of potential immigrants is compatible with the ECHR, if the detention is a genuine part of the process to determine whether the individual should be granted immigration clearance or asylum and it is not otherwise arbitrary (for example on account of its length). The Court concluded that, in this case, the detention of Mr Saadi was a “bona-fide” application of the Government’s fast-track policy and that in the circumstances of his case, detention for a period of seven days was not arbitrary (para 45). There had been a violation of Article 5(2) ECHR, as Mr Saadi had not been informed of the reasons of for his detention “promptly”. A delay of 72 hours, in this case, was unlawful.

I would be grateful if you could tell us:

- what steps the Home Office has taken, or proposes to take, to ensure that the detention of asylum seekers is a) only undertaken as “a genuine part of the asylum process”; and b) is not arbitrary;
- what steps have been taken by the Home Office to disseminate the findings of the ECtHR in *Saadi v UK*;

- what steps, if any, have been taken to ensure that an individual is not detained for a significant period of time without any assessment of whether or not his detention is arbitrary and unlawful; and
- what steps, if any, have been taken to ensure that the reasons for an individual's detention are communicated to him "promptly";
- what are the average and longest times spent in detention in Immigration Removal Centres (or at other venues) by an asylum applicant; and
- whether figures are available on:
 - i. the number and proportion of applicants detained and then subsequently removed from the United Kingdom;
 - ii. the number and proportion of applicants detained who are unable to be removed from the United Kingdom due to administrative or other difficulties unrelated to their application; and
 - iii. the number and proportion of applicants who are detained, released and subsequently detained for an additional period.

If any of these figures are available, we ask that they are provided to us.

Keegan v United Kingdom (App. No 18867/03)

In this case, the ECtHR decided that a failure to verify that a suspect had a continued connection with a property before executing a forcible was in breach of Article 8 ECHR. The lack of a domestic remedy for this violation of the applicants' rights was in a breach of Article 13 ECHR.

I would be grateful if you could tell us:

- a) what steps have been taken to draw this judgment to the attention of Police Authorities, and to ensure that particular and appropriate efforts are made to avoid disproportionate, unnecessary or negligent searches in breach of Article 8 ECHR;
- b) whether, in the Government's view, had the events in this case occurred after October 2000, a claim for damages pursuant to Sections 7-8, HRA 1998 would have provided an effective remedy for the applicants; and
- c) if not, whether the Government has considered the introduction of a new remedy for individuals affected by the conduct of disproportionate, unnecessary or negligent searches.

I would be grateful for your response by 20 February 2007.

Appendix 4: Letter dated 10 May 2007 from Liam Byrne MP, Minister of State, Home Office, re. Implementation of Judgments of the European Court of Human Rights

Thank you for your letter of 23 January to John Reid seeking details of the Government response to two recent ECtHR judgements – in the cases of *Saadi v United Kingdom* and *Keegan v United Kingdom*. I am sorry for the delay in replying.

The answers to your questions about these two cases are attached. I should mention that the *Saadi* case has been referred to the Grand Chamber of the ECtHR on the application of the claimant and the judgement handed down last July is not therefore final. The case is due to be heard on 16 May.

I hope the attached information is helpful.

Appendix

Saadi v United Kingdom (App No 13229/03)

What steps the Home Office has taken, or proposes to take, to ensure that the detention of asylum seekers is a) only undertaken as "a genuine part of the asylum process; and b) is not arbitrary?

Oakington Reception Centre opened in March 2000 as a centre for deciding asylum applications quickly through a process known as the fast track process. In a written Ministerial statement on 16 March 2000 the then Minister, Barbara Roche, explained that [Col. 385]:

"Oakington Reception Centre will strengthen our ability to deal quickly with asylum applications, many of which prove to be unfounded. In addition to the existing detention criteria, applicants will be detained at Oakington where it appears that their application can be decided quickly, including those which may be certified as manifestly unfounded ... Detention will initially be for a period of about seven days to enable applicants to be interviewed and an initial decision to be made. Legal advice will be available on site."

In *R (Saadi) v Secretary of State for the Home Department* [2002] 1 WLR 3131 the House of Lords considered the lawfulness of detaining asylum claimants, pursuant to the fast track process at Oakington, for the sole purpose of deciding their claims quickly. Their Lordships concluded that detention for the purpose of claims being decided quickly was lawful both within the Immigration Act 1971 and under Article 5 of the European Convention on Human Rights. Lord Steyn, having held (paragraph 43) that detention under the fast track process was "to prevent [a person] effecting an unauthorised entry into the country" within the meaning of Article 5(1)(f), added (paragraphs 45 of the judgement) that:

"I do not see that either the methods of selection of these cases (are they suitable for speedy decision?) or the objective (speedy decision) or the way in which people are held for a short period (ie short in relation to the procedures to be gone through) and in reasonable physical conditions even if involving compulsory detention can be said to be arbitrary or disproportionate".

The Detained Fast Track (DFT) was set up in April 2003 at Harmondsworth Removal Centre building on the success of the original Oakington fast track process. It was initially limited to single male asylum applicants who were considered to have straightforward claims and who could be detained pending a quick decision. A female DFT process opened in May 2005 at Yarl's Wood Removal Centre.

A further written Ministerial statement was issued by the then Minister, Des Browne, on 16 September 2004 [Col. 391] in relation to the DFT. This explained that:

"A key element in the Government's strategy to speed up processing of asylum claims has been the introduction of the fast track asylum processes operated initially at the Oakington reception centre and now also at Harmondsworth removal centre and other locations. The use of detention to fast track suitable claims under these processes is necessary to achieve the objective of delivering decisions quickly. This

ensures, amongst other things, that those whose claims can be quickly decided can be removed as quickly as possible in the event that the claim is unsuccessful ... When deciding whom to accept into fast track processes account is taken of any particular individual circumstances known to us, which might make the claim particularly complex, or unlikely to be resolved in the timescales however flexibly applied. The existence of UK based family ties – such as a spouse, partner or child – would not automatically exclude a claimant from the process as some issues, such as article 8 family life ones, can be relatively easy to decide quickly given the case law and the individual's actual circumstances”.

The statement confirmed that decisions should generally be made within 10-14 days.

The DFT has a focus on high quality decision-making, with access to high quality legal advice through a panel of duty solicitors, and a case owner with overall responsibility for a case throughout the process. The DFT process provides an in-country right of appeal subject to an accelerated statutory timetable set out in the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005.

The fairness of the DFT process was challenged in 2004 in both the High Court and the Court of Appeal. The latter court upheld the judgement of the former court that the Harmondsworth system was not inherently unfair or arbitrary. However, the Court of Appeal suggested that a “written flexibility policy to which officials and representatives alike can work will afford a necessary assurance that the ...timetable is in truth a guide and not a straitjacket”. Following the Court of Appeal judgement a “Flexibility Document” was published to ensure that the DFT process operated flexibly and fairly. That document is in the public domain and it continues to guide the day to day operation of the DFT process.

The Flexibility Document is designed to ensure the fairness of the DFT process. In addition, there is a “Suitability Document”, also in the public domain, that is designed to ensure that the DFT process is not arbitrary. As indicated above, the DFT process is considered to be suitable only for single males or females with no dependants, so family cases, for example, are not detained under the DFT process. In addition, the Suitability Document gives advice on a wide range of other types of cases that are not suitable for the DFT process, eg persons under the age of 18 and those with a medical condition requiring 24 hour nursing or medical intervention. The Suitability Document also provides a list of countries that are likely to be suitable for the DFT process. However, it makes it clear that any asylum claim may potentially be fast-tracked, whatever the nationality or country of origin of the claimant, where it appears after initial screening to be one that may be decided quickly. The Suitability Document is kept under review and revised from time to time to reflect changes in case law and country conditions, etc.

The decision to process an asylum claim in the DFT process is taken by a specialist IND unit - the Asylum Intake Unit – that liaises closely with the DFT Units at Harmondsworth and Yarl's Wood. Once detained in the DFT process, a claimant is interviewed in depth about their asylum claim, usually within 2-3 days of their date of detention. If, following that interview, it becomes clear that the claim is not one that can be decided quickly, then the claimant will be released from the DFT process and the claim will be dealt with on a slower, non-detained track. About 15% of those detained in the DFT process are released before a decision is made on their claim.

Additional safeguards exist post-decision. For example, an Immigration Judge may remove a case from the DFT process if he is satisfied that there are exceptional circumstances which mean that the appeal cannot otherwise be justly determined. The detainee also has the right to apply for bail.

Taken together with the numbers released pre-decision, about one third of those who enter the DFT process are removed from it before their case becomes "appeal rights exhausted". This demonstrates that the DFT process is neither unfair nor arbitrary but, rather, is operated in a flexible and sensible manner, with each case being judged on its merits at each key stage of the process.

What steps have been taken by the Home Office to disseminate the findings of the ECtHR in *Saadi v UK*?

A synopsis of the *Saadi* judgement was disseminated to all DFT staff within a few days of the promulgation of the Court's judgement.

What steps, if any, have been taken to ensure that an individual is not detained for a significant period of time without any assessment of whether or not his detention is arbitrary and unlawful?

The ECtHR in *Saadi* held that a delay of 76 hours in providing reasons for detention was not compatible with the requirement in Article 5(2) that such reasons be given "promptly". The Home Office is satisfied that no such delay could occur under the DFT process. When a decision is made to detain a claimant in the DFT process, the claimant is given form IS91R "Reasons for Detention and Bail Rights". This will indicate, among other things, that the Immigration Officer is satisfied that the asylum claim can be decided quickly using fast track procedures. In addition, claimants are taken through a standard "induction" programme with DFT staff within 24 hours of their entry to the DFT process during which that process is explained. They are also given prompt access to legal advice through a panel of duty representatives, or they can use their own private legal representative if they wish. We are therefore satisfied that the process takes full account of the *Saadi* judgement.

Once detained, the continuing detention of DFT claimants is reviewed regularly by a DFT case owner after 24 hours, 3 days, 7 days, 14 days and 21 days. A detention review would also be conducted on an ad hoc basis following a significant change of circumstances or event relating to a particular case. The decision on whether or not to maintain detention has to be authorised by a senior officer. After 28 days, detention reviews are undertaken by a central unit, which is separate from the DFT process, to ensure that the decisions about detention for periods of a month or more are taken in an entirely objective manner by officials not connected with the determination of the asylum claim and authorised, where appropriate, by increasingly senior officials as the length of time in detention increases.

What steps, if any, have been taken to ensure that the reasons for an individual's detention are communicated to him "promptly"?

At the time of Mr Saadi's detention at Oakington in 2001 the reasons for detention notice (IS91R) served on all detainees at the point of their detention did not contain specific reference to the fast-track asylum process. As a result, the ECtHR held that the first time the real reason for Mr Saadi's detention was communicated to him was when his representative was informed orally (approximately 76 hours after he was first detained) that he met the criteria for Oakington. The position has long since been rectified, initially by the inclusion of an Oakington-specific addendum to the IS91R and, subsequently, by revision of the form itself to include specific reference to the fast-track asylum process as a reason for detention.

What are the average and longest times spent in detention in immigration removal centres (or at other venues) by an asylum applicant?

Information relating to length of time spent in detention for asylum applicants detained solely under Immigration Act powers is published in the Quarterly Asylum Statistics bulletins available on the Home Office's Research, Development and Statistics website at: <http://www.homeoffice.gov.uk/rds/immigration1.html>. Due to data quality issues, information on length of time spent in detention for persons detained as at 30 December 2006 is not available.

Whether figures are available on:

The number and proportion of applicants detained and then subsequently removed from the United Kingdom?

Information relating to the number of asylum applicants recorded as leaving detention solely under Immigration Act powers, with the reason for leaving as having been removed from the UK, is also published in the Quarterly Asylum Statistics bulletins. This information was first published in February 2006 and covered the period between July and September 2005.

The number and proportion of applicants detained who are unable to be removed from the United Kingdom due to administrative or other difficulties unrelated to their application?

The number and proportion of applicants who are detained, released and subsequently detained for an additional period?

Information relating to the number of asylum applicants detained who are unable to be removed from the UK due to administrative or other reasons, and those who are detained, released from detention and subsequently detained for an additional period is not available; it would only be available by examination of individual records at disproportionate cost.

Keegan v United Kingdom (App No 18867/03)

What steps have been taken to draw this judgement to the attention of Police Authorities, and ensure that particular and appropriate efforts are made to avoid disproportionate, unnecessary or negligent searches in breach of Article 8 ECHR?

Whether, in the Government's view, had the events in this case occurred after October 2000, a claim for damages pursuant to sections 7-8, HRA 1998 would have provided an effective remedy for the applicants?

If not, whether the Government has considered the introduction of a new remedy for individuals affected by the conduct of disproportionate, unnecessary or negligent searches?

This case highlighted the importance of compliance with the provisions of section 15 of the Police and Criminal Evidence Act (PACE) 1984 and the associated provisions in section 3 (Search Warrants and production orders: Before making an Application & Making an Application).

These provisions clearly set out what reasonable enquires an officer must make prior to making an application for a warrant, including anything known about the likely occupier of the premises, the nature of the premises, whether previous searches have occurred and any other relevant information. When information appears to justify an application, the officer is required under paragraph 3.1 of Code B to ensure that reasonable steps are taken to check that the information is accurate, recent and not provided maliciously or

irresponsibly. The officer is required to make use of this information on making an application and required, among a number of other actions, to specify the person in occupation of the premises.

The case was reported in the Times on 9 August and has been reported in a number of Official Reports and law journals. This would have been picked up by legal departments within police forces and police authorities. However, we do not envisage specifically drawing this judgement to the attention of police authorities. That is because the police service is required to carry out all their activities in a fair, proportionate and lawful manner. There is little to be gained from sending out a notification to forces telling them not to be negligent.

As indicated above, the provisions for entry and search of premises are set out in PACE. Breach of such provisions may render evidence gathered during the course of an investigation as inadmissible. Any breach of the PACE Codes may also render individual officers subject to disciplinary proceedings. It would also be open to any aggrieved party to consider civil proceedings. These remedies were open to prior to and since the introduction of the HRA 1998. An HRA claim would provide an adequate remedy.

Appendix 5: Letter dated 23 January 2007 to The Rt Hon. Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs

The Joint Committee on Human Rights is continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR). I am writing to ask for an update on the progress made by the Government towards the implementation of a number of judgments of the European Court of Human Rights. We previously considered each of these judgments in our First Progress Report on the Implementation of Strasbourg Judgments (2005-06, Thirteenth Report, HL 133, HC 954).

A v UK

In our last progress report, we noted that the Committee of Ministers was not yet fully satisfied with the implementation of the Children Act 2004 as a means of executing the judgment of the Court in *A v UK* (para 11). The Secretariat of the Committee of Ministers have noted that the provisions of the Children Act 2004 are in principle, in conformity with the requirements of the Convention. The Committee of Ministers have not as yet considered whether the provisions of the Children Act 2004 are adequate to ensure effective deterrence.¹⁸¹ Both the Committee of Ministers and the Parliamentary Assembly of the Council of Europe have expressed their concern as to whether the judgment had been effectively executed in Northern Ireland and in Scotland. The Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006, approved in July 2006, appears to extend the protection offered to children in England and Wales by the Children Act 2004 to Northern Ireland.

I would be grateful if you could:

- a) advise us whether the Government is satisfied that the law in Scotland and Northern Ireland is now adequate to protect against further**

¹⁸¹ Information presented for the meeting of the Ministers Deputies, 17-18 October 2006 (Last published update); http://www.coe.int/t/e/human_rights/execution/02_documents/PPcasesExecution_Nov%202006.pdf.

violations of children's rights to dignity and physical integrity as in *A v UK*; and if so, why; and

- b) provide us with a further explanation of the Government's view that the provisions of the Children Act 2004 provide an effective deterrent to the use of physical punishment to comply with the requirement that the execution of the judgment in *A v UK*; and**
- c) provide us with up to date information on the number of cases in which the defence of reasonable chastisement has been raised since the enactment of the Children Act 2004; and on the number of cases in which the defence of reasonable chastisement has been successful.**

Beet v UK; Lloyd and Others v UK

These cases concerned applicants who had failed to pay local taxes, or fines, imposed by magistrates courts. We noted in our last progress report that guidance on this issue was expected to be provided to magistrates on the issues raised by these cases shortly.

The Magistrates Association published a Guidance Note on this issue in September 2006.¹⁸² We did not receive a copy of this guidance from the Department of Constitutional Affairs, who have confirmed that this is the relevant guidance. It was published late last year in a Business Information Notice (an approach agreed by the Magistrates Association, the Justices' Clerks Society and Lord Justice Thomas). The Department have apologised for their oversight in failing to forward this information to the Committee. We are disappointed that a draft copy of the relevant Guidance Note was not provided to us during the course of consultation with the relevant stakeholders; and the Guidance Note was not copied to us on publication. We note that this guidance does not appear to be easily accessible via the HMCS website.

I would be grateful if you could explain:

- a) the Government's view that this Guidance Note adequately implements the judgments in *Beet* and *Lloyd*; and**
- b) what steps, if any, HMCS are taking to disseminate this guidance to magistrates and justices clerks.**

Hirst v UK

The Department for Constitutional Affairs published their consultation paper on the Voting Rights of Convicted Prisoners on 14 December 2006, over ten months after the Secretary of State for Constitutional Affairs indicated that he hoped it would be available. The information provided to the Committee of Ministers for their meeting on 17-18 October 2006 indicated that draft legislation expected in October 2007. This appears unrealistic in light of the new timetable of the proposed consultation. Although there is no new timetable presented in the DCA consultation document, this consultation will close on 7 March 2007. This consultation – which is presented as “Stage 1” – will be followed by a further “Stage 2” process involving proposals for legislation. It appears that the Government expects this consultation process to last for a significant time. The necessary reforms will not be in place in time for the Northern Irish Assembly elections in March

¹⁸² A copy of the guidance note is available online: http://www.magistrates-association.org.uk/branch_information/noticeboard%20attachments/imprisonment-for-non-payment-of-fines-guidance.doc.

2007; Scottish Parliament elections; National Assembly in Wales; and local government elections in England and Scotland, all expected in May 2007.

The Consultation Paper clearly expresses the Government's "firm belief" that "individuals who have committed an offence serious enough to warrant a term of imprisonment, should not be able to vote while in prison (Foreword by the Lord Chancellor). We note that the Government have concluded that the judgment in *Hirst v UK* "did not conclude that the UK must enfranchise all prisoners". As a result, the consultation does not offer total enfranchisement of all prisoners as an option for change. However, we note that the Consultation Paper invites respondents to comment on retaining total disenfranchisement, despite this being the only option which the Government accepts is incompatible with the judgment of the Grand Chamber (paras 57-58, DCA Consultation Paper).

I would be grateful if you could tell us:

- a) why there has been such a significant delay in the launch of this consultation process;**
- b) why, given the significant number of forthcoming elections, the Government considers that it is appropriate to conduct a two stage consultation process;**
- c) what is the proposed timetable for Stage 2 of the consultation;**
- d) what are the Government's reasons for consulting on maintaining the blanket ban on voting for all prisoners, which was found to breach the ECHR by the European Court of Human Rights;**
- e) what are the Government's reasons for excluding from the options for change any prospect of full enfranchisement.**

We would be grateful for a fuller explanation of the Government's views than those provided in the Consultation Paper.

Hooper v UK

In our last progress report, we welcomed plans by the Home Office to issue a practice direction on bind-over Orders, including on rights to make representations and to provide for legal representation where necessary. The Home Office indicated that a Practice Direction would be published in 2006. In the information provided to the Committee of Ministers for their meeting on 17-18 October 2006, the Government indicated that progress on the relevant Practice Direction had been delayed, but that a first draft had been produced. The Government indicated that they expected that the 2005 figures would show a significant reduction in the use of binding-over orders.

I would be grateful if you could provide us with:

- a) a copy of the draft Practice Direction;**
- b) a revised timetable for the publication of the Practice Direction on "binding-over"; and**
- c) revised statistics for 2004-2006 (or 2004-2005, if no figures for 2006 are available) on the use of binding-over orders.**

Yetkinsekercki v UK

This case concerned delays in criminal procedures. In our last progress report, we welcomed steps taken to reduce waiting times for Criminal Appeals. We noted that the Criminal Appeals Office expected waiting times to continue to fall and that we would look forward to further progress.

I would be grateful if you could provide us with updated statistics on waiting times from the Criminal Appeals Office.

Appendix 6: Letter dated 14 March from The Rt Hon. Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs

1. Thank you for your letters of 23 January regarding judgments of the European Court of Human Rights.

2. I will respond separately to your questions regarding the judgment in *Hirst v UK* and the declaration of incompatibility in *William Scott v Electoral Registration Officer*.

A v UK (App. No. 25599/94)

a) advise us whether the Government is satisfied that the law in Scotland and Northern Ireland is now adequate to protect against further violations of children's rights to dignity and physical integrity as in A v UK; and if so, why?

3. In the Committee's First Progress Report on the Implementation of Strasbourg Judgments (2005-06, Thirteenth Report, HL 133/HC 954) it was acknowledged that section 58 of the Children Act 2004 was likely to be sufficient to remedy the incompatibility in *A v UK* in England and Wales. The Committee of Ministers has also welcomed the progress made by s.58, albeit that it is keen to monitor the operation of the new provision in practice. The Government therefore believes that s.58 is ECHR compliant.

4. Article 2 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006 replicates section 58, and the Government therefore believes that the law in Northern Ireland in this area is also now ECHR compliant. Article 2 of the Order is underpinned by guidance for prosecutors regarding the appropriate level of charge taking into account the vulnerability of the victim.

5. In Scotland section 51 of the Criminal Justice (Scotland) Act 2003 prescribes a test which the Scottish Courts must apply when considering whether the physical punishment of a child was justified. The section further sets out when such punishment is never reasonable. This is consistent with that applied by the European Court of Human Rights in *A v UK*. Accordingly, the Government is satisfied that the position in Scotland is also ECHR compliant.

b) provide us with a further explanation of the Government's view that the provisions of the Children Act 2004 provide an effective deterrent to the use of physical punishment to comply with the requirement that the execution of the judgment in A v UK?

England and Wales

6. The European Court of Human Rights found that the law at the time of *A v UK*. Did not provide adequate protection to the applicant against treatment or punishment contrary to

Article 3 of the Convention, and the Government accepted that this was the case. Following the enactment of Section 58 of the Children Act 2004, the defence of "reasonable punishment" is no longer available under any circumstances where an offence falls to be charged as assault occasioning actual bodily harm, grievous bodily harm, or cruelty. These categories would inevitably include any offence that would be capable of construction as a breach of a child's rights under Article 3.

7. The Government is keen to promote an environment, in which children are genuinely safe from genuine "harm", and in which parents and carers with parental responsibility are treated as the best people to bring up their own children. In addition to the deterrent of the criminal law provisions in place, the Government is working, in partnership with local areas, to ensure that parents and families have access to the support they need, when they need it, so that all children can benefit from confident positive and resilient parenting.

8. Up to £70 million is being invested over a two year period from April 2008 to fund new measures related to parenting, including: universal access to parenting support; piloting Parent Support Advisers; improving local authority delivery of parenting provision through guidance for Directors of Children's Services; developing the workforce by establishing a National Academy for Parenting Practitioners to ensure those who provide support to parents have the skills they need; providing additional support to teenage parents; and legislating to extend the use of parenting orders and enable the earlier use of parenting contracts.

Northern Ireland

9. Article 2 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2008 is also part of a twin track approach. Accordingly the legislative reform has been accompanied with the establishment of an interdisciplinary group on positive parenting. That group, which is comprised of representatives from Government departments and voluntary organisations, will be looking at how parents can be supporting in providing a loving and nurturing environment for their children and how they can be encouraged to use alternative forms of discipline. The group is currently refining its communications strategy and will be conducting an audit of the available parental support services. The recently launched consultation paper 'Family matters; supporting families in Northern Ireland' has positive parenting as one of its themes and one of the proposed aims is to increase the availability of positive parenting and anger management classes.

Scotland

10. The Scottish Executive believes in giving every child the best possible start in life. This extends to all areas of policy - not east that relating to child protection and support for families. Section 51 of the Criminal Justice (Scotland) Act 2003 provides improved protection for children against physical assault. By giving greater clarity to the law. it aims to help their parents and carers avoid the use or unnecessary and excessive physical punishment

11. In addition, the Scottish Executive has produced a booklet *Children, Physical Punishment and the Law - A Guide for Parents in Scotland*¹⁸³ which both explains the law to parents and encourages positive discipline. This is designed both as an information tool and as a deterrent to the use of physical punishment. Voluntary organisations working with parents and children and focus groups of parents were consulted on the design and content of this booklet which was sent to the parents of every child in Scotland through nurseries and schools. There is still regular demand for this booklet and over 700,000

¹⁸³ <http://www.scotland.gov.uk/Publications/2003/10/18406/28339>.

copies have been distributed so far to GP surgeries, social work departments and other agencies.

c) provide us with up to date information on the number of cases in which the defence of 'reasonable chastisement' has been raised since the enactment of the Children Act 2004; and on the number of cases in which the defence of reasonable chastisement has been successful?

