House of Lords
House of Commons

Joint Committee on Human Rights

# Legislative Scrutiny: Second Progress Report

## Third Report of Session 2006-07

*Report, together with formal minutes and appendices*

*Ordered by The House of Lords to be printed 29 January 2007*
*Ordered by The House of Commons to be printed 30 January 2007*

**HL Paper 39**
**HC 287**
Published on 7 February 2007
by authority of the House of Lords and
the House of Commons London:
The Stationery Office Limited
£0.00

## Joint Committee on Human Rights

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

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

### Current Membership

| HOUSE OF LORDS | HOUSE OF COMMONS |
|---|---|
| Lord Fraser of Carmyllie | Mr Douglas Carswell MP (Conservative, *Harwich*) |
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| Lord Lester of Herne Hill | Nia Griffith MP (Labour, *Llanelli*) |
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| Lord Plant of Highfield | Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*) |
| Baroness Stern | Mark Tami MP (Labour, *Alyn and Deeside*) |

### Powers

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

### Publications

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

### Current Staff

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

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## Report

# Summary

The Joint Committee on Human Rights examines the human rights implications of Government and private bills in accordance with the new legislative scrutiny sifting system which it has adopted from the start of Session 2006-07. A full explanation of the Committee's scrutiny procedures is given in the Committee's Twenty-third Report of Session 2005-06, *The Committee's Future Working Practices*, HL Paper 239/HC 1575.

This is the Committee's second Legislative Scrutiny Progress Report of this Session. In this Report the Committee draws the special attention of both Houses to three Government bills.

*Concessionary Bus Travel Bill*

In the Committee's view this Bill enhances the right recognised in Article 8 ECHR of older and disabled people to participate in the life of their community by providing free bus travel. (paragraphs 1.1-1.3).

In the Committee's view the Bill raises a single human rights compatibility issue: whether the provisions for appeals against the setting of arrangements for reimbursement of operators required to permit concessions are adequate for the purposes of Article 6 (1) ECHR. This is an issue the Committee has often raised with the Government. The Committee considers that without access to an appeal to an independent and impartial tribunal, decisions by the Secretary of State on reimbursement pursuant to the enabling powers in Clause 9 may give rise to a risk of incompatibility. The Committee reiterates its frequently expressed view that where safeguards are necessary to meet a risk of incompatibility with Convention rights, those safeguards should be expressed on the face of the relevant Bill (paragraphs 1.4- 1.19).

*Legal Services Bill*

In relation to this Bill, the Committee reiterates its view that statements of compatibility which are not accompanied by a clear explanation of the Government's views on compatibility do not assist proper Parliamentary scrutiny. The Committee considers that this Bill raises significant human rights issues in relation to Article 6 and 8 ECHR, including the right of access to an independent and impartial tribunal, draws attention to provisions which in its view raise a risk of incompatibility with ECHR and recommends amendments to help safeguard Convention rights (paragraphs 2.4-2.38). Specifically, the Committee considers that without a right of appeal from regulatory decisions of the LSB, which the Government accept engage Article 6(1) ECHR, there may be a risk of incompatibility with the right to a fair hearing by an independent and impartial tribunal, as guaranteed by Article 6(1) ECHR (paragraphs 2.17 – 2.20). The Committee considers that a similar risk of incompatibility may arise in relation to decisions on complaints against authorised persons considered by the Ombudsman under the auspices of the Office for Legal Complaints (paragraphs 2.26 – 2.29).

The Committee considers that the provisions in the Bill which govern powers of search and seizure lack clear safeguards and propose a number of amendments which would increase legal certainty and provide valuable protection for the right to respect for private life guaranteed by Article 8 ECHR (paragraphs 2.32 – 2.38).

The Committee considers that the Bill provides some valuable safeguards for the protection of legal professional privilege in Alternative Business Structure (ABS) firms and the rights of those clients to confidential communications with their legal advisers as guaranteed by Article 6 (1) ECHR (paragraphs 2.39-2.40).

*Offender Management Bill*

The main purpose of the Bill is to make provision for the contracting out of probation services .It also has a number of other purposes which have human rights implications. The Committee did not find the Explanatory Notes accompanying the Bill satisfactory in their analysis of human rights compatibility (paragraphs 3.3-3.5).

The Committee finds it remarkable that more than eight years after the enactment of the Human Rights Act the Government and Parliament still cannot tell with confidence whether bodies carrying out particular functions will be treated by the courts as public authorities for the purposes of the Human Rights Act .In the Committee's view it is a matter of fundamental importance that Parliament should know with a reasonable degree of certainty whether the arrangements it is being asked to approve for the delivery of certain services will be covered by the duties and responsibilities imposed by the Human Rights Act (paragraphs 3.6-3.10).

In the Committee's view the Bill should be amended to make clear on its face that where information to be disclosed for offender management purposes engages Article 8 ECHR the test of necessity must be met. Otherwise, the Committee sees a risk of incompatibility (paragraphs 3.11-3.16).

The Committee concludes that the absence of publicly available procedures regulating the power to strip search visitors to prisons means that the interference with visitors' right to privacy is not "in accordance with the law" and is therefore incompatible with both Article 8 ECHR and the European Prison Rules. The Committee therefore recommends that the Government should make available to Parliament the relevant parts of Prison Service Order 1000, containing the procedural safeguards on searching, to enable Parliament to assess the proportionality of the proposed power to interfere with the Article 8 rights of visitors to prison and that the Government should also translate those safeguards into a publicly available and binding form (paragraphs 3.17-3.26).

In the Committee's view Article 5 ECHR is clearly engaged by the new power to detain a visitor to a private prison pending the arrival of a constable. The Committee does not agree that such detention would be authorised under Article 5(1)(b). In the Committee's view, such detention is in principle capable of being a justified deprivation of liberty under Article 5(1)( c), but the power could be more tightly defined by requiring that certain conditions be satisfied (paragraphs 3.27-3.32).

In relation to the new criminal offence which the Bill would create of removing documents from a prison, the Committee takes the view that the offence as drafted would have too wide a scope because of its protection for the "operation" of the prison and is not necessary to achieve the government's purposes (paragraphs 3.33-3.39).

The Committee is satisfied that the removal of the requirement to appoint a prison medical officer is compatible with the requirements of international standards for the detention of

prisoners (paragraphs 3.40-3.44).

In relation to the power which the Bill would give the Secretary of State to send people who receive a detention and training order to prison when they turn 18, which the Government has explained is a contingency measure, the Committee questions the appropriateness of introducing such a significant measure on a contingency basis while the future of Young Offenders' Institutions is not known, and queries whether the Government's proposed guidance would be sufficient to protect this highly vulnerable group of offenders (paragraphs 3.45-3.48).

# Bills drawn to the special attention of both Houses

## Government Bills

# 1 Concessionary Bus Travel Bill

| | |
|---|---|
| Date introduced to first House | 27 November 2006 |
| Date introduced to second House | |
| Current Bill Number | HL 13 |
| Previous Reports | None |

1.1 This is a Government Bill introduced to the House of Lords on 27 November 2006. Lord Davies of Oldham has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998. The Explanatory Notes accompanying this Bill explain the Government 's views on Convention compatibility at paras 42-44. [1] The Bill had its Report stage in the Lords on 29 January 2007.

1.2 The purpose of the Bill is to implement the Chancellor's announcement in the 2006 Budget that residents of England who are aged 60 or over or disabled, will be entitled to free off-peak travel on all local buses anywhere in England. **The Bill is clearly a human rights enhancing measure: by providing free bus travel for a large number of older and disabled people, it enhances the rights of those people to participate in the life of their community, which is a right recognised by Article 8 ECHR and in various international standards concerning the right of elderly and disabled people to independent living.**[2]

1.3 We wrote to Lord Oldham of Davies on 19 December 2006 asking a number of questions concerning a single significant human rights issue raised by the Bill.[3] He responded in a letter dated 18 January 2006.[4] We welcome the full response provided.

## Right of access to a judicial determination of civil rights and obligations

1.4 The Bill raises a single human rights issue: whether the provision for appeals against the setting of arrangements for reimbursement of operators required to permit concessions are adequate for the purposes of Article 6(1) ECHR. This is an issue which we have often raised with the Government (e.g. recently in the context of the Violent Crime Reduction Bill).[5]

1.5 Clause 9 of the Bill permits the Secretary of State to amend Part 2 of the Transport Act 2000 to provide that any obligation of travel concession authorities in England to

[1] HL 13 – EN.

[2] See for example, the recent UN Convention on the Rights of Persons with Disabilities. See Text Adopted by the Plenary Session of the General Assembly on 13 December 2006, A/61/611 http://www.un.org/esa/socdev/enable/rights/convtexte.htm. Open for signature and ratification in March 2007.

[3] Appendix 1.

[4] Appendix 2.

[5] Fifth Report of Session 2005-06, *Legislative Scrutiny: Second Progress Report*, HL Paper 90/HC 767, para 3.26.

reimburse operators is instead imposed on the Secretary of State.[6] The Secretary of State is also empowered to transfer the same obligations from district councils to county councils.[7] Clause 9(3)(g) enables the Secretary of State, should he exercise his power to assume the obligation for setting reimbursement arrangements for concession operators, to provide for appeals by operators "in connection with re-imbursement" and to establish a person or body for the purposes of such appeals.

1.6 The Regulatory Impact Assessment ("RIA") accompanying the Bill explains that reimbursement arrangements are currently set by the relevant travel concession authority (these are currently district and unitary Councils, or in metropolitan areas, Passenger Transport Executives). Under existing legislation, an operator can appeal to the Secretary of State if he believes that he may be prejudicially affected by the proposed reimbursement arrangements. The RIA explains that the Bill maintains this approach to appeals, "but should there be any change, via regulations, to the existing funding and reimbursement mechanisms in the future, further consideration of the appropriateness and nature of the appeals would be required."

1.7 The Explanatory Notes accompanying the Bill explain that the Government does not consider that Article 6 ECHR is "inherently engaged here with respect to the determination of reimbursement arrangements by travel concession authorities under the Transport Act 2000".[8]

1.8 Lord Davies explains that the Government accept that the determination of reimbursement for operators in the Transport Act 2000 "clearly involves a determination of the civil rights of those operators and, in that respect the department agrees that Article 6 must be complied with".[9] We are grateful for this clarification of the Government's understanding of the scope of Article 6 ECHR. It is unfortunate that the original Explanatory Notes accompanying the Bill were not satisfactory. **We understand that the Explanatory Notes accompanying the Bill will be amended for the next stage of the Bill's progress and we recommend that they are amended to accurately reflect the Government's view on the application of Article 6(1) ECHR.**

1.9 The Government considers that the existing mechanisms for appeal by operators, in the Transport Act 2000, are compatible with the right to a fair hearing by an independent and impartial tribunal, as required by Article 6(1) ECHR.[10] The Government consider that an appeal to the Secretary of State, subject to judicial review of the decision of the Secretary of State's decision on traditional judicial review grounds (that is, "reviewing whether or not the Secretary of State's decision was fairly and reasonably taken") would be adequate to meet the right to a "fair determination of civil rights envisaged by Article 6(1) ECHR.[11]

1.10 In the event that responsibility for reimbursement is transferred to the Secretary of State, the Government consider that "a mechanism for appeal to an independent and impartial body [will] be needed in order for the arrangements to be Article 6 compliant".[12]

[6] Clause 9(1).

[7] Clause 9(2).

[8] EN – para 44.

[9] Appendix 2, para 2.

[10] Sections 149-150.

[11] Appendix 2, para 6-10.

[12] Appendix 2, para 13.

However, the Government does not consider that it would be appropriate to place a positive duty on the Secretary of State to provide a right of appeal without first "being in a position to specify at least the broad form those appeal mechanisms would take". To do this would "deprive the Department of the necessary flexibility in being able to determine the most appropriate arrangements".[13]

### *Appeals: Article 6(1) ECHR*

1.11 The current law provides that local transport concession authorities will have responsibility for reimbursement of operators affected by concessions. The travel concession authority will set the mechanism for reimbursement (the Regulatory Impact Assessment explains that bus operators are reimbursed on a "no better, no worse off" basis, but that travel concessions determine the mechanism for calculating reimbursements). If an operator believes that he may be prejudicially affected by the proposed reimbursement arrangements, he may appeal to the Secretary of State. The Secretary of State may modify the proposed arrangements for reimbursement on the grounds that there are "special reasons" why they would be inappropriate with respect to one or more local services provided by him.[14] The decision of the Secretary of State is subject to judicial review. Clause 9 would permit the Secretary of State to assume the responsibilities of the transport concessions for reimbursement of operators. If the Secretary of State assumed these functions, without further amendment to the Transport Act, the legislative scheme would provide for the Secretary of State to take the initial decision on a proposed reimbursement mechanism, subject to any appeal to the Secretary of State.

1.12 In the recent case of Tsfayo v United Kingdom, the European Court of Human Rights indicated 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 Court decided that the issue to be determined by the decision maker in that 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.[15]

1.13 We cannot share the Government's confidence that this case is not relevant to the existing appeals mechanism as the Secretary of State "is manifestly impartial and independent of the Travel Concession Authorities whose determinations are being challenged".[16] In order to be considered adequately independent and impartial to satisfy the requirements of Article 6(1) ECHR, the relevant "tribunal" must be independent of the executive, the parties and the legislature.[17]

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[13] Appendix 2, para 14.

[14] Transport Act 2000, sections 149–150.

[15] *Tsfayo v United Kingdom*, App No 60860/00, Judgment 14 November 2006.

[16] Appendix 2, para 7.

[17] *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165 at para 78.

1.14 The real question is whether access to judicial review of the decision of the Secretary of State on appeal is adequate to satisfy the requirement for a review by a court with full jurisdiction and to render the whole decision making process compatible with Article 6(1) ECHR. The Government considers that a right of appeal to an independent and impartial tribunal will be necessary if the Secretary of State is the initial decision maker. [18] Under the current scheme, the Secretary of State is asked to determine whether or not an individual operator has "special reasons" which justify a modification of the proposed reimbursement mechanism. It appears to us that this is the type of decision which, according to the analysis of the Court in *Tsfayo*, would satisfy the requirements of Article 6(1) ECHR if subject to judicial review. However, in *Tsfayo,* where the relevant review board was asked to determine whether an individual had "good cause", the Court thought that this involved a simple determination of fact and access to judicial review was not adequate to ensure compatibility with Article 6(1) ECHR. Clearly, the Secretary of State may take a decision on either the prejudicial effects of a proposed scheme for reimbursement or on the "special reasons" presented by an operator entirely based on his assessment of the facts in an individual operator's appeal. This is an area where there is some considerable uncertainty as to the requirements of Article 6(1) ECHR.