12. The Crown Prosecution Service are currently undertaking a research project to identify cases where 'reasonable chastisement' has been used as a defence against a charge of common assault of a child from January 2005 (when the Children Act 2004 came into force) to November 2006. A final report is expected in time to meet the deadline for information for the meeting of the Committee of Ministers on 5-6 June. The JCHR will be notified of the findings.

Beet v UK (App. No. 47676/99): Lloyd and Others v UK (App No. 29798/96)

a) explain the Government's view that this Guidance Note [produced by Magistrate's Association] adequately implements the judgments in *Beet* and *Lloyd*?

13. The claims in *Beet* and *Lloyd* were based on shortcomings in the procedures adopted by magistrates' courts. The Guidance Note reminded magistrates of some of the pitfalls which could be encountered when considering imprisonment of defendants for non-payment of fines and civil liabilities. A checklist for magistrates and court staff considering committal for default was included. Accordingly, the Government considers that the Note adequately implements the judgments in *Beet* and *Lloyd*.

b) what steps, if any, HMCS are taking to disseminate this guidance to magistrates and justices clerks?

14. The guidance was disseminated by the Magistrates' Association to branches in October 2006 and published on the Magistrates' Association website.¹⁸⁴

Hooper v UK (App. No 423178/98)

I would be grateful if you could provide us with:

a) a copy of the draft Practice Direction.

15. A copy of the draft Practice Direction is enclosed with this letter.

b) a revised timetable for the publication of the Practice Direction on "binding over."

16. The President of the Queen's Bench Division and the Lord Chief Justice issued the draft Practice Direction for consultation. As a result of the comments received, the President of the Queen's Bench Division wishes to seek the advice of the Criminal Procedures Rules Committee at their next meeting in March.

17. I will update the JCHR as to revisions made to the Practice Direction and the timetable for publication following that meeting in March.

¹⁸⁴ http://www.magistrates-association.org.uk/branch_information/noticeboard%20attachments/imprisonment-for-non-payment-of-fines-guidance.doc.

c) revised statistics for 2004-2006 (or 2004-2005, if no figures for 2006 are available) on the use of binding-over orders.

18. Statistics for 2004-2006 are not currently available. The statistics for 2004-2005 are as follows:

Number of persons ⁽¹⁾ bound over and number of orders made, ⁽²⁾ by type of bindover, England and Wales, 2004-05		
Type of bindover	2004	2005
Bindovers with convictions/recognizances		
Number of persons	6,155	5,590
Number of orders made	6,750	6,200
Bindovers without conviction		
Number of persons	14,936	10,067
Number of orders made	17,664	11,616
Bound over at the Crown Court to come up for judgement if called upon		
Number of persons	6	9
Number of orders made	7	15
Parent recognizances		
Number of persons	264	209
Number of orders made	289	228
(1) Bound over for principal offence, whether or not principal disposal.		
(2) Total bindovers made (includes persons bound over for principal offences together with any non-principal offences and other persons bound over for non-principal		

offences).

Although care is taken in collating and analysing the returns used to compile these figures, the data are of necessity subject to the inaccuracies inherent in any large-scale recording system. Consequently, although figures are shown to the last digit in order to provide a comprehensive record of information collected, they are not necessarily accurate to the last digit shown.

Yetkinsekercki v UK (71841/01)

I would be grateful if you could provide us with updated statistics on waiting times from the Criminal Appeals Office.

19. The figures below demonstrate a further improvement in the waiting times to disposal by the full court (in months):

	December 2005	December 2006
Conviction	13.2	11.5
Sentence	5.6	4.8

Wainwright v UK (App. No. 12350/04)

a) what steps, if any, the Government intends to take to give effect to the decision of the ECtHR in *Wainwright*?

20. The breach in *Wainwright* was a result of specific failures arising from the circumstances of the case, rather than of existing policy. The European Court of Human Rights found that the searches were “in accordance with the law”. However, it was the failure to adhere to the Prison Service’s internal policy, which laid down established procedures and safeguards, which underpinned the finding that the searches were not proportionate and that Article 8 had been breached. The Government considers that searches would have been carried out in compliance with Article 8 if established policy had been applied and the correct procedures operated, with appropriate records kept.

21. In addition, HM Prison Service policy in relation to visitor searching is now quite different to 1997. More use is made of closed or closely observed visits, with strip searching only occurring rarely.

b) whether the Government have considered taking steps to introduce a statutory tort of privacy invasion, in light of the different approaches taken by the ECtHR and the House of Lords in *Wainwright* to the application of Article 8 ECHR?

c) If so, have the Government considered what safeguards would be necessary to afford adequate protection to the Convention rights of others, including the right to freedom of expression guaranteed by Article 10 ECHR?

22. The Government does not consider that a new statutory tort of invasion of privacy is appropriate or necessary. *Wainwright* arose prior to the commencement of the Human Rights Act 1998. Since the Human Rights Act came into force in October 2000 victims of unlawful action can bring a case under the Act and the Court must, under section 2, take into account the jurisprudence of the European Court of Human Rights, including the decision in *Wainwright*. The Government believes that the balance to be struck between

freedom of expression and the right to privacy is a matter best determined by the courts on the individual facts of each case.

d) What steps the Government has taken to disseminate the judgment in *Wainwright* to Prison and Police Authorities and to the judiciary, in order to ensure that particular and appropriate efforts are made to avoid disproportionate, unnecessary or negligent searches in breach of Article 8 ECHR?

23. HM Prison Service Security Policy Unit issued a note in November 2003 following the House of Lords judgment in *Wainwright* reminding prison staff of the appropriate policy on strip searching and emphasising the importance of adhering to the correct procedures and maintaining full and accurate records.

24. In December 2006, HM Prison Service Operation Group agreed a paper amending aspects of searching policy. Part of those amendments specifically addresses issues raised in the *Wainwright* case and the importance of record keeping. It is anticipated that this will be published by April 2007 and it will be circulated to all prisons.

25. The judgment of the European Court of Human Rights received extensive coverage in various legal publications to which practitioners and the judiciary have access.¹⁸⁵

Blake v UK (App. No. 68890/01)

a) what steps have been taken to draw this judgment to the attention of Judges and to the staff of the Treasury Solicitor, and to ensure that particular and appropriate efforts are made to proceed without delay in civil cases involving the State?

26. Copies of the judgment in *Blake* were made available to all Civil Appeals Office lawyers and senior administrators. The judgment was widely reported in various legal publications.¹⁸⁶

27. A number of substantial administrative changes have had a significant effect in reducing the time cases take to be heard, including:

- A number of changes implemented as a result of the Bowman Report. The follow up report¹⁸⁷ details the impact of the changes to the Court of Appeal (Civil Division) following the review. One of the key findings was that the times for all key stages in the processing of appeals and applications fell. The age of cases at disposal also showed a downward trend;
- The Woolf Reforms introduced a much clearer system of case management set out in the Civil Procedure Rules, Part 52 of which, together with the supplementary Practice Direction, govern appeals to the Court of Appeal;
- Supervising Lords Justice now take responsibility for overseeing the case management in different fields of law, with Civil Appeals Office lawyers carrying out the day-to-day case management of their individual areas with the support of administrative case managers;

¹⁸⁵ [2006] All ER. 125, TLR, 3rd October 2006, (2006)156 NLJ 1524, [2007] PL 151, [2007] Legal Action 10, (2006) 10 Co.L.J. 15, (2006) 66 MLN 32, [2006] Justice of the Peace and Local Government Law 984, (2006) 150 S.J. 1553.

¹⁸⁶ [2006] All ER 126, [2006] 1 EHRLR 86, The Times 11 October 2006, (2006) JIPLP 827, [2006] MLN 31 and I.P. News Nov. 6 2006.

¹⁸⁷ <http://www.dca.gov.uk/research/2003/5-03es.htm>.

- The Master of the Rolls' Practice Note of February 2003 set clear hearby dates and reduced these to periods ranging from 4-9 months. The Master of the Rolls also gave clear guidance on principles for expedition in appropriate cases;
- The Civil Appeals Office monitors the throughput of applications and appeals closely. For example, weekly reports are produced on any cases which have passed their hearby dates and full reports are prepared monthly and examined by Civil Appeals Office lawyers with a view to deciding what steps need to be taken in order to progress each case appropriately. The lawyers report to their line managing Deputy Masters and supervising Lords Justice on the progress of all cases within each subject area.

28. The Treasury Solicitors Department promotes to its staff a proactive attitude towards conducting litigation and has client care standards designed that reinforce this approach. Whilst not seeking to defend the delay in *Blake* such cases are very unusual. Wider considerations, including the position under interlocutory orders, could be relevant to timing; it cannot be said that any delay must necessarily be avoided and that the same instruction would be relevant to all cases. However, as already indicated, proactivity is the general rule.

b) provide us with up to date statistics on the average and longest times taken to process civil cases at each stage, including in: the county courts; each division of the High Court the Court of Appeal; and the House of Lords.

29. The Committee will wish to note that the statistics at each stage are collected separately and reflect each court's procedures. They are not intended to be directly comparable and they should therefore be treated only as indicative numbers.

County Court

30. The following statistics are for cases closed in 2006. The 90%, 95% and 99% percentiles represent the lengths that 90%, 95% and 99% of cases respectively are equal to or greater than.

	Average time	90% percentile	95% percentile	99% percentile
Issue to small claim hearing in the county court	28 weeks	44 weeks	55 weeks	89 weeks
Issue to trial in the county court	50 weeks	82 weeks	104 weeks	174 weeks

High Court

31. The following statistics relate to the period between receipt and disposal for cases disposed of in 2006.

	County court final list	Chancery Division final list	Chancery Division (bankruptcy) final list	Queens Bench Division final list

Average time	109 days	158 days	104 days	108 days
Longest case	1717 days (<i>Inderjit Baria v Hides Ltd</i>)			

Administrative Court

Average (including time spent stood out on list)	4.3 months
Average (discounting time spent stood out on list)	3.6 months
Longest case	41.7 months (minus time stood out) (<i>Luke Alexander Phillips v London Borough of Barnet</i>)

Court of Appeal

32. The following statistics relate to the period taken from the case being set down to judgment for all cases heard before the Civil Division of the Court of Appeal in 2006.

Average	151 days
Longest case	1527 days (<i>Metro Trading International Inc & anr v Glencore International AG</i>)

House of Lords

33. The Judicial Office of the House of Lords collate combined civil and criminal case statistics and so the following statistics relate to the period taken from presentation of petition of appeal to final judgment for all cases before the House of Lords in 2006.

Average	426 days
Longest case	1504 days (<i>Regina v London Borough of Bromley (respondents) ex parte barker (FC) (Appellant)</i>)

Tsfayo v UK (App. No. 60860/00)

a) what steps the Government consider necessary to ensure that individuals have access to an independent and impartial tribunal (other than by way of judicial review)

b) what does the Government consider to be the implication of the decision in *Tsfayo* for its position that “there is a line of authority to the effect that it is not necessary for an appeal to lie to a court where judicial review is possible.”

34. In many cases decisions of an administrative decision maker are already subject to full appeal. In other cases, the Government's position is that judicial review provides an adequate review process. *Tsfayo* was concerned with Housing Benefit Review Boards (HBRBs), which had already been replaced by a system of independent and impartial tribunals under the Child Support, Pensions and Social Security Act 2000, with effect from 2 July 2001.

35. In its judgment in *Tsfayo*, the Court found that the HBRB was directly connected to the paying local authority because the Board comprised of up to five local councillors. The Court observed that the paying authority would have had to pay 50% (rather than the usual 5%) of the benefit claimed in cases where an applicant was found to have good cause for a late claim. The Court accordingly found that the HBRB was not merely lacking in independence; it also lacked any objective impartiality because the five councillors on the Board had a financial interest in the outcome of the decision and this might affect the Board's independence, of judgment in relation to the finding of primary fact in a way which could not adequately be scrutinised or rectified by judicial review. Furthermore, the Court found that the HBRB was deciding a simple question of fact, the determination of which required no specialist knowledge. Because the HBRB's decision turned on the credibility of the witness, there was never any possibility that the central issue in dispute would be determined by an independent and impartial tribunal—the judicial review court having no power to re-hear the evidence or substitute its own view. It was in those circumstances that the Court found judicial review to be insufficient to cure the lack of independence and impartiality of the administrative decision-maker, the HBRB.

36. However, the Court also referred with implicit approval to the previous line of domestic authorities in *Alconbury* and *Runa Begum*, but distinguished *Tsfayo* as being significantly different. Therefore, the Government considers that there remains a line of authority to the effect that it is not necessary for an appeal to lie to a court where judicial review is possible and the decision in *Tsfayo* does not alter that position.

Appendix 7: Letter dated 23 January 2007 to The Rt Hon. Adam Ingram MP, Minister of State for the Armed Forces, re *Martin v United Kingdom*

The Joint Committee on Human Rights is continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR). I am writing to ask for information on the Government's response to the judgment of the European Court of Human Rights in *Martin v United Kingdom* (App No 40426/98).

In that case, the Court stressed that while the ECHR did not absolutely exclude the jurisdiction of military courts over civilians, careful scrutiny was required of such jurisdiction, as only in very exceptional circumstances could their determination of criminal charges against civilians be compatible with Art.6. In this case, the composition, structure and procedure of the court-martial were themselves sufficient to raise a legitimate fear as to its lack of independence and impartiality. There were essential safeguards lacking. Specifically, all six members of the tribunal were subordinate in rank to the Convening Officer; although there were two civilian members of the Court-martial, those members did not have sufficient influence over the Court-martial as a whole, including over the

military members to satisfy the need for independence and impartiality guaranteed by Article 6(1).

I would be grateful if you could tell us:

- **whether the Government considers that Armed Forces Act 2006 satisfies the Convention requirement that the determination of criminal charges against civilians by military courts can only be justified in “very exceptional circumstances”;**
- **if so, why do they consider that the trial of civilians for criminal offences by a court martial or by the Service Civilian Court pursuant to Armed Forces Act 2006 will be compatible with the rights of those individuals to a hearing by an independent and impartial tribunal guaranteed by Article 6(1) ECHR; and**
- **if not, what steps are being taken by the Government to ensure that the application of the Armed Forces Act 2006 is compatible with the judgment of the ECtHR in the case of *Martin v UK* on the trial of civilians under military jurisdiction.**

Appendix 8: Letter dated 22 January 2007 from Derek Twigg MP, Parliamentary Under-Secretary of State for Defence and Minister for Veterans, Ministry of Defence

Thank you for your letter of 23 January to Adam Ingram about the European Court of Human Rights' judgment in the case of *Martin v United Kingdom*. I am replying as the Armed Forces Act 2006 falls within my area of responsibility.

In your letter you raised the following points:

- whether the Government considers that the Armed Forces Act 2006 satisfies the Convention requirement that the determination of criminal charges against civilians by military courts can only be justified in “very exceptional circumstances”;
- if so, why does the Government consider that the trial of civilians for criminal offences by the Court Martial or by the Service Civilian Court pursuant to the Armed Forces Act 2006 will be compatible with the rights of those individuals to a hearing by an independent and impartial tribunal guaranteed by Article 6(1) of the Convention; and
- if not, what steps are being taken by the Government to ensure that the application of the Armed Forces Act 2006 is compatible with the judgment of the European Court of Human Rights in the case of *Martin v United Kingdom* on the trial of civilians under military jurisdiction.

Following the Court's judgment my Department has very carefully considered the compatibility of the provisions of, and the procedures that will be established under, the Armed Forces Act 2006 with the European Convention on Human Rights. On the basis of that consideration, I remain of the view that the system established under the Armed Forces Act 2006 will be compatible with rights under the Convention.

The Armed Forces Act 2006 provides that certain civilians, such as dependants of members of the Armed Forces living with them outside the United Kingdom, can be tried by the

new standing Court Martial or by the Service Civilian Court which will be set up under the Act.

We consider that the Armed Forces Act 2006 enables the Court Martial and the Service Civilian Court to be constituted, when they deal with civilians, in such a way that they should not be held to be "military courts". Our view is that the judgment in *Martin* does not prevent the use of courts established under legislation dealing with the Armed Forces. The use of such legislation is inevitable because of the Service context in which the jurisdiction over civilians is required, but the courts must meet the requirements of a civilian court.

The Court Martial

You mention the problem in the *Martin* case of the role and rank of a convening officer. In fact, the *Martin* case occurred before the function of the convening officer was ended by the Armed Forces Act 1996. This is therefore no longer an issue for any court martial.

Whether the defendant appealing before the Court Martial is a member of the armed forces or a civilian, the judge advocate will be a civilian. This is one of the key requirements for Article 8 compliance.

In addition to this, section 155 of the Armed Forces Act 2006 enables us to make special provision as to the other members of the Court Martial (the "lay members") where the defendant is a civilian. The lay members perform a similar function to members of a jury in the Crown Court in that they decide the guilt or innocence of a defendant. Unlike their jury counterparts, however, they also Join with the judge advocate to decide on sentence.

Section 155(3) of the Armed Forces Act 2006 provides that the lay members are to be officers or warrant officers. This will be the case where the defendant is a member of the armed forces, but section 155(4) provides that section 155(3) is subject to Court Martial Rules.

We intend to use this power to provide for the lay members to be civilians where a defendant is civilian. We are, however, still considering whether there may be exceptional circumstances (as allowed by the judgment in *Martin*) where lay members might be members of the armed forces. An example of the sort of circumstances we are considering is where a contractor who is subject to Service discipline and is working with the armed forces in a war zone or other very dangerous area is accused of a crime. If it was necessary for the Court Martial to sit in the danger area and a sufficient number of civilian lay members were not available, there might be compelling reasons which would justify trial by a court with a military component. This will be looked at very carefully.

We consider that this "civilianisation" of the Court Martial will mean that, although it will still bear the name of "the Court martial", in substance it will not be a "military court" when trying civilians, in the same way that the composition of the Court martial Appeal Court will mean that it is substantively a civilian court, despite its name.

The Service Civilian Court

Turning to the Service Civilian Court, we have carefully considered the composition and procedures of this court. Notwithstanding its name, we are of the view that in substance it is a civilian court. As at present with the Standing Civilian Court, the Service Civilian Court will be presided over by a single judge advocate, who is a civilian. There are no lay members. The Service Civilian Court has powers that are similar to those of a magistrates' court or Youth Court in England and Wales. The fact that a judge advocate alone presides

over the Service Civilian Court hearings is akin to a District Judge (Criminal) sitting alone in a magistrates' court or Youth Court.

In conclusion, by taking the steps explained here, we take the view that the trial of a civilian by the Court Martial or by the Service Civilian Court will be compatible with the judgment in *Martin*.

Appendix 9: Information Note prepared for the Committee of Ministers by the Ministry of Defence, on *Martin v United Kingdom* Application No. 40426/98 for 3-4 April meeting

1. The Court's judgment in the case of *Martin v UK* became final on the 24th January 2007. This judgment has been disseminated to the Services' legal branches, the Ministry of Defence's (MoD) relevant policy units and Ministers. As yet the case has not been published.

Individual Measures

2. Following the Court's judgment the MoD has authorised payment of the Applicant's costs in the sum of 8370 Euros.

General Measures already taken

3. The case of *Martin* occurred before some extensive changes were made to court-martial procedure by the Armed Forces Act 1996 (<http://www.opsi.gov.uk/ACTS/acts1996/1996046.htm>) following the case of *Findlay v United Kingdom* (no. 110/1995/616/706) in which the Court found a violation of Article 6(1) of the Convention on the grounds that the army court-martial system then in operation did not meet the requirements of independence and impartiality.

4. The Armed Forces Act 1996 came into force on the 1 April 1997 and the changes it made were explained to, and accepted by, the Court in the case of *Morris v United Kingdom* (Application no. 38784/97). The Committee is in particular referred to paragraphs 19 to 23, 26, 30 and 61 to 62 of that judgment. In summary the relevant changes are that the posts of "convening officer" and "confirming officer" have been abolished; the former responsibilities of the convening officer in relation to the bringing of charges and the prosecution of them have been split between Higher Authority and the Prosecuting Authority whilst the convening of a court-martial and the appointment of members, summoning of witnesses and selection of venue are now the responsibility of the Court Administration Officer and his staff who are independent of Higher Authority and the Prosecuting Authority. Additionally, the former power of the convening officer to dissolve a court-martial is now vested in the Court Administration Officer prior to commencement of a court-martial, and thereafter in the judge advocate who is an independent civilian judge appointed by the Lord Chancellor (now the Judicial Appointments Committee) and is a member of a court-martial.

5. Consequently the Court concluded (at paragraph 62 of the *Morris* judgment) that "a separation has existed since the coming into force of the 1996 Act between the prosecutory and adjudicatory functions at a court-martial which was not present in the *Findlay* case. Advisory functions have also been allocated separately to the Director of Army Legal Services and Brigadier Advisory. Although the Director of Army Legal Services is also the Prosecuting Authority, the Court is of the view that sufficient safeguards of independence exist in that, in his advisory role, he does not deal with disciplinary matters and, in any event, he is in that role answerable to the Adjutant General, while as Prosecuting Authority he is answerable to the Attorney General."

6. The case of *Findlay* was closed by the Committee of Ministers on the basis of payment by the UK Government of sums for costs and expenses awarded by the Court and general measures taken by the Government to amend the army court-martial procedure so as to prevent new violations similar to the ones found in *Findlay*. Neither the *Findlay* case nor other cases tried under the *Findlay* court-martial system were re-opened.

General Measures to be taken

7. A point that the Court raised that has not been addressed in previous UK cases is the determination of criminal charges against civilians in military courts. The UK Government intends to take the measures detailed below to address this and ensure compliance with the Convention.

8. At present each of the Services is governed by its own Service Discipline Act (SDA), under which courts-martial are convened (the relevant one in this case being the Army Act 1955); however, in November 2006 the Armed Forces Act 2006 (http://www.opsi.gov.uk/acts/acts2006/ukpga_20060052_en.pdf) (AFA06) received Royal Assent and is scheduled to come into force at the beginning of 2009. The AFA06 creates a single system of Service law for all of the Services and under its provisions a standing Court Martial is established.

9. Additionally there are at present Standing Civilian Courts established in Germany and Cyprus which are very similar in their powers and jurisdiction to the magistrates' courts in England and Wales. They deal exclusively with certain civilians who live or work with the Armed Forces outside the United Kingdom. Under the AFA06 those separate courts are combined as the Service Civilian Court and may sit anywhere in the world outside the UK and the Channel Islands. The MoD has therefore considered both the position to be established under the AFA06 and the current position under the SDAs in light of the Court's judgment.

Position under AFA06

10. The AFA06 provides that certain civilians when outside the United Kingdom, such as dependants of members of the Armed Forces living with them, can be tried by the new standing Court Martial or by the Service Civilian Court. The AFA06 enables the Court Martial and the Service Civilian Court to be constituted, when they deal with civilians, so that they contain no military members. This is explained in more detail below. The courts will inevitably operate under an Act of Parliament which deals with the Armed Forces, because it is only where civilians are living or working with the Armed Forces that it is appropriate to have courts to deal outside the United Kingdom with those civilians.

11. In all cases the judge advocate will, as now, be a civilian. This is one of the key requirements for Article 6 compliance. In the Service Civilian Court, the only member will be the judge advocate. In the Court Martial, there are in addition lay members whose main function (like that of a jury in the English Crown Court) is to decide on guilt or innocence. Where the defendant is a civilian, all these members of the court will also be civilians, unless (in accordance with the judgment in *Martin*), there are considered to be compelling reasons sufficient to justify within Article 6 one or more service members.

12. Further any appeal by a civilian defendant will be to a court comprised entirely of civilians.

Position under the existing legislation

13. We have included in the AFA06 powers which are sufficiently wide to allow us to achieve the same effect as under the AFA06 in the existing SDAs, i.e. the alignment of SDA

provisions with those of the AFA06 where appropriate. The intention is that, where a civilian is court-martialled under any of the SDAs, the judge advocate will in all cases (as now) be a civilian and any lay members of a court-martial will be civilians, unless there are compelling reasons which would justify one or more service members. Any appeal by a civilian defendant will be to a court comprised entirely of civilians.

14. Amending the current SDAs to provide for this will require a form of subordinate legislation which must be debated by both Houses of Parliament and so needs to be fitted into the Parliamentary timetable. It is our aim, therefore, to have these amendments in place by the end of 2007.

Appendix 10: Letter dated 23 January 2007 to The Rt Hon. Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs

The Joint Committee on Human Rights is continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR). I am writing to inquire about the Government response to a number of recent judgments of the European Court of Human Rights.

Wainwright v United Kingdom (App. No 12350/04)

In this case, the European Court of Human Rights (ECtHR) held that as strip searches of the applicants, Mrs Wainwright and her son Alan, did not comply with prison guidance on their conduct, effective consent was not secured. The searches were not proportionate, due to the manner in which they were carried out and were in breach of Article 8 ECHR. In the circumstances, the applicants had no means of securing an adequate remedy for the breach of their rights to respect for their private life, in violation of Article 13 ECHR.

Early commentary on this judgment interpreted it as requiring the introduction of a general tort of invasion of privacy into English law. Others indicated the need for caution. Domestic Courts have historically refused to use Sections 3 and 6 of the Human Rights Act 1998 to create an entirely new tort of breach of privacy. Despite the ability of an individual to bring a claim under Sections 7 – 8 HRA, it is questionable whether the applicants would have a remedy if they brought their case today. The House of Lords decision in *Wainwright* gives strong guidance that a negligent invasion of privacy would not give rise to a breach of Article 8 ECHR, and so, could not give rise to a claim under the HRA. The ECtHR in *Wainwright* did not comment on whether Sections 7-8 of the Human Rights Act could afford an effective remedy for the purposes of Article 13 ECHR.

I would be grateful if you could tell us:

a) what steps, if any, the Government intends to take to give effect to the decision of the ECtHR in *Wainwright* ; and

b) whether the Government have considered taking steps to introduce a statutory tort of privacy invasion, in light of the different approaches taken by the ECtHR and the House of Lords in *Wainwright* to the application of Article 8 ECHR;

c) if so, have the Government considered what safeguards would be necessary to afford adequate protection to the Convention rights of others, including the right to freedom of expression guaranteed by Article 10 ECHR; and

d) what steps the Government has taken to disseminate the judgment in *Wainwright to Prison and Police Authorities* and to the judiciary, in order to ensure that particular and appropriate efforts are made to avoid disproportionate, unnecessary or negligent searches in breach of Article 8 ECHR.

Blake v United Kingdom (App No 68890/01)

In this case, the ECtHR considered a delay of around nine years in civil proceedings issued by the Attorney General against the applicant, a former member of the British Secret Intelligence Service convicted of communicating information contrary to the Official Secrets Act 1911. The Applicant had escaped from prison and sought to publish his autobiography. The Attorney General sought to recover the proceeds. The Court concluded these proceedings were not pursued with the due diligence required by Article 6(1) ECHR. Many of the causes of the delay in this case occurred before the Woolf Review, the coming into force of the Access to Justice Act 1999 and the advent of the Civil Procedure Rules ("CPR"). We accept that, under the timetables enforced by the CPR, it is less likely that the significant delays involved in this case would have occurred.

I would be grateful if you could:

a) tell us what steps have been taken to draw this judgment to the attention of judges and to the staff of the Treasury Solicitor, and to ensure that particular and appropriate efforts are made to proceed without delay in civil cases involving the State; and

b) provide us with up to date statistics on the average and longest times taken to process civil cases at each stage, including in: the county courts; each division of the High Court; the Court of Appeal and the House of Lords?

Tsfayo v United Kingdom (App No 60860/00)

In this case, the ECtHR decided that judicial review of administrative decisions will only be able to satisfy the requirements of Article 6(1) ECHR in circumstances where the issues to be determined in the decision making process require a "measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims", or where the assessment of the facts in a particular case are "merely incidental" to a broader judgment on policy which it would be appropriate for a democratically accountable authority to take. The ECtHR decided that the issue to be determined by the Board in this case, namely whether there was a "good cause" for the applicant's delay in making a claim for housing benefit was a simple question of fact, and therefore required determination by an independent and impartial tribunal with full jurisdiction to rehear the evidence and to substitute its own views. Failure to provide such a review was in breach of Article 6(1) ECHR.

This case engages with a recurrent point of Convention law on which the Committee has cause to disagree with the Government, namely when recourse to judicial review of the reasonableness of administrative decision making will be adequate to satisfy the requirements of Article 6(1) ECHR for a hearing by an independent and impartial tribunal. For example, the Explanatory Notes accompanying the Legal Services Bill, explain the Government's view that there is a line of authority "to the effect that it is not necessary for an appeal to lie to a court where judicial review is possible". The Committee has consistently questioned the Government's assertion that such a line of authority exists.

This case engages with a recurrent point of Convention law on which the Committee has cause to disagree with the Government, namely when recourse to judicial review of the reasonableness of administrative decision making will be adequate to satisfy the requirements of Article 6(1) ECHR for a hearing by an independent and impartial tribunal. For example, the Explanatory Notes accompanying the Legal Services Bill, explain the Government's view that there is a line of authority "to the effect that it is not necessary for an appeal to lie to a court where judicial review is possible". The Committee has consistently questioned the Government's assertion that such a line of authority exists.

I would be grateful if you could tell us:

a) what steps the Government consider necessary to ensure that individuals have access to an independent and impartial tribunal (other than by way of judicial review) from any decision by an administrative decision maker which is similar to the type taken in the case of *Tsfayo v UK*;

b) what does the Government consider to be the implications of the decision in *Tsfayo* for its position that "there is a line of authority to the effect that it is not necessary for an appeal to lie to a court where judicial review is possible"?

As the Home Office retains responsibility for prisons, we have copied this letter to the Home Secretary and have asked for his response to the judgment in *Wainwright v UK*. However, it appears that there are wider human rights issues which arise in the context of this case which would be more appropriately addressed by the Department of Constitutional Affairs.

We have also copied this letter to the Attorney-General, the Treasury Solicitor and the Judicial Studies Board for information, in so far as it relates to the judgment in *Blake v United Kingdom*.

Appendix 11: Letter dated 16 June 2006 from John Hirst, re *Hirst v UK* (No.2)

I note that that your remit excludes consideration of individual cases. However, given that these cases concern the individual versus the State, in my view, this anomaly needs to be rectified if you are to be effective as a watchdog.

I note the powers of The Committee; I also note that they have not been used to their full extent in my case. For example, in para 52 of the 13th Report, it states that The Committee "wrote to the DCA to inquire about implementation measures following this case as part of its scrutiny of the Electoral Administration Bill. Subsequently, in a written statement of 2 February 2006, the Secretary of State for Constitutional Affairs stated that:

The ECtHR indicated that there should be proper debate about those issues and I have therefore concluded that the best way forward would be to embark on full public consultation in which all the options can be examined and which will give everyone the opportunity to have their say. A consultation document is therefore in preparation and I hope it will be available for discussion in a few weeks time. Thereafter there will be a period for Those with an interest to make their views known, which will help to inform the development of future policy.

In our report on the Electoral Administration Bill, we expressed regret that Parliament had not afforded the opportunity to consider the important issue of prisoner voting rights in the course of scrutiny of that Bill. We nevertheless welcomed the consultation exercise

proposed. We intend to return to consider the proposals for reform of the law arising from the consultation process.

During the preparation for this case my research discovered that there had been no Parliamentary debate on the issue of prisoner voting rights. This fact was mentioned in my argument to the ECtHR. The Court accepted this point. I won this point. The UK lost this point. At para 79 of the Grand Chamber's judgment it states:

"...it cannot be said that there was any substantive debate by members of the legislature on the continued justification in the light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote".

The Court did not say, Charles Falconer, Lord Chancellor, we indicate that you should now go and start talks about talks. The UK's obligation to the Convention is to amend the existing laws which led to the violation in human rights. This delaying tactic used by the DCA is unacceptable. See for example, Ireland's passing of a Bill to legislate to allow all prisoners the postal vote.

The Court used the principle of universal suffrage as it's starting point. The Suffragette Movement's motto became "Deeds not words", when Parliament sought to deny women the vote by offering to talk about the subject rather than pass a law to implement it. I echo this with mine, action not words.

I trust that you will now use your teeth, and stop wagging your tail.

Appendix 12: Letter dated 2 February 2007 to The Rt Hon. Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs, re *William Smith v Electoral Registration Officer*

On 23 January 2007, I wrote requesting further information on the steps being taken by the Government to execute the judgment of the European Court on Human Rights, in *Hirst v UK*. Further to the questions raised in that letter, I would be grateful for information on the Government's response to the judgment of the Court of Session, sitting as the Registration Appeal Court Scotland, in *William Smith v Electoral Registration Officer* [2007] CSIH 9 XA33/04 (24 January 2007).

In this case, the Court of Session concluded that, in light of the judgment in *Hirst v UK*, the forthcoming elections for the Scottish Parliament (expected in May 2007) would "take place in a manner which is not Convention-compliant" (para. 55). The Court held that s.3, Representation of the People Act 1983 was incompatible with the right to participate in elections, as guaranteed by Article 3, Protocol 1 ECHR and issued a declaration of incompatibility pursuant to s.4 of the Human Rights Act 1998 (para. 56).

During the hearing of this case, the Advocate-General accepted that the timetable for the DCA Consultation on Voting rights for Convicted UK Prisoners (CP/29/06) would mean that there would be no amending legislation before the Scottish Parliamentary election in May 2007. We note that prior to the publication of the DCA Consultation, the Advocate-General assured the Court that compatibility could be achieved by May 2007 using a Remedial Order pursuant to s.10(2) HRA 1998 (para. 46).

I would be grateful if you could give us information about the Government's views on the declaration of incompatibility in this case. In particular, I would be grateful if you could:

- a) Tell us whether, in light of the declaration of incompatibility in *Smith* and the number of forthcoming elections, the Government agree that there is a need for urgent action to amend or repeal s. 3(1) Representation of the People Act 1983;
- b) Tell us whether, in light of the imminent elections in Scotland, Northern Ireland and Wales, the Government have considered using the Remedial Order procedure to execute the judgment in *Hirst* and remedy the incompatibility identified in *Smith* before those elections take place, and if not, why not?
- c) If you did consider using the Remedial Order process, please explain why this option has been rejected in favour of the two stage consultation proposed in the DCA consultation paper.

Appendix 13: Letter dated 27 March from the Rt Hon Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs, re Implementation of judgments of the European Court of Human Rights, Human Rights Act: Declarations of Incompatibility, *William Scott v Electoral Registration Officer*

1. Thank you for your letters of 23 January and 2 February regarding the judgment of the European Court of Human Rights in *Hirst v UK* and the declaration of incompatibility made in *William Scott v Electoral Registration Office*. I also take this opportunity to include details of an application for judicial review brought by two prisoners in Northern Ireland.

Hirst v UK (App. No. 74025/01)

a) Why there has been such a significant delay in the launch of this consultation process?

2. Prisoner enfranchisement is a complex and difficult issue. It also has considerable opponents. There are a number of potential options that could be pursued as a result of the Grand Chamber judgment, and the Government needed to consider these carefully before publishing the consultation paper.

b) Why, given the significant number of forthcoming elections, the government considers that it is appropriate to run a two stage consultation process?

3. The current consultation document focuses on the principles of prisoners voting, and the options available to the UK following the European Court of Human Rights judgment in *Hirst*. As I stated in my foreword to the consultation, the second stage consultation is to consider how any changes might work in practice, which is a separate issue and will be based on the results of the first stage document.

c) What is the proposed timetable for stage two of the consultation process?

4. A revised Action Plan for future steps, based on the actual publication date of the consultation paper on 14 December 2006, is as follows:

Action	Time
Written Ministerial Statement in Parliament committing to consultation	2 February 2006
Research and Drafting of Phase 1 consultation (Principles, Context, and Options)	February and March 2006

Obtain Ministerial clearance of draft Phase 1 paper and publication	14 December 2006
Consultation period 12 weeks minimum	7 March 2007
Analysis of responses and drafting of Phase 2 consultation (Preferred Option & Detailed implementation issues)	April - June 2007
Obtain Ministerial clearance for and publish Response paper for Phase 1 paper and draft Phase 2 consultation paper	June 2007
Consultation period (12 weeks minimum)	July - September 2007
Analysis of responses and drafting of Response paper for Phase 2	October - December 2007
Obtain Ministerial clearance for and publish Response paper for Phase 2	January 2008
Drafting of appropriate legislation to effect change	February - April 2008
Introduction and passage of legislation	From May 2008? (Timing subject to Parliamentary business)

d) What are the Government's reasons for consulting on maintaining the blanket ban on voting for all prisoners, which was found to breach the ECHR by the European Court of Human Rights?

5. The consultation paper does invite views from persons who believe that it is right in principle that prisoners should remain disenfranchised, in order that they can be taken into account in considering the extent of any future reform. It encourages such respondents to consider thoroughly the available options. However, the document also makes it clear that retaining the blanket ban is outside the margin of appreciation given by the *Hirst* judgment, and that it is not, therefore, an option for the future,

e) What are the Government's reasons for excluding from the options for change any prospect of full enfranchisement?

6. As I stated in my foreword to the paper, the judgment did not conclude that the UK must enfranchise all prisoners. The Government is opposed to complete enfranchisement of all convicted prisoners. It is therefore omitted from the list of possible options for change in the consultation paper, so as clearly to indicate that it is not an option for reform that we would feel able to adopt.

William Scott v Electoral Registration Officer

I would be grateful if you could give us information about the Government's views on the declaration of incompatibility in this case. In particular, I would be grateful if you could:

- a) Tell us whether, in light of the declaration in Smith and the number of forthcoming elections, the Government agree that there is a need for urgent action to amend or repeal s.3(1) Representation of the People Act 1983;**

- b) Tell us whether, in light of the imminent elections in Scotland, Northern Ireland and Wales, the Government have considered using the Remedial Order procedure to execute the judgment in *Hirst* and remedy the incompatibility identified in *Smith* before those elections took place, and if not, why not?**
- c) If you did consider using the Remedial Order process, please explain why this option has been rejected in favour of the two stage consultation proposed in the OCA consultation paper.**

7. The Government notes the ruling of the Registration Appeal Court that it is part of the Court of Session for the purposes of section 4 of the Human Rights Act, and therefore has power to make a declaration of incompatibility under that section. The Government is considering the implications of this ruling.

8. Before turning to the questions raised by the Committee, I take this opportunity to note that domestic proceedings have also been brought by way an application for judicial review in Northern Ireland (*In the matter of an application by Toner and Walsh for leave to apply for judicial review*). These proceedings were brought on 15th February 2007, shortly before the Northern Ireland Assembly elections held on 7th March. They were dismissed by the High Court of Northern Ireland (which heard the matter on 1st March and delivered judgment on 2nd March) and the Court of Appeal of Northern Ireland (which heard the matter on 2nd March and gave its decision on that day). The Court of Appeal indicated that it may or may not deliver a full judgment in due course. A copy of the High Courts judgment is at Annex A, and of the affidavit evidence submitted on the behalf of the Secretary of State for Northern Ireland, at Annex B.

9. Turning to the questions raised by the Committee in respect of the *Smith v Scott* case, the Government does not agree with the Committee that the judgment of the Registration Appeal Court requires urgent action to repeal the current law barring prisoners from voting at UK elections. This judgment does not establish any new principle beyond that established in the *Hirst* judgment

10. The Government's clear view is that an issue as fundamental - the franchise requires careful consideration and deliberation, and should not be addressed piecemeal. We are clear that any extension of the franchise must be consistent across all elections within the United Kingdom.

11. The Government already has in place the process to address these issues - the current two-stage consultation on prisoners' voting rights. As I have stated above, the Grand Chamber of the European Court of Human Rights concluded that a total ban was outside the margin of appreciation given by the Convention, but the judgment does not require the UK to enfranchise all convicted prisoners, nor does it dictate which categories of prisoner should be enfranchised. Indeed, the Court acknowledged that there was no common European approach to this issue, and that Contracting States had a wide margin of appreciation in deciding which convicted prisoners should have the right to vote. This leaves the UK with a number of potential options that could be pursued, and which require public consultation followed by full consideration by Parliament.

12. For these reasons, the Government considers primary legislation to be the appropriate vehicle for implementing any option for change.

Appendix 14: Memorandum dated 16 March 2007 from Liberty, re Implementation of Judgments of the European Court of Human Rights and Declarations of Incompatibility

Introduction

1. On 21 February 2007, the Joint Committee of Human Rights (the “JCHR”) called for evidence on: (i) the implementation of judgments in the European Court of Human Rights (the “ECtHR”) finding the UK to be in breach of the European Convention on Human Rights (the “ECHR”); and (ii) the adequacy of the Government’s response to declarations of incompatibility made under the Human Rights Act 1998 (the “HRA”). In this short response we seek to draw out some general observations about the Executive’s and Parliament’s responses to such decisions.

2. We welcome the JCHR’s recent decision to “be more proactive in relation to declarations of incompatibility, both in terms of pressing the Government to take action and, in appropriate cases, recommending what action should be taken”¹⁸⁸ and, similarly, to present “more regular progress reports examining the implementation of Strasbourg judgments”.¹⁸⁹ Considering the UK’s response to such decisions is, in our view, one of the JCHR’s most important roles. Rather than giving our courts the final say about how our rights are protected, the HRA retains an important role for the other limbs of government: the Executive and Parliament. The JCHR helps to ensure that this role is properly performed by, for example (i) bringing adverse decisions of the Strasbourg and UK courts to Parliament’s attention; (ii) scrutinising the Executive’s response to such judgments and encouraging it to respond in an appropriate and timely manner; and (iii) scrutinising proposed new laws to limit the risk of future adverse decisions.

Implementation of ECtHR Judgments

3. All the Strasbourg decisions identified by the JCHR in its call for evidence raise important human rights issues. We are pleased that the JCHR has written to the relevant Government departments about these decisions, seeking information about their proposed courses of action, and that it is now seeking evidence from interested parties. We do not consider every decision mentioned but focus instead on a selection of three cases in which Liberty has been involved, whether in the litigation itself, by engaging in a Government consultation on how to respond to the judgment or by lobbying Parliament to legislate to address an adverse decision of the ECtHR.

Saadi v. United Kingdom¹⁹⁰

4. The decision of the ECtHR in *Saadi* is of great significance given the number of people who have been detained pursuant to immigration powers in the UK and the length of time people have been required to spend in immigration detention. Routine detention is, for example, a significant aspect of the Government’s fast-track system for asylum-seekers. Under this fast-track system, the justification for detention is simply administrative convenience, i.e., it is easier for the state to process claims. We are delighted that the JCHR is considering this issue more broadly as part of its inquiry into the treatment of asylum-seekers.

5. *Saadi* involved a challenge to the legality of immigration detention for mere administrative convenience. We are disappointed that the Court found this to be

¹⁸⁸ *Twenty-third Report 2005-06*, HL 239/HC 1575, at para. 61.

¹⁸⁹ *ibid.*

¹⁹⁰ *Saadi v. the United Kingdom* (Application No. 13229/03), [2006] I.N.L.R. 638.

compatible with Article 5(1)(f) of the ECHR and hope that this decision will be reversed when the Grand Chamber hears the case (in which Liberty is intervening). We fear that this decision is being seen as a green light for the continuation of the Government's fast-track regime and for the continued detention of asylum-seekers for significant periods of time.

6. We believe *Saadi* to be a case where the Government should not need to wait for an adverse decision by the Grand Chamber before taking action to protect human rights. The Government should recognise that three of the seven judges in *Saadi* did consider that the applicant's right to liberty had been violated by his detention for the purposes of administrative convenience (there had been no indication that he would abscond¹⁹¹ and, indeed, the fast-track process is limited specifically to applicants not in danger of absconding). The Court was also considering the "Oakington regime" at a time when detention to process an asylum claim was limited to 7 days. Many people are now detained for substantially longer periods (under other application-processing regimes). Given the emphasis the ECtHR placed on the length of time Dr Saadi was detained, one would therefore expect the Government to ensure, at the very least, that people were not detained for any longer than 7 days. Unfortunately this does not seem to be the Government's current thinking in relation to detention and deportation. The scope of detention is in fact increasing. The UK Borders Bill currently in its Committee Stage in the House of Commons creates an automatic deportation regime for foreign prisoners. As part of this there will be a presumption of detention for any foreign prisoner who has reached the end of their sentence pending deportation.

7. The ECtHR did find that the delay of 76 hours in informing Dr Saadi of the reasons for his detention was not compatible with the requirement in Article 5(2) that such information be given "*promptly*".¹⁹² Dr Saadi had no knowledge of the actual reason for his detention until his legal representative was informed 3 days later that he was in the fast-track procedure. This was due to the immigration officers having used an outdated form. Between the issue of judicial review proceedings and the hearing in the Administrative Court, the Government did amend the form to include an accurate reason for detention at Oakington (i.e. because their applications were suitable for determination under the fast-track procedure). Nevertheless, we note that it took the Government 11 months from introducing the Oakington regime to amending the form. This delay was described by Collins J in the Administrative Court as a "*disgrace*".¹⁹³ We hope the Government will take note of this criticism and ensure that such delays in this context and in other parts of the immigration system are not repeated.

Hirst v. United Kingdom¹⁹⁴

8. *Hirst* related to the blanket ban on convicted prisoners in detention voting in elections. The applicant argued that this ban violated his right to free elections under Article 3 of Protocol No.1 of the ECHR (both alone and in conjunction with Articles 10 (the right to freedom of expression) and 14 (prohibition of discrimination)). The ECtHR held that there was a violation of Article 3 of Protocol No.1. Although the ban had a legitimate aim (i.e. preventing crime by sanctioning the conduct of convicted prisoners and enhancing civic responsibility and respect for the rule of law), it was not a proportionate measure to achieve that aim. It reached this decision on the basis that: (i) the ban applied to a significant number of individuals and encompassed a wide range of offenders and sentences; and (ii) the ban applied to only convicts with custodial sentences: it did not

¹⁹¹ The applicant was granted temporary admission and repeatedly presented himself, as required, before the immigration authorities for the first three days of his presence in the UK.

¹⁹² The Court noted that it had, in previous cases, held that a period of 7 hours was compatible with the ECHR, whereas a period of 4 days was not.

¹⁹³ *Saadi v. the United Kingdom* (Application No. 13229/03), [2006] I.N.L.R. 638, at para. 12.

¹⁹⁴ *Hirst v. the United Kingdom* (Application No. 74025/01), (2006) 42 E.H.R.R. 41.

depend on the nature of the actual crime that had been committed. The restriction on the right to vote was thus general, automatic and indiscriminate, and it fell outside the margin of appreciation granted on the issue.

9. The Department for Constitutional Affairs (the "DCA") published a consultation paper, "*Voting Rights of Convicted Prisoners Detained within the United Kingdom*", in December 2006. The Government's position, as outlined in the paper, is that:

- loss of the right to vote is "a proper and proportionate punishment for breaches of the social contract that resulted in imprisonment";¹⁹⁵ and
- whilst steps must be taken to respond to the ECtHR's judgment, the judgment "did not conclude that the UK must enfranchise all prisoners":¹⁹⁶ total enfranchisement is therefore not offered as a possible option.

The DCA notes that other European states offer various forms of partial enfranchisement and sought responses on the options of: (i) relating disenfranchisement to the length of sentences; and (ii) allowing the sentencing authority to determine whether the right to vote should be withdrawn.

10. Liberty has provided a detailed response to this consultation¹⁹⁷. For the purposes of this paper, we do not repeat the arguments made in that consultation response but make instead a few observations about the way in which the Government responded to the decision.

- We are disappointed that the Government did not adequately address the reasons underlying the ECtHR's decision in *Hirst*. Instead, the consultation paper represented the decision as a "bolt out of the blue" and a judgment from on high which the UK was bound to follow. It failed to explain why and how the court had reached the decision and why many countries around the world are now giving their prisoners the right to vote.
- The Government did not adequately consider the way in which other jurisdictions had responded to this issue. This may well have been embarrassing for the Government, demonstrating how far out of line the UK is becoming. Such information would, however, have helped to identify how other countries have responded to this issue which could be of use in deciding on the UK's response.
- The consultation paper sought to close off the most progressive option for protecting the right to vote addressed in *Hirst*: the enfranchisement of all prisoners. It only proposed more minor reforms, saying explicitly that full enfranchisement is not an option.
- The Government's response seems designed to do little more than ensure that, should another similar case be taken to the ECtHR, the UK's approach would be considered to be within its "margin of appreciation". Human rights are supposed to provide a floor rather than a ceiling, and it is therefore disappointing that the UK seems intent on responding to the decision in *Hirst* by making as limited a change to the current legal position as possible.

¹⁹⁵ Foreword by Lord Falconer of Thoroton.

¹⁹⁶ *ibid.*

¹⁹⁷ Available at <http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>.

A v. United Kingdom¹⁹⁸

11. The case of *A v. United Kingdom* concerned the defence of "reasonable chastisement"¹⁹⁹. In *A*, the defence had been relied on by a man who had disciplined his step-children with a garden cane "applied with considerable force on more than one occasion"²⁰⁰. The applicant, a young boy, was found to have been thus disciplined resulting in a total of nine bruises. The stepfather was charged with assault, but was acquitted on the basis of the defence. The ECtHR held that the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3 ECHR.

12. Although the Government accepted that the law failed to provide adequate protection to children and should be amended, it did not take the opportunity to remove or amend the defence in its Children's Bill, introduced into Parliament in 2004. The Bill, as originally drafted, did not address the loophole that enabled some parents to escape a criminal conviction for causing actual bodily harm to their children by using the overly-broad defence of reasonable chastisement.