1.15 On balance, we consider that there remains a risk that, without a right of appeal, decisions on reimbursement of operators pursuant to Sections 149 – 150 may give rise to a risk of incompatibility with Article 6(1) ECHR. This risk of incompatibility would be dispelled if either an independent appeal tribunal were established to hear appeals against decisions on payment conditions or a right of appeal to an existing court or tribunal were provided. **We draw this matter to the attention of both Houses.**

1.16 **For the same reasons, we consider that without access to an appeal to an independent and impartial tribunal, decisions by the Secretary of State on reimbursement pursuant to the enabling powers in Clause 9 may give rise to a risk of incompatibility. We welcome the Government's conclusion that such a right of appeal would be necessary in these circumstances.**

## *Enabling Appeals*

1.17 We have consistently taken the view that where it is likely that safeguards, and in particular provisions for appeal, are necessary to satisfy the right of access to an independent and impartial tribunal guaranteed by Article 6(1) ECHR, these safeguards should be expressly provided for on the face of the Bill.[19] We accept that the Government does not necessarily intend to make provision for the Secretary of State to assume responsibility for the reimbursement arrangements for operators. We also note that the Secretary of State will be required by s.6 of the Human Rights Act 1998 to act in a Convention compatible way, if he chooses to assume that responsibility.

1.18 However, we do not accept that it is appropriate for the Secretary of State to have the power to adopt a decision making power which engages Article 6(1) ECHR without also having an obligation to establish an appeals mechanism which secures the rights of individual operators to a fair hearing by an independent and impartial tribunal. We do not

[18] Appendix 2, para 13.

[19] Fifth Report of Session 2005-06, op. cit. at paras 3.25-3.26.

consider that this would necessarily require the precise form of the independent and impartial tribunal to be identified on the face of the Bill. We consider that this would provide greater protection for Convention rights, as it would allow Parliament to assess whether the proposed appeals mechanisms were compatible with Article 6(1) ECHR during its scrutiny of the Bill.

1.19 However, if this is not possible at this stage, it would be preferable that the Secretary of State's power to assume the existing powers of transport concession authorities were conditional on the establishment of an appropriate right of appeal for operators against decisions on reimbursement. This would leave a sufficient degree of flexibility to permit the Department to conduct consultation on the appropriate mechanisms of appeal, but would ensure that these structures were in place prior to the Secretary of State taking over the administration of reimbursement. We welcome the amendments proposed by the Government which aim to clarify that the Secretary of State may "alter" existing appeals mechanisms. We do not consider that this will ensure that Secretary of State cannot assume responsibility for reimbursement arrangements without first establishing an appropriate appeals mechanism. **We recommend that the Bill be amended to require the Secretary of State to make provision for appeals to an independent and impartial tribunal for the purpose of hearing appeals by operators in connection with reimbursement should he decide to exercise his power to take over administration of operator reimbursement from local transport concession authorities. We reiterate our frequently expressed view that where safeguards are necessary to meet a risk of incompatibility with Convention rights, those safeguards should be expressed on the face of the relevant Bill.**

# 2 Legal Services Bill

| | |
|---|---|
| Date introduced to first House | 23 November 2006 |
| Date introduced to second House | |
| Current Bill Number | HL Bill 9 |
| Previous Reports | None |

2.1 This is a Government Bill introduced to the House of Lords on 23 November 2006. Lord Falconer, the Lord Chancellor, has made a statement of compatibility with Convention rights under Section 19(1)(a) Human Rights Act 1998. The Explanatory Notes accompanying the Bill set out the Government's views on compatibility with the European Convention on Human Rights ("ECHR") at paras 517-525.[20] Report stage in the House of Lords is expected to begin on 31 January.

2.2 The Bill was published in draft for pre-legislative scrutiny on 24 May 2006. The Joint Committee on the Draft Legal Services Bill published their Report on the Bill in late July 2006. Correspondence on the human rights implications of the Bill was prepared after informal consultation with our Legal Adviser and is published as an Appendix to that Committee's Report.[21]

2.3 We wrote to the Minister on 19 December 2006 to ask for a further explanation of the Government's views on Convention compatibility.[22] We received the Minister's response in a letter dated 17 January 2006, which we publish as an Appendix to this report.[23]. We welcome the Minister's prompt response.

## Effect of the Bill

2.4 The main purpose of the Bill is to reform the regulatory framework for the provision of legal services, in light of the recommendations of the Clementi Review on the regulation of legal services in England and Wales (which concluded that the existing regulatory model was "inflexible, outdated and complex").[24] It provides for a) the establishment of a new regulatory oversight body, the Legal Services Board ("LSB"); b) the establishment of an Office for Legal Complaints with statutory power to handle complaints about regulated legal services; and c) provides the framework for the establishment of Alternative Business Structures to enable lawyers and non-lawyers to work together and to permit external investment in businesses providing legal services.

## Human Rights Issues

2.5 We consider that the Bill raises the following significant human rights issues:

(1) Whether the decisions of the LSB or any Licensing Authorities (bodies authorised to license and regulate new Alternative Business Structures authorised by the Bill) are

[20] HL 9-EN.

[21] First Report of Session 2005-06, Joint Committee on the Draft Legal Services Bill, *Draft Legal Services Bill*, HL Paper 232-I/HC 1154-I, pages 138-156.

[22] Appendix 3.

[23] Appendix 4.

[24] Sir David Clementi, *"Review of the Regulatory Framework for Legal Services in England and Wales"*-Final Report 2004.

compatible with the right of access to an independent and impartial Tribunal guaranteed by Article 6(1) ECHR;

(2) Whether the decisions of the new Office for Legal Complaints and its Ombudsmen are compatible with the right of access to an independent and impartial Tribunal guaranteed by Article 6(1) ECHR;

(3) Whether the Solicitors Disciplinary Tribunal ("SDT") will continue to be considered an independent and impartial tribunal for the purposes of Article 6(1) ECHR if the LSB assumes responsibility for the approval of its Rules and gains a general power to issue directions to it;

(4) Whether the investigative powers granted to the Legal Services Board, the Approved Regulators and Licensing Authorities by the Bill are compatible with Articles 6 and 8 ECHR; and

(5) Whether there are adequate safeguards in the Bill for the protection of legal professional privilege in new Alternative Business Structures (i.e. adequate safeguards to protect individual clients' rights under Article 6 ECHR).

## (1) Access to an Independent and Impartial Tribunal: Regulatory Bodies and Decision Making

2.6 In the course of our preliminary scrutiny of this Bill, we considered whether the proposed decision making procedures of the Legal Services Board or any Licensing Authorities (bodies authorised to license and regulate new Alternative Business Structures authorised by the Bill) are compatible with Article 6(1) ECHR.

2.7 The Explanatory Notes accept that both of these bodies may make determinations which affect a persons civil rights, and that those determinations "would therefore need to be independent and impartial". They go on to explain that "the nature and extent to which the Article is engaged, and the procedural and other provisions necessary to ensure compliance with it, will differ according to the matter in issue".[25] This is an adequate statement of the legal position, but entirely unhelpful when the Explanatory Notes fail to explain precisely which provisions of the Bill the Government consider engage Article 6(1) and why those provisions are considered capable of being applied in a manner which is compatible with the right to a fair hearing. The Government explains that "the preconditions for the exercise of powers and parliamentary scrutiny, the separation of the regulatory functions from the Secretary of State and the involvement of the High Court in relation to the shareholding provisions provide sufficient safeguards when combined with the duties of the Board to comply with Section 6 of the Human Rights Act".[26] This type of generic explanation of the Government's views, particularly when referring to the decision making powers of several different decision making bodies, encompassed in a Bill of over 200 clauses is unhelpful. **We reiterate our view that statements of compatibility which are not accompanied by a clear explanation of the Government's reasons to believe that**

[25] EN, para 521.

[26] EN, para 521.

**the provisions of a Bill are compatible with the Convention, do not assist proper Parliamentary scrutiny. We draw this to the attention of both Houses.**

2.8 We asked the Minister questions about the compatibility of decisions of the LSB and Licensing Authorities and the imposition of financial penalties. We consider her response below.[27]

### *Regulatory Decisions of the LSB*

2.9 Part 4 of the Bill sets up the regulatory functions of the LSB in relation to "Approved Regulators" (these Approved Regulators will regulate providers of legal services, subject to the supervision of the LSB).[28] The LSB will have the power to set performance targets and issue directions to Approved Regulators where their acts or omissions have "an adverse impact" on one or more of the regulatory objectives identified in the Bill.[29] The LSB may censure an Approved Regulator publicly if it is satisfied that an act or omission has had an adverse impact on the regulatory objectives and may impose financial penalties if appropriate.[30] The only statutory right of appeal provided by the Bill is against the imposition of financial penalties. The Government accepts that all other decisions will be subject to judicial review. [31]

2.10 This issue attracted a significant amount of attention in the evidence presented to the Joint Committee on the Draft Legal Services Bill. The then Chairman of the Bar Council indicated that it was his view that access to judicial review of regulatory decisions of the LSB would be insufficient to meet the United Kingdom's obligations under Article 6(1) ECHR.[32] That Committee recommended that the Bill should be amended to allow a right of appeal against all regulatory decisions of the LSB to the High Court.[33] Amendments that would provide a right of appeal against certain decisions of the LSB were laid during Committee stage in the House of Lords.[34]

2.11 The Government accept these (and other) decisions of the LSB will engage Article 6(1) ECHR.[35] This is clearly correct: such reasons clearly determine rights to reputation and property. The question is whether the LSB is to be considered an "independent and impartial tribunal" for the purposes of Article 6(1) ECHR; and if not, whether access to judicial review (or to a statutory appeal in the case of financial penalties) will be adequate to provide a review by a Court with full jurisdiction.

2.12 The Government considers that the LSB will be "sufficiently independent and impartial". They reason that all appointments will be made by the Lord Chancellor in

[27] Appendix 4.

[28] The regulatory structures proposed by the Bill are explained in the Explanatory Notes. In short, the LSB will regulate Approved Regulators (including, for example, the Law Society and the Bar Council) who will act as front-line regulators for providers of legal services. In time, the LSB may approve Approved Regulators to act as Licensing Authorities for Alternative Business Structures ("ABS" or "ABS firms").

[29] Clauses 30, 31–33.

[30] Clauses 34–35, 36–39.

[31] Op. cit., page 149, para 24.

[32] First Report of Session 2005-06, Joint Committee on the Draft Legal Services Bill, *Draft Legal Services Bill*, HL 232–II/HC 1154-II, Q112.

[33] Op. cit., page 58, para 191.

[34] Third Marshalled List of Amendments, 22 January 2007, See for example, Amendment 56.

[35] Op. cit., page 148, para 20.

accordance with the Code of Practice of the Office for the Commissioner of Public Appointments, so as to ensure a transparent and accountable process of appointment on merit. [36] (The Bill refers to the Secretary of State. However, we welcome the Minister's assurance that the Government will be presenting amendments to ensure that all powers in the Bill currently to be exercised by the Secretary of State will be exercised by the Lord Chancellor. Herein we will refer to the powers of the Lord Chancellor.)[37] The Government note that the tenure of members of the LSB will be similar to those provided in the Financial Services and Markets Act 2000 for the members of the Financial Services Authority. We note that the Government cite a lack of successful challenge to the FSA as a precedent to support the conclusion that the LSB will be considered independent and impartial for the purposes of Article 6(1) ECHR. [38] We consider that this precedent is limited in value, as the Government do not refer to any case where arguments based on a lack of independence and impartiality has failed.

2.13 In considering whether a Tribunal lacks adequate independence and impartiality, the European Court of Human Rights considers that the relevant body must be independent of the executive, the legislature and the parties. The fact that the LSB is appointed by the Lord Chancellor is not determinative of its independence, but regard must be had to the manner of appointment of its members and their term of office, the existence of outside guarantees against outside pressures and the question of whether the LSB presents an appearance of independence.[39] Although the standpoint of the relevant Approved Regulator, subject to a regulatory measure, will be important, it will not be decisive.[40]

2.14 While we consider that there are significant safeguards to ensure the independence of the LSB – including the intention of the Government that all appointments are made according to the Code of Practice of the Office of the Commissioner for Public Appointments - we have some outstanding concerns. In particular, we note that, the terms of appointment of members of the LSB are "subject to the terms and conditions of that person's appointment", albeit subject to the minimum requirements that an ordinary member must be appointed for a fixed period and that periods of appointment must not exceed 5 years. We have previously expressed our doubt that these terms of appointment will be adequate to meet the requirements of Article 6(1) ECHR.[41]

2.15 **We cannot share the Government's confidence that the LSB will be considered an independent and impartial tribunal for the purposes of Article 6(1) ECHR.**

2.16 However, despite our doubts about the ability of the decision making procedures of the LSB to comply with Article 6(1) ECHR, we accept that the decision making process, considered as a whole may comply with the requirements of Article 6(1) ECHR if Approved Regulators have the right to a review by a court or tribunal with full jurisdiction.

[36] Appendix 4, para 1.

[37] Appendix 4, para 4.

[38] Appendix 4, page 2.

[39] *Campbell and Fell v United Kingdom* [1985] 7 EHRR 165.

[40] *Whitfield v United Kingdom,* App No 46387/99, Judgment, 12 July 2005.

[41] See for example, Seventh Report of Session 2004 – 05, *Legislative Scrutiny: Third Progress Report*, HL Paper 47/HC 333, paras 2.20; Twentieth Report of Session 2005-06, *Legislative Scrutiny: Tenth Progress Report*, HL Paper 186/HC 1138, para 2.48.

Whether a Court exercising judicial review on traditional judicial review grounds will have "full jurisdiction" will depend upon all the circumstances of an individual case.[42]

### *Judicial Review and Article 6(1) ECHR*

2.17 In a number of our recent reports, we have considered the adequacy of judicial review of administrative decision-making processes to meet the requirements of Article 6(1) ECHR. The European Court of Human Rights ("ECtHR") have recently confirmed that whether judicial review will be considered a review by a Court with full jurisdiction will depend on the circumstances in question; the nature of the administrative decision making body and the administrative decision taken. We set out the facts of the decision in *Tsfayo*, above, in our report on the Concessionary Bus Travel Bill.[43] The exercise by the LSB of its powers to issue directions and impose penalties, will be subject to the requirement that the LSB be satisfied that "an act or omission of the approved regulator …has had (or is likely to have) an adverse impact on one or more regulatory objectives" and "that it is appropriate to take action in the circumstances".

2.18 We consider that these are the type of assessments that, according to the analysis of the ECtHR in *Tsfayo*, would satisfy the requirements of Article 6(1) ECHR if subject to judicial review. However, in *Tsfayo* the ECtHR considered the adequacy of judicial review of a decision of a first instance appeal body. All of the cases considered in that case concerned a similar appeal structure, involving an initial decision by an administrative decision maker, subject to appeal and then subject to judicial review. We accept that this is an area where there is some considerable uncertainty as to the requirements of Article 6(1) ECHR. **On balance, we consider that, without access to a full appeal on the merits, there remains some risk that decisions of the LSB which engage Article 6(1) may give rise to a risk of incompatibility.**[44]

### *Financial Penalties imposed by the LSB: Appeals*

2.19 Where the LSB imposes a financial penalty on an Approved Regulator, the Bill provides for a right of appeal to the High Court on limited grounds: a) that the penalty was outside the powers of the Board to impose a financial penalty (Clause 36); b) that a failure to observe the procedural requirements for the imposition of a financial penalty have substantially prejudiced the Approved Regulator (Clause 37); c) that the amount of the penalty was unreasonable; or d) that it was unreasonable for the LSB to require the penalty or any proportion of that penalty to be paid within the time or times it is required to be paid. Clause 38(7) appears to exclude any further appeal, whether by judicial review or otherwise. It provides that "except as provided by this section, the validity of a penalty is not to be questioned by any legal proceedings whatever".