13. Eventually, after the active lobbying of Children's and human rights organisations and parliamentarians, an amendment was put down which removed the defence of reasonable chastisement in respect of statutory assault²⁰¹. This removed the worst excesses of the reasonable chastisement defence. This provision would prevent the defence being used in the kind of situation that arose in *A*.

Declarations of Incompatibility

14. Section 4 of the HRA empowers a court to make a declaration where it believes a piece of legislation to be incompatible with the HRA. A declaration of incompatibility has no legal effect and does not bind Parliament, contrary to popular belief. This is a peculiar feature of human rights protection in the UK, an innovative compromise between human rights protection by the courts²⁰² and the maintenance of parliamentary supremacy. It recognises that it is not only the courts, but also the other two limbs of state, that have a responsibility for protecting human rights. If the scheme for human rights protection envisaged by the HRA is, however, to be effective, Parliament and the Executive must also respect and protect our rights and freedoms. Section 4 declarations are very important in this regard. They represent a clear indication that the existing law violates our rights and freedoms and a clear signal that Parliament and the Executive should take steps to remove the incompatibility.

15. Before looking at some examples of how the elected limbs of government have responded to declarations of incompatibility, it is important to point out how rare such declarations actually are. The DCA explains that, since the HRA came into force the courts have made only 20 declarations of incompatibility, of which 6 were overturned on appeal to the Court of Appeal or the House of Lords²⁰³. The rarity of section 4 declarations is partly due to: (i) Parliament's, and the JCHR's, scrutiny of proposed laws to limit the risk of findings of incompatibility; and (ii) the significant amount of time spent by Parliament, prior to the entry into force of the HRA, on removing incompatibilities. A key factor, however, is the fact that the courts treat declarations of incompatibility as a "measure of

¹⁹⁸ *A v United Kingdom*, (1999) 27 E.H.R.R. 611.

¹⁹⁹ *A v United Kingdom*, (1999) 27 E.H.R.R. 611, at para. 14.

²⁰⁰ *A v United Kingdom*, (1999) 27 E.H.R.R. 611, at para. 9.

²⁰¹ Section 58, Children Act 2004.

²⁰² In most jurisdictions, courts have the power to quash legislation which is incompatible with constitutional rights and freedoms.

²⁰³ Document available at . <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf>.

last resort".²⁰⁴ Wherever possible, the courts are required to interpret legislation compatibly with convention rights.²⁰⁵

16. At the outset, we welcome the fact that the Executive has not, at least to date, simply disregarded a declaration of incompatibility. Such a response would, we believe, constitute an unacceptable disrespect for basic rights and freedoms, for the British courts and for the scheme of rights protection that Parliament envisaged in the HRA. Generally, the nature of the response by the elected limbs of the state has been constructive and appropriate, removing the incompatibility.

- In *Bellinger v Bellinger* the House of Lords declared section 11(c) of the Matrimonial Causes Act 1973 to be incompatible with Articles 8 (right to respect for private life) and 12 (right to marry) because it made no provision for the legal recognition of gender reassignment²⁰⁶. This was remedied by the Gender Recognition Act 2004 which followed detailed consideration and scrutiny of the issues raised by gender reassignment.
- *Re McR's Application for Judicial Review* related to section 62 of the Offences Against the Person Act 1861 (attempted buggery) which continued to apply in Northern Ireland.²⁰⁷ The High Court held that the provision was incompatible with the Article 8 right to respect for private life because it interfered with consensual sexual behaviour between individuals. The section was repealed in Northern Ireland by the Sexual Offences Act 2003.²⁰⁸

17. The nature of the response to declarations of incompatibility has not, however, been universally effective. By far the most notorious and unacceptable response came to the decision of the House of Lords in *A and Others v Secretary of State for the Home Department*.²⁰⁹ The House of Lords declared section 23 of the Anti-terrorism, Crime and Security Act 2001, which authorised the indefinite detention without charge of foreign terror suspects, to be incompatible with Articles 5 (right to liberty and security) and 14 (prohibition of discrimination). Despite the declaration, the Government did not release the men for a further three months, even though some of them had already been detained for several years and suffered serious mental illnesses as a result of their treatment. The Government's response was the replacement of the Belmarsh detention regime with control orders under the Prevention of Terrorism Act 2005, rushed through Parliament in less than two weeks. This regime sought to address the discriminatory treatment of foreign terror suspects under the 2001 Act by treating everybody equally badly – British citizens and foreigners alike. Liberty's opposition to control orders is well-known and we do not reiterate our objections here. The Prevention of Terrorism Act 2005 is a clear and chilling demonstration that the scheme of human rights protection under the HRA will not be effective unless Parliament and the Executive take seriously their responsibilities for the protection of rights and freedoms.

²⁰⁴ Cf. *Ghaidan v. Mendoza* [2004] UKHL 30.

²⁰⁵ Section 3 of the HRA.

²⁰⁶ 2003 2 A.C. 467.

²⁰⁷ [2003] N.I. 1.

²⁰⁸ Sections 139, 140; Schedule 6, para. 4; and Schedule 7.

²⁰⁹ [2004] UKHL 56.

Appendix 15: Letter dated 23 January 2007 to The Rt Hon. John Reid MP, Secretary of State for the Home Department

The Joint Committee on Human Rights is continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR). I am writing to ask for an update on the progress made by the Government towards the implementation of two judgments. We previously considered these judgments in our First Progress Report on the Implementation of Strasbourg Judgments (2005-06, Thirteenth Report, HL 133/HC 954).

Blackstock v United Kingdom

This case concerned delays in reviews of the applicant's detention and in his transfer to a lower category prison. In our last progress report, we expressed our concern that increasingly overcrowded prison conditions may continue to result in delays in further cases similar to the applicant in *Blackstock*. We recommended that consideration should be given to whether it is possible, in cases where there have already been delays in reviews of detention, such as may breach Article 5(4) ECHR, whether it would be possible in a particular case to reduce the amount of time a prisoner will be required to spend in a lower category prison.

I would be grateful if you could tell us:

- a) what are the latest available figures on the average (and longest) time taken to put Parole Board decisions on prisoner transfers into effect;**
- b) whether the Home Office is aware of any cases where there has been a delay in putting parole transfer orders into effect since the case of *Blackstock* was decided in June 2005; and if so, what were the reasons for any individual case of delay;**
- c) what action has been taken by the Home Office since the publication of our last progress report to reduce the impact of prison overcrowding on procedures for review of detention; and**
- d) what steps have been taken to implement our recommendation that where there have been delays in relation to a review or a transfer; that consideration should be given to whether it is possible to reduce the amount of time a prisoner will spend in a lower category prison.**

Massey v UK

This case concerned delay in criminal proceedings. The Court highlighted the relevance of the investigative period to cases involving delay and allegations of a breach of Article 6 ECHR (the right to a fair hearing). In a letter dated 10 February 2006, the then Home Secretary indicated that he was considering whether guidance to the police on the implications of this case was necessary. In our last progress report on the Implementation of Strasbourg Judgments, we welcomed this willingness to consider further guidance and urged the Home Secretary to adopt guidance on the issue of delays in police investigations (2005-06, Thirteenth Report, para 76).

I would be grateful if you could tell us:

- a) **what steps have been taken as a result the undertaking given by the then Home Secretary to consider guidance on the issue of delay in police investigations;**
- b) **whether the Government intends to issue such guidance;**
- c) **if not, why does the Government consider that guidance is unnecessary; and**
- d) **if the Government intends to publish guidance; what is the timetable for publication.**

Appendix 16: Letter dated 20 February 2007 from Gerry Sutcliffe MP, Parliamentary Under-Secretary of State, Home Office, re Recent Judgments of the European Court of Human Rights

Thank you for your letter of 23 January 2007 in which you requested further information about the Government's response to a number of recent judgments of the Court. As was the case with the Home Secretary's reply in February last year, I will list and answer your questions in turn.

Blackstock v UK, Application No 59512/00

- a) ***What are the latest available figures for the average (and longest) time taken to put Parole Board decisions on prisoner transfers into effect?***

The Parole Board has an advisory role on the transfer of life and indeterminate sentence prisoners to open conditions and any such recommendations to the Secretary of State are not binding. Details of the number of such recommendations considered on behalf of the Secretary of State by senior officials are held within the Lifer Review and Recall Section as part of its business planning processes. The cumulative position up to 31 January 2007 indicates that 78% of all such decisions to accept panel advice in this area were carried out within the 6 week target. That figure is on line to meet the relevant 2006/07 Lifer Section business plan target (80%). It is not possible to break this down further, nor is it possible to say how long it then took for the Prison Service to actually transfer the lifers into open prisons.

- b) ***Whether the Home Office is aware of any cases where there has been a delay in putting parole transfer orders into effect since the case of Blackstock was decided in June 2005; and if so, what were the reasons for any individual case of delay?***

Again it is not possible to provide definitive figures in reply to this question. There will inevitably be cases where risk related information emerges and which calls into question the suitability of the lifer to progress to open conditions. In such cases, the adverse material will be disclosed to the prisoner and all the relevant papers, including his or her representations, may then be sent back to the Board for further consideration.

- c) ***What action has been taken by the Home Office since the publication of our last progress report to reduce the impact of prison overcrowding on procedures for review of detention?***

The number of prisoners given indeterminate sentences by the courts has increased sharply in recent years, and the National Offender Management Service is reviewing the sentence pathway with a view to enabling prisoners to progress more quickly. In the meantime, new

arrangements for arranging the allocation and transfer of life sentence prisoners were introduced in September 2006 with a view to enabling moves to take place more quickly once the appropriate work – and, where relevant, consideration by the Parole Board and Secretary of State – has been completed.

d) What steps have been taken to implement our recommendation that where there have been delays in relation to a review or a transfer; that consideration should be given to whether it is possible to reduce the amount of time a prisoner will spend in a lower category prison?

The Home Secretary's previous reply on this point made it quite clear that the period of risk assessment required between parole reviews was dependent on the circumstances of the individual case. That is in line with all relevant ECHR judgments in this area, including the Blackstock case. There is some local Home Office data indicating that the 2 year maximum period between Parole Board reviews in lifer cases is set only in a minority of cases now. That change reinforces the Home Secretary's earlier point about the importance of rigorous testing given the concerns over the numbers of lifers who "fail" the test of open conditions and the rising numbers of life licensees recalled or reconvicted. Whether, and to what extent, a reduction in the interval between reviews may be contributing to these trends is an issue that may require further exploration.

Massey v UK, Application No 14399/02

a) What steps have been taken as a result of the undertaking given by the then Home Secretary to consider guidance on the issue of delay in police investigations?

Following the Home Secretary's letter, enquiries were undertaken to establish the extent of any existing guidance, and a view was taken on the legal position. It was ascertained that there was general guidance to practitioners in the avoidance of delay but not, apparently, on this specific issue. Specific guidance for the police has, accordingly, been drafted.

b) Whether the Government intends to issue such guidance?

The Government agrees that the issue of such guidance is appropriate. To achieve the maximum practical effect, the best vehicle for it has been identified as the ACPO/CPS Prosecution Team Manual of Guidance (MOG) which is referred to daily by the police in the preparation and processing of case files. It has been agreed to include guidance on "Avoidance of Undue Delay - ECHR Considerations" as a passage in the MOG.

c) If not, why does the Government consider that such guidance is unnecessary?

Not applicable.

d) If the Government intends to publish guidance; what is the timetable for publication?

The guidance is to be published in the next edition of the MOG. I understand that ACPO is currently discussing arrangements for the next edition.

Appendix 17: Letter dated 30 May 2007 from Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs

Hooper v UK (App.No 423178/98)

Further to my letter of 14 March I am pleased to inform the Committee that the President of the Queen's Bench Division has now handed down Amendment No.15 to the Consolidated Criminal Practice Direction. This amendment, inter alia, added a new direction on 'binding orders and conditional discharges' which provides practical guidance on the practice of imposing binding over orders. A copy of the new direction is enclosed with this letter and can be accessed on the website of Her Majesty's Court Service at: http://www.hmcourts-service.gov.uk/cms/files/sch2_binding_over_orders_III.pdf. The new text appears at paragraph III.31 of the Consolidated Practice Direction which can be viewed at: <http://www.hmcourts-service.gov.uk/cms/pds.htm>.

Appendix 18: Letter dated 12 July 2006 from Tom Watson MP, Parliamentary Under-Secretary of State for Defence and Minister for Veterans, to the Chairman

ECHR - ROCHE VS UK

I note that when the Joint Committee on Human Rights published a letter from Don Touhig about the Roche case in its Thirteenth Report, it added a rider that it looked forward to receiving further information in due course.

I therefore thought that it would be appropriate to write to advise you that the Government has now prepared an Action Plan for the Committee of Ministers of the Council of Europe, and has submitted it to the Committee's secretariat together with an accompanying Note. I enclose copies of the Plan and the Note, which I hope are self-explanatory.

I will write to inform you of progress against the plan, however you will wish to be aware that I intend to make a statement on 14 July announcing the publication that day of the historical survey of the Service Volunteer Programme at Porton Down.

Roche v UK - Application No 32555/96 - Action Plan

Objective	Action	Target Completion Date	Status
1. Clarify responsibilities of those handling requests	1.1 Prepare and distribute internal MoD guidance, covering: a. How to recognise a request that triggers Article 8 rights as described in the judgment b. The actions required by the responding branch over and above those already required by specific domestic legislation (the Data Protection Act and the Freedom of	31/07/06	Work on guidance commenced

	<p>Information Act).</p> <p>c. Communication with the requester eg to clarify the scope of the request, or to explain the structured release process that will apply if all the requested information cannot be released at once, or if some will be sent from another part of the Department;</p> <p>d. The procedure (analogous to that under the Freedom of Information Act) for handling any expression of dissatisfaction from the applicant, with standard wording to use to explain that procedure to the applicant.</p>		
2. Make it easier for applicants to make and pursue a request for information about their actual or possible hazardous exposure.	2.1 Revise the pages on the UK Ministry of Defence internet site (www.mod.uk) that allow applicants to submit requests, to clarify the application procedure for applicants with Article 8 rights as described in the judgement.	31/10/06	Under development
	2.2 Disseminate the information on the internet site to groups representing potential applicants	31/10/06	Dependent on completion of 2.1
	2.3 Revise relevant leaflets made available to current and former staff and members of the public, and relevant standard letters, to clarify the application procedure for applicants with Article 8 rights as described in the judgement.	31/10/06	Will commence when work on 2.1 has progressed further.
3. Improve public availability of information about the tests at Porton Down	3.1 Publish a historical survey of the Service Volunteer Programme at Porton Down, addressing the variety of studies undertaken together with their purpose, results and the	31/07/06	Survey to be published imminently.

	<p>numbers of individuals who participated in them. The survey also seeks to put the studies of the Service Volunteer Programme into the wider context of the historical climate and contemporary events.</p>		
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Note to Accompany Action Plan on General Measures

Roche v UK - Application No 32555/96

The Action Plan sets out the steps that will be taken to remedy the breach found by the Court. However, those steps build on a number of important changes since Mr Roche first made his requests for information. The purpose of this note is to set the context in which the Action Plan sits by explaining those changes, which would in themselves now avoid many of the difficulties Mr Roche experienced.

Under the UK’s Data Protection Act 1998, individuals (data subjects) have a right (subject to any exemptions and third party considerations which may apply) to receive personal data that a public authority holds about them. Written Subject Access Requests’, as they are known, from current and former employees and members of the public are submitted to nominated contact points, who satisfy themselves as to the identity of the person making the request and that sufficient information is provided to locate the data sought, then collate the information from the main personnel records and other sources as appropriate, and respond within the statutory timescale of 40 calendar days. Approximately 13,200 requests are handled each year.

The Armed Services each keep their own personnel and medical records, and there are thus separate contact points for the Royal Navy, Army and Royal Air Force. Access to civilian staff records has been handled separately by the main business units that employ civilian staff, but a single contact point for Ministry of Defence civilian staff records is now being established.

The UK’s Freedom of Information Act 2000, which came fully into force on 1 January 2005, creates a general right of access to any information held by a public authority. (Each Government Department is a separate authority for this purpose, but the Ministry of Defence and the Armed Services are treated as a single entity.) This right is subject to certain exceptions, and also to a limit of cost incurred of £600 (equivalent to 24 hours of staff effort) in identifying the information and preparing it for release. In preparation for the Act, the Ministry of Defence established a network of Freedom of Information Focal Points, and initiated an audit of information held. The aim was to enable a request received in any part of the Department to be road quickly to the appropriate subject matter expert, and a response to be sent in compliance with the Act, which requires straightforward requests to be dealt with within 20 working days. Where a single letter or e-mail contains requests for information on a range of subjects, or asks for both personal and general information, a decision will be taken in the circumstances of the case as to whether to collate a single reply, or to advise the applicant that various elements will be dealt with as if they had been submitted separately.

If applicants under the Freedom of Information Act 2000 or the Data Protection Act 1998 express dissatisfaction with the content or timeliness of the response they receive, a process of Internal Review is triggered. The Internal Review Team, in the Ministry of

Defence Headquarters, reconsiders the requests from first principles. Case outcomes often include the release of additional information, and where appropriate recommendations or instructions to improve the timeliness and effectiveness of responses to future requests.

When the Actions in the Action Plan have been completed, focal points and subject matter experts will be aware of the extra steps that must be taken to comply with requests like that made by Mr Roche. This includes continuing beyond the normal £600 cost limit, consulting information held by other government departments, most notably the older records transferred to The National Archives, and making clear to the applicant the structured programme of release that is in train when information cannot all be released at once. All would be reconsidered in Internal Review (explicitly extending the requirement under the domestic legislation) if the applicant expressed dissatisfaction.

Specifically at Porton Down, a dedicated Volunteers Helpline was established in and has operated since February 1998. It provides former volunteers, or their representatives, with an effective mechanism through which they can obtain access to information relating to participation in the Service Volunteer programme at Porton Down. This is described in more detail in the document enclosed.

MOD PORTON DOWN SERVICE VOLUNTEER INITIATIVES

Porton Down Volunteers Helpline

During the latter half of the 1990s there was a growing interest amongst former volunteers and/or their relatives to find out more about the studies in which the individual volunteers had participated. Additionally, there was increasing speculation in the media that Porton Down and the MOD were withholding vital information relating to the participation of these individuals in the Service Volunteers Programme. One of the ongoing campaigning initiatives at this time was run by Mr Michael Roche, in his capacity as the Chairman of the Porton Down Volunteers Association, the first Porton Down activities group.

In autumn 1997, following a series of Parliamentary questions and media articles, Dr John Reid, then Minister for the Armed Forces, held a meeting with a group of former volunteers, including Mr Roche, to discuss their concerns and their ability to gain access to the information they required.

The outcome of this meeting was the initiation of the Porton Down Volunteers Helpline which went live at the beginning of February 1998. The main objective of this service was to help former volunteers and/or their representatives to easily gain access to information relating to individual participation in the Service Volunteer Programme at Porton Down.

History

Prior to the formalisation of this procedure, about 150 former Porton Down Volunteers had approached Porton Down for information on the studies in which they participated. These requests had come in during various time periods and had often received responses commensurate with the time period. It needs to be appreciated how open Porton Down has become over the last decade compared to the climate of secrecy that had operated during the 1970s and 1980s.

In fact from the middle of the 1990s requests for information relating to participation in the Service Volunteer Programme were dealt with positively and sympathetically. Where ever possible individuals were provided with as much information as possible. It was these internal procedures that were formalised in the instigation of the dedicated Porton Down Volunteer Helpline Service.

Helpline Procedures

The Porton Down Volunteer Helpline number is a well publicised free 0800 phone number which is currently answered by MoD's Defence Science and Technology Laboratory (Dstl) Central Enquiries during working hours. The number also has an answer phone to enable messages to be left during the silent hours.

Publicity

When the Helpline was set up in 1998 its formation was announced in the National Sunday Papers and copies of the Helpline Leaflet were sent to both Alan Care, then of the solicitors Russell Jones and Walker, and Mr Roche for the members of his support group.

In the first day of operation the Helpline took over 100 calls, and this volume of calls was repeated for several days (although it should be noted that many of the volunteers phoned the number repeatedly to update the details that they had provided).

Since then the free 0800 phone number has been included in all information on the Porton Down Volunteers provided by the MoD Press Office and by the Wiltshire Police.

Helpline Form

The Helpline advisor obtains information from the individual utilising this facility and completes a Helpline Form (copy at Annex A). The details recorded on this form are important as they provide the starting point to enable staff to search the historical record books and identify entries relating to individual participants. The information requested includes, name, address, service number, regiment time in service and an estimated date of attendance.

The Helpline operator explains to the caller what is being completed and that all of the requests for information are handled in accordance with the Data Protection Act. It is then explained that they will receive a copy of the form to check and will be requested to return it to the Helpline together with proof of their Identity. A copy of the standard letter which accompanies the Helpline Form is at Annex B.

Location of Information

Once proof of identity has been received, staff commence the searches of the historical experimental records books to locate entries relating to the individual for which the information is requested.

The first search undertaken involves the database created by the consultants HVR for the MOD funded independent epidemiology study. This frequently identifies the service numbers of the individual and saves the manual searches of the Alphabetical Record books.

Once an entry in the alphabetical book has been identified then staff locate all of the record books relating to that time period to identify the studies that the individual - participated in.

The entries in the record books vary through the time period of the Service Volunteer Programme. For some of the time periods the entries are very detailed and for others very cryptic. The majority of the information relating to the studies and the participation of the individual concerned can be located in the volunteer records. However, there are time periods for which this information is often very limited and sometimes cryptic necessitating further detailed searches of the internal technical literature for an explanation of the

overall scientific direction of the programme at the time as well as the detail of any procedures.

Non-attendance

It should be noted that for some individuals that contact the Helpline, staff are unable to locate any information in the experimental record books which would confirm that they attended Porton Down or participated in the Service Volunteer Programme. At the moment it is estimated that about 10% of the enquiries for information are from individuals who are not recorded as attending Porton Down. In fact with many of these the recollections that they describe are commensurate with them attending a training course at the nearby Armed Forces nuclear, biological and chemical defence training school.

Response Letters

Once all the available information relating to the attendance of the particular individual has been collated a detailed letter is written to summarise this information and present it in a manner that a lay person can understand. All of the individual letters, together with the source data, are reviewed and signed off by either the Technical Capability Leader for CBRN or the Chief Scientist Biomedical Science.

A standard inclusion in these letters is an invitation to the individual to visit Dstl Porton Down to view the original record books for themselves and to discuss any concerns with current members of staff.

Visits

To date only a small percentages of those individuals who have been invited to visit Porton Down and view the original record books and discuss their concerns with current members of staff have taken up this invitation.

Those who do accept the invitation are shown the original record books and the TCL CBRN and Chief Scientist Biomedical Science talk them through the cryptic entries. The individuals are provided with an opportunity to recall their experiences and discuss any concerns that they might have. At the end of the visit they are provided with a redacted copy of their individual entries from the record books and redacted copies of any relevant internal technical papers that detail the studies that they participated in. (Redaction takes place to remove the names of individuals).

If individuals refuse the invitation to visit Porton Down but request copies of their entries then they are also provided with redacted copies.

Number

Since the introduction of the Helpline and the publicity surrounding the Wiltshire Police Inquiry into the conduct of the Service Volunteer Programme during the period 1939 to 1989 Dstl Porton Down has responded to over 1000 enquiries for information. Each enquiry concerning attendance at Porton Down is dealt with as an individual research task.

Legislative Requirements

There are two main pieces of legislation which impinge on the operation of the Porton Down Volunteers Helpline. These are the Data Protection Act 1998 and the Freedom of Information Act 2000.

Data Protection Act 1998

All enquiries to the Porton Down Volunteers Helpline are dealt with in accordance with the provisions of the Data Protection Act because the data is viewed as being personal data in relation to the individual concerned, or their next of kin.

Freedom of Information Act 2000

All requests for information relating to individual attendances in the Service Volunteer Programme are dealt with as Data Protection requests to ensure consistency. However, requests for internal technical reports relating to the Service Volunteer Programme or general background information are dealt in accordance with the 2000 Act.

Historical Survey

MoD has commissioned an independent layman's review of the Service Volunteer Programme which will address the variety of studies undertaken together with their purpose, results and the numbers of individuals who participated in them. This review also seeks to put the studies of the Service Volunteer Programme into the wider context of historical climate and events. It is expected that this Historical Survey will be published in 2006.

Background Information Relating to the Service Volunteer Programme

History

The Service Volunteer Programme at Porton Down came into existence in 1916 and since then over 20,000 volunteers from the three Services have taken part in various studies at Porton Down. There is no evidence to suggest that the Service volunteers who have participated in studies at Porton Down have suffered any harm to their health. However, to allay concerns a dedicated helpline was set up at the beginning of February 1998 (see above).

Approximately 3000 of these individuals participated in studies involving nerve agents and about 6000 with mustard gas; in some cases individuals have been potentially exposed to both. However, participating in studies which involved the use of agents does not necessarily mean that participants were exposed to the agent; for instance, some volunteers acted as controls, while where protective equipment was being studied this may have prevented actual exposure. Many other chemicals and drugs have been assessed during the course of the Service Volunteer Programme including incapacitant agents, glycollates, morphine derivatives, artificial smog and pyrexal. It is estimated that several hundred volunteers were involved with each of the first three materials and several tens with the latter two.

The Service Volunteer Programme at Porton Down is still in operation today and its operation is overseen by the Independent CBD Ethics Committee. It is currently attended by 100 to 150 volunteers per year, which include Dstl members of staff.

Annex A

Porton Down Volunteers - Helpline Form

Personal Information- When Complete.

Date:	Volunteer's Surname:
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Time:	Volunteer's First Name(s):
Caller's Surname (<i>if different from Volunteer</i>):	Caller's First Name (<i>if different from Volunteer</i>):
Relationship of Caller to Volunteer (<i>if different to volunteer</i>):	Service Number:
Dates in the service:	Unit:
Date of birth:	Approximate dates of Volunteer's attendance at Porton Down:
Address:	Telephone No:
Reason for Calling:	
Any other information (<i>e.g.: type of studies undertaken</i>)	
Comments:	
Please indicate which proof of identity you have enclosed: a) Passport b) Drivers licence c) Birth certificate d) Utility bill	
Please print name:	Signature:
Date:	
Office use only. Action:	

Annex B

Standard Letter to those who contact the helpline

Thank you for contacting the Porton Down Helpline to enquire about your attendance at Porton Down. As we explained over the telephone, the Data Protection Act, which came in to force on 24 October 2001 now requires us to obtain proof of identity before any

personal information can be disclosed. This proof can be in the form of photocopies of any of the following: Utility Bill, Driving Licence, Passport or Birth Certificate.

You will see we have enclosed a copy of the form which was completed when you contacted the Helpline. I would be grateful if you could confirm that this information is correct by signing and dating the form before returning it together with your chosen form of identification. Additionally, if you have remembered anything else about your attendance at Porton Down as part of the Service Volunteer Programme which you feel may be of interest, please do not hesitate to include this information on the form.

It would perhaps be helpful to explain clearly the types of records held by Porton Down regarding the Service Volunteer Programme. Records of the volunteers involved in the Service Volunteer Programme from 1940-1990 are held in summary books. These summary books contain a volunteers name, Service number, date of attendance and a brief title for the study in which they participated. Where these studies have involved exposure to chemical warfare agents such as mustard or nerve agents additional information may be available regarding the nature of this exposure from laboratory note books. However, where volunteers have not participated in this type of study, it is often the case that the only surviving information we have regarding their attendance is the simple entry in the summary book. The records held at Porton Down are experimental records relating to the Service Volunteer Programme, they are not medical records.

I have enclosed a copy of the Porton Down Volunteers Leaflet for your information.

Yours sincerely

Appendix 19: Letter dated 23 January 2007 to Tom Watson MP, Parliamentary Under-Secretary for Defence and Minister for Veterans, Ministry of Defence, re *Roche v UK*

The Joint Committee on Human Rights is continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR). I am writing ask for an update on the Government's steps to implement the judgment in *Roche v UK*.

We are grateful to you for providing us with an advance copy of the Action Plan for the implementation of this judgment prior to your statement to the House of Commons on 14 July 2006 announcing the publication of the historical survey of the Service Volunteer Programme at Porton Down (part of the third objective) (in your letter dated 12 July 2006).²¹⁰

I would be grateful if you could tell us:

- a) what progress has been made on the implementation of the Action Plan, including whether the targets set for implementation have been met; and**
- b) what measures over and above compliance with the requirements of the Freedom of Information Act 2000 and the Data Protection Act 1998, do the Government consider necessary to meet the requirements of Article 8 ECHR and the decision of the European Court of Human Rights in *Roche v UK*.**

²¹⁰ Your Ref: D/MSU/3/6/is.

Appendix 20: Letter dated 25 January 2007 from Derek Twigg MP, Parliamentary Under-Secretary of State for Defence and Minister for Veterans, Ministry of Defence

You may recall Tom Watson's letter of 12 July which related to the judgment against MOD issued by the European Court of Human Rights in October 2005. The letter provided a copy of the Action Plan and accompanying Note submitted to the secretariat of the Committee of Ministers of the Council of Europe and promised to let you know about progress against the Action Plan. It is timely to write to provide you with an update.

The Action Plan contained two entries (numbered 1 and 3) with target completion dated of 31 July 2006. These actions were duly completed on time. Entry number 1 was achieved by issuing internal MOD guidance on the Department's intranet and entry number 3 was met through publication, in July, of a historical survey of the Service Volunteer Programme at Porton Down. The remaining entry (number 2) had a target completion date of 31 October 2006. Parts (a) and (b) of the action were achieved by introducing a Special Subject Access Request procedure and promoting this both on the MOD internet site and by writing to groups representing potential applicants. This was done before the end of October. Part (c) of the action will be completed when current supplies of the leaflets aimed at existing and former staff and members of the public are re-published. In the meantime, arrangements have been made for a note to be included in the current versions to advise recipients of the changes.

For ease of reference, I enclose a copy of the updated Plan which I hope is self-explanatory. I am also enclosing copies of two progress reports which were submitted to the secretariat of the Committee of Ministers of the Council of Europe to confirm that the action promised has indeed been taken.

Enclosure 1

Roche v UK — Application No 32555196 — Action Plan

Objective	Action	Target Completion Date	Status
1. Clarify responsibilities of those handling requests	<p>1.1 Prepare and distribute internal MoD guidance, covering:</p> <p>a. How to recognise a request that triggers Article 8 rights as described in the judgment</p> <p>b. The actions required by the responding branch over and above those already required by specific domestic legislation (the Data Protection Act and the Freedom of Information Act).</p> <p>c. Communication with the requester eg to clarify the scope of the request, or to explain the structured release</p>	31/07/06	Internal MOD Guidance was placed on the Department's intranet in July 2006. The guidance was highlighted in an email drawing attention to the guidance issued during July.

	<p>process that will apply if all the requested information cannot be released at once, or if some will be sent from another part of the Department;</p> <p>d. The procedure (analogous to that under the Freedom of Information Act) for handling any expression of dissatisfaction from the applicant, with standard wording to use to explain that procedure to the applicant.</p>		
2. Make it easier for applicants to make and pursue a request for information about their actual or possible hazardous exposure.	2.1 Revise the pages on the UK Ministry of Defence internet site (www.rnod.uk) that allow applicants to submit requests, to clarify the application procedure for applicants with Article 8 rights as described in the judgement.	31/10/06	Pages of the MOD Internet site were revised to highlight a Special Subject Access Request (SSAR) Procedure for applicants concerned about potentially hazardous exposure. Go-live was achieved on 31 October 2006.
	2.2 Disseminate the information on the internet site to groups representing potential applicants.	31/10/06	Letters were sent to 15 groups representing potential applicants outlining the changes, and requesting they advise their members. A hard copy of the SSAR form was enclosed.
	2.3 Revise relevant leaflets made available to current and former staff and members of the public, and relevant standard letters, to clarify the application procedure for applicants with Article 8 rights as described in the judgement.	31/10/06	Relevant leaflets will be updated at the next print run. In the interim, a note will be included with each leaflet sent out advertising of the changes. In addition, key staff across the department have received written and verbal briefings addressing the ECtHR judgement, MOD response, Article 8 triggers, request handling and points of contact.
3. Improve public availability of information about the	3.1 Publish a historical survey of the Service Volunteer Programme	31/07/06	The historical survey of tests at Porton Down was published in July

tests at Porton Down.	at Porton Down, addressing the variety of studies undertaken together with their purpose, results and the numbers of individuals who participated in them. The survey also seeks to put the studies of the Service Volunteer Programme into the wider context of the historical climate and contemporary events.		2006 and it is available on the internet.
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Enclosure 2

Roche V UK - Application No 32555/96

Report of Progress against Action Plan on General Measures

The Action Plan contains two entries with target completion dates of 31 July 2006. These actions have been completed, and this report provides details: progress on the third action in the Action Plan, which has a later target completion date, will be reported separately.

This report also provides a response to a supplementary question raised by the Secretariat. A report of the proceedings in the Pensions Appeal Tribunal by Mr Roche will be provided separately.

Action 1: Clarify Responsibilities of those handling requests

Internal Ministry of Defence guidance was placed on the Department's intranet in July 2006. It is within a series of documents called Defence Information Notices, which are the principal formal means of communicating with staff across the Department. The guidance was highlighted in an email drawing attention to the Notices issued during July.

The guidance is intended for internal rather than external use: it reflects and conveys the Department's legal advice, and it would therefore be inappropriate to publish it. Against the specific elements of the Action Plan:

- It explains how to recognise a request that triggers the Article 8 rights (serial 1.1 a);
- It explains the actions required over and above those necessary to comply with domestic legislation (serial 1.1 b);
- It sets out the need to communicate with the requester (serial 1.1 c);
- It describes the appeals procedure by analogy with that under the Freedom of Information Act 2000, and recommends the use of the standard wording previously circulated (serial 1.1 d)

Action 3: Improve public availability of information about the tests at Porton Down

The historical survey was published in July 2006. It is available on the internet. An introductory note is attached — it is also available at:

<http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/HealthandSafety/PortonDownVolunteers/PortonDownHistoricalSurvey.htm>.

The report itself is at

<http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/HealthandSafety/PortonDownVolunteers/HistoricalSurveyOfThePortonDownServiceVolunteerProgramme19391989.htm>

(because it is several hundred pages long, and the electronic version is some 64 MB in size, it is not convenient to enclose it).

The survey places a great deal of information about activities at Porton Down into the public domain, and therefore supplies proactively the answers to many queries that participants in the tests might have.

Question from the Secretariat:

What would happen if an applicant was dissatisfied with the information provided (or not provided) following a request to the MOD? Could he pursue his request through the courts?

The detail of the answer depends in part on the extent to which an Article 8 request falls within the scope of the relevant domestic legislation. A request for personal information about the requester held by the MOD falls under the Data Protection Act 1998 (DPA 1998). A request for other information held by the MOD falls under the Freedom of Information Act 2000 (FOIA 2000). In practice, we expect very few Article 8 requests to fall outside this framework.

The applicant's first recourse would be to ask informally for the person responding to reconsider the information provided. This is a voluntary step.

Second, the applicant may seek an Internal Review, conducted independently by the Director of Information (Exploitation) in the Ministry of Defence Head Office. Under FOIA 2000, this is a mandatory stage before appealing to the Information Commissioner. Under DPA 1998 this is a voluntary step before appealing to the Information Commissioner. For other Article 8 requests, this is a voluntary step. The Internal Review process under FOIA 2000 is described at <http://www.mod.uk/NR/rdonlyres/8805C9D5-888F-4F13-9167-23745C1191BC/O/foiappeals.pdf>. The process is similar under the other regimes. The MOD's procedures require responses to requests to explain the availability of Internal Review, and to give the contact details.

For requests within the scope of FOIA 2000 or DPA 1998, the applicant may then appeal to the Information Commissioner. The procedures are outlined on the Commissioner's website - see

<http://www.ico.gov.uk/complaints.aspx>.

Decisions of the Information Commissioner may be appealed to the Information Tribunal. The Tribunal's procedures are described on its website - see

http://www.informationtribunal.gov.uk/how_to_appeal/how_to_appeal.htm.

The applicant may appeal a decision of the Information Tribunal (other than National Security Appeals Panel decisions - see below) on a point of law to the High Court under section 59 of FOIA 2000, and section 49(6) of DPA 1998.

There is a separate National Security Appeals Panel of the Tribunal which hears appeals against certificates issued by a Minister of the Crown under section 28 (relating to exemption from disclosure of information for reasons of national security) of the Data Protection Act 1998 and sections 23 (relating to exemption from disclosure of information supplied by or relating to bodies dealing with security matters) and 24 (relating to exemption from disclosure of information for reasons of national security) of FOIA 2000. The certificates essentially provide (subject to review by the courts) conclusive evidence that information is covered by the relevant exemption. Anyone directly affected by the issue of a certificate may appeal against it. The Panel of the Tribunal applies the principles of judicial review to the certificate, considering whether the Minister has reasonable grounds for issuing the certificate.

If an Article 8 request fell outside the scope of DPA 1998 and FOIA 2000, it would still be within the ambit of the Human Rights Act 1998, which brought the European Convention on Human Rights into domestic law. Section 6 of the Act requires public authorities (in this case, the MOD) to act in a way which is compatible with the Convention. If the applicant believed that MOD had not discharged its obligations under Article 8, he could seek judicial review of the MOD's action in the Administrative Court. If the Court found in the applicant's favour, the Court could make an Order essentially compelling such discharge. The applicant could appeal, with permission, against a decision of the Administrative Court to the Court of Appeal or the House of Lords.

Porton Down: Historical Survey

A review of the Service Volunteer Programme from 1939 to 1989

On 21 November 2000 Dr Lewis Moonie, then Minister for Veterans' Affairs, announced a package of measures intended to address emerging concerns that some Porton Down Volunteers (PDVs) might have suffered unusual ill health because of their participation in trials at the Chemical Defence Establishment, Porton Down. The Ministry of Defence (MOD) has seen no scientific evidence to support this belief but takes such suggestions seriously. In May 2001 the Minister, as part of the MOD's commitment to assist former PDVs, announced the intention to publish a Historical Survey of the Porton Down Service Volunteer programme 1939 to 1989 (the period of most interest to volunteers).

The Historical Survey of the Porton Down Service Volunteer Programme 1939-1989 has now been published (see related information). It sets out a full description of the size and shape of the studies in which volunteers took part, and explores their ethical aspects.

The Survey has been conducted by MOD officials who had no previous professional contact with Porton. No member of Porton staff was involved in determining the ground the survey should cover or the documents which were to be consulted. Porton's advice has been sought in order to clarify explanations of scientific matters (for example, the effect of agents and treatments on physiology and the metrics used to measure doses and exposures). They have not had any further editorial involvement.

Professor Sir Ian Kennedy acted as independent supervisor to this project, providing valuable guidance. Sir Ian's assessment of Porton's conduct appears at the end of the survey. It draws on the descriptions of the trials conducted by Porton, the information presented on how service volunteers were recruited, and on Dr Alasdair Maclean's analysis of ethics codes/guidelines and practice. No attempt has been made by the MOD to summarise Sir Ian's assessment, to avoid any inadvertent changes in meaning or language.

Sir Ian identifies a small number of trials spread over several decades which he considers 'amount to serious departures from what should have been done'. However, he is clear that they 'are few in number'. Sir Ian also warns that these studies must be viewed in the

historical context of both the Second World War and the Cold War. The MOD welcomes Sir Ian's view that 'a very great debt of W gratitude is clearly owed to those who volunteered to take part in the research at Porton and to those who carried it out.' The MOD does not entirely agree with all the opinions he expresses, but we respect the absolute integrity with which he approached his task and the conclusions that he reached based on a summary of those records detailed in the draft Survey.

Enclosure 3

Roche V UK - Application No 32555/96

Report of Progress against Action Plan on General Measures

The Action Plan contained two entries (numbered 1 and 3) with target completion dates of 31 July 2006. These actions were completed and details reported to the Secretariat in early October 2006.

The Action Plan also contained an entry (number 2) with a target completion date of 31 October 2006. This report provides, below, details of progress against the three elements of work that make up this entry.

Action 2: Make it easier for applicants to make and pursue a request for information about their actual or possible hazardous exposure

2.1 Revise the pages of the UK Ministry of Defence internet site to clarify the application procedure for applicants with Article 8 rights.

The pages of the UK Ministry of Defence internet site (www.mod.uk) have been revised to include information about a Special Subject Access Request (SSAR) procedure that has been introduced for individuals who are concerned about potentially hazardous exposure they may have experienced during their military Service or civilian employment with MOD. Under the heading *Potentially Hazardous Exposure*, applicants have access to a SSAR form (including explanatory notes) which they can download for completion and submission to a central point in MOD HQ.' The SSAR form is accessible via a number of avenues on the site, and the changes were implemented by the Action Plan target date of 31 October 2006. One direct link is:

<http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/Healthandsafetypublications/HazardousExposure/PotentiallyHazardousExposure.htm>

The changes to the internet site were also highlighted on the intranet site which is accessible only to MOD staff. This helped to promote internal awareness of the extended access regime, and so augmented the internal guidance (mentioned in the October report) which was published in July 2006.

2.2 Disseminate the information to groups representing potential applicants.

On 31 October, letters outlining the new extended access to information regime and providing a copy of the SSAR form were sent to 15 groups representing potential applicants. These groups were invited to advise their members accordingly. A copy of the letter is provided at Annex A and a list of the groups who were contacted is included at Annex B.

2.3 Revise relevant leaflets.

Relevant leaflets have been identified. It has been decided that these will be updated to reflect the extended right of access when current supplies have been exhausted. In the interim, arrangements are being made for a note to be included in each leaflet to advise recipients of the changes. In addition, key personnel across the department (e.g. Freedom of Information and Data Protection Act focal points, Single Service Points of Contact) have received written guidance and a verbal briefing about the ECtHR judgement, the Action Plan, how to recognise requests giving a right to information under Article 8, request handling and points of contact.

ANNEX A — Letter to groups representing potential applicants.

Name of recipient

Appointment

Address line 1

Address line 2

POSTAL TOWN IN CAPITALS

Postcode

D/DG Info/3/30/3 31 October 2006

IMPROVED ACCESS TO INFORMATION

I am writing to inform you of a recent change to the arrangements used by the Ministry of Defence (MOD) for access to personal information.

Following a decision by the European Court of Human Rights, we have implemented a Special Subject Access Request (SSAR) procedure for individuals who are concerned about any potentially hazardous exposure they may have experienced during their military service or civilian employment with the MOD.

The SSAR procedure involves completing a form (a copy is enclosed), and submitting it with proof of identity to the address on the form. The form is also available to download from the MOD website: applicants should select the 'Contact us' tab on the MOD internet site located at <http://www.mod.uk/defenceinternet/home>.

If you become aware of anyone who might wish to use these arrangements, please let him or her know how to apply.

Please note that applications for personal data excluding a hazardous exposure element should continue to be made on the existing form (DPA SAR Form 1694), and that Porton Down Volunteers should continue to use the Porton Down Helpline.²¹¹

ANNEX B — US of representative groups contacted.

- 1. Porton Down Veterans Support Group (PDVSG)**
- 2. National Gulf Veterans & Families Association (NGV&FA)**

²¹¹www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/HealthandSafety/PortonDownVolunteers/PortonDownHelpline.htm.

- 3. The Gulf Veterans' Association (GVA)**
- 4. British Nuclear Test Veterans Association (BNTVA)**
- 5. Campaign Against Depleted Uranium (OADU)**
- 6. Combined Veterans Forum (CVF)**
- 7. Low Level Radiation Campaign (LLRC)**
- 8. NDDU Depleted Uranium Support Group (NDDU DU SG)**
- 9. Solders, Sailors, Airmen Families' Association (SSAFA)**
- 10. The Royal British Legion**
- 11. The Queen Alexandra Hospital Home (QAHH)**
- 12. Service Benevolent Funds**
 - **Seafarers UK²¹²**
 - **Army Benevolent Fund (ABF)**
 - **Royal Air Force Benevolent Fund (RAFB)**
- 13. The CMI Service Benevolent Fund (CSBF)**

Appendix 20a: Letter dated 8 February 2007 to Derek Twigg MP, Parliamentary Under-Secretary for Defence and Minister for Veterans, Ministry of Defence, re Roche v UK

In my letter dated 23 January 2007, I wrote to request further information on the implementation of the European Court of Human Rights judgment in *Roche v UK*.

Thank you for your letter dated 25 January 2007, enclosing further details of the progress made by the Ministry of Defence in relation to the progress of their Action Plan. We are grateful for the steps which the Ministry of Defence have taken to keep the Committee informed of the progress made towards implementation in this case.

In your letter, you helpfully enclosed documents, including Notes to the Committee of Ministers and an updated Action Plan. These documents refer to Internal Guidance placed on the Department's intranet in July 2006 on matters including, how to recognise a request for information which triggers Article 8 ECHR and the action required by the responding branch over and above that already required by specific legislation (the Data Protection Act and the Freedom of Information Act). We note that you have not provided copies of this guidance to the Committee of Ministers, arguing that "the Guidance is intended for internal rather than external use: it reflects and conveys the Department's legal advice, and it would therefore be inappropriate to publish it". While the Ministry retains a right to privilege for its legal advice, the substance of this guidance will be key to the assessment of whether or not the guidance given is adequate to give effect to the judgment in *Roche v UK* ("to provide an effective and accessible procedure enabling the

²¹² Seafarers UK is the new identity for the King George's Fund for Sailors.

applicant to have access to all relevant and appropriate information" (para.167)) and to avoid repetition of similar cases in future.

I would be grateful if you could provide the JCHR with copies of this guidance (if necessary redacted or edited to omit any references to the legal advice provided to the Ministry).

Alternatively, I would be grateful if you could tell us:

- a) When the Ministry considers that a request for information will trigger Article 8 ECHR rights?**
- b) What actions over and above those necessary to comply with the Data Protection Act 1998 and the Freedom of Information Act 2000 are necessary when an Article 8 ECHR request is made?**
- c) What steps are recommended for communication with the requester in relation to an Article 8 ECHR request?**
- d) How are complaints by those making Article 8 ECHR requests dealt with by the Ministry?**

Appendix 20b: Letter dated 28 February 2007 from Derek Twigg MP, Parliamentary Under-Secretary of State for Defence and Minister for Veterans, Ministry of Defence

Thank you for your letter of 8 February, in which you asked for a copy of the Internal Guidance which was referred to in our progress report to the European Court of Human Rights (ECtHR) secretariat in September 2006. You noted that we had informed the secretariat that the guidance was intended only for internal use as it reflects and conveys legal advice, but nonetheless felt that visibility of the direction given to staff would be key to the Joint Committee's assessment of our compliance with the ECtHR judgement in *Roche v UK*.

To assist with the Joint Committee's assessment, I am minded to provide you with a complete copy of the guidance. However, as the document is protectively marked and contains legal advice, I must first ask for your confirmation that it would be held by the committee in confidence. If you are content to agree to this request for confidentiality I will highlight the legally sensitive sections when I provide you with the guidance. However, I hope you will be able to assess our compliance with the judgement by oblique reference rather than direct publication of any part of the guidance.

You will be aware that the Internal Guidance itself is only one of a number of steps taken by the Ministry of Defence in light of the *Roche* ruling. I hope those steps will be clear from my previous correspondence but it might be helpful if I recap the measures taken by MOD.

In addition to drawing up and publicising departmental guidance, making appropriate changes to the MOD Internal and external websites, writing to representative groups, revision of relevant leaflets and publication of an historical survey of the Porton Down tests, we have introduced a new Special Subject Access Request (SSAR) procedure. This aims to make it easier for applicants to pursue a request for information about their potentially hazardous exposure, with particular attention to providing a systematic release of relevant information, including any that falls outside the rights of access offered by the Data Protection and Freedom of Information Acts. To manage the SSAR procedure, a MOD

focal point has been established. This brings together the responsibility for provision of advice and guidance, raising awareness of the changes, establishing links with key stakeholders and overseeing the handling of all requests to the department that involve a right to information under Article 8. As you know, we have provided two progress reports to the ECtHR secretariat and I included copies of these with my letter of the 25 January.

Appendix 20c: Letter dated 13 March 2007 to Derek Twigg MP, Parliamentary Under-Secretary of State for Defence and Minister for Veterans, Ministry of Defence, re *Roche v UK*

Thank you for your letter of 28 February.

At its meeting on 12 March the Committee considered your offer to provide a full set of the Internal Guidance on condition that we held it in confidence. The Committee agrees to this, but it reserves the right, once it has seen the Guidance, to seek your agreement that confidentiality could be lifted from some or all of the material to enable the Committee to publish and/or refer to it.

It would be helpful if we could receive a copy of the Guidance as soon as possible to enable us to complete our Report on implementation of Strasbourg judgments.

Appendix 20d: Letter dated 27 March 2007 from Derek Twigg MP, Parliamentary Under-Secretary of State for Defence and Minister for Veterans

Thank you for your letter of 13 March in which you confirmed that the Committee agrees to hold a copy of the MOD Internal Guidance in confidence. Given this assurance, I am pleased to provide the Committee with two copies of the Guidance (enclosed).

You will note a complete copy of the Guidance is provided at Annex A, while Annex B contains a redacted version. We wish to avoid disclosure of the legal advice reflected in Annex A paragraphs 4, 5 and 6, and in serials 1-12 of the table at paragraph 9, hence these redactions have been made in the copy of the Guidance at Annex B. We are content for the Committee to publish and/or refer to the redacted version only.

We are also keen to ensure full compliance with the requirements of the ECtHR judgement and would be grateful for an opportunity to review a draft of the Committee's Report.