2.20 The Minister explains that the Government considers that there will be adequate scope within the statutory appeal grounds for an appellant to raise "all factual issues that may be in issue". We welcome the Minister's reassurance that the grounds in Clause 38 are broad enough to permit the Court of Appeal to consider whether a) there was a relevant act

[42] *Bryan v UK* (1996) 21 EHRR 342, paras 24-25; *Runa Begum v London Borough of Tower Hamlets* [2003] UKHL 5, para 5.

[43] See above at para 1.12.

[44] A full list of the decisions which the Government consider engage Article 6(1) ECHR was provided by the Minister in response to a letter of the Chair of the Joint Committee on the Draft Legal Services Bill.

or omission; b) whether the act or omission had an adverse impact on one or more of the regulatory objectives; or c) whether it was appropriate to impose a financial penalty. We do not consider that the Bill goes so far. For example, although the first ground of appeal will allow the appeal court to consider whether the LSB has acted within its powers to impose a financial penalty, that power arises when the LSB is "satisfied" that an act or omission of the Approved Regulator has had an adverse impact on the regulatory objectives and that a financial penalty is appropriate. In order to determine whether the actions of the LSB were lawful, will the appeal court need to consider the facts, or simply whether the LSB was reasonably satisfied? We consider that this is far from clear. The Minister states that the grounds of appeal in Clause 38 are "similar to judicial review", and for this reason, Article 6(1) ECHR will clearly be satisfied.[45] **We consider that without access to a full appeal on the merits, decisions of the LSB, and particularly decisions to impose a financial penalty, may lead to some risk of incompatibility with Article 6(1) ECHR. If, as the Minister contends, the High Court were able to consider the facts and the law underlying the decision to impose a financial penalty on appeal, we consider that it would be unlikely that this decision would be considered incompatible with Article 6(1) ECHR. We do not consider that the grounds of appeal expressed on the face of the Bill are adequately wide to ensure that this is the case. We draw this to the attention of both Houses.**

### *Licensing Authorities and Appeals*

2.21 The Bill provides for the LSB to have the power to authorise Approved Regulators to act as Licensing Authorities for the purpose of licensing "Alternative Business Structures".[46] The creation of "ABS firms" will allow for regulated providers of legal services to work together with non-lawyers, and for commercial investment in legal businesses.

2.22 The Minister has assured us that all licensing authorities will be required to establish a body "to hear and determine appeals as provided under Part 5".[47] The LSB cannot approve a Licensing Authority unless its licensing rules make provision for a "body" to hear appeals provided for by "this Part" (which appears to refer to Part 5 of the Bill) or its proposed licensing rules. The Minister explains that where a Licensing Authority is a statutory body, such as the Law Society, additional primary legislation may be required to provide for such a route of appeal. Clause 79 provides that the Secretary of State *may* by order establish a body to hear appeals that are subject to appeal under Part 5, or pursuant to the licensing rules of a licensing authority. The Minister explains that this power will only be used if necessary to provide for an appeal in relation to decisions from a statutory body that could not otherwise be provided. This is not clear from the face of the Bill.

2.23 Part 5 provides for an appeal to lie to the "relevant appellant body" against decisions of a licensing authority imposing a financial penalty (Clause 93). Schedule 13 provides for various rights of appeal to the "relevant appellant body" against decisions involving approval or revocation of approval of interests in licensed bodies (i.e. in respect of economic interests in Alternative Business Structures).[48] A further appeal will lie to the

[45] Appendix 4.

[46] Part 5, Schedules 10 – 13.

[47] Appendix 4.

[48] Schedule 13.

High Court on a point of law. The Explanatory Notes explain that these rights of appeal are relevant to the Government's analysis of the Bill's compatibility with Article 1, Protocol 1 ECHR. We doubt that a Licensing Authority will be considered an independent and impartial tribunal and consider that these rights of appeal are likely to be critical to the assessment of whether a decision on either a) the imposition of a financial penalty or b) the deprivation of an individual interest in a licensed body is compatible with Article 6(1) ECHR.

2.24 We welcome the Minister's assurance that some decisions by Licensing Authorities will be subject to appeal. However, it is unclear from the Minister's reply precisely which decisions the Government consider must be subject to appeal in order to satisfy Article 6(1) ECHR. We have been provided with no explanation of the type of appeal body that may be approved by the LSB where an approved regulator is a non-statutory body. Although Clause 79 indicates that the Secretary of State may designate either the Solicitors Disciplinary Tribunal, or the Discipline and Appeals Committee established by the Council of Licensed Conveyancers, the Secretary of State may choose to create another body, as recommended by the LSB. We understand that the Government seeks to leave as much discretion as possible with the LSB (in order to preserve the independence of that body).[49] **However, we are not currently in a position to assess whether the decision-making procedures of individual Licensing Authorities will comply with Article 6(1) ECHR. We have been assured by the Secretary of State that the LSB would, as a public body, be required to act in a manner compatible with Convention rights (in accordance with its duty under s.6 HRA 1998). We reiterate our view that, where appeal rights are likely to be necessary in order to comply with Article 6(1), that the enabling Bill should expressly provide for the establishment of those appeal rights. We draw this to the attention of both Houses.**

2.25 **We note that the LSB will consult on any recommendations in respect of the relevant appeal body for the purposes of Clause 79.[50] We look forward to receiving a copy of the relevant consultation documents when they are available.**

## (2) Access to an Independent and Impartial Tribunal: Office for Legal Complaints and the Ombudsman

2.26 The Bill provides for the establishment of the Office for Legal Complaints ("OLC") that will have responsibility for dealing with consumer complaints against providers of regulated legal services.[51] The members of the OLC will be appointed by the LSB and its Chair will be appointed only with the approval of the Lord Chancellor. Members will hold and vacate office on similar terms as members of the LSB (that is, subject only to the minimum requirement that their term of office is fixed, for less than five years, and renewable only once).[52] They may be removed from office by the LSB where it is satisfied that the member is "unfit to hold the office, or otherwise unable to discharge its functions".[53] The scheme for the administration of complaints will be administered by a

[49] Part 6.

[50] Clause 80.

[51] Part 6.

[52] Schedule 15, paragraphs 5-7.

[53] Schedule 15, paragraph 8.

Chief Ombudsman ("the Ombudsman Scheme"). The OLC will appoint the Chief Ombudsman and any assistant ombudsmen. An Ombudsman will be appointed on such terms and conditions as the OLC considers "(a) consistent with ensuring the independence of the person appointed, and (b) otherwise appropriate".

2.27 The "Ombudsman scheme" will deal with service complaints and may not deal with any "disciplinary action" (including the imposition of sanctions in respect of relevant conduct or disciplinary rules). [54] It will however have the power to determine a complaint "by reference to what is, in the opinion of the ombudsman making the determination, fair and reasonable". It will have the power to direct a provider of regulated legal services to make an apology or payment of compensation to the complainant "as a result of any matter connected with the complaint" (up to a maximum of £20,000), and may direct the respondent to take any other action "in the interests of the complainant".[55] If the complainant accepts the Ombudsman's determination, the decision is binding on both the Complainant and the Respondent. The Ombudsman is required to give a copy of his determination to the parties, and to the Respondent's Approved Regulator. The OLC may publish a report of a particular determination, subject to provisions for the protection of the complainant's privacy.[56] The Government accept that decisions of the Ombudsman will involve determinations of civil rights and obligations for the purpose of Article 6(1) ECHR. The Government consider that the Ombudsman will have an adequate degree of "structural independence" to satisfy the requirements of Article 6(1) ECHR. The OLC will appoint the Ombudsmen and the Government consider that the OLC is independent of any parties to a complaint and independent of the Executive.

2.28 **While we welcome the inclusion of a requirement that the terms and conditions of the Ombudsmen be consistent with their independence, we are not currently in a position to assess whether those terms and conditions will be sufficiently well defined in order to meet the requirements of Article 6(1) ECHR. We do not share the confidence of the Government that, subject to judicial review, the Ombudsman scheme will have adequate structural independence to satisfy Article 6(1) ECHR. We do not consider that the Ombudsman would be considered an "independent and impartial tribunal". We draw this to the attention of both Houses.**

2.29 If the Ombudsman does not provide a fair hearing before an independent and impartial tribunal, on the basis of the *Tsfayo* analysis, we consider that, without a right of appeal on the merits, the decision making processes of the Ombudsman may lead to a risk of incompatibility with Article 6(1) ECHR. We consider that many of the decisions taken by the Ombudsman may be significantly related to the facts of a complaint. While the assessment of what is "fair and reasonable" in all the circumstances may involve the application of specialist knowledge, the determination of the facts in a particular case, and the assessment of the weight to be afforded to those facts will not necessarily be a specialist skill which must be determined by a democratically appointed decision maker.[57] **We consider that there remains a risk that judicial review of a decision of the Ombudsman (or a decision of an internal appeals body) will not be adequate to meet the**

[54] Clause 110.

[55] Clauses 134–135.

[56] Clause 147.

[57] Similar issues were recently raised in connection with the passage of the Legal Profession and Legal Aid (Scotland) Bill through the Scottish Parliament.

**requirements of Article 6(1) ECHR. We consider that this risk of incompatibility could be avoided by either providing a right of appeal to an independent, specialist tribunal or a right of appeal to an existing court or tribunal on the merits.**

## (3) Solicitors Disciplinary Tribunal: Independence and Impartiality

2.30 Clause 171 provides that where the SDT proposes to alter their rules, that alteration will generally need to be approved by the LSB. The LSB will also have the power to issue directions to the SDT where the LSB considers that it has failed to perform any of its functions to an adequate standard or at all. The LSB will be able to recommend to the Lord Chancellor that an Order be made for the purpose of enabling the SDT to carry out its role more "effectively or efficiently". The domestic courts have consistently held that the SDT is an independent and impartial tribunal for the purposes of Article 6(1) ECHR.[58] We asked the Minister whether the new powers of the LSB could change this assessment of the SDT. The Minister considers that transferring the supervision of the SDT rules from the Master of the Rolls to the LSB would not impact negatively on the independence and impartiality of the SDT. The Minister refers to precedent for Executive involvement in the making of Court and Tribunal Rules. **We have reviewed the reasons given by the Minister in her response, and despite our outstanding concern that regulatory decisions of the LSB may give rise to some risk of incompatibility with Article 6(1) ECHR, we consider that the transfer of responsibility for the approval of SDT rules from the Master of the Rolls to the LSB is unlikely to lead to a significant risk of incompatibility with Article 6(1) ECHR.**

2.31 **We are concerned at the breadth of the direction making power granted to the LSB by the Bill. Provided that the directions given to the SDT are restricted to the very limited purposes identified by the Minister, we consider that it is unlikely to give rise to a significant risk of incompatibility with Article 6(1) ECHR. However, if these powers are exercised frequently, or in a way which substantially changes the functions of the SDT in order to allow it to perform its role more "effectively", we consider that this may give rise to a risk of incompatibility with Article 6(1) ECHR in relation to the determination of disciplinary complaints against solicitors.**

## (4) Investigatory Powers and the right to Respect for Private Life

2.32 The Explanatory Notes identify that "the Bill provides powers necessary for Regulators to investigate whether any offences have been committed". The Government explained that these powers "in principle" engage Article 8 ECHR, but that the Government considered any interference was justified, as they were "necessary to enable the Regulators and Licensing Authorities to properly carry out their functions".[59] We asked the Minister to identify the provisions in the Bill that the Government consider engage Article 8 ECHR and for a further explanation of the Government's views that these provisions are compatible with the Convention.

[58] See for example, *R (Thompson) v Law Society* [2004] EWCA CW 167.

[59] EN, para 523.

### *Powers of Search and Seizure*

2.33 In relation to the powers of entry granted to the LSB by Clauses 41, 47 and 78, we note that amendments have been made to the provisions which were published in the draft Bill to require a warrant to enter and search an Approved Regulator's premises. We welcome the provision for judicial oversight of those powers as an important safeguard for rights of Approved Regulators to respect for the integrity of their business premises as guaranteed by Article 6(1) ECHR. However, a warrant may only be refused if a judge or justice of the peace is not satisfied that its issue is "necessary or desirable" for the purpose of continued regulation. We consider that this test is extremely broad. The intrusive nature of search and seizure powers are such that we consider that, in order to be considered proportionate, they should only be used where necessary, rather than simply expedient. This reflects the view consistently taken by the European Court of Human Rights.[60] The Minister reassures us that while this test is broad, it will be accompanied by a number of safeguards, which will be provided in Regulations. The Bill requires the Lord Chancellor to make regulations specifying the matters which a judge must be satisfied of, or have regard to, in granting a warrant. The Minister reassures us that the primary consideration for the issue of a warrant "is satisfying the balance between the rights of a body or an individual, who might be subject to an entry search and seizure order, and the need for the continuing and effective administration of legal services". The Minister argues that as this power of entry is not accompanied by a power to use force to effect entry, any intrusion will be proportionate "to the needs of regulation". Although the execution of these warrants will only take place on business premises of Approved Regulators, the ECtHR has treated the violation of business premises seriously, particularly in cases where a search involves premises which may contain legally privileged material and specifically privileged material of clients.[61] **We consider that a warrant granted on the basis that a search was merely "desirable" could lead to a significant risk of incompatibility with Article 8 ECHR. We recommend that the Bill be amended to require that any warrant for entry, search and seizure provided in the Bill will only be provided if the necessity test is satisfied.**

2.34 The Minister has identified a number of additional safeguards which it considers "may have to be satisfied in respect of the execution of a warrant under clauses 41, 44 and 78". We consider that each of these proposed safeguards would provide valuable protection for the right to respect for private life enjoyed by Approved Regulators. However, we are concerned that no provision is proposed for the protection of legal professional privilege.[62]

2.35 The Minister considers that these additional safeguards cannot be provided on the face of the legislation, as "flexibility" is required to adapt to changes in the way the powers should be exercised.[63] We have consistently taken the view that where safeguards are necessary to meet the requirements of the Convention for proportionality, those safeguards should be provided on the face of the Bill. As we made clear in our recent report on the Compensation Bill, we consider that where powers of search and seizure are sought, safeguards should generally be included in primary legislation and that in a regulatory context, where the Government have already identified the safeguards necessary, the

[60] *Keegan v United Kingdom*; App No 28867/03, Judgment 18 July 2006.

[61] *Niemietz v Germany* (1992) 16, EHRR 97, para 37.

[62] See for example, Section 9, Police and Criminal Evidence Act 1984.

[63] Appendix 4.

requirement for "flexibility" is not adequate justification for failing to do so. In our reports on the Compensation Bill, we clearly identified legislative precedent for the inclusion of safeguards in respect of search and seizure, including provisions in relation to the material which should be taken into account in the course of an application for a warrant. [64] **We recommend that the Bill is amended to require that the execution of warrants of entry, search and seizure issued in pursuit of powers created by the Bill are subject to identified safeguards, including those identified by the Minister in her response and additional protection exempting documents which attract legal professional privilege from seizure. We consider that the inclusion of these safeguards on the face of the Bill would create additional legal certainty and would provide a valuable safeguard for the rights of Approved Regulators guaranteed by Article 8 ECHR. The exemption of privileged documents would provide a valuable safeguard for the rights of Approved Regulators and others under Article 6(1) ECHR.**

2.36 Clause 189 covers the powers of entry, search and seizure afforded weights and measures officers, including a power to effect forced entry under warrant. This provision largely replicates Section 22A of the Solicitors Act 1974. The Explanatory Notes explain that this clause provides local weights and measures authorities with the powers necessary to investigate and prosecute persons who undertake "reserved instrument activities" without authorisation (these activities are defined in the Schedule 2 of the Bill, and largely extend to the activities involved in conveyancing). [65]

2.37 We note that this power remains subject to judicial oversight. We are concerned that the power to determine precisely by whom the warrant should be executed remains with the individual officer seeking the warrant, rather than the Court.[66] We consider that if a warrant were executed by a person lacking adequate maturity and experience, or by additional persons (including private bodies) identified by the weights and measures officer, this could give rise to a risk that a search effected by forced entry could be conducted in a manner which was disproportionate to the rights of the individual suspected of weights and measures offences to respect for his or her privacy. **We recommend that the Bill be amended to provide that a warrant must, where the Court considers it appropriate, authorise persons other than the weights and measures officer to conduct the search. This would permit the Court to limit forced entry to circumstances where the weights and measures officer could be accompanied by a constable, and would allow the Court to supervise the use of other persons to assist the weights and measures officer in the execution of a search and would provide a valuable safeguard for the rights of the suspect to respect for his home and private life.**

2.38 **We note that although there are a number of safeguards incorporated into Clause 189, again, there is no provision for documents subject to legal professional privilege to be exempted from any seizure powers. We recommend that the Clause 189 be amended to exempt privileged documents from the seizure powers of weights and measures officers.**[67]

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[64] Twenty-first Report of Session 2005-06, *Legislative Scrutiny: Eleventh Progress Report*, HL Paper 201/HC 1216, paras 3.10–3.13; Twentieth Report of Session 2005-06, *Legislative Scrutiny: Tenth Progress Report*, HL Paper 186/HC 1138, paras 2.51 – 2.60.

[65] EN, para 485.

[66] Clause 189(6).

[67] See Section 9, Police and Criminal Evidence Act 1984.

## (5) Legal Professional Privilege and Alternative Business Structures

2.39 The importance of the right to confidential communications with legal advisers has been consistently recognised as an important part of the right of effective access to a fair hearing guaranteed by Article 6 ECHR.[68] In his Report, Sir David Clementi recognised that one of the key concerns about the development of businesses incorporating regulated legal professionals and other professionals, such as accountants and financial advisers, would be the need to have adequate processes in place to protect clients' rights to legal professional privilege.[69] The Bill provides that a communication to, or from, a licensed body (an "Alternative Business Structure firm" or "ABS firm"), providing legal services via a "relevant lawyer" (generally, any authorised provider of regulated legal services), or under the supervision of a relevant lawyer will attract legal privilege if a communication directly involving the relevant lawyer would have.[70] We also note that a Licensing Authority must require all managers or employees of ABS firms to maintain the professional principles that are set out in the Bill.[71] These include the principle that the affairs of clients should be confidential.[72] The Minister has assured us that clients of ABS firms "will benefit from the same legal professional privilege protection that they have had in retaining existing legal services providers".[73]

2.40 We clearly cannot predict how these provisions will work in practice, and in particular, how the professional principles will interact with the regulatory obligations of other non-lawyer professionals. However, **we consider that the Bill provides valuable safeguards for the protection of legal professional privilege in ABS firms and the rights of those clients to confidential communications with their legal advisers, as guaranteed by Article 6(1) ECHR.**

[68] For example, in *Niemietz v Germany*, the ECtHR held that "Where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention. (1992) 16 EHRR 97 at para 37.

[69] "Review of the Regulatory Framework for Legal Services in England and Wales", 2004, para F.91.

[70] Clause 182 (3)–(7).

[71] Schedule 11, Paragraph 17 (1)(b).

[72] Clause 1(3)(e).

[73] Appendix 4.

# 3 Offender Management Bill

| | |
|---|---|
| Date introduced to first House | 22 November 2006 |
| Date introduced to second House | |
| Current Bill Number | HC 50 |
| Previous Reports | None |

## Background

3.1 This is a Government Bill introduced into the House of Commons on 22 November 2006. The Rt Hon John Reid MP, Home Secretary, has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998. The Explanatory Notes accompanying this Bill set out the Government's view of the Bill's compatibility with the Convention rights at paras 156-167. The Bill began its Committee stage on 11 January 2007.

3.2 On our initial consideration of the Bill we thought that it raised a number of significant human rights issues and we therefore wrote to the Minister on 19 December asking for a fuller explanation of the Government's view that the proposals in the Bill are compatible with human rights in certain respects.[74] We received the Minister's reply in a letter from Gerry Sutcliffe MP, Parliamentary Under Secretary of State at the Home Office, dated 17 January 2007.[75] We are grateful to the Minister for his full and prompt response.

## The effect of the Bill

3.3 The main purpose of the Bill is to make provision for the contracting out of probation services by the Secretary of State to private and voluntary sector providers, as envisaged in the August 2006 Government consultation paper *Improving Prison and Probation Services: Public Value Partnerships*.

3.4 However, the Bill also has a number of other purposes which have human rights implications, including providing for information sharing between various bodies and persons for offender management purposes; extending the powers of staff (eg. to search, detain and adjudicate) in contracted out prisons; introducing new criminal offences about taking prohibited articles into and out of a prison, including certain documents; removing the requirement that there be a prison medical officer; and empowering the Secretary of State to send a juvenile who has received a detention and training order to prison when they turn 18.

3.5 We regret to report that we did not find the Explanatory Notes accompanying the Bill satisfactory in their analysis of the human rights compatibility of the measures in the Bill which clearly engage human rights, for the reasons we make clear below. To some extent the Minister's letter in response to our questions rectified the deficiency of the Notes, and we are grateful for the full and prompt response to our questions by the Minister. However, we repeat our frequently made observation that provision of a full human rights memorandum at the time of the Bill's publication would not only enable us to report more promptly and thoroughly to Parliament on a bill's compatibility with human rights, but would also reduce the burden on the relevant Department following the bill's publication.

[74] Appendix 5.

[75] Appendix 6.

## (1) Whether providers are "public authorities"

3.6 The Bill imposes a statutory duty on the Secretary of State to make arrangements to provide probation services[76] and gives the Secretary of State the power to make contractual or other arrangements with any other person for the provision of probation services.[77] The power to make arrangements with any other person expressly includes the power to authorise or require the other person to sub-contract with third parties.[78] Under the Bill, probation services may therefore be provided by a person or body who has no direct contractual relationship with the Secretary of State, but is a sub-contractor of a person or body with whom the Secretary of State has entered into contractual or other arrangements.

3.7 We have therefore considered whether providers of probation services from the private or voluntary sectors will be "public authorities" for the purposes of s. 6 HRA 1998. The Explanatory Notes to the Bill are silent on this question. When the issue has been raised by us before in other contexts, the Government has confidently asserted that in its view the relevant bodies are "public authorities" when performing functions which would otherwise be performed by a public body. However, in light of the current state of the case law interpreting s. 6 of the HRA, there remains considerable legal uncertainty as to the scope of the definition of public authority in the Act. Recently, in *Johnson v Havering BC*, the High Court upheld the Court of Appeal's restrictive interpretation of the term in the *Leonard Cheshire* case, rejecting the argument made by the Department for Constitutional Affairs, intervening, that the *Leonard Cheshire* interpretation had been implicitly overruled by a later House of Lords decision. A decision is now awaited from the Court of Appeal in the *Johnson v Havering* case.

3.8 On the current state of the law, a private party running a residential care home pursuant to a contract with a local authority is not a public authority for the purposes of the HRA. In light of this continuing uncertainty about what the courts will consider to be a "public authority", and the Bill's provision for the provision of services by third party sub-contractors, we decided to ask the Government whether in its view providers of probation services from the private or voluntary sectors will be public authorities for the purposes of the HRA, and whether it agreed that on the current state of the case law there was considerable uncertainty as to whether the courts will regard providers of probation services from the private or voluntary sectors as public authorities for the purposes of the HRA.

3.9 The Government replied that it was clear in its view that such providers of probation services will be "functional" public authorities for the purposes of s. 6 HRA: that is, public authorities by virtue of certain of their functions being functions of a public nature.[79] It also expressed the hope that this clear statement will "assist the court in the event that they find themselves in difficulty."

3.10 We find it remarkable that more than 8 years after the enactment of the Human Rights Act the Government and Parliament still cannot tell with confidence whether bodies carrying out particular functions will be treated by the courts as public authorities

[76] Clause 2(1) and (2).

[77] Clause 3.

[78] Clause 3(3)(c).

[79] Section 6(3)(b) HRA 1998.

for the purposes of the Human Rights Act. The Government is reduced to expressions of hope that its clear statements might assist the court, but there can be no guarantee that the courts will not disagree and regard the bodies in question as having no public functions and therefore not subject to the duties imposed by the HRA. **Given the fact that the ECHR requires States to protect the rights of detained people, the Government may not contract out of its obligation. Therefore, to the extent that the contracting out of services allows for the sub-contracting to third parties, the Government must ensure full compliance with Convention rights. In our view it is a matter of fundamental importance that any entity, including private or voluntary entities, providing probation services constitutes a public authority for the purposes of the duties and responsibilities imposed by the Human Rights Act. We will be returning to this question shortly in a further report on the meaning of public authority in the HRA.**

## (2) Information sharing

3.11 The second issue we have considered is whether the power to disclose information for offender management purposes[80] contains sufficient safeguards to make it likely that it will be exercised compatibly with the right to respect for private life in Article 8 ECHR.

3.12 The Explanatory Notes state that the power to share information in the Bill is compatible with Article 8 "because the clause creates a power to disclose information, not a duty to do so. Accordingly the party proposing to disclose is able to refrain from doing so if he considers that such a disclosure would amount to an unlawful interference with an individual's Article 8 rights."[81] This is clearly not an adequate explanation of the power's compatibility with Article 8, which depends to a large extent on the breadth of the power and the adequacy of the safeguards provided.

3.13 In some respects the power to share information in the Bill is closely defined. For example, it lists the entities who are able to benefit from the power to share information,[82] it specifies the purposes for which disclosure may be made,[83] and provides that exchange of information authorised by the Bill is subject to the existing safeguards regarding data protection.[84] However, some aspects of the definition of the power to share information are in our view surprisingly wide. For example, although the Bill specifies the purposes for which disclosure may be made, these are wide in scope: they include "the probation purposes", which are defined to include "the giving of information to victims of persons charged with or convicted of offences"[85] and "any other purposes connected with the management of offenders".[86] The test for disclosure is whether it is "necessary or expedient" for any of the specified purposes.[87] And the Secretary of State is given the power to amend by order any enactment which would otherwise prevent the sharing of data permitted by the Bill.[88]

[80] Clause 10.

[81] EN para. 158.

[82] Clause 10(1) and (2).

[83] Clause 10(4).

[84] Clause 10(6)(b).

[85] Clause 1(1)(f).

[86] Clause 10(4)(c).

[87] Clause 10(3).

[88] Clause 10(7).

3.14 In response to our questions about the apparent width of the power, the Government says that many instances of disclosure using the power in the Bill will not engage Article 8, for example where data is anonymised prior to disclosure, as typically occurs when undertaking research. However, it accepts that Article 8 may be engaged in certain cases, for example where the identity of the individual is not anonymised prior to disclosure and the individual in question has not consented to the disclosure.

3.15 Where making a disclosure for "any other purposes connected with the management of offenders", the Government envisages that the legitimate aim relied on to justify disclosure will be one or more of the interests of public safety, the prevention of crime or disorder, the protection of health or morals, or the protection of the rights and freedoms of others. In the Government's view, because the individuals whose information is to be shared are offenders who have "inflicted some harm on society and pose a threat to public safety or individual members of the public as a result, disclosures considered to be necessary to maximise their prospects of rehabilitation and minimise the possibility of their reoffending will usually be necessary for one or more of the purposes listed in Article 8(2).

3.16 We welcome the Government's acceptance that a conclusion that disclosure may be "expedient" will not, of itself, satisfy the requirement of necessity in Article 8(2). However, it states that there will be many occasions when satisfying the test of expediency will be enough, for example where no individual can be identified from the data proposed to be disclosed so that Article 8 does not apply. It therefore does not propose to amend the Bill. **In our view, the Bill should be amended to make clear on its face that where the information to be disclosed engages Article 8 the test of necessity must be met. Not to provide this clarification, in our view, risks incompatibility because it appears to authorise disclosure of offender information where it is merely expedient to serve one of the probation purposes or some other purpose connected with offender management.**

## (3) New powers to strip-search visitors in private prisons

3.17 The Bill would remove the current restriction[89] on the power of prisoner custody officers at contracted out prisons and secure training centres to search visitors, so as to enable them to require visitors to remove items of clothing which are not merely an outer coat, jacket or gloves: in other words, to strip-search them.[90]

3.18 We have considered whether this new power of prisoner custody officers to strip-search visitors is accompanied by sufficient safeguards to be compatible with the right to respect for privacy and physical integrity in Article 8 ECHR. According to the very clear case-law of the Court of Human Rights, intrusive powers of search which are clearly capable of interfering with the dignity of the person being searched must be accompanied by strong procedural safeguards and rigorous precautions to ensure that the dignity of the person being searched is not interfered with to a greater extent than is necessary. As the Court recently held in *Wainwright v UK*,[91]

[89] The restriction is contained in s. 86(2) of the Criminal Justice Act 1991.

[90] Clause 11.

[91] App. No. 12350/04, judgment of 26 September 2006, at paras 44 and 48.

> "the Court considers that the searching of visitors may be considered as a legitimate preventive measure. It would emphasise nonetheless that the application of such a highly invasive and potentially debasing procedure to persons who are not convicted prisoners or under reasonable suspicion of having committed a criminal offence must be conducted with rigorous adherence to procedures and all due respect to their human dignity."