Annex B

NB: REDACTED COPY (TEXT REFLECTING LEGAL ADVICE REMOVED)

DEFENCE INSTRUCTION NOTICE (2006 DIN 02-207)

EXTENDED ACCESS TO INFORMATION

RESTRICTED

Audience

1. Any member of the Department receiving correspondence from individual current or former Service or civilian personnel or from members of the public that requests information.

Issue

8. It is conceivable that a dependant of a person involved in a hazardous activity might be uncertain as to the effects of the activity on his or her own health (e.g. through fear of genetic mutation). Seek legal and policy advice via the Article 8 focal point before responding to such a request, whether under the statutory or Article 8 rights.

Distinction between Article 8 Right and Statutory (DPA, FOI Act and EIR) Rights

9. The right to receive information under DPA, FOIA and EIR is accompanied by a number of requirements and limitations. The way in which those considerations apply to the Article 8 right is set out in the table: the key point under Article 8 is to achieve full, timely and structured disclosure.

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14. Any branch responsible for relevant material must also be responsible for explaining its meaning and significance, for declassifying it as necessary, and for making any case for withholding all or part of it. The lead branch must look for consistency and coherency in the material, and stand ready to challenge any delay or unwillingness to release on the part of others, involving the Article 8 Focal Point as necessary. In particular, the lead branch must ensure that either it or the Subject Access Request Focal Point has identified any significant interaction between the personnel and medical information disclosed on the one hand, and the personal and contextual material found by the lead branch on the other.

15. The usual arrangements for advising Ministers, senior officials and the Press Office as appropriate of any contentious or newsworthy cases or releases of information apply.

16. If it is apparent that the requestor contemplates a claim against the Department, the Chief Claims Officer should be advised. However, this does not reduce the requestor's right to information.

17. If it is apparent or possible that information at The National Archives could be in scope, the assistance of the DG Info Corporate Memory Analysis Branch should be sought in identifying and retrieving it. Only organisations with an approved relationship with The National Archives may deal direct (currently, this is only AWE).

Annex A (to DIN)

Summary of the European Court of Human Rights case – Roche v UK

A1. On 19 October 2005, the European Court of Human Rights (ECtHR) delivered its judgment in the case that had been brought against the UK by Thomas Michael Roche, a former member of the British Army. The ECtHR held unanimously that there had been a violation of Article 8 of the European Convention on Human Rights (ECHR) – the right to respect for private and family life.

A2. Mr Roche participated in mustard and nerve gas tests conducted at Porton Down in 1963²¹⁸. The substance of his complaint under Article 8 was that he was denied adequate access to information concerning these tests. The ECtHR found that Mr Roche's uncertainty as to whether or not he had been put at risk through participation in the tests had caused him substantial anxiety and stress. As there were no national security grounds for withholding the information concerned, the ECtHR ruled that there was a positive obligation to provide an "effective and accessible procedure" giving access to "all relevant and appropriate information". This would have allowed Mr Roche to assess the risk to which he might have been exposed while participating in the Porton Down tests. In concluding that there had been a violation of Article 8 in Mr Roche's case, the ECtHR said that a structured disclosure process was needed so that information would be made available on request and without recourse to litigation.

A3. Mr Roche claimed breaches of a number of other Articles: this is the only aspect in which his case was successful.

Annex B (to DIN)

Text of Article 8

RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE
--

²¹⁸ He claimed to have attended in 1962 as well, but no records were found.

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

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

The full text of the Convention can be accessed conveniently in its form as Schedule 1 to the Human Rights Act 1998 – see <http://www.opsi.gov.uk/ACTS/acts1998/19980042.htm#aofs>

Annex C (to DIN)

Data Protection Act Subject Access Request Focal Points

Navy :

Naval Service Freedom of Information Co-ordination Cell
Mail Point G1, Leach Building, Whale Island
Portsmouth PO2 8BY

Army:

Army Personnel Centre
Civil Secretariat
Disclosures 2
Mailpoint 515
Kentigern House
65 Brown Street
Glasgow G2 8EX

Royal Air Force:

RAF DPA SAR Focal Point
PMA IM1A, Room 5
Building 248A
RAF Personnel Management Authority
RAF Innsworth
Gloucester GL3 1EZ

MDPGA

MDPGA Secretariat
Room 114
MDPGA HQ Wethersfield
Braintree
Essex CM7 4AZ

Civil Servants

TLB Personnel Management Authorities. (This responsibility will pass to the PPPA in 2007, and further information will be provided then).

Appendix 21: Memorandum dated 15 March 2007 from the British Irish Rights Watch

INTRODUCTION

1. British Irish RIGHTS WATCH is an independent non-governmental organisation that monitors the human rights dimension of the conflict and the peace process in Northern Ireland. Our services are available free of charge to anyone whose human rights have been affected by the conflict, regardless of religious, political or community affiliations, and we take no position on the eventual constitutional outcome of the peace process.

2. We welcome this opportunity to make a submission to the Joint Committee on Human Rights (JCHR) and the review of the implementation of judgements of the European Court of Human Rights by the UK government.

3. In keeping with our mandate, this submission will focus on: the delay in the implementation of judgements relating to the investigation of deaths engaging Article 2 of the European Convention on Human Rights (ECHR), which protects the right to life; and general measures taken by the Government to meet the United Kingdom's obligation to execute Strasbourg judgments rapidly and effectively.

4. As the Joint Committee on Human Rights are aware none of the families in the six cases relating to Northern Ireland (*McKerr, Jordan, Kelly & Ors, Shanaghan, McShane and Finucane*) have received an effective investigation into the death of their loved one. We welcomed the comments made by the JCHR in the *19th Report of Session 2005-6 into the UK government's compliance with the UN Convention against Torture* which highlighted this issue. Since this report was published there have been several key developments both in these cases and in the wider forum of the government's attempts to meet its Article 2 responsibilities.

THE DELAY IN THE IMPLEMENTATION OF JUDGEMENTS RELATING TO THE INVESTIGATION OF DEATHS ENGAGING ARTICLE 2 ECHR: CASES OF *MCKERR, JORDAN, KELLY & ORS, SHANAGHAN, MCSHANE AND FINUCANE*

5. Since our last submission to the JCHR on this issue in March 2006, there has only been one major development in the cases of *McKerr, Kelly & Ors* and *McShane*; namely that these cases will now be examined by the Historical Enquiries Team (HET). While BIRW are encouraged that due to the pressing need to investigate these cases, the HET will take them out of chronological sequence, we continue to state that the HET is not the correct avenue for the government's discharge of its Article 2 obligations. In the case of *Finucane*, his family, the Irish government, and the US Congress among others have consistently opposed an inquiry into his death under the Inquiries Act 2005 on the principle that an inquiry held under this legislation will not be Article 2 compliant. It is our understanding that many members of the judiciary are equally sceptical about the power of the Act to discharge the government's Article 2 obligations and as such will not sit as Chair on such an inquiry if invited to do so by the Secretary of State. A wider exploration of the impact of the Inquiries Act 2005 is outlined in paragraphs 15 to 18.

6. *Jordan*, along with another Northern Irish case of *McCaughey*, and the English case, *Hurst*, were recently heard in the House of Lords. Their Lordships were asked to decide, among other things, whether the Human Rights Act 1998 (HRA) and the European Convention of Human Rights impose a duty on the government to act in compliance with Article 2 even if the death occurred before the Act came into force. While the judgment is pending in this case, several key issues emerged. Firstly, the keen need for a robust overhaul of the Northern Ireland Coronial system. Secondly, the fact that the government continues to offer the HET as a suitable method of resolving killings involving the state

which took place prior to the inception of the HRA, despite its lack of independence. Finally, the depth of confusion which surrounds the correct application of the HRA.

7. These six cases are not the only examples where the UK has failed to act on rulings made by the European Court of Human Rights. For example in the case of *McCann, Farrell, and Savage v UK*²¹⁹ (the Gibraltar case), when Michael Heseltine, the then Deputy Prime Minister "angrily rejected the court's ruling and stated that the government would not be taking any further action regarding the case".²²⁰ Also, in the case of *Murray v UK*²²¹, which examined the whether inferences could be drawn by a court on the failure of the accused to answer police questions or to give evidence, and the role this played in determining his guilt, combined with the fact legal advice was withheld for the first 48 hours of his time in custody. The European Court found there had been a breach of John Murray's right to a fair trial. The UK government were slow to amend the legislation which enabled the Murray case to arise, namely the Criminal Evidence Order (Northern Ireland) 1988, and the Court's decision was only implemented after 2000²²².

GENERAL MEASURES TAKEN BY THE GOVERNMENT TO MEET THE UNITED KINGDOM'S OBLIGATION TO EXECUTE STRASBOURG JUDGMENTS RAPIDLY AND EFFECTIVELY

INQUESTS

8. The draft Coroners Bill, published for consultation in 2006, attempted to address the reforms recommended by Professor Tom Luce in his Fundamental Review of Inquests (2003). However, the Bill, unlike the Luce review, did not apply to Northern Ireland. BIRW had concerns that, should this Bill have become law, that it would have been applied to Northern Ireland without appropriate consultation. Equally, an application of this Bill to Northern Ireland would have failed to take into account the legacy of 30 years of conflict and the significance of the deep flaws in the Northern Ireland coronial system. In the event, the Coroners Bill was dropped from the legislative programme. While the Northern Ireland Court Service has recently made some administrative reforms to the coronial system, this has not gone far enough to provide investigations which are Article 2 compliant and the NICS does not have the power to make the changes necessary to bring this about without any legislative basis.

9. One issue which featured in *Jordan, McCaughey & Ors*, was the nature of the verdict which the Northern Ireland Coroner is able to issue. While BIRW acknowledge that the Council of Ministers decided to close the examination of the measures taken in respect of this aspect of the Court's judgments, we respectfully assert that this remains a crucial issue. Cases currently proceeding through the Coronial system, such as the murder of Danny McGurk (2003) which was held in September 2006, have highlighted the limits of a Northern Irish inquest in both the investigation of deaths, and the closure brought to families and the wider community by the inquest process. In particular, the limits placed on verdicts, the restricted scope of inquests and the absence of legal aid for families undermines the Coronial system and continues to deny those in Northern Ireland their Article 2 rights.

THE POLICE OMBUDSMAN

²¹⁹ Case of *McCann and Others v United Kingdom*, (17/1994/464/545).

²²⁰ Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism, Heymann, P.B, Kayyem, J.N: A joint project of Harvard University's John F. Kennedy School of Government Harvard Law School, November 2004.

²²¹ *John Murray v UK*, 18731/91 [1996] ECHR 3 (8 February 1996).

²²² See: Council of Europe, Committee of Ministers, Interim resolution DH (2000) 26.

10. The Police Ombudsman of Northern Ireland (PONI) has been identified by the government as a suitable outlet for the investigation into the cases of *Jordan* and *McKerr*, as both deaths were caused by police officers. As the Joint Committee are no doubt aware, the PONI can only investigate the behaviour of police officers and not that of soldiers and civilians (and thus not police agents), nor can she investigate the murder itself, but only alleged police misconduct. These restrictions have ensured that any investigation into Article 2 deaths by her office will not be compliant with the ECHR.

11. The inability of the Police Ombudsman to fully explore the role of police informers has very serious implications for many families in Northern Ireland. The recent PONI report, entitled *Operation Ballast*,²²³ into the murder of Raymond McCord Junior uncovered extensive collusion which had resulted in the murders of 10 people, and 72 other instances of criminal activity, including attempted murders. We support Raymond McCord Senior's call for a full and independent inquiry into his son's murder. The PONI report, while detailed, was not able to explore the full picture; nor will the Inquiries Act 2005 provide an effective investigation into the murder of Raymond McCord Junior.

12. The work of the Police Ombudsman has been part hampered by the Public Prosecution Service's refusal to carry forward PONI's recommendations to prosecute former police officers. The government suggests in their response to the Committee of Ministers²²⁴ that this refusal to prosecute only occurs in 3% of cases. However, it is significant that none of the police officers cited as involved in the collusion surrounding the murder of Raymond McCord Junior will face prosecution.²²⁵

THE HISTORICAL ENQUIRIES TEAM

13. While BIRW welcomed the establishment of the Historical Enquiries Team (HET) in 2006, we have always maintained that they will not provide Article 2 compliant investigations. The Committee of Ministers in Europe confirmed this view, saying:

"In particular, the establishment of the Historical Enquiries Team, especially designed for re-examining deaths attributable to the security situation in Northern Ireland during 'the Troubles' and containing a unit solely staffed with officers from outside the PSNI, seems encouraging. It is clear however, that it will not provide a full effective investigation in conformity with Article 2 in 'historical cases' but only identify if further 'evidentiary opportunities' exist."²²⁶

The HET answers to the Chief Constable of the PSNI, thus eroding its independence; combined with the fact that the HET is subject to the jurisdiction of HM's Inspectorate of Constabularies, currently headed by Sir Ronnie Flanagan. He was a serving RUC²²⁷ officer for over thirty years and presided over some of the worst acts of collusion, as recently exposed by the Police Ombudsman report into the murder of Raymond McCord Jnr. He was a serving officer during the period of all six cases under consideration by the JCHR inquiry.

14. BIRW has concerns that seven cases are currently being withheld from HET investigation by the PSNI, despite the fact all these cases fall under the HET's remit²²⁸.

²²³ *Statement by the Police Ombudsman for Northern Ireland on her investigation into the circumstances surrounding the death of Raymond McCord Junior and related matters*, 22 January 2007, <http://www.policeombudsman.org/press.cfm>.

²²⁴ Committee of Ministers, April 2006: CM/Inf/DH (2006)4 Addendum.

²²⁵ Junior officers 'supported at highest levels of RUC and PSNI' by Owen Bowcott, *The Guardian*, 23 January 2007.

²²⁶ Cm-Inf-DH(2006)4rev2E.htm, paragraph 65.

²²⁷ The former name of the PSNI.

²²⁸ 'Cold case' cops in dark over murders, by Alan Murray, *Belfast Telegraph*, 11 February 2007.

There are also concerns about the co-operation between the HET and Police Ombudsman. The overlap which exists should ideally provide a holistic and complete investigation into conflict-related deaths. In reality, however, we fear that there may be cases which the HET has investigated, only for the case to be re-investigated by the Police Ombudsman, or vice versa, causing unnecessary trauma to families. We hope that these issues can be overcome by excellent liaison and co-operation between the agencies, although without any compromise of the Police Ombudsman's independence, but we have seen no evidence to date that mechanisms yet exist that will deliver such co-ordination.

HER MAJESTY'S INSPECTOR OF CONSTABULARY (HMIC)

15. Public confidence in the office of the HMIC has been substantially undermined by the *Operation Ballast* report. The fact that Sir Ronnie Flanagan has denied all knowledge about what went on during the late 1990s and the role of individuals such as Mark Haddock, described by the Police Ombudsman as Informer 1 either means he was an incompetent Chief Constable or he is seeking to distance himself from the web of collusion the PONI uncovered.²²⁹ When the Chief Constable of the PSNI is deciding whether to "call in" another police force to investigate an issue in Northern Ireland, he consults HMIC. While we acknowledge that this consultation is, in the words of the government, "entirely informal and advisory", BIRW has very strong concerns about the role of HMIC in Northern Ireland so long as Sir Ronnie Flanagan remains as Chief Inspector.

Inquiries Act 2005

16. As already noted above and in previous submissions, the Inquiries Act 2005 is incapable of providing Article 2 compliant investigations into deaths in which collusion was a factor.

17. David Wright, the father of Billy Wright, murdered inside the Maze Prison in 1997 in circumstances where collusion played a part, judicially reviewed the Secretary of State's decision to convert the statutory basis of the Billy Wright Inquiry into one held under the Inquiries Act, on the principle that an Inquiries Act inquiry would not be Article 2 compliant. Mr Justice Deeny ruled on 21 December 2006 that the Secretary of State's decision was unlawful because he failed to take into account the importance of the Inquiry's independence. He stated, referring to an inquiry under the Inquiries Act, that:

"In those circumstances one has to ask whether an inquiry conducted under a sword of this nature, which was perhaps not Damoclean but still rested in the scabbard of the Minister, would or could be perceived to be truly independent."²³⁰

However in early February 2007, David Wright waived his right to seek an order to quash the Secretary of State's decision due to personal reasons. Regardless of David Wright's final decision, the Inquiries Act was undoubtedly dealt a blow by this judicial review and the objections to the Act of human rights NGOs and other interested parties were confirmed. (Please see our Third Party Intervention into the Judicial Review, which has been appended)

18. The inquiry into the murder of prominent human rights lawyer Rosemary Nelson opened in 2005 under section 44 of the Police (Northern Ireland) Act 1998. In September 2006, the inquiry granted full participant status to MI5. We remain concerned about part of the reason given by the Inquiry for this action. The inquiry stated: "the Service will have assumed lead responsibility for national security intelligence work in Northern Ireland by

²²⁹ Flanagan refuses to resign, Ulster Television, 23 February 2007.

²³⁰ In the High Court of Justice in Northern Ireland, Queen's Bench Division, In the matter of an application by David Wright for Judicial Review of a decision by the Secretary of State for Northern Ireland, Deeny J, 21 December 2006.

the time the Inquiry makes its recommendations, and needs therefore to be able to make representations and to understand fully the evidence behind and reasons for any recommendations.”²³¹ Our concerns are firstly that MI5 has not yet assumed this new role and secondly, how does MI5 know what recommendations the Inquiry will make and whether it will have any need to make representations about them. Finally, if MI5 has any right to make representations to the Inquiry about its recommendations, that right should be restricted to recommendations connected to MI5’s responsibilities, rather than any recommendation at all. The inquiry has also been subject to several delays, with full hearings now not expected to open before September 2007.

19. The inquiry into the murder of Robert Hamill opened in May 2005. The Inquiry has been hampered by legal issues and thus delays. In March 2006, the Chairman of the Inquiry Panel applied to the Secretary of State for the conversion of the Inquiry into one held under the Inquiries Act 2005; this was duly granted. Substantive delays occurred as a result of the applications by police officers for anonymity certificates. The inquiry initially ruled that anonymity would not be granted; this decision was judicially reviewed by the police officers in late 2006 where the Court of Appeal did not uphold the decision of the Inquiry Panel. The Inquiry then decided to appeal the Court of Appeal judgment in the House of Lords. There has also been a request for the terms of reference of the Inquiry to be extended to include the involvement of the Office of the Director of Public Prosecutions (DPP). We believe it is vital, considering the nature of Robert Hamill’s death, that the Inquiry is able to assure itself that the prosecution process was not subverted in anyway, whether with or without the co-operation of anyone within the Office of the DPP. While BIRW remain confident that the Robert Hamill inquiry still has a valid purpose to serve, we remind the JCHR that an inquiry under the 2005 legislation is not Article 2 compliant.

20. Finally, we draw the Committee’s attention to the fact that no serving Judge has yet participated in an inquiry under this legislation. The Chair of the Robert Hamill Inquiry, Sir Edwin Jowitt, is a retired High Court Justice while the Billy Wright Inquiry is chaired by Lord MacLean, a retired Appellate judge from Scotland. This is perhaps indicative of the unpopularity of the legislation within the judiciary; an issue which will cause major problems as the number of public inquiries heard under this legislation increases.

CONCLUSION

21. The continued failure of the UK government to implement the Strasbourg judgments not only denies families their right to the truth about how their loved one died, but undermines the UK’s domestic and international standing on human rights. While BIRW welcome the creation of the HET and the work done by the PONI we continue to have concerns about the independence of the former and the limited remit of the latter, which consequently detracts from their ability to adequately meet the state’s Article 2 obligations. Ultimately we believe that serious and substantial changes need to be made to the legislation in this area, most significantly the repeal of the Inquiries Act 2005 and its replacement with an Article 2 compliant mechanism for proper public inquiries, for the UK to abide by the Strasbourg judgments. We respectfully urge the JCHR to encourage the government to implement these decisions and provide Article 2 compliant investigations not only into the six cases discussed within this submission, but across all the hundreds of similar cases in Northern Ireland.

Supplementary Memorandum dated 19 March from the British Irish Rights Watch

Further to British Irish Rights Watch’s submission to the Joint Committee on Human Rights’ inquiry “IMPLEMENTATION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

²³¹ *Inquiry grants full participant status to the UK Security Service*, Press Notice 06/01, 20th September 2006, <http://www.rosemarynelsoninquiry.org/press-notices/12/>.

AND DECLARATIONS OF INCOMPATIBILITY", it has come to our attention that the Secretary of State for Northern Ireland has appealed Judge Deeny's ruling in the judicial review taken by David Wright regarding the inquiry into the death of his son, Billy Wright. Please see paragraph 17 of our submission.

We would be grateful if you could bring this development to the attention of the Committee.

Appendix 22: Letter dated 14 March 2007 from the Committee on the Administration of Justice (CAJ), re Implementation of Judgments of the European Court of Human Rights and Declarations of Incompatibility

The Committee on the Administration of Justice (CAJ) is an independent cross-community human rights group working to uphold the highest standards in the administration of justice in Northern Ireland.

We note that as part of the above-named review, the Committee is continuing its examination of the delay in the implementation of judgments relating to the investigation of deaths engaging Article 2 ECHR. As the Committee may be aware, CAJ was involved in taking a number of cases to the European Court of Human Rights in relation to Article 2 (namely, *Shanaghan v UK*, *Jordan v UK*, *Kelly & Ors v UK*, *McKerr v UK*) and continues to monitor very closely the subsequent implementation of the above judgments. It is obviously of particular concern to us and the families concerned that there has been little noticeable progress with regard to the implementation of the above judgments and to that extent, greater parliamentary scrutiny is indeed encouraged and welcomed.

For the Committee's information, we attach the following submissions²³² that we have made to the Committee of Ministers of the Council of Europe, which would encapsulate our concerns about the government's lack of commitment to the effective and expeditious implementation of the above judgments:

- Submissions of February 2007
- Submissions of October 2006
- Submissions of May 2006
- Submissions of March 2006
- Submissions of September 2005
- Submissions of May 2005
- Submissions of February 2005
- Letter of 29th November 2002*
- Submissions of 8th October 2002*

CAJ's experience of the process is that it is somewhat opaque. It is even difficult for us (who follow the process closely) to know exactly when and how to intervene in the oversight process. We have no guidance and/or information about what the government is

²³² Ev not printed.

doing to facilitate the implementation of these judgments, since the government makes little or no effort to engage with the families of the victims, or their legal or NGO representatives. As a result, in addition to the fact that the families remain aggrieved and frustrated, we feel that there is very little scope for our views, or those of the families and their legal representatives to be taken into account by the government.

It is unfortunately our conclusion that the lack of transparency on the part of the government continues, despite the Committee's previous recommendation that "*greater efforts should be made in government to make up-to-date information on ECtHR judgments available to the general public*" (Paragraph 7 of the Thirteenth Report of the Joint Committee on Human Rights on the Implementation of Strasbourg Judgments: First Progress Report - HL 133/HC 954).

We hope you find this information of use to your review, please do not hesitate to contact me should you have any further queries.

Appendix 23: Letter dated 26 February 2007 from The Rt Hon Harriet Harman MP QC, Minister of State, Department for Constitutional Affairs

You wrote to me on 23 January on the Implementation of Judgments of the European Court of Human Rights, mentioning that the Committee of Ministers' Deputies of the Council of Europe have requested up-to-date statistics on the progress of coroners' inquests. I am pleased to be able to give you what information is currently available. The latest figures relate to the calendar year 2005. Updated information for 2006 will be available in approximately May or June 2007, shortly after publication of the next annual Coroners Statistics bulletin around the end of April.

1. The number of Inquests pending before coroners in England and Wales

The number of inquests 'pending' before coroners in England and Wales, at the end of each calendar year since 2001, were as follows:

At the end of:-

2005: 10,033

2004: 9,825

2003: 8,244

2002: 9,173

2001: 8,449

2. The average time for the completion of inquests in England and Wales

The estimated average time to complete an inquest is 23 weeks (just over 5 months), based on data submitted by coroners for the calendar year 2005. Over a third of Inquests were concluded within 3 to 6 months, with a further quarter concluded within 1 to 3 months of the death being reported. Only just over a quarter of inquests had not been resolved within six months. The average figure is slightly affected by a small number of inquests which take a long time to conclude.

3. The longest time for the completion of an inquest in England and Wales.

We do not currently have that information. Although we have data relating to how long it is taking for coroners to conclude inquests in general, there are at present no records kept contrary of extreme cases.

I will write to give you updated figures for 2006 when these statistics are available.

Appendix 24: Note from the Coroners Service for Northern Ireland

1. The number of inquests pending before coroners in Northern Ireland

Table 1 below indicates the number of cases (deaths) pending before coroners in Northern Ireland at the end of each calendar year from 2001 to 2006.