3.19 The recently revised and updated European Prison Rules (2006) require that in each prison there should be a clearly understood set of procedures which describe in detail the circumstances in which searches of visitors should be carried out and the methods to be used, and that these procedures should be designed to protect the dignity of visitors. The Rules provide, so far as relevant:

> *"Searching and controls*
>
> 54.1 There shall be detailed procedures which staff have to follow when searching:
>
> …
>
> c. visitors and their possessions;
>
> 54.2 The situations in which such searches are necessary and their nature shall be defined by national law.
>
> 54.3 Staff shall be trained to carry out these searches in such a way as to detect and prevent any attempt to … hide contraband, while at the same time respecting the dignity of those being searched and their personal possessions.
>
> 54.4 Persons being searched shall not be humiliated by the searching process.
>
> 54.5 Persons shall only be searched by staff of the same gender.
>
> …
>
> 54.7 An intimate examination related to a search may be conducted by a medical practitioner only.
>
> …
>
> 54.9 The obligation to protect security and safety shall be balanced against the privacy of visitors.
>
> 54.10 Procedures for controlling professional visitors, such as legal representatives, social workers and medical practitioners, etc., shall be the subject of consultation with their professional bodies to ensure a balance between security and safety, and the right of confidential professional access."

3.20 The European Prison Rules are regularly referred to by both the European Court of Human Rights and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. They date back to 1973 when the Council of Europe first adopted a regional version of the United Nations Standard Minimum Rules

for the Treatment of Prisoners. The most recent revision of the European Prison Rules was made with the assistance of Andrew Coyle, a former UK Prison Governor. The new Rules are the subject of Recommendation (2006) 2 of the Committee of Ministers to member states, recommending that Governments be guided in their legislation, policies and practice by the new European Prison Rules.

3.21 The Explanatory Notes to the Bill state that the new power to strip-search in contracted out prisons is in accordance with the law "because of the provision the Bill makes" and serves the legitimate aims of maintaining good order, protecting the health and security of prisoners and others and, possibly preventing the commission of a crime. On proportionality, however, the Notes merely state that the question of whether any interference is proportionate will always depend on the circumstances of each case.[92] They contain no analysis of the adequacy of the procedural safeguards which surround the power to search, which are critical to the compatibility of the power with Article 8.

3.22 The new power to strip search visitors contains two limitations on the face of the Bill. The search must be "in accordance with prison rules"[93] and the power does not include a power to require a visitor to submit to an intimate search.[94] The Prison Rules 1999[95] make the following provision for the searching of visitors, in Rule 71:

> **"71.** (1) Any person or vehicle entering or leaving a prison may be stopped, examined and searched and in addition any such person may be photographed, fingerprinted or required to submit to other physical measurement.
>
> (1A) Any such search of a person shall be carried out in as seemly a manner as is consistent with discovering anything concealed about the person or their belongings."

3.23 This appears to be the extent of the published procedures and safeguards accompanying the power to strip search visitors. In its response to our letter asking for a detailed explanation of the precise procedural safeguards which will accompany the new power, the Government said that the purpose of the provision in the Bill was merely to replicate existing powers to search visitors in public sector prisons, which are regulated by Rule 71(1) of the Prison Rules. It appears that more detailed guidance on searching techniques does exist but that this is not publicly available: it is contained in the "National Security Framework", which is a mandatory Prison Service Order[96] which, although freely available to staff in both public and private prisons, is "not made publicly available due to its restricted security status and impact on operational matters." The Government relies on the existence of this secret internal guidance, along with the various inspection and monitoring mechanisms,[97] in support of its view that appropriate safeguards have been provided to ensure that the power to strip-search visitors is compatible with Article 8.

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[92] EN para. 159.

[93] Proposed new s. 86(1)(b) CJA 1991, as amended by cl. 11(1)(a).

[94] Proposed new s. 86(2) CJA 1991, as amended by cl. 11(1)(b).

[95] SI 1999/728, as amended by SI 2005/869.

[96] Prison Service Order 1000.

[97] These include a contractual requirement regularly to self-audit their procedural compliance with correct searching techniques, monitoring of the contractor's staff by the prison Controller, inspection by HM Inspectorate of Prisons and the Independent Monitroing Board, and consideration of individual complaints by the Prison and Probation Ombudsman.

3.24 The Government also points to the fact that the power to search visitors remains exercisable only by a prisoner custody officer, who are required to be certificated as competent to do so by the prison's Controller, and who, prior to being certificated, must successfully complete a training course which includes a module on the correct searching techniques and the limits of search powers. We note, however, that the Bill also provides a mechanism for authorising a "worker" at a contracted out prison who is not a prisoner custody officer to perform "restricted activities", including searching, which can currently only be performed by prisoner custody officers. In future, the Secretary of State will be able by order to specify the activities that a worker may be authorised to carry out. In our view this wide proposed power in the Secretary of State detracts considerably from the weight which can be attached to the current requirement that searches of visitors can only be carried put by prisoner custody officers.

3.25 We have given careful consideration to whether the procedural safeguards which accompany the power to strip-search visitors to prisons are sufficiently defined in law and rigorous in nature to satisfy the requirements of Article 8 described above. Both Article 8 ECHR and the European Prison Rules require detailed procedures, prescribed by law, to ensure that the dignity of the person being searched is not interfered with to a greater extent than is necessary. **The only procedural requirement that is prescribed by law is that the search "be carried out in as seemly a manner as is consistent with discovering anything concealed". We have no hesitation in finding that this falls well short of the sort of detailed procedural safeguards and rigorous precautions that are required by Article 8. We therefore conclude that the absence of publicly available procedures regulating the power to strip search visitors to prisons means that the interference with visitors' right to privacy is not "in accordance with the law" and is therefore incompatible with both Article 8 ECHR and the European Prison Rules.**

3.26 We note the possibility that some if not all of the detailed procedural safeguards required by Article 8 and the European Prison Rules do exist, but not in a form which counts as "law", in the secret Prison Service Order. In the course of the *Wainwright* litigation the Government appears to have made available to both the domestic courts and the Strasbourg Court the equivalent document, in that case a local document, *"Strategy and Procedures of Searching at Leeds Prison"*, which appears to have contained a number of the detailed procedural safeguards required by Article 8. In our view, Parliament is entitled to no less when it is being asked by the Government to enact a law containing a wide power to strip search visitors to prison. We are not suggesting that information which would be harmful to security should be disclosed; we merely ask that those parts of the Prison Service Order which contain the relevant procedural safeguards be put in the public domain. **We therefore recommend that the Government make available to Parliament the relevant parts of Prison Service Order 1000, containing the procedural safeguards on searching, to enable Parliament to assess the proportionality of the proposed power to interfere with the Article 8 rights of visitors to prison, and that the Government also translate those safeguards into a publicly available and binding form which would satisfy the requirement that interferences with the right to respect for privacy and physical integrity be "in accordance with the law."**

## (4) New power to detain visitors in contracted out prisons

3.27 The Bill provides a new power for prisoner custody officers in contracted out prisons and secure training centres to detain a visitor for up to two hours whilst waiting for the arrival of a constable, where the officer has reason to believe that the visitor has committed an offence under the Prison Act.[98] The power includes the power to use reasonable force to prevent the person from making off while subject to such a requirement.

3.28 We have considered whether this new power to detain visitors to prisons is compatible with the right to liberty in Article 5 ECHR. In the Explanatory Notes the Government states that Article 5 does not apply because requiring a person to wait for up to two hours does not amount to a deprivation of liberty, or alternatively that the power is compatible with Article 5 because it is within the scope of Article 5(1)(c), that is, a deprivation of liberty effected for the purpose of bringing the person before the competent legal authority on reasonable suspicion of having committed an offence.[99]

3.29 In its response to our letter the Government has elaborated considerably on its reasons for its view that the new power is compatible with Article 5 ECHR. First, it argues that case-law supports its view that detention under the clause, even for a period of up to two hours, will not amount to a deprivation of liberty within the meaning of Article 5 ECHR. It relies on an old Commission decision[100] in which it was held that there was no deprivation of liberty where a 10 year old child was held in a sometimes unlocked police cell for two hours for the purposes of questioning, and the House of Lords judgment in *Gillan*,[101] in which it was held that detention for up to 30 minutes pending completion of a stop and search procedure did not amount to a deprivation of liberty for the purposes of Article 5, because the detention was in the nature of being kept waiting or kept from proceedings, rather than detention in the nature of confinement or custody. A requirement to wait under the new power in the Bill, pending arrival of a constable, is in the Government's view similar in nature to the detention in these two cases which was not found to amount to a deprivation of liberty.

3.30 We are not persuaded by the Government's argument that detention pursuant to the new power will not amount to a deprivation of liberty for the purposes of Article 5. Detention for questioning in a sometimes unlocked police cell and detention for less than half an hour pending completion of a stop and search procedure are in our view materially different from detention for up to two hours on suspicion of having committed an offence and subject to being restrained by the use of force if attempting to leave. We accept that merely transitory detention will not constitute a deprivation of liberty such as to engage Article 5 ECHR. However, detention for as long as two hours, with a view to being handed over to a police constable for further detention, is unlikely to be regarded as merely transitory. The Court of Appeal in *Laporte v Chief Constable of Gloucestershire*, for example, held that detention on a coach for two and a half hours "went far beyond anything which could conceivably constitute transitory detention".[102] **In our view Article 5**

[98] Clause 12(1), inserting a news s. 86A into the CJA 1991.

[99] EN para. 160.

[100] *X v Austria* (1979) 18 DR 154.

[101] *Gillan v Commissioner of Police for the Metropolis* [2006] UKHL 12 at para. 23.

[102] [2004] EWCA Civ 1639 at para. 47 (this aspect of the Court of Appeal's decision is not affected by the decision of the House of Lords [2006] UKHL 55).

**ECHR is clearly engaged by the new power to detain a visitor pending the arrival of a constable.**

3.31 Second, the Government in its letter (but not in the Explanatory Notes) argues that, if Article 5 applies, detention would be authorised under clause 5(1)(b) ECHR, which permits deprivation of liberty "in order to secure the fulfilment of any obligation prescribed by law." The argument here appears to be that since the Prison Rules give a power to stop, examine and search a visitor to a prison, a visitor in respect of whom there is a reasonable suspicion that they have committed an offence can be required to submit to a search or to be stopped, which is therefore an obligation prescribed by law. We find this to be a circular argument of potentially alarming breadth. It potentially brings within the scope of the Article 5(1)(b) exception any power to stop and search on reasonable suspicion of an offence having been committed. In our view the exception does not have such a wide scope, but has been given a very narrow scope by the Court of Human Rights to cover only those situations where a person is detained to compel him to fulfil a specific and concrete obligation which he has until then failed to satisfy**. We do not agree that detention under the new clause would be authorised under Article 5(1)(b).**

3.32 Third, the Government argues that, if Article 5 applies, detention for up to two hours is within the Article 5(1)(c) exception because it is either effected for the purpose of bringing the visitor before the competent legal authority on suspicion of having committed an offence, or is reasonably necessary to prevent his fleeing after having committed an offence. **In our view detention of a visitor to a contracted out prison under the new power in the Bill is in principle capable of being a justified deprivation of liberty under Article 5(1)(c) ECHR. Given the requirement that the prisoner custody officer must have reason to believe that the visitor is committing or has committed a criminal offence, we see no distinction in principle between the power to detain pending the arrival of a constable and the power of "citizen's arrest".**[103] **In our view, however, the power could be more tightly defined, for example by introducing a requirement that certain conditions be satisfied before the power to detain arises, such as that the prisoner custody officer be satisfied that it is not reasonably practicable for a constable to make the arrest, and that there are reasonable grounds to believe that detaining the visitor is necessary to prevent them from making off before a constable arrives. If a person is so detained, s/he should be accompanied by a custody officer of the same sex.**

## (5) New criminal offence of removing documents from a prison

3.33 The Bill would create a new offence of removing or transmitting, without authorisation, a "restricted document" from prison.[104] Restricted documents are defined to mean photographs, sound-recordings, personal records, and any other document which contains information relating to an identified or identifiable individual, if the disclosure of that information would or might prejudicially affect the interests of that person, and "information relating to any matter connected with the prison or its operation if the disclosure of that information would or might prejudicially affect the security or operation

[103] As now defined in s. 24A Police and Criminal Evidence Act 1984, inserted by s. 110 of the Serious Organised Crime Act 2005.

[104] Clause 18, inserting new s. 40D into the Prison Act 1952.

of the prison."[105] It is a defence to show that in all the circumstances there was an overriding public interest which justified the removal or transmission of the document.[106]

3.34 The Explanatory Notes acknowledge that this could, in certain circumstances, interfere with rights under Article 10 ECHR, but state the Government's view that the interference will be justified for the protection of the rights of prison staff and the security of the prison.[107]

3.35 A prisoner's right to communicate with those outside the prison is regarded as an important bulwark against the risk of wrongful conviction or mistreatment in prison.[108] In light of the importance attached to this right, we have considered whether the proposed new criminal offence of removing or electronically transmitting "restricted documents" from a prison is so broad as to amount to a disproportionate interference with the right to freedom of expression in Article 10 ECHR. We therefore asked the Government why it is considered necessary to create an offence of such width, and in particular the justification for including within the scope of the offence information the disclosure of which "might prejudicially affect the operation of the prison."

3.36 The Government explains in its response that the new offence is intended to address shortcomings in the current law which were exposed in a recent case concerning the publication of photographs of a remand prisoner taken by an undercover journalist inside a prison. The Government accepts that in certain circumstances the new offence could engage and interfere with rights under Article 10 ECHR, but anticipates that in most circumstances such an interference would be justified for the following reasons:

- Protection of the security and good order of the prison;
- Protection of the rights of prisoners, staff and visitors;
- Securing compliance with the State's obligation to afford protection/anonymity to persons whose physical/mental health or safety would be endangered by disclosure of their identities or whereabouts;
- Protection of the integrity of the trial process by avoiding prejudicial media coverage; and
- Protection of the public.

3.37 The Government also believes that the availability of a public interest defence counters the concern about the impact of the new offence on a prisoner's right to communicate with those outside the prison as an important safeguard against the risk of wrongful conviction or mistreatment in prison.

3.38 **We accept that all of the reasons listed by the Government are legitimate aims which are capable in principle of justifying the interference with freedom of expression**

[105] Proposed new s. 40E(4)(d)(ii) of the Prison Act 1952, as inserted by clause 18 of the Bill.

[106] Proposed new s. 40D(4)(b).

[107] EN para. 162.

[108] See eg. *Daly v Secretary of State for the Home Department* [2001] 2 AC 532, in which the House of Lords held that a Prison Rule restricting a prisoner's access to a visiting journalist had to be read down in order to be compatible with Article 10 ECHR.

**which results from the existence of such an offence. We also accept that the public interest defence provides an important safeguard for freedom of expression and would protect a genuine whistleblower who might otherwise commit the offence in the course of exposing an abuse taking place inside a prison.**

3.39 **We remain concerned, however, that making this offence apply to information relating to any matter connected with the operation of the prison, the disclosure of which would or might prejudicially affect the "operation" of the prison, gives the offence a potentially very wide scope. Protecting the security of the prison, and the rights of prisoners and staff, are clearly legitimate aims which can justify the existence of this offence, but protecting the "operation" of the prison is not in our view a purpose which can be brought within any of the legitimate aims for which freedom of expression can be limited in Article 10(2) ECHR. In our view the reference to prejudicially affecting the operation of the prison in the definition of "restricted document" gives the offence too wide a scope and is not necessary in order to achieve the purposes set out by the Government, and we recommend that these references be deleted from the Bill in order to reduce the risk of the new offence leading to unjustified interferences with freedom of expression.**

## (6) Removal of requirement to appoint medical officer

3.40 The Bill removes the requirement in the Prison Act 1952 that prisons must appoint a medical officer.[109] The Explanatory Notes explain that the reason for this change is that the provision of medical care is now contracted out to primary care trusts and the role of medical officers has become redundant.[110] It is not considered by the Government to create any ECHR issues.

3.41 In view of the importance of having suitable medical expertise available in any place where vulnerable people reside or may arrive at short notice, we decided to scrutinise more closely whether the abolition of this requirement is compatible with international minimum standards for the detention of prisoners. The European Prison Rules, for example, require that arrangements shall be made to ensure at all times that a qualified medical practitioner is available without delay in cases of urgency.[111]

3.42 The Government explained in its response that the abolition of this requirement is a reflection of the improvement and modernisation of prison health services in recent years, when responsibility for prison health services has been transferred from the Prison Service to the NHS, so that prisoners' health services are now provided in the same way for prisoners as they are for the general public. It points out that this transfer of services to the NHS complies fully with the European Prison Rules which require medical services in prisons to be organised in close relation with the general health administration of the community or nation and health policy in prisons to be integrated into, and compatible with, national health policy.[112]

[109] Clause 20.

[110] EN para. 165.

[111] Rule 41.2.

[112] Rules 40.1 and 40.2.

3.43 The Government also says in its response that the removal of the medical officer role will not affect the level of service available on site to prisoners. Prisons have healthcare staff who screen all prisoners on entry into custody and a comprehensive health needs assessment determines the services available at each prison, including local arrangements for emergency and out of hours on-call cover by G.P.s, so that medical expertise is always available for prisoners that need it.

3.44 **Having considered the further information provided by the Government we are satisfied that the removal of the requirement to appoint a medical officer is compatible with the requirements of international standards for the detention of prisoners.**

## (7) Power to send to prison at 18

3.45 The Bill would give a power to the Secretary of State to send people who receive a detention and training order to prison when they turn 18.[113]

3.46 The Explanatory Notes state that there will be policy guidelines in place to ensure that transfer to prison takes place only in appropriate cases, with due consideration to the requirements of the ECHR.[114] In light of the particular vulnerability of this group of young offenders, who are currently held in Young Offender Institutions rather than the adult prison system, and the concern of the Chief Inspector of Prisons about the inadequate provision for young adults, we asked the Minister the likely content of the proposed "policy guidelines".

3.47 The Government responded that the power to place 18 year olds in a prison is a contingency measure which the Government does not intend to make use of unless young offender institutions for adults are no longer provided. It has yet to be decided how young adults sentenced to imprisonment would be accommodated after the bringing into force of the statutory provision[115] reducing the minimum age of adult imprisonment to 18. The Government therefore does not intend to prepare guidance on the new power until the policy on young adults is settled, but it acknowledges that the guidance would need to set out a procedure for identifying and excluding highly vulnerable trainees who would be likely to find life in an adult establishment particularly challenging.

3.48 We query whether such guidance would be sufficient to protect this group of offenders who are peculiarly vulnerable because of their age. We also question the appropriateness of introducing such a significant measure on a contingency basis. In our view it is premature to do so until the future of Young Offenders Institutions is known and there can be a proper debate about the measures required to ensure that vulnerable young offenders are not transferred to the adult prison system.

[113] Clause 26.

[114] EN para. 166.

[115] Section 61 of the Criminal Justice and Court Services Act 2000.

# Formal Minutes

## Monday 29 January 2007

Members present:

Mr Andrew Dismore MP, in the Chair

| | |
|---|---|
| Lord Fraser of Carmyllie | Dr Evan Harris MP |
| Lord Judd | Mark Tami MP |
| Lord Lester of Herne Hill | |
| The Earl of Onslow | |
| Lord Plant of Highfield | |
| Baroness Stern | |

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Draft Report [Legislative Scrutiny: Second Progress Report], proposed by the Chairman, brought up and read.

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

Paragraphs 1.1 to 3.48 read and agreed to.

Summary read and agreed to.

*Resolved*, That the Report be the Third 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.

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[Adjourned till Monday 5 February at 4.00pm.

# Appendices

## Appendix 1: Letter dated 19 December, from the Chairman to Lord Davies of Oldham, Government Spokesperson for Transport, re Concessionary Bus Travel Bill

The Joint Committee on Human Rights is considering the human rights compatibility of the Concessionary Bus Travel Bill. Having undertaken initial scrutiny of the Bill, we recognise that the Bill is clearly a human rights enhancing measure; by providing free bus travel for a large number of older and disabled people, it enhances the rights of those people to participate in the life of the community, which is a right recognised by Article 8 ECHR and in various international standards concerning the rights of the elderly and disabled people to independent living. However, the Committee would be grateful if you could provide a fuller explanation of the Government's view that the proposals in the Bill are compatible with the Convention rights guaranteed by the Human Rights Act 1998, on a single issue.

**Right of access to a judicial determination of civil right to reimbursement**

Clause 9 provides that the Secretary of State may amend Part 2 of the Transport Act 2000 to provide that any obligation of travel concession authorities in England to reimburse operators is instead imposed on the Secretary of State. The Explanatory Notes accompanying the Bill explain that the Government does not consider that Article 6 ECHR is "inherently engaged here with respect to the determination of reimbursement arrangements by travel concession authorities under the Transport Act 2000". It is our initial view that it is likely that these provisions, which determine the extent of any compensation or re-imbursement to which an individual business will be entitled when the Act imposes a concession, do engage Article 6(1) ECHR. The question therefore is whether the provisions for appeal in the underlying Act, and the powers in Clause 9, provide for an individual operator to have access to a fair hearing by an independent and impartial tribunal.

1. **We would be grateful if you could better explain the Government's view that Article 6 ECHR is not "inherently engaged" in relation to the determination of re-imbursement arrangements?**

The existing powers of travel concession authorities to determine re-imbursement arrangements are subject to a power of any operator who considers that he may be "prejudicially affected" by the proposed arrangements to apply to the Secretary of State for a modification of the proposed arrangements on the grounds that there are "special reasons" why they would be inappropriate with respect to one or more local services provided by him (Section 150(3), Transport Act 2000). As the Explanatory Notes explain, the Secretary of State's decision would be subject to judicial review.

In *Tsfayo v United Kingdom*, the European Court of Human Rights 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 the democratically accountable authority (in this case, the Secretary of State), to take (App. No 60860/00), 14 November 2006). The Court decided that the issue to be determined by the decision-making process in that case, namely whether there was "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.

2. **Is the Government satisfied that the existing power to apply to the Secretary of State for a modification of the reimbursement arrangements, subject to judicial review (as provided in s150(3) of the Transport Act 2000), is capable of satisfying the right of operators to a determination of their civil right to reimbursement by an independent and impartial tribunal as guaranteed by Article 6(1) ECHR?**

3. **Does the Government consider that a reviewing court will have jurisdiction to decide for itself whether there are "special reasons" why proposed reimbursement arrangements would be inappropriate, or would the court be confined to reviewing whether the Secretary of State's view on that issue was reasonable?**

The Explanatory Notes explain that should the Secretary of State exercise his powers under Clause 9(1) to take over responsibility for re-imbursement of operators, the Bill gives him the power to "set up an appropriate appeal mechanism against his determination of a reimbursement, including setting a body up to hear such appeals". Although the Bill empowers the Secretary of State to establish an appeals mechanism compatible with Article 6(1) ECHR, he is not *required* to do so. The Committee has consistently taken the view that where it is likely that safeguards, and in particular a route of appeal, are necessary to satisfy the right of access to an independent and impartial tribunal guaranteed by Article 6(1) ECHR, that these safeguards should be expressly provided for on the face of the Bill.

4. **Is there any reason why the Secretary of State, should he choose to exercise his powers in Clause 9(1)(a) to assume responsibility for reimbursing operators, should not be required to establish an appropriate avenue of appeal against his determinations to an independent and impartial body, in accordance with Article 6(1) ECHR?**

I would be grateful for your response by 19 January 2006.

## Appendix 2: Letter dated 18 January, from Lord Davies of Oldham, Government Spokesperson for Transport, re Concessionary Bus Travel Bill

Thank you for your letter of 19th December 2006 following the Committee's initial scrutiny of the Concessionary Bus Travel Bill. I have responded to your numbered points in detail below.

**JCHR Question 1 - We would be grateful if you could better explain the Government's view that Article 6 ECHR is not "inherently engaged" in relation to the determination of re-imbursement arrangements?**

1. Article 6(1) of the ECHR secures, broadly, the right to a fair and public hearing by an independent and impartial tribunal established by law in the determination of civil rights.

2. Bus operators are potentially deprived of fare income and may incur other costs as a result of the obligation under s145 of the Transport Act 2000 to provide certain concessions. They are entitled, however, to be reimbursed for this by travel concession authorities ("TCAs") under s149 of that Act. The determination of such reimbursement clearly involves a determination of the civil rights of those operators and, in that respect the Department agrees that Article 6 must be complied with. The Department's view however is that the requirements of Article 6 are met by the mechanisms provided under the existing legislation and it was this that the Department intended to convey in its Explanatory Notes to the Bill. We will shortly be revisiting these notes in readiness for the Bill's Introduction in the House of Commons and we will revise the text as appropriate to clarify this issue.

3. The right to reimbursement, and the mechanism for reimbursement determinations to be appealed in the Transport Act 2000 are unchanged by the present Bill, although clause 9 provides powers for them to be changed in the future. The Department considers that the compatibility of the reimbursement arrangements with Article 6 would not be changed by the exercise of powers under clause 9 (provided of course that those powers were exercised compatibly with Convention rights as would be required under section 6 of the Human Rights Act).

**JCHR Question 2 - Is the Government satisfied that the existing power to apply to the Secretary of State for a modification of the reimbursement arrangements, subject to judicial review (as provided in section 150(3) of the Transport Act 2000) is capable of satisfying the right of operators to a determination of their civil right to reimbursement by an independent and impartial tribunal as guaranteed by Article 6(1) ECHR?**

4. The Department is satisfied that existing provisions allowing for application to the Secretary of State where an operator seeks a modification of the reimbursement arrangements coupled with a further right to seek judicial review are capable of satisfying the requirements of Article 6 ECHR.

5. The Department notes the points the Committee raises about the *Tsfayo* case but with respect would question its relevance in this context. In *Tsfayo,* it will be recalled, that the applicant made a claim for backdated housing benefit. When that claim was refused she appealed first to the relevant local authority itself and then to a review board which comprised five councillors from the same local authority.

6. The adequacy of judicial review for Article 6(1) purposes was a key issue at the European Court of Human Rights in Tsfayo, therefore, because the review board did not itself adequately satisfy the article 6(1) requirements of independence and impartiality (and this was accepted by all the parties). Because of its membership, the Board was seen as essentially an extension of the Local Authority that had originally taken the administrative decision to reject the benefit claim. It was not therefore independent. Nor was it impartial because of the direct financial interest in the outcome of the case of the Local Authority of which the board members were a part. In consequence of this lack of independence and impartiality, it was critical for the Human Right's Court to consider whether judicial review, with its limited scope to re-examine factual issues, was adequate to correct those deficiencies at the first appeal stage. And, on the facts of the *Tsfayo* case, the Court of course held that judicial review was inadequate for those purposes.

7. By contrast with the review board in *Tsfayo,* the Secretary of State here is manifestly impartial and independent of the Travel Concession Authorities whose determinations are being challenged. Travel Concession Authorities are defined, it will be recalled, in section 146 of the Transport Act 2000. They are, depending on the form of local government in the area in question, a non-metropolitan district council in England, a council of a county in England so far as they are the council for an area for which there are no district councils, a Passenger Transport Executive for a passenger transport area in England, or a county council or county borough council in Wales. Passenger Transport Executives are in turn defined in section 162(5) of the 2000 Act by reference to the Passenger Transport Executives established under Part 2 of the Transport Act 1968. The Secretary of State is clearly independent of such bodies and there is no parallel between his relationship with them and the relationship between the local authority and the review board in Tsfayo.

8. In the Department's view, therefore, the issue in the *Tsfayo* case of whether judicial review is an adequate substitute or corrective for an inadequately independent and impartial first stage appeal body does not arise when considering the compatibility of the concessionary fares reimbursement arrangements. There is, in the person of the Secretary of State, already an independent and impartial tribunal entirely separate from the original decision making body.

**JCHR Question 3 - Does the Government consider that a reviewing court will have jurisdiction to decide for itself whether there are "special reasons" why proposed reimbursement arrangements would be inappropriate, or would the court be confined to reviewing whether the Secretary of State's view on that issue was reasonable?**

9. With regard to the issue of whether or not a reviewing court would have the jurisdiction to decide if a bus operator had "special reasons" for making an appeal under s150 of the

Act, we think it is sufficient that the court's role is confined to reviewing whether or not the Secretary of State's decision was fairly and reasonably taken.

10. This position is in the context of the Department's view that the right to a fair determination of civil rights envisaged by Article 6(1) ECHR is met by the mechanism under which the Secretary of State can hear appeals in respect of reimbursement arrangements proposed by TCAs. The Secretary of State can, as part of this, look at whether there are "special reasons" why proposed reimbursement arrangements would be inappropriate and in doing so can act as an independent and impartial tribunal by reference to the original decision maker (the TCA).

11. It is not necessary, in our view, for an appellant to be able to make a second appeal (to a second appeal body) against the merits of the decision made by the first appeal body for the requirements of Article 6 to be met. Despite this, the courts can ensure that a decision has been properly taken (including that the appeal body was not unfair, irrational or unreasonable). The existence of judicial review can of course, effectively force a reconsideration by the Secretary of State of any decision which was made unfairly, unreasonably or irrationally, and this will include circumstances where there is any procedural unfairness, or bias.

**JCHR Question 4 - Is there any reason why the Secretary of State, should he choose to exercise his powers in clause 9(1)(a) to assume responsibility for reimbursing operators, should not be required to establish an appropriate avenue of appeal against his determinations to an independent and impartial body, in accordance with Article 6(1) ECHR?**

12. We appreciate the Committee's concern to see a safeguard to Convention rights appear on the face of the Act and have attempted to explain below the Department's approach here.

13. Clause 9(3)(d) of the Bill gives the Secretary of State a power to provide for appeals against determinations made by him, rather than an obligation to do so. The Department recognises that in the event of responsibility for reimbursing operators passing to the Secretary of State, a mechanism for appeal to an independent and impartial body would be needed in order for the arrangements to remain Article 6 compliant. Indeed, the Secretary of State would have to establish an appeal mechanism to comply with his duty to act compatibly with Convention rights under section 6 of the Human Rights Act.