Table 1 - Coroners outstanding cases 2001 – 2006

	Outstanding cases at end
2001	1897
2002	1633
2003	1844
2004	1892
2005	1494
2006 ^[1]	1333

[1] provisional figures

The Coroners Service does not maintain statistics on the number of inquests pending as this figure is fluid at any one time depending on the number of post mortem reports received, statements from the police etc. The position in Northern Ireland is different from that in England and Wales as inquests are not held in every death registered with a coroner in Northern Ireland. Approximately 7% of reported deaths are concluded by inquest.

2. The average time for the completion of inquests in Northern Ireland

Table 2 below provides details of the average time taken from date of death to the end of the inquest from 2001 to 2006. As a consequence of the amalgamation, the coroners have prioritised the longest standing cases. They have cleared 813 of these older cases between January 2006 and April 2007. As these statistics focus on concluded inquests, this process has led to the average time increasing over the last two years.

- Table 2 - Coroners Inquests Held – Average time from date of death to the end of the inquest

	Average time (weeks)
2001	71.92
2002	73.05
2003	84.12
2004	86.43
2005	105.16
2006 ^[1]	108.92

[1] provisional figures

3. The longest time for completion of an inquest in Northern Ireland

The longest time for completion of an inquest in Northern Ireland since the Coroners Service was established (and records for the whole of Northern Ireland were amalgamated) is 378.29 weeks. The death occurred on 8 June 1999 and the inquest was completed on 7 September 2006. Before an inquest was possible a health and safety investigation had to be concluded and a decision reached on whether a prosecution would be brought.

Appendix 25: Letter dated 23 January 2007 to The Rt Hon. David Hanson MP, Minister of State for Northern Ireland, Northern Ireland Office, re *John Murray v United Kingdom*

The Joint Committee on Human Rights is continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR). I am writing ask for an update on the Government's response to the judgment in *John Murray v United Kingdom* (App No 18731/91).

In this case, the European Court of Human Rights held that it was incompatible with Article 6 ECHR to permit adverse inferences to be drawn from the silence of defendants who had not had the benefit of legal advice. The Government have recently undertaken a review of the application of police and criminal evidence legislation in Northern Ireland. The Government have indicated that the relevant statutory provisions, Section 36, Criminal Evidence Order (Northern Ireland) 1999 (on non-permissible inferences from silence) will not enter into force in Northern Ireland until this review was completed.

We note that a draft Order on police and criminal evidence in Northern Ireland was laid before Parliament on 4 December 2006 (Draft Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007)). The Explanatory Notes accompanying that draft Order explains that the Bill extends certain reforms which are already in force in England and Wales to Northern Ireland. The consultation process leading up to its publication lasted for 12 weeks, between March and June 2006. We note that the consultation period for the Draft Codes of Practice 2006 also ended in June 2006.

Now that the review of the police and criminal evidence and codes of practice in Northern Ireland appears to be complete, I would be grateful if you could tell us when the

Government plans to bring into force Section 36 of the Criminal Evidence (Northern Ireland) Order 1999.

Appendix 26: Letter dated 14 February 2007 from The Rt Hon David Hanson MP, Minister of State for Northern Ireland, Northern Ireland Office, re *John Murray v United Kingdom in Northern Ireland*

Thank you for your letter of 23 January 2007 seeking an update on the Government's response to the ECHR judgment in the case of John Murray v United Kingdom in Northern Ireland.

I am glad to be able to advise you that the Police and Criminal Evidence (Amendment) (Northern Ireland) Order was approved by both Houses of Parliament on 24 January and will come into operation on 1 March 2007. The associated revised PACE Codes of Practice were laid before Parliament on 6 February 2007 and will also be commenced on 1 March 2007, in line with the legislation

This means that the way is open for us to commence the provisions of Article 36 of the Criminal Evidence (Northern Ireland) Order 1999 to reflect the Murray judgment and I can confirm that this will also come into operation on 1 March 2007.

I hope this is helpful.

Appendix 27: Letter dated 23 January 2007 to Yvette Cooper MP, Minister for Housing and Planning, Department for Communities and Local Government, re *Connors v United Kingdom*

The Joint Committee on Human Rights is continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR). I am writing to request updated information on implementation of the judgment in *Connors v UK* (Application Number 66746/01), in which the European Court of Human Rights found that the summary eviction of a family from a local authority gypsy caravan site, without reasoned justification or sufficient procedural safeguards, breached the right to respect for private life and the home under Article 8 ECHR.

We reported in our last progress report on the Implementation of Strasbourg Judgments that the Government considered that the issue of security of tenure would be considered as part of the Law Commission's wholesale review of rented tenure (2005-06, Thirteenth Report, HL 133/HC 954, para. 13). The Law Commission's Final Report "Renting Homes" was published in May 2006. It does not appear to deal with the issue of security of tenure for Gypsy and Traveller residents on caravan sites.

In July 2006, a group of members of the House of Commons introduced a private members' bill (a ten-minute-rule bill) that sought to provide an effective response to the breach identified in *Connors*, the Caravan Sites (Security of Tenure) Bill (HC Bill 206). The Bill provides for security of tenure to be acquired only after an introductory tenancy and lost by means of demotion when abused.

We would be grateful if you could explain:

a) how the Government intends to proceed in light of the failure of the Law Commission's Final Report to deal with the issue;

b) whether the Government considers that any further delay in the implementation of the judgment in this case is justifiable;

c) what are the Government's views on the proposals in the Caravan Sites (Security of Tenure) Bill 2006; and

d) whether the Government has considered addressing this issue by means of a short remedial order, and

e) if not, why not?

Appendix 28: Letter dated 26 March 2007 from Meg Munn MP, Parliamentary Under-Secretary of State, Department for Communities and Local Government, re *Connors v United Kingdom*

Thank you for your letter of 23 January to Yvette Cooper, seeking updated information on the implementation of the judgment of the European Court of Human Rights in the case of *Connors vs United Kingdom*. I am replying as the Deputy Minister for Women and Equality, with responsibility for Gypsy and Travellers, and I apologise for the delay in doing so.

The Government is committed to implementing the European Court of Human Rights judgement in the *Connors* case as soon as Parliamentary time allows. Communities and Local Government is actively seeking a legislative opportunity that would enable us to address this. You will be aware that the shape of the legislative programme for the third session of Parliament is currently being considered. We expect to consult later in the Spring on improving the rights and responsibilities of Gypsies and Travellers on local authority sites - including the security of tenure issues raised by the *Connors* judgment - to align them more with those of tenants in social housing. This consultation will inform the content of future legislation.

As you say, we had originally proposed that this issue could be addressed as part of the Bill being drafted by the Law Commission on tenure reform. I understand that the Law Commission's proposals are now being considered in the context of the conclusions of John Hill's review of social housing, which was published last month.

We have considered the possibility of using a remedial order to implement the *Connors* judgement. However, we consider that we would need to restrict a remedial order to improving security of tenure, and that we would not be able to address improvement of the rights and responsibilities of Gypsies and Travellers more widely. Given the burdens on Parliamentary time it makes sense to address all of these issues together as a package in primary legislation.

The Caravan Sites (Security of Tenure) Bill, which was introduced by Julie Morgan MP in the last session of Parliament, would have provided Gypsies and Travellers on Local Authority sites with the same security of tenure as tenants in Local Authority housing, as well as extending other rights, such as succession, assignment and exchange, to them. As you know, the Bill was not moved at second reading. However, it may prove useful to us as we take this issue forward, as future legislation may end up covering some of the same ground.

Appendix 29: Memorandum dated 12 March 2007 from the Housing Law Practitioners Association, re Implementation of Judgments of

the European Court of Human Rights and Declarations of Incompatibility

About HLPAs

The Housing Law Practitioners Association (HLPAs) is an organisation of solicitors, barristers, advice workers, independent environmental health officers and others who work in the field of housing Law.

Membership is open to all those who use housing Law for the benefit of the homeless, tenants and other occupiers of housing. It has existed for over 10 years. Its main function is the holding of regular meetings for members on topics suggested by the membership and led by practitioners particularly experienced in that area, almost invariably members themselves. The Association is regularly consulted on proposed changes in housing Law (by primary and subordinate Legislation and also by other means such as relevant codes) by the relevant Departments, chiefly the DCLG.

The Chair Vivien Gambling is an experienced housing specialist and a partner in a leading firm of solicitors. Although the Association is London based, the membership is countrywide. The Association is also informally linked with similar Housing Law Practitioners Groups in the North-West, South Yorkshire and the West Midlands.

Membership of HLPAs is on the basis of a commitment to HLPAs' objectives. HLPAs' objectives are:

- To promote, foster and develop equal access to the legal system.
- To promote, foster and develop the rights of homeless persons, tenants and others who receive housing services or are disadvantaged in the provision of housing.
- To foster the role of the legal process in the protection of tenants and other residential occupiers.
- To foster the role of the legal process in the promotion of higher standards of housing construction, improvement and repair, landlord services to tenants and local authority services to public and private sector tenants, homeless persons and others in need of advice and assistance in housing provision.
- To promote and develop expertise in the practice of housing law by education and the exchange of information and knowledge.

The HLPAs Law Reform working group has prepared this response. This group meets regularly to discuss law reform issues as they affect housing law practitioners. The Chair of the group reports back to the Executive Committee and to members at the main meetings which take place every two months. The main meetings are regularly attended by over one hundred practitioners.

Submission of the Housing Law Practitioners Association to the Joint Committee on Human Rights

Connors v United Kingdom

This submission is made to the Joint Committee on behalf of the Housing Law Practitioners' Association in relation to the judgment of the European Court of Human Rights (ECHR) in the case of *Connors v UK*.²³³

The issues in *Connors*

The case concerned a family of gypsies who had lived on a local authority site in Leeds for over 14 years. Mr Connors had a contractual licence to occupy one plot, where he lived with his wife and four children. His daughter and her husband lived on an adjacent plot. After allegations of nuisance made against Mr Connors' adult sons, who visited the site, the council required the family to vacate both plots. The council obtained possession orders against Mr Connors in summary proceedings (i.e., the short form of proceedings used against trespassers on land). Mr Connors complained to the European Court of Human Rights that the eviction of his family was in breach of articles 8 (right to respect for private and family life, and for the home) and 14 (prohibition of discrimination) of the European Convention on Human Rights.

In its judgment, the Court stated that in spheres such as housing, which play a central part in the welfare and economic policies of modern societies, it would generally apply a "margin of appreciation" and respect member states' judgment about what is in the general interest, unless that judgment is clearly unreasonable. However, the vulnerable position of gypsies as a minority group meant that special consideration should be given to their needs and their different lifestyle. There was a positive obligation on states to facilitate the gypsy way of life.

The Court found that the consequences of eviction for Mr Connors and his family represented a serious interference with Article 8 rights. The mere fact that anti-social behaviour occurred on gypsy sites could not in itself justify a summary power of eviction. Even allowing for the margin of appreciation, the Government had not sufficiently demonstrated the necessity for a statutory scheme which permitted the summary eviction of Mr Connors and his family. There was accordingly a violation of the Convention.

The legal background

Under the Mobile Homes Act 1983, the owner-occupiers of mobile homes stationed on protected sites can be lawfully evicted from the site only on the court being satisfied that the site owner has a ground for possession, such as that the mobile home dweller has breached the terms of his or her licence agreement.

However, under section 5 of that Act, sites provided by Local authorities as caravan sites providing accommodation for gypsies were specifically excluded from the protection of the Act. Thus, at the time when the decisions in the Cannon case were taken, gypsies and travellers living on sites provided by Local authorities were vulnerable to summary proceedings for possession, no matter how long they had lived on a particular site. As such, they could be evicted following a short period of notice to terminate their licence. The authority would obtain a court order for possession, but the court – as bound to make a possession order forthwith. No reasons for eviction needed to be given, and (except where the authority was a district council) the court could not suspend or postpone possession.

Referring to this exclusion from the protection of the Mobile Homes Act, the ECHR in *Connors* stated:

²³³ ECHR Appeal no: 66746/01, 27 May 2004.

"The power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal has not been convincingly shown to respond to any specific goal or to provide any specific benefit to members of the gypsy community....It would rather appear that the situation in England as it has developed, for which the authorities must take some responsibility, places considerable obstacles in the way of gypsies pursuing an actively nomadic lifestyle while at the same time excluding from procedural protection those who decide to take up a more settled lifestyle...[T]he court finds that the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights, and consequently cannot be regarded as justified by a "pressing social need" or proportionate to the legitimate aim being pursued." (para 94-95)

There was a further anomaly, in that where the local authority was a district council, the occupier would be entitled to the more limited protection of the Caravan Sites Act 1968 (see below). But, where the local authority was a county council, the occupier had no statutory protection and would be treated as a trespasser following the expiry of a basic notice period.

The current law: the Housing Act 2004

Following the decision in *Connors*, section 209(2) of the Housing Act 2004 was passed as a holding measure, pending more comprehensive examination of the issues. The effect of this amending provision was to confer on occupiers of mobile homes on county council gypsy sites the same limited protection as those on district council sites. This protection, derived from the Caravan Sites Act 1968, consists of the following rights:

- the right to four weeks' written notice of termination of contract; and
- in some circumstances, the right to ask the court to suspend the possession order for up to 12 months.

This is an improvement on the total absence of security on county council sites that existed before. But it is far from meeting the expectations inherent in articles 8 and 14, as developed by the ECHR in *Connors*. Under the 1968 Act, the court has no choice but to make a possession order. The authority does not have to prove a reason for its decision to evict. The court has the power to suspend the order for up to 12 months, and the suspension can be renewed for further periods of 12 months, but there is no guidance as to how the court should exercise that discretion, and it amounts only to a stay of execution. This limited improvement has not, however, addressed the more fundamental incompatibility of current legislation identified by the European Court of Human Rights.

The current situation is best summed up by the authors of the leading text on the Housing Act 2004:

"There now remains a limbo situation before the Government gives gypsies the right to contest, before any possession order is made, whether or not they have been guilty of breach of their occupation agreement and makes the grant of any possession order subject to reasonableness"²³⁴

The continued disparity in the position of gypsies and travellers, on the one hand, and other public sector occupiers on the other, is still more anomalous when set against the new duties on local authorities to assess the accommodation needs of gypsies and

²³⁴ *The Housing Act 2004: a Practical Guide*, by H. Carr, S. Cottle, T. Baldwin and M. King (Jordans, 2005), p 210.

travellers residing in or resorting to their district, and to prepare a strategy to meet those needs.²³⁵

The need for further legislation

The amendment in the Housing Act 2004 (above) was essentially a holding measure. On 1 November 2004, the Minister for Housing and Planning, Keith Hill MP, wrote to the Chair of the Joint Committee as follows:

“You will also be aware that we are considering the tenure of local authority Gypsy and Traveller sites as part of our aim to mainstream site provision, one of the options being to look at the comparison with social housing....The Law Commission is undertaking a review of rented tenure and is due to report early next year. It is our intention to consider the security of tenure of Gypsy and Traveller sites in the context of that review.”

Although the Law Commission has now published its Final Report and draft Rented Homes Bill,²³⁶ this does not deal with the specific context of mobile homes. There are no proposals currently on the table from the Law Commission, therefore, which address the question of residential security on gypsy sites, as the Minister envisaged in his letter.

In our submission, the issues identified by the ECHR in the *Connors* case are too important to remain unresolved pending the more comprehensive reform of housing law advocated by the Law Commission (which we support). In our view, there is one obvious and readily available way to deal with the incompatibility, and that is to bring occupiers of mobile homes stationed on local authority sites within the Mobile Homes Act 1983, such that they will enjoy security of tenure subject to the authority having a statutory reason to evict them. Where an authority wishes to provide for the recovery of possession for particular management or other purposes, it would be open to it to insert appropriate terms into the agreement for letting a pitch on each site. It may be that in some circumstances the availability of a suitable alternative site would constitute a sufficient ground, so long as it is reasonable in all the circumstances for the authority to require possession. When the Law Commission reforms are finally adopted by Government, the rights of mobile home owners can be incorporated into the new regime under a suitably adapted form of the Commission’s proposed secure occupation contract.

The present law is not compatible because it requires the court to make a possession order in every case: the court merely has a power to suspend execution on undefined grounds. The changes we have advocated will remedy the discrimination which gypsies and travellers suffer under the current legislation, and will bring about broad parity of treatment between the occupiers of local authority gypsy sites and other mobile home and public sector occupiers, by ensuring that no possession order is made without proven cause.

Submission of the Housing Law Practitioners Association to the Joint Committee on Human Rights

The cases of *Morris* and *Gabaj*

This submission is made by the Housing Law Practitioners’ Association in relation to the declarations of incompatibility in respect of section 185(4) of the Housing Act 1996 made by, respectively, the Court of Appeal in *Morris v Westminster City Council (1)* and *First*

²³⁵ s.225, Housing Act 2004.

²³⁶ *Renting Homes: the Final Report*, Law Com no 297, May 2006.

*Secretary of State (2)*²³⁷ and the Administrative Court in *R (Gabaj) v Bristol City Council (1) and First Secretary of State (2)*.²³⁸

The homelessness legislation: eligibility for assistance

Each of these cases resulted in the making of a declaration of incompatibility in respect of the same provision of the Housing Act 1996. Part VII of that Act (Homelessness) sets out the conditions which a homeless person must satisfy before the local housing authority will owe him or her the 'full' housing duty. One of these conditions is that the applicant for accommodation must be 'eligible for assistance'. 'Eligibility' is a matter of a person's immigration status. Another condition is that the applicant must have a 'priority need': among the criteria for priority need are that the applicant has dependent children or that the applicant is personally "vulnerable".

Section 185 sets out the framework whereby certain 'persons from abroad' will be treated as eligible or ineligible for assistance under the Act. Eligibility in the context of homelessness is entirely a matter of immigration status. Where a person is found not to be eligible, the authority will owe him or her no duty to find accommodation, but only the general duty to provide free advice and information about homelessness.

Section 185(4) of the Housing Act 1996 provides:

"A person from abroad who is not eligible for housing assistance shall be disregarded in determining ... whether another person –

(a) is homeless or threatened with homelessness, or

(b) has a priority need for accommodation.

It is this provision which has been declared incompatible with Articles 8 and 14 of the Convention.

The Morris case

The case of Morris concerns a typical example of a family which is affected by section 185(4). Ms Morris arrived in the UK from Mauritius with her daughter, aged 3. She was a British citizen by descent. She applied to the Council for accommodation as a homeless person. The Council decided that she did not have a priority need, because her daughter was a person subject to immigration control who was not herself eligible for assistance. The effect of s.185 (4) was that Ms Morris's daughter was to be disregarded. Ms Morris was therefore to be treated as a single woman without any dependants and was therefore not in priority need.

The Court of Appeal held that the effect of section 185(4), was plainly discriminatory under Article 14 of the Convention, when read with Article 8, because there was clearly differential treatment based on either national origin or on a combination of nationality, Immigration control, settled residence and social welfare. The First Secretary of State had not been able to justify such treatment. The First Secretary had argued that such a provision was necessary in order to counter "benefits tourism": but the Court considered that the discrimination could not be regarded as a proportionate and reasonable response to this legitimate concern.

²³⁷ [2005] EWCA Civ 1184.

²³⁸ Administrative Court 29 March 2006, unreported, but summarised in Shelter's Housing Law Update, June 2006, p.3.

A declaration of incompatibility was made in terms that section 185(4) of the Housing Act 1996 was Incompatible with Article 14 of the Convention to the extent that it required a dependent child of a British citizen, if both are habitually resident in the United Kingdom, to be disregarded when determining whether the British citizen has a priority need for accommodation, when that child is subject to immigration control.

The *Gabaj* case

A further declaration of incompatibility was made in respect of s.185 (4), with the consent of the Secretary of state, in the case of *Gabaj*, to the extent that it requires a pregnant member of the household of a British Citizen, to be disregarded when determining whether a British Citizen has a priority need for accommodation or is homeless, when the pregnant member of the household is a person from abroad who is ineligible for housing assistance.

The effect of section 185(4)

Perhaps the most common situation in which section 185(4) applies is that in which a British Citizen, or a person who is settled in this country, is joined by his or her children from another country. On entry, the children, assuming they are not themselves British Citizens, will normally be granted two years' leave to enter. At the end of the two year period, the parent can apply to the Home Office for them to be granted 'settled status' or indefinite leave to remain.

What may happen is that the parent is able to support and accommodate the family at first, but unforeseen problems may occur, for example, employment may be curtailed by illness or the landlord may require possession of the family's private rented accommodation. The parent's efforts to find alternative accommodation come to nothing, and he or she is compelled to make a homelessness application to the council. At that stage, the council will call upon s.185 (4) and refuse to assist, because the children are effectively invisible to it.

The process under s.185 (4) not only causes undue hardship and distress to families caught in these changes of circumstances. Its operation is also unfair because it amounts to a lottery of gender and birth. For example, where a British Citizen man is joined by his non-eligible wife and child from overseas, despite the presence of his child in the household he will not be in priority need if the family become homeless during the initial 2 year period of limited leave. Consequently, the family will receive no assistance from the housing authority. If they are on the streets, the only safety net will be to request social services to provide emergency accommodation, but this has its own pitfalls. Yet, if another child is born to the couple in the UK during the 2 years, that child will be born British and will confer priority need on the father. On the other hand, if the applicant is a British Citizen woman who has been joined by her husband from overseas, it is likely that any children of hers will have been born British in the UK; so that, if homelessness strikes during the period of the husband's limited leave, the woman, as the applicant, will be in priority need and accommodation will be provided for the whole family, including the husband.

However, as the Court of Appeal identified in *Morris*, the principal reason why the law should be changed is because it is clearly discriminatory and unfair in its operation. The Court accepted that the underlying purpose of the subsection- to discourage people from coming to this country with the intention of relying on public funds - was legitimate in itself, but considered that this particular measure was disproportionate and was not justified by the policy objective.

This must be right. Those who find themselves in this situation will have gone through the entry clearance process at the British High Commission abroad. They have entered the

country lawfully, usually on the basis that their spouse or parent has undertaken to support and accommodate them, but the family has fallen on unexpected hard times. The "settled" person is entitled to make a homelessness application, but the law obliges local authorities to ignore his or her true circumstances. There is no question of section 185(4) being used to defeat "benefits tourism" in these circumstances all it does is to leave vulnerable families without assistance in dealing with homelessness or in finding alternative accommodation.

The Government's response

The Court of Appeal decision in *Morris* was published in October 2005. HLPAs have lobbied for the law to be reformed throughout the intervening period, but there is still no evident purpose to effect the necessary change. In July 2006, the Housing Minister, Yvette Cooper, stated that the Government is "currently considering how to remedy the incompatibility" (*Hansard* HC Written Answers, 3 July 2006).

It appears that the Government has not moved on the issue because there is not a groundswell of opinion arguing for change. But that is simply because the issue itself is complex and those directly affected by it do not have electoral strength or organisation. It is clearly not in the interests of local authorities to demand a change in the law. But it is wholly unacceptable that for the past 18 months, authorities have been implementing a piece of legislation which is discriminatory and incompatible with Convention rights, and that they continue to do so.

The way forward

There is surely no good reason for the Government's hesitation in effecting change, or for it to expend time and resources in investigating ways of remedying the incompatibility. There is one obvious, simple and speedy way of doing so, and that is to repeal section 185(4) altogether. It would not be missed. There appears to us no other way in which the subsection can be rendered acceptable or compatible: it is inherently discriminatory, and it would be misguided to think that it could survive in some modified form. The Human Rights Act 1998 will allow such a measure to be effected by secondary legislation.

HLPAs therefore ask the Joint Committee to urge Government to act immediately to cure the present situation by repealing section 185(4) of the Housing Act 1996.

Appendix 30: Letter dated 23 January 2007 to The Rt Hon. Rosie Winterton MP, Minister of State for Health Services, Department of Health, re *Glass v United Kingdom*

The Joint Committee on Human Rights is continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR). I am writing to request updated information on implementation of the judgment in *Glass v UK (App No 61827/00)* in which the Court held that medical treatment administered to a severely ill child against the wishes of his family breached his right to physical integrity under Article 8 ECHR.

In a letter to our predecessor committee in November 2004, the Minister stated the Government's intention to revise existing Department of Health guidance on consent, taking into account the judgment in *Glass v UK*. You indicated that this guidance would be produced following the enactment of the Human Tissue Bill and the Mental Capacity Bill. We wrote to the Minister again in February 2006 asking that copies of the relevant guidance be provided to the Committee as soon as they were available. We note that

significant parts of the Mental Capacity Act and the new Code of Practice are due to come into force in April 2007.

We would be grateful if you could give us an update on the status of the relevant guidance:

- a) does the Government consider that the new Code of Practice accompanying the Mental Capacity Act is adequate to meet the findings of the ECtHR in *Glass*;**
- b) if so, we would be grateful if you could provide us with an explanation of the Government's views;**
- c) if not, what is the current timetable for the publication of the relevant guidance and what is the reason for the delay in publication.**

We would be grateful for copies of any relevant guidance as soon as they are available.

Appendix 31: Letter dated 2 March 2007 from The Rt Hon. Rosie Winterton MP, Minister of State for Health Services, Department of Health, re *Glass v United Kingdom*

Thank you for your letter of 23 January about the Department of Health's consent guidance and Judgment of the European Court of Human Rights in the *Glass* case.

As I mentioned in my previous letter, the Department intends that the consent guidance will be revised to reflect recent legislative changes and legal cases, including the *Glass* case. We intend to issue the revised guidance in advance of the Mental Capacity Act (MCA) coming into force in 2007. The bulk of the MCA as it relates to consent policy comes into force in October 2007 and the guidance will be revised in line with this timetable.

You also asked about the MCA Code of Practice. This was laid before Parliament on 22 February and will be issued in April so those working in this area can familiarise themselves with it prior to the Act coming into force. The MCA deals with people over the age of 16 and so is not as relevant to the *Glass* Judgment as the guidance on consent. However, you may be interested to note that it does contain a number of similar messages stressing the importance of involving the courts in situations where there is doubt or disagreement about a person's best interests.

Appendix 32: Letter dated 1 May 2007 from Tom Strickland, Private Secretary to the Rt Hon. Rosie Winterton MP, Department of Health re Mental Capacity Act

I wrote to you on 3 April advising you of the Department of Health's intention to revise its guidance on consent.

I wish to clarify that the end of May deadline that I mentioned should refer to the publication of revised advice on the Department's website on the use of the existing forms to comply with changes in legislation (Human Tissue Act 2004, Mental Capacity Act 2005). The formal guidance, published by the Department, will be re-issued in time for the coming into force of the relevant provisions of the Mental Capacity Act 2005 in October.

We will send draft copies of this guidance to JCHR as soon as it becomes available.

Appendix 33: Letter dated 4 January 2006 from the Office of the Solicitor, re Declaration of Incompatibility – Section 82(4)(b) of the Care Standards Act 2000. R (on the application of Wright and others) v Secretary of State for Health [2006] EWHC 2886 (Admin), [2006] All ER (D) 216 (NOV)

1. I am writing on behalf of the Department of Health to notify you of a Declaration of Incompatibility made under section 4 of the Human Rights Act 1998 on 16 November 2006 in respect of section 82(4)(b) of the Care Standards Act 2000.

2. The declaration was made in the following terms:

‘IT IS DECLARED that section 82(4)(b) of the Care Standards Act 2000 is incompatible with the rights afforded by Articles 6 and 8 of the European Convention on Human Rights.’

Care Standards Act

3. Section 82 is a part of Part VII of the 2000 Act which provides for the creation of a statutory list of persons who are unsuitable to work with vulnerable adults (the POVA list). Inclusion on the POVA list effectively precludes a person from working as a care worker with vulnerable adults.

4. Under section 82(1) care providers must refer care workers to the Secretary of State if various conditions are fulfilled, including ~f the worker has been dismissed or transferred to a non-care position on the grounds of misconduct which harmed or placed at risk a vulnerable adult.

5. Under section 82(4)(b), if it appears from the information submitted by the care provider that it may be appropriate to list the worker on the POVA list, the Secretary of State must provisionally include the worker on the list. The Secretary of State then determines whether to confirm the listing.

6. The effect of provisional listing is that a care provider must cease to employ that care worker in a care position.

7. If the Secretary of State has not decided on the final listing within nine months, the person can ask the Care Standards Tribunal (CST) under section 86(2) to determine whether he should be included in the POVA list. The person can also appeal to the CST if the Secretary of State decides to confirm the listing.

Article 6 ECHR

8. The Court held that provisional listing involved the determination of the civil rights and obligations of a care worker. Section 82(4)(b) was found to be incompatible with Article 6 ECHR on the basis that a person could be provisionally listed on grounds of suspected but unproven misconduct. Judicial Review was held not to be an adequate remedy.

Article 8 ECHR

9. Article 8 was held to be engaged on the basis that listing interfered with personal relationships with colleagues and vulnerable adults. The Court found a breach on the basis that the decision-making procedure is unfair and does not ensure due respect for the interests of care workers that are safeguarded by Article 8.

Appeal

10. The Secretary of State is appealing the decision.

Appendix 34: Letter dated 23 January 2007 to The Rt Hon. Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs, re Human Rights Act: Declaration of Incompatibility

In our recent report on our working practices, the Joint Committee on Human Rights agreed to expand our work to include regular progress reports on the treatment of declarations of incompatibility made under Section 4 HRA 1998 (2005-06, Twenty-third Report, paras 58 - 63).

The importance of swift and consistent Government reaction to declarations of incompatibility was highlighted recently by the European Court of Human Rights judgment in *Burden v UK*.²³⁹

The Court confirmed that United Kingdom applicants to the Court may not be required to first exhaust their claim in the domestic courts if the only possible remedy is a declaration of incompatibility. As it is within the discretion of the Government whether or not to amend the legislation subject to a declaration of incompatibility, and whether to change the law in a way which provides an adequate remedy for the individual applicant, the remedy cannot be considered an effective one (paras 39-40). The Court indicated that, should evidence emerge at a "future date" of a "long-standing and established practice" of the United Kingdom giving effect to declarations of incompatibility, this might support a different conclusion.

I would be grateful if you would tell us:

(a) whether there has been any change in the Government's general policy towards declarations of incompatibility since its response to our predecessor Committee's report on the making of remedial orders;²⁴⁰ and

(b) whether the Government plans to revisit that policy in light of the decision in *Burden*.

In response to our predecessor Committee's report on the Making of Remedial Orders, the Government also indicated that it intended to include that Committee's recommendations in a revised version of the DCA guide to Whitehall Departments on the Human Rights Act.²⁴¹

Although this commitment was given in July 2002, it does not appear that any new guidance has been issued. New guidance for public authorities was launched by the DCA in 2006, but we are unaware that any new Departmental guidance has been published.

We would be grateful for an update on the state of Departmental guidance on the Human Rights Act:

²³⁹ Application No 13378/05, Judgment, 12 December 2006.

²⁴⁰ Nineteenth Report of Session 2004-05, *Work of the Committee in the 2001-2005 Parliament*, Appendix 2, paras 5-8.

²⁴¹ *ibid.* para 124.

- Please confirm when was this guidance last updated; whether it has incorporated the recommendations of our predecessor Committee on remedial orders; and whether it has incorporated any other recommendations of the JCHR;
- If the Guidance has not been updated since July 2002, please provide us with the reasons for this delay; and

Please provide us with a copy of the current version of the Departmental Guidance, and with draft copies of any proposed revisions if they are available.

Appendix 34a: Letter dated 17 May 2007 from Lord Falconer of Thoroton QC, Secretary of State and Lord Chancellor, Department for Constitutional Affairs

Thank you for your letter of 23 January on the above subject. I am sorry for the delay in responding.

In view of the negative attitude previously taken by the European Court of Human Rights towards declarations of incompatibility (as shown for example in *Hobbs v UK*)²⁴², I am greatly encouraged by the decision of the Court in *Burden v UK*.²⁴³ It remains disappointing that the Court does not yet feel that there is sufficient evidence in the Government's policy and practice of taking remedial action in good time following a declaration of incompatibility to consider a declaration a remedy that must be exhausted before an application to Strasbourg. However, it is a significant step forward that the Court is now consistently referring in judgments²⁴⁴ to this outcome being in sight.

In principle, I concur entirely with the position as laid out by Yvette Cooper in her letter to the Committee of 8 July 2002, and I believe that the Government has abided by the spirit of that position. My officials liaise closely with colleagues in other departments about the making of declarations of incompatibility and the taking of remedial action, including reminding their colleagues of the need to keep the Committee informed. Obviously, there have been a few declarations in respect of which remedial action has been controversial or difficult, and – as Yvette suggested was possible – it has sometimes taken longer than would have been desirable to bring remedial measures into force. However, given the step forward in *Burden*, I see no pressing need to reconsider this policy, although your letter has served as a timely reminder of the importance of giving effect to it.

The *Guidance for Departments* on the Human Rights Act, which was originally produced by the Home Office before the Act came into force, was superseded last year by the new handbook *Human Rights: Human Lives*. This sets out the obligations of Government departments as public authorities under the Human Rights Act, and has been widely distributed and well received in Whitehall.

In addition to these general obligations, there are a few areas of specific interest to Whitehall, including declarations of incompatibility and remedial orders. Other publications advise on some of these specific areas, such as the guidance on human rights in Bills in the *Cabinet Office Guide to Legislative Procedures*²⁴⁵. In relation specifically to declarations of incompatibility and remedial orders, guidance is usually provided by

²⁴² Application 63684/00, 18 June 2002.

²⁴³ Application 13378/05, 12 December 2006.

²⁴⁴ e.g. admissibility decisions in *R & F v UK* (Application 35748/05, 28 November 2006) and *Parry v UK* (Application 42971/05, 28 November 2006).

²⁴⁵ Available on the Cabinet Office website at http://www.cabinetoffice.gov.uk/secretariats/economic_and_domestic/legislative_programme/guide.asp.

officials and lawyers in my department directly to their colleagues as the need arises, using their expert knowledge of the subject. Such guidance can then be tailored to individual circumstances, and often includes referring colleagues to reports written by the Committee. In addition, the human rights intranet site for Government lawyers contains, for example, a link to the Committee's report on the *Making of Remedial Orders*.²⁴⁶

However, in light of the undertaking given on behalf of the Lord Chancellor's Department by Yvette, I have asked officials to consider whether there is any advantage in crystallising their advice into some form of new guidance on such specific additional matters for the attention of their Whitehall colleagues.

Appendix 35: Letter dated 11 October 2006 from Fiona Woolf CBE, President of The Law Society

Section 185(4) Housing Act 1996
Westminster City Council v Morris (2005) EWCA Civ 1184
Declaration or incompatibility with the European Convention on Human Rights

In October 2005 the Court of Appeal declared that s185(4) Housing Act 1996 was incompatible with the European Convention on Human Rights.

Unfortunately, the Government have not yet remedied this incompatibility. We have therefore written to Ruth Kelly, Secretary of State for the Department of Communities and Local Government, urging the Government to deal with the matter. I enclose a copy of our letter for your committee as information.

Enclosure

Dear Ms Kelly

Section 185(4) Housing Act 1996
Westminster City Council v Morris (2005) EWCA Civ 1184
Declaration of incompatibility with the European Convention on Human Rights

In October 2005 the Court of Appeal declared that 8185(4) Housing Act 1996 was incompatible with the European Convention on Human Rights.

The declaration, set out in paragraph 57 of the judgment reads:

“That s.185(4) of the Housing Act 1996 is incompatible with art.14 of the Convention to the extent that it requires a dependent child of a British citizen, if both are habitually resident in the United Kingdom, to be disregarded when determining whether the British citizen has a priority need for accommodation, when that child is subject to immigration control.”

We write to ask that the Government legislate to remedy this incompatibility as soon as possible.

S185(4) prevents a person would otherwise be eligible from establishing a priority need for homelessness assistance where the claim for priority need status is based upon a resident dependent child who is ineligible for United Kingdom citizenship, and therefore subject to immigration control.

²⁴⁶ Seventh Report of Session 2001-02.

The Court of Appeal made the declaration set out above. Ms Morris's case was that s184(5) amounted to a breach of her right to enjoy her right to respect for her home and family without discrimination. The court accepted that in comparison with an applicant who was a British citizen (and who had a dependent child or was pregnant),* Ms Morris was treated differently and less favourably, and that the discrimination was on the ground of her daughter's national origin. The difference in treatment did not have an objective and reasonable justification. The court therefore concluded that the refusal to treat her as having a priority need was incompatible with her rights under Article 14 read with Article 8. The Court was not able to avoid making a declaration of incompatibility by interpreting s185(4) so that it could comply with the European Convention on Human Rights.

The refusal of help to those affected causes significant hardship. s185(4) does not just affect people with children, but anyone who seeks homelessness assistance on the basis of the priority need of someone else such as a person looking after an ill or elderly relative. We therefore urge the Government to legislate as soon as possible to remedy the incompatibility. For those denied homelessness help by this provision the situation is urgent. One year has elapsed since the Court of Appeal made the declaration in the Morris case, yet the incompatibility has not been remedied. We consider that the Secretary of State should now use the remedial power contained in s10 Human Rights Act 1998 to amend primary legislation so that the Housing Act 1996 is compatible with the European Convention on Human Rights.

The DCA's review of the implementation of the Human Rights Act, published in July, stated:

Section 10 of the HRA permits a Government minister to amend legislation by a remedial order to remove an incompatibility found by the domestic courts under section 4 or by the European Court of Human Rights, provided there are compelling circumstances to justify proceeding by order (rather than by way of fresh primary legislation). All of the declarations of incompatibility made since the coming into force of the HRA have been remedied (or are still under consideration with a view to being remedied). However in almost all cases this has been done by primary legislation and only in one case using the remedial order power.

I am copying this letter to Baroness Ashton of Upholland, Minister with responsibility for human rights at the Department of Constitutional Affairs, and to Andrew Dismore MP, Chair of the Joint Committee on Human Rights.

Appendix 36: Letter dated 29 June 2006 from Vivien Gambling, Chairman of the Housing Law Practitioners Association

I am writing to you on behalf of members of the Housing Law Practitioners Association (HLPAs) about the case *Morris v Westminster CA* 2005, EWCA Civ 1184, which declared s185(4) of the Housing Act 1996 incompatible with Article 14 of the European Convention on Human Rights.

HLPAs is an organisation of solicitors, barristers, advice workers, independent environmental health officers and others who work in the field of housing law. Members work in housing law for the benefit of homeless people, tenants and other occupiers of housing.

The Court of Appeal declared s 185(4) of the Housing Act 1996 incompatible with Article 14 of the ECHR to the extent that it requires a dependant child of a British citizen, the child being subject to immigration control, to be disregarded when determining whether the British citizen has a priority need for accommodation under s 189 (1)(b) of the Act.

The declaration of incompatibility leaves the offending legislation in force s 3(2) of the 1998 Act and local housing authorities obliged to comply with it. HLPAs have conducted a survey amongst its members, which shows that the factual situation that led to the declaration regularly occurs. Therefore without legislation or a remedial action decisions contrary to the Convention will continue to be made. The result is that those who should be entitled to accommodation under the Housing Act are being denied it.

I understand that the Government wrote to the Joint Committee on Human Rights (JCHR) on 3 March 2006 to inform the committee that they will not be appealing against the Court of Appeal decision and that the matter is currently under consideration. If the JCHR should require further assistance, HLPAs would welcome the opportunity to provide you with evidence about the impact of the factual situation that regularly occurs including the impact on families and children and explain why some form of legislation or a remedial action needs to be made a priority.

Appendix 37: Letter dated 23 January 2007 to Yvette Cooper MP, Minister for Housing and Planning, Department for Communities and Local Government, re Human Rights Act: Declarations of Incompatibility

The Joint Committee on Human Rights is continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR). In our recent report on our working practices, we agreed to expand our work to include regular progress reports on the treatment of declarations of incompatibility made under Section 4 HRA 1998 (2005-06, Twenty-third Report, paras 58 – 63). I am writing to request an update on the Government's intended response to two outstanding declarations of responsibility which relate to areas within the responsibility of your department.

Morris v Westminster City Council [2005] EWCA Civ 1184

Gabaj v First Secretary of State (Unreported)

The *Morris* case concerned an application for local authority accommodation by a single mother, who was a British citizen, but whose child was subject to immigration control. The Court of Appeal held that s185(4) Housing Act 1996 was incompatible with Article 14 taken together with Article 8 ECHR to the extent that it requires a dependent child who is subject to immigration control to be disregarded when determining whether its family has priority need for housing.

In *R (Gabaj) v First Secretary of State* the administrative court, in a logical extension of the reasoning in *Morris* held that s185(4) was similarly incompatible to the extent that it requires a pregnant member of a household to be disregarded where that person is a person from abroad and ineligible for housing assistance.

The DCA's most recent review of outstanding declarations of incompatibility indicates that the Department for Communities and Local Government were still considering what action to take in respect of these judgments in August 2006.²⁴⁷ The Minister last wrote to the Committee on 20 April 2006, shortly after the decision in *Gabaj*. At that stage, she indicated that "the Secretary of State has not yet come to a decision whether to repeal or amend section 185(4). This matter raises some important policy issues and consequently further consideration and consultation with other Government departments will be

²⁴⁷ <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf>.

necessary before a final decision can be made."²⁴⁸ There was no reference to a Housing Bill in the Queen's Speech and there is no reference to a Housing Bill on the website of the Leader of the House.

The Law Society and the Housing Law Practitioners Association ("HLPAs") have written to us, stressing the need for the Government to take urgent action to address these declarations of incompatibility. HLPAs has conducted a survey amongst its members, which they argue indicates that the factual situation that led to these declarations regularly occurs. Without legislation or a remedial action decisions contrary to the Convention will continue to be made and those who are in priority need will be denied accommodation in breach of their Convention rights.

We note that the declaration of incompatibility in *Morris* has been in place for over 15 months. I would be grateful if you could give us:

- a) details of the Government's plans in respect of a remedy for the incompatibility identified by both of these cases;
- b) information and statistics on the application of section 185(4) Housing Act 1996 since October 2005 (including details of any cases raising issues similar to those in *Morris* and *Gabaj* during the past 15 months, and the outcomes in those cases);
- c) reasons for the continued delay in determining whether to amend or repeal s185(4); and
- d) an indication of whether, if amendment is being considered, the Government will use a Remedial Order to prevent any further delay associated with the need to secure adequate parliamentary time for new primary legislation.

Appendix 38: Letter dated 27 February 2007 from Yvette Cooper MP, Minister for Housing and Planning, Department for Communities and Local Government, re Human Rights Act: Declarations of Incompatibility

Thank you for your letter of 23 January.

The declarations of incompatibility in the cases of *Morris* and *Gabaj* have raised some important policy issues. These bear on the Government's policy regarding access to local authority housing assistance for persons from abroad, and consequently have implications not only for this department but also for the Home Office.

I regret the delay in implementing a remedy but it has been very difficult to identify a compatible solution that will continue to deliver the Government's policy on access to social housing. However, we do believe that a suitable remedy has now been developed, and we propose to take this forward as quickly as possible, in consultation with colleagues at the Home Office.

We are currently exploring whether this is remedied through remedial order or through legislation before the House such as the Local Government and Public Involvement in Health Bill.

²⁴⁸ Twenty-third Report of Session 2005-06, Appendix 4. See also, Written Answer, HC Deb, 3 July 2006, 769W.

The Government does not collect statistics on the application of section 185(4), and I am not aware of any further cases that raise similar issues to *Morris* and *Gabaj* having arisen since the *Gabaj* case.

Appendix 39: Letter dated 22 March 2007 to Yvette Cooper MP, Minister for Housing and Planning, Department for Communities and Local Government, re *Morris v Westminster City Council*, *Gabaj v First Secretary of State*

Thank you for your letter dated 27 February 2007.

In your letter, you told us that a suitable remedy had been developed and that the Government hoped to take this forward "as quickly as possible". You also told us that you were "exploring" whether to give effect to this proposed solution by way of remedial order or through legislation already before the House, such as the Local Government and Public Involvement in Health Bill.

I would be grateful if you could:

- (a) Describe the proposed solution which the Government has identified;
- (b) Explain why the Government considers that the solution which they have identified resolves the incompatibility identified in the cases of *Morris* and *Gabaj*; and
- (c) Provide the Committee with any draft legislative or other proposals being considered;
- (d) Explain whether the Government has decided how best to bring forward these proposals, and if so, explain why this mechanism is considered most appropriate.

Appendix 40: Letter dated 13 April 2007 from Yvette Cooper MP, Minister for Housing and Planning, Department for Communities and Local Government, re *Morris v Westminster City Council*, *Gabaj v First Secretary of State*

Thank you for your letter of 22 March.

The cases of *Morris* and *Gabaj* both concerned the impact on a British citizen applicant's entitlement to the main homelessness duty where the application depended on an ineligible family member to convey priority need. The ECHR rights at issue are those of the homeless British citizen to have his/her family members taken into account when being considered for homelessness assistance.

The Government's proposal for remedying the incompatibilities declared in the above cases is broadly as follows. In considering applications for housing assistance under Part 7 of the *Housing Act 1996*, local housing authorities will still be required to disregard any household members of the applicant who were in the UK unlawfully (for example, where the household member was required to have leave to enter or remain and did not have it). However, the incompatibility will be remedied by putting housing authorities under a new interim duty to secure accommodation for the applicant and all household members for a temporary period in order to give them an opportunity to regularise their immigration status. Once the immigration status was regularised, further consideration of the housing application would proceed and the interim duty to secure accommodation would end.

ECHR rights must be taken into account when applications for leave to enter or remain or for citizenship are considered. So, in any case where it was compatible for an application for leave to be refused, it would also be compatible for a housing authority to decide that there was no substantive duty to secure accommodation.

The proposed remedy would enable the Government to continue its policy of ensuring that people who do not have a right to be in the UK cannot confer entitlement to substantive homelessness assistance, whilst also ensuring that any ECHR rights are fully considered and taken into account by the appropriate authorities.

I will be consulting colleagues at the Home Office about the proposal, but no draft legislative or other detailed proposals have been produced, and no decision has been taken yet on how best to bring forward the proposals.

I will write to you again as soon as decisions have been taken on how and when the remedy will be implemented.

Appendix 41: Letter dated 23 January 2007 to The Rt Hon. John Reid MP, Secretary of State for the Home Department, re Human Rights Act: Declarations of Incompatibility

In our recent report on our working practices, the Joint Committee on Human Rights agreed to expand our work to include regular progress reports on the treatment of declarations of incompatibility made under Section 4 HRA 1998 (2005-06, Twenty-third Report, paras 58 - 63). I am writing to request an update on the Government's intended response to the declaration of incompatibility in *R (Baiai) v Secretary of State and Another* [2006] EWHC 823.

In that case, Mr Justice Silber concluded that the Certificate of Approval scheme in Section 19 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 was incompatible with Article 12 ECHR (the right to marry) and Article 14 ECHR in so far as it discriminated between Church of England and other marriages. We are aware that the Government intend to extend the scheme to marriages within the Church of England.

I would be grateful if you could provide us with an update on the Government's plan to extend the Certificate of Approval scheme to Church of England marriages.

If the Government does not intend extend the scheme to Church of England marriages until the final outcome of the appeal in this case, we would be grateful for an explanation of the Government's reasons.

Appendix 42: Letter from the Chairman dated 19 June 2007 to The Rt Hon. Lord Falconer of Thoroton QC, Secretary of State for Justice re Declarations of Incompatibility: *R (Clift) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and Another* [2006] UKHL 54

In December 2006, the House of Lords declared sections 46(1) and 50(2) of the Criminal Justice Act 1991 incompatible with Article 14 ECHR taken together with Article 5 ECHR because they discriminated on the grounds of national origin. As a result of these provisions, certain foreign prisoners liable for deportation would be treated differently from other prisoners for the purposes of early release. We note that these provisions have already been repealed and replaced by provisions of the Criminal Justice Act 2003, but they continue to apply to prisoners whose offences were committed before 4 April 2005.

The Home Office were initially responsible for considering how to remedy the incompatibility in relation to offences falling within this transitional category. We note that the most recent DCA monitoring tables, dated 10 April 2007, indicate that the Home Office is considering how to remedy the incompatibility in relation to offences falling within the "transitional category".

As the Ministry of Justice has recently assumed responsibility for criminal justice and prisons, I would be grateful if you could:

- a) Provide figures for the number of prisoners likely to be affected by the continued application of the transitional arrangements (i.e. prisoners who committed offences prior to 4 April 2005 and in relation to whom, the Secretary of State, as opposed to the Parole Board, must make a decision on early release);**
- b) Tell us what steps the Government intend to take to remedy the Convention incompatibility identified in this case;**
- c) Tell us whether the Government intends to use the remedial order procedure to remedy the incompatibility?**
- d) If so, when does the Government intend to produce the draft remedial order for scrutiny by our Committee;**
- e) If not, why does the Government consider the remedial order process is inappropriate in this case?**

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2006–07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350
Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human Rights Act	HL Paper 77/HC 410
Tenth Report	The Treatment of Asylum Seekers: Volume I Report and Formal Minutes	HL Paper 81-I/HC 60-I
Tenth Report	The Treatment of Asylum Seekers: Volume II Oral and Written Evidence	HL Paper 81-II/HC 60-II
Eleventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 83/HC 424
Twelfth Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 91/HC 490
Thirteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 105/HC 538
Fourteenth Report	Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)	HL Paper 106/HC 539
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 112/HC 555
Sixteenth Report	Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights	HL Paper 128/HC 728

Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766

Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/ HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547
Twenty-third Report	The Committee's Future Working Practices	HL Paper 239/HC1575
Twenty-fourth Report	Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention	HL Paper 240/HC 1576
Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
Twenty-sixth Report	Human trafficking	HL Paper 245-I/HC 1127-I
Twenty-seventh Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626
Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)	HL Paper 276/HC 1714
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716