14. The Department does not, however, consider it would be appropriate to express this as a duty on the face of the Bill without being in a position to specify at least the broad form those appeal arrangements would take (for example the identity of the appellate body). To do otherwise would be to impose a duty lacking in content and could also risk unduly depriving the Department of necessary flexibility in being able to determine the most appropriate arrangements.

15. There are no immediate plans to exercise the power under clause 9(1) to transfer responsibility for reimbursement to the Secretary of State; but before any such action were

taken the Department would need to consider in detail all the implications of doing this including consideration of the precise appeal mechanisms to be set up. The Department will of course consult fully before any decisions are taken in this area.

16. Because of this, the Department prefers to give the Secretary of State the maximum flexibility to cater for whatever is ultimately wanted, following such consultation. This flexibility would not exist if the exact mechanism was pre-determined in the Bill.

17. In the supplementary memorandum that the Department provided the Delegated Powers and Regulatory Reform Committee, the Department gave some examples of instances in other parts of the Transport Act 2000 where a similar discretion has been given to the Secretary of State, in place of an obligation, in the hope that this might allay any concerns:

- Section 257 of the 2000 Act inserts sections 99ZA to 99ZC into the Road Traffic Act 1988. Section 99ZA provides that regulations may make provisions about driver training courses. Section 99ZC stipulates that such regulations may provide for the approval by the Secretary of State of persons providing driving training courses, and for appeals against refusal or withdrawal of such approvals.

- Section 195 of the 2000 Act also gives a power to the Lord Chancellor to make provision (via regulations) for or in connection with the determination of disputes relating to charging or licensing schemes; appeals relating to any such determinations; and the appointment of persons to hear such appeals. (Charging schemes are schemes for imposing charges in respect of use or keeping of cars on roads, and are made by local traffic authorities. Under licensing schemes, licensing authorities can charge the occupiers of workplace premises for licences allowing the parking of a maximum number of vehicles at relevant workplaces.) Similarly, the provisions under which road user charging schemes may be made by London borough councils (contained in Schedule 23 of the Greater London Authority Act 1999) do not include a requirement for such schemes to include an appeal mechanism. Instead there is a power at paragraph 28 for the Lord Chancellor to make regulations for or in connection with the determination of disputes and appeals against such determinations, and the appointment of persons to hear such appeals. SI 2001/2313 sets out procedures for appeal against charges made under any such schemes, and deals with the appointment of adjudicators to hear them.

18. The DPRRC's Report on the Bill did not raise any concerns about this point but they did draw attention to the width of the power to make regulations at clause 9(3)(g) and, in case it is helpful, I enclose a copy of a letter that I have today sent to Lord Goodhart, Chair of the DPRRC, responding to their Report on the Bill. The letter notifies them of an amendment I have tabled to address their concern about clause 9(3)(g) and as you can see, new clause 9(3)(f) now limits the scope of the regulation-making powers that an order under clause 9(1)(a) can confer on the Secretary of State. It enables regulation-making powers to be conferred which correspond or are similar to the Secretary of State's existing regulation-making powers in sections 149(3) and 150(6) and (7) of the 2000 Act.

19. In this amendment we have also sought to be more specific about the kind of amendments of the 2000 Act that an order under clause 9(1)(a) might make by virtue of clause 9(3). We hope that the wording at clause 9(3)(b), by referring to "altering" (as opposed to removing) current provisions about appeals provides reassurance that there *will* be an appropriate appeal mechanism in future.

## Appendix 3: Letter dated 19 December, from the Chairman to The Rt Hon. Baroness Ashton of Upholland, Parliamentary Under Secretary of State, Department for Constitutional Affairs, re Legal Services Bill

The Joint Committee on Human Rights is considering the human rights compatibility of the Legal Services Bill. We are aware that this Bill has been subject to pre-legislative scrutiny and have seen the correspondence between the Minister and the Joint Committee on the Draft Legal Services Bill on matters relating to human rights. Having undertaken initial scrutiny of the Bill, the Committee would be grateful if you could provide a fuller explanation of the Government's view that the proposals in the Bill are compatible with the Convention rights guaranteed by the Human Rights Act 1998, in the following respects.

**(1) Decisions of the Legal Services Board, Approved Regulators and Licensing Authorities**

The Committee is considering whether the decision-making framework provided by the Bill is such that decisions of the Legal Services Board ("LSB"), individual Approved Regulators or any Licensing Authorities (bodies authorised to license and regulate new Alternative Business Structures authorised by the Bill) are likely to be compatible with Article 6(1) ECHR. The Explanatory Notes accept that these bodies may make determinations which affect a persons civil rights, and that those determinations "would therefore need to be independent and impartial". They go on to explain that "the nature and extent to which the Article is engaged, and the procedural and other provisions necessary to ensure compliance with it, will differ according to the matter in issue". However, the Explanatory Notes do not explain precisely which provisions of the Bill the Government consider engage Article 6(1) and why those provisions are capable of being applied in a manner that is compatible with the right to a fair hearing. The Explanatory Notes explain that "the preconditions for the exercise of powers and parliamentary scrutiny, the separation of the regulatory functions from the Secretary of State and the involvement of the High Court in relation to the shareholding provisions provide sufficient safeguards when combined with the duties of the Board to comply with Section 6 of the Human Rights Act". We note that the Minister explained in correspondence with the Joint Committee on the Draft Legal Services Bill, that it was the Government's view that the composition of the Legal Services Board, taken together with the right to pursue judicial review, would provide an adequately independent and impartial hearing to satisfy the requirements of Article 6(1) ECHR.[116] In that correspondence, the Minister also identified several decisions taken by the LSB which the Government considered would involve the determination of civil rights and obligations and stressed that it was his view that the Legal

[116] HC-1154-1/HL232-I, pages 149-150.

Services Board would be adequately independent from Government to ensure that the Board would have a "satisfactory degree" of independence to satisfy Article 6(1) ECHR. The Bill provides for the Secretary of State to appoint the Chair and members of the LSB (Schedule 1, paragraph 1(1)), who will then have the power to designate Approved Regulators and determine applications by those seeking to act as Licensing Authorities for new ABS practices.

*Appeals: Financial Penalties*

Clause 38 provides for a limited appeal to the High Court in relation to the imposition of a financial penalty. Clause 38(7) provides that there will be no alternative route of challenge to any financial penalty other than the statutory appeal provided by Clause 38, thus excluding judicial review. When asked whether the grounds of appeal set out in Clause 38 would permit the appeal court to act as a reviewing court of "full jurisdiction" (i.e. allowing the Court to substitute their own decision on the appropriateness of a penalty), the Minister indicated that the power of the Court would be limited to a review of the legality and reasonableness of the decision taken by the LSB.

1. **What has persuaded the Government that the limited right of appeal against financial penalties in Clause 38 will satisfy the right to a fair hearing by an independent and impartial tribunal guaranteed by Article 6(1) ECHR?**

*Appeals: Alternative Business Structures*

The Bill provides that the Secretary of State, on the recommendation of the LSB, may establish an appeals body to hear decisions made by any person in their capacity as a licensing authority for ABS firms (Clause 79). That body will be able to hear appeals against any decision specified in the Bill, or in the licensing rules of any individual licensing authority. The licensing rules of any individual authority must be approved by the LSB. The Bill provides that any financial penalties imposed by the licensing authority will be subject to a right of appeal to the appellate body, on the same grounds identified in Clause 38, subject to a further appeal to the High Court on a point of law (Clause 94). The Committee has consistently taken the view that where it is likely that safeguards, and in particular a route of appeal, is necessary to satisfy the right of access to an independent and impartial tribunal guaranteed by Article 6(1) ECHR, that these safeguards should be expressly provided for on the face of the Bill.

2. **Is there any reason why, the Secretary of State should not be required to establish an appellate body for the purposes of hearing appeals against decisions of licensing authorities?**

3. **What has persuaded the Secretary of State that it is necessary to allow a right of appeal against decisions imposing financial penalties and decisions relating to the approval of individual interests in ABS firms, but not against a decision of the licensing authority to modify the terms of a licence granted to an ABS firm?**

*The LSB and the Rules of the Solicitors' Disciplinary Tribunal*

Clause 171 provides that where the Solicitors Disciplinary Tribunal proposes to alter their rules that alteration will generally need to be approved by the LSB. Under Clause 172, the Legal Services Board's power to issue directions apply to the Tribunal where it has failed to perform any of its functions to an adequate standard or at all. The Legal Services Board will also be able to able to recommend to the Secretary of State that an Order be made for the purpose of enabling the Tribunal to carry out its role more "effectively or efficiently" (Clause 173). In *R (Thompson) v Law Society*, the Court of Appeal concluded that the Solicitors Disciplinary Tribunal was sufficiently independent and impartial to satisfy the requirements of Article 6(1) ECHR.

4. **What has persuaded the Government that the Solicitors' Disciplinary Tribunal ("SDT") will continue to be considered an independent and impartial tribunal for the purposes of Article 6(1) ECHR after the Legal Services Board (which is to be appointed by the Secretary of State) assumes responsibility for the approval of the SDT Rules and gains a general power to issue directions to the SDT?**

**(2) Decisions of the Office for Legal Complaints and its Ombudsmen**

The Committee is considering whether the decisions of the new Office for Legal Complaints and its Ombudsmen are likely to be compatible with the right of access to an independent and impartial Tribunal guaranteed by Article 6(1) ECHR. The Explanatory Notes accompanying the Bill explain that the provisions for securing the separation and independence of complaints investigation are modelled on existing provision in relation to appointments, tenure and conditions of office which "have either not been criticised in terms of Article 6 or upheld as complying with it". The Government go on to explain that "the availability (to be provided for under scheme rules) of a form of internal review, together with the availability of judicial review is consistent with 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, on the basis that the case-law only accepts that judicial review is an adequate remedy where there is first the possibility of appeal to a first-tier tribunal such as a planning inspector which has many of the attributes of a court.

5. **What has persuaded the Government that the Ombudsman will be considered an independent and impartial tribunal for the purposes of Article 6(1) ECHR (other than the lack of any successful challenge to the operation of the Financial Ombudsman Scheme)?**

6. **On what basis has the Government concluded that, if the decision making processes of the Ombudsman are not adequate to satisfy the requirements of Article 6(1) ECHR, judicial review will provide a fair hearing by a tribunal with full jurisdiction?**

**(3) Powers of Search and Seizure: Article 8 ECHR**

The Committee is considering whether the investigative powers granted to the LSB, the Approved Regulators and Licensing Authorities by the Bill are compatible with Articles 6 and 8 ECHR. For example, the Bill gives a Licensing Authority (who may be the Legal Services Board, or another authorised regulatory body) the power to intervene in an ABS practice, including in its accounts and files, where it has suspended an individual firm's licence (Schedule 14). The Government correctly accept that this, and other "powers necessary for the Regulators to investigate whether any of the offences have been committed" will engage Article 8. The Explanatory Notes however do not explain precisely which provisions the Government consider engage Article 8 ECHR, or why any relevant interference with the rights of individual clients, or the relevant ABS firm, may be justified and proportionate (some elaboration is given in the Minister's correspondence with the Joint Committee on the Draft Legal Services Bill).

7. **Which of the provisions in the Bill which grant investigatory powers to the Legal Services Board, Approved Regulators, or Licensing Authorities do the Government consider engage the right to private life guaranteed by Article 8 ECHR?**

8. **What has persuaded the Government that each of those powers is accompanied by adequate safeguards to ensure that they are not used in a manner which is incompatible with the right to respect for private life guaranteed by Article 8 ECHR or individual clients' or firms' rights to a fair hearing guaranteed by Article 6(1) ECHR?**

In response to concerns raised by the Joint Committee on the Draft Legal Services Bill, powers of search and seizure granted to the LSB by the Bill are now subject to judicial oversight. Clauses 41 and 47 of the Bill now provide that where the LSB seeks to enter and search the premises of an approved regulator, or a former approved regulator, they must do so under a judicial warrant. A warrant may only be refused where the judge or justice of peace is not satisfied that "its issue is necessary or desirable for the purpose of continuing regulation". This is a very broad test. Although other conditions must be imposed on the issue and exercise of the powers granted by a warrant, these matters are left to secondary legislation. While we note that the Bill requires those regulations to include specific provisions on the conditions for the care of property seized and its return, no further detail is provided on the face of the Bill. Specifically, no express provision is made for the protection of items which may be subject to legal professional privilege. Although the draft Bill made provision for any search to take place during "reasonable times", there is no such condition on the face of this Bill. This approach mirrors that taken by the Government in the Compensation Bill. We raised concerns in relation to the lack of safeguards on the face of that Bill, and the same concerns may arise in this context (2005-06, Twenty-first Report, 3.13; Twentieth Report, 2.51-2.60).

9. **What matters does the Government consider to be relevant to the grant of a warrant for search and seizure?**

**10. What conditions do the Government consider necessary to ensure that the exercise of search and seizure powers under the Bill are compatible with the rights of approved regulators, individual authorised persons and their clients' rights to respect for their private life?**

**11. What has persuaded the Government that these conditions cannot be specified on the face of the Bill?**

**(4) Protection of Legal Professional Privilege**

The Committee is considering whether there is adequate provision in the Bill for the protection of legal professional privilege in new Alternative Business Structures (i.e. adequate safeguards to protect individual clients' rights under Articles 6 ECHR). The importance of the right to confidential communication with legal advisers has been consistently recognised by the European Court of Human Rights as part of the right to effective access to a fair hearing guaranteed by the Convention. The Bill provides that any communications made by or to a "licensed body" (i.e. an ABS firm) will be privileged in legal proceedings to the same extent as they would have been if they had been made to or by a "relevant lawyer" (Clause 182(3) – (5)).

**12. We note that the Government has amended the provisions in the Draft Bill to include greater protection for legal privilege owed to clients in ABS firms. What has persuaded the Government that these new provisions will be adequate to protect clients' rights under Article 6 and Article 8 ECHR to confidential communication with their legal advisers?**

I would be grateful for your response by 19 January 2006.

## Appendix 4: Letter dated 17 January 2007, from Bridget Prentice MP, Parliamentary Under Secretary of State, Department for Constitutional Affairs, re Legal Services Bill

Thank you for your letter of 19 December, which asked for a fuller explanation of the Government's view that the proposals in the Legal Services Bill are compatible with the Convention Rights given effect by the Human Rights Act 1998. As the lead minister for the Legal Services Bill, your letter has been passed on to me for response. You raised a number of specific issues and I will deal with each in turn.

**(1) Decisions of the Legal Services Board, Approved Regulators and Licensing Authorities**

**1. What has persuaded the Government that the limited right of appeal against financial penalties in Clause 38 will satisfy the right to a fair hearing by an independent and impartial tribunal guaranteed by Article 6(1) ECHR?**

Under the provision made in clause 36, in instances where the Legal Services Board (the Board) is satisfied that an act or omission of an approved regulator has had an adverse impact on one or more of the regulatory objectives, it may, where it is satisfied that it is appropriate in all circumstances of the case to do so, impose a financial penalty on the approved regulator in question.

It is accepted that the imposition of such financial penalties will amount to the determination of an approved regulator's civil rights, and as such, engages Article 6(1) of the ECHR. Clause 37 sets out the procedure that must be followed by the Board before it may impose a financial penalty. This procedure allows for the approved regulator to make representations to the Board concerning any proposed penalty and requires the Board to consider such representations.

The Government considers that the Board itself will be sufficiently independent and impartial. All appointments will be made in accordance with the Code of Practice of the Office of the Commissioner for Public Appointments, so as to ensure a transparent and accountable process of appointment on merit. The Lord Chancellor is obliged (Schedule 1, paragraph 3 as amended) to appoint members with relevant experience. Independence is also secured by provisions as to tenure (Schedule 1, paragraphs 4-9), which are similar to those provided in the Financial Services and Markets Act 2000 for the Financial Services Authority (whose independence for Article 6 purposes has not been successfully challenged), by which Board members are appointed for a fixed term of no longer than five years and may be re-appointed only once, and are removable only on limited grounds. In addition, Board members, other than the chairman, can only be removed after the Lord Chancellor has consulted the chair.

Furthermore, clause 38 allows for an approved regulator to challenge decisions of the Board to impose a financial penalty upon it. Although it is correct to state that clause 38(2) limits the right of appeal against the imposition of a financial penalty, we would suggest that these grounds provide sufficient scope for an approved regulator to raise all factual issues that may be in issue. Sub-paragraph (a) in particular would allow an approved regulator to argue that:

- there was no relevant act or omission;
- the act or omission did not have an adverse impact on one or more of the regulatory objectives; or
- it was not appropriate to impose a financial penalty.

The appeal grounds listed in the Bill are similar to the grounds for judicial review. For these reasons, we would suggest that when the Bill's provisions on the imposition of financial penalties are considered as a whole, the procedure complies with the relevant requirements of Article 6(1).

**Appeals: Alternative Business Structures**

**2. Is there any reason why, the Secretary of State should not be required to establish an appellate body for the purposes of hearing appeals against decisions of licensing authorities?**

It is important to note that the Bill requires all licensing authorities to have an appellate body in place to hear and determine appeals as provided under Part 5 (see Schedule 10, paragraph 11(2)(b)).

Where an applicant for licensing authority status is a non-statutory body, it will not need legislative instruments in order to establish an appellate body with powers to hear the relevant appeals, or to change the functions of an existing appellate body. It can simply establish the new body or adapt the functions of an existing one accordingly.

However, where an applicant for a licensing authority status is a *statutory body*, such as the Law Society or the Council for Licensed Conveyancers, it can only establish an appellate body, or vest an existing one with new functions, through recourse to amendments to legislation.

This distinction in non-statutory and statutory status of potential applicants for licensing authority designation creates a disparity in ability of these applicants to demonstrate to the Board that they comply with the requirements for designation. Clause 79 has therefore been included in the Bill to level this disparity, and to facilitate the establishment of an appellate body or changes to an existing one, without recourse to primary legislation.

**3. What has persuaded the Secretary of State that it is necessary to allow a right of appeal against decisions imposing financial penalties and decisions relating to the approval of individual interests in ABS firms, but not against a decision of the licensing authority to modify the terms of a licence granted to an ABS firm?**

Financial penalties and adverse decisions relating to interests in ABS firms both involve deprivation of assets. In the Government's view, these are severe penalties, arguably akin in some respects to some criminal penalties. In addition, similar decisions affecting interests in companies and firms, found in the Financial Services and Markets Act 2000 (e.g. sections 185(7), 186(5) and 187(4)), carry rights to refer the decisions to a separate body – the Financial Services and Markets Tribunal. For these reasons, the decision was therefore taken to allow for certain rights of appeal in these circumstances.

Decisions to modify licence terms, on the other hand, will generally have a different and less significant substantive effect, such as changes in requirements for reporting, training or internal policies or procedures. Furthermore, licence term changes will often be the subject of agreement, following on the application of a licensed body. In any event, the Bill contains a number of procedural safeguards for such decisions, including requirements that modifications may only be made in accordance with licensing rules (clause 84), and either upon application and/or upon notice to the licensed body (clause 84); and requirements for licensing authorities to provide for review of their decisions (Schedule 11, paragraph 6(3)).

**The LSB and the Rules of the Solicitors Disciplinary Tribunal**

**4. What has persuaded the Government that the Solicitors' Disciplinary Tribunal ("SDT") will continue to be considered an independent and impartial tribunal for the purposes of Article 6(1) ECHR after the Legal Services Board (which is to be appointed by the Secretary of State) assumes responsibility for the approval of the SDT Rules and gains a general power to issue directions to the SDT?**

***The Solicitors Disciplinary Tribunal (SDT) forms part of the regulatory arrangements of the Law Society. The Board will assume the role of approving elements of the Law Society's regulatory arrangements that currently rest with the Master of the Rolls. We do not consider that this would impact negatively on the SDT's independence and impartiality. The SDT's rules will be approved by the Board and not by a Minister; but it is in any event far from unprecedented for there to be a direct ministerial role in the making or approval of rules for courts and tribunals, without it being argued that the court or tribunal in question is thereby rendered insufficiently independent or impartial to satisfy the requirements of Article 6(1) ECHR.***

For example, employment tribunal procedure regulations are made by the Secretary of State and Appeal Tribunal procedure rules (for the Employment Appeal Tribunal) by the Lord Chancellor after consultation with the Lord President of the Court of Session (subsection 7 and 30 of the Employment Tribunals Act 1996); rules for the Asylum and Immigration Tribunal (whose members are appointed by the Lord Chancellor) are made by the Lord Chancellor (section 106 of the Nationality, Immigration and Asylum Act 2002; Civil Procedure Rules and Family Procedure Rules may be allowed or disallowed by the Lord Chancellor (s.3 of the Civil Procedure Act 1997 and section 79 of the Courts Act 2003); Criminal Procedure Rules may be allowed or disallowed by the Lord Chancellor with the concurrence of the Secretary of State (section 72 of the Courts Act 2003); and the Lord Chancellor may require Civil Procedure Rules, Criminal Procedure Rules or Family Procedure Rules to be made to achieve a specified purpose (section 3A of the Civil Procedure Act 1997 and subsection 72A and 79A of the Courts Act 2003).

In relation to Board's power to give directions (so that it is possible, in restricted circumstances, for directions to be given to the SDT), it should be borne in mind that the power can only be exercised if the Board is satisfied that the SDT has failed to perform any of its functions to an adequate standard or at all, or has failed to comply with a requirement imposed on it by or under enactment, and is limited to directing such steps as are necessary to remedy that failure. Furthermore, directions cannot relate to any specific case or proceedings, and are subject to the procedure and preconditions set out in Schedule 7 to the Bill, which include the requirement for the Board to obtain the advice of the Lord Chief Justice, whose view in relation to the effect of any direction on the independence and impartiality of the SDT will be of great importance.

It should also be noted that the provisions governing appointment and terms of office of members of the SDT are unchanged, and that the SDT will continue to operate as a self-governing entity. Its independence from the approved regulator (the Law Society) is

reinforced by the new section 46A inserted into the Solicitors Act 1974 by paragraph 43 of Schedule 16 to the Bill, which formalises the arrangements for the SDT to settle its budget.

Finally, the Government has listened carefully to the arguments made by a number of peers, who expressed concern that the functions in the Bill should rest with the Lord Chancellor rather than the Secretary of State. This argument was made on the basis that the Lord Chancellor has by reason of his oath of office and provisions of the Constitutional Reform Act 2005, a range of unique duties and responsibilities not shared by other Ministers. Among these are that he must have regard to "the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters"; the Lord Chancellor must be qualified by experience in Law or Parliament and he has a duty to respect the rule of law. Whilst the Government believes that conferring the ministerial functions in the Bill on the Secretary of State provides adequate safeguards in respect of independence of the Board, and other bodies subject to its oversight, we have sought to give further reassurance to the House on this issue. Consequently, at the Committee stage of the Legal Services Bill on the 9 January, Baroness Ashton accepted amendments with the effect that the Lord Chancellor will now be substituted for the Secretary of State as the minister with the duties and responsibilities specified in the Bill. Officials are currently instructing Parliamentary Counsel regarding this issue to bring forward Government amendments to cover all the functions at the Report stage of the Bill.

**(2) Decisions of the Office for Legal Complaints and its Ombudsmen**

**5. What has persuaded the Government that the Ombudsman will be considered an independent and impartial tribunal for the purposes of Article 6(1) ECHR (other than the lack of any successful challenge to the operation of the Financial Ombudsman Scheme)?**

For the purposes of independence, the relevant clauses in the Bill are clause 119 (concerning the appointment of the Chief Ombudsman and assistant ombudsmen) and paragraphs 1-10 of Schedule 14 (making provision for the membership of the OLC, the appointment of members and their terms of appointment and tenure).

The Chief Ombudsman and assistant ombudsmen are not appointed by the Lord Chancellor or with the Lord Chancellor's consent or other involvement: rather, the Chief Ombudsman is appointed by the OLC, and assistant ombudsmen are appointed by the OLC with the consent of the Chief Ombudsmen. In appointing ombudsmen, the OLC is under an obligation to appoint only persons with appropriate qualifications and experience. In addition the terms of an ombudsman's appointment, including terms as to duration and termination of appointment and remuneration, are explicitly required to be consistent with ensuring the independence of the person appointed. Furthermore, neither the Board nor the Lord Chancellor can be party to a complaint under the scheme, and the ombudsmen are entirely separate from the approved regulators.

The OLC in turn is distanced from the Executive by being appointed by the Board, although with some involvement of the Lord Chancellor: the OLC's chairman is appointed

with the Lord Chancellor's consent, and the other members of the OLC are appointed by the LSB after consultation with the chairman. The Board is under an obligation to appoint members with relevant experience, and whilst considerations of insulation from pressure through security of tenure for a member of the OLC are not the same as for a holder of judicial office, a measure of insulation is secured by provision that members of the OLC must be appointed for a fixed period not exceeding five years, and may be re-appointed only once, for a maximum of a further five years. Members of the OLC may be removed from office only by the LSB, only on the limited grounds set out in Schedule 15, and only after consulting the chairman, or in the case of the chairman, the consent of the Lord Chancellor.

The OLC is responsible for making the detailed rules for the operation of the ombudsman scheme, subject to consultation requirements set out in clause 188, and the consent of the Board (clause 152): the Lord Chancellor's consent is not required, except for rules for the setting of charges for respondents. The Board is able, through clause 153, to give directions to the OLC as to modifications of the rules, but must first publish the substance of the proposed directions and have regard to representations received as a result.

These provisions appear appropriate for ensuring the necessary degree of structural independence, as required by Strasbourg jurisprudence.

**6. On what basis has the Government concluded that, if the decision making processes of the Ombudsman are not adequate to satisfy the requirements of Article 6(1) ECHR, judicial review will provide a fair hearing by a tribunal with full jurisdiction?**

While the core structure of the OLC's complaints handling machinery is set out in the Bill, the detail of the machinery will be set out in scheme rules made by the OLC itself, subject to requirements as to consultation, and with the consent of the Board. The provisions in the Bill are such as to enable a framework to be established which complies with Article 6.

As a public body, the OLC will (by virtue of section 6 of the Human Rights Act) be under an obligation to make the machinery compatible with the Convention rights (as will the Board in its consent and direction functions).

The Financial Ombudsman Service, on which this ombudsman scheme is modelled, has the power to award redress to consumers in circumstances where it upholds complaints made against financial service providers. Its decisions are not subject to any statutory appeals procedure. The absence of such an appeals procedure has recently been approved by the Financial Services Authority and the Financial Ombudsman Service following their most recent review of the Financial Services and Markets Act 2000 and its operation. There has not been a successful challenge of the FOS scheme on the basis that it offends against Article 6, notwithstanding that the scheme makes no provision for appeals on the merits.

The initial stages of disciplinary or administrative proceedings which involve the determination of civil rights and obligations are frequently conducted by bodies which do not fully comply with all the requirements of Article 6(1), particularly as to an oral hearing. There is no automatic right to an oral hearing at every stage of administrative decision-

making proceedings. It is envisaged that the procedures to be prescribed for the complaints handling process will make it clear that the parties may apply for an oral hearing; and it is likely that the availability of a hearing on application, with the implication of waiver by the parties in the absence of such an application, will suffice for the complaints handling process to comply with Article 6 (assuming a structurally independent tribunal).

To the extent that review of decisions is required in such circumstances, there is a line of authority from the case of *Bryan v United Kingdom* to the most recent House of Lords decision in *Begum (Runa) v. Tower Hamlets LBC* to the effect that the concomitant of the extension of Article 6 to administrative decisions must be greater flexibility in considering whether its requirements have been met, and that the requirements of Article 6(1) may (depending on "matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute", as it was put in *Bryan*) be satisfied by the adoption of what has been referred to as "a composite approach" involving a decision on the merits by a "structurally" independent administrative decision maker at first instance, combined with a with appeal on a point of law only (or on classic judicial review grounds) to an Article 6 compliant court.

Furthermore, the nature of the ombudsman's powers and the provision for enforcement are analogous to the provisions under consideration in *R (Thompson) v. Law Society* [2004] EWCA Civ 167 and which were held by the Court of Appeal to be compatible with Article 6(1).

On that basis, the Government is convinced that Judicial Review is a sufficient appeal mechanism for the scheme.

**(3) Powers of Search and Seizure: Article 8 ECHR**

**7. Which of the provisions in the Bill which grant investigatory powers to the Legal Services Board, Approved Regulators, or Licensing Authorities do the Government consider engage the right to private life guaranteed by Article 8 ECHR?**

Clauses 40 and 41, 44 and 47, 54 and 55, 78, 189 and the provisions of Schedules 14, 16 and 17, provide powers necessary to investigate whether offences have been committed (and to enable regulators to be able to carry out their general regulatory functions). In principle all of these provisions engage the Article 8 rights to some degree. The provisions which enable entry and search are clauses 41, 47, 78 and 189.

**8. What has persuaded the Government that each of those powers is accompanied by adequate safeguards to ensure that they are not used in a manner which is incompatible with the right to respect for private life guaranteed by Article 8 ECHR or individual clients' or firms' rights to a fair hearing guaranteed by Article 6(1) ECHR?**

Each of the powers of entry and search has been made subject to judicial oversight in response to concerns expressed by the Joint Committee during pre-legislative scrutiny, at appendix 5 of their report. We agree that judicial oversight is an appropriate safeguard. A

judge may only issue a warrant, for example under clause 41 where an intervention direction under clause 40 has effect and the judge is satisfied that the issue of a warrant is necessary or desirable for the exercise of the intervention direction. The other new search and seizure provisions in clauses 47 and 78 parallel this approach. The Committee has noted that this is a broad approach, but further safeguards are afforded by regulations that must be made by the Lord Chancellor, subject to affirmative order, which provide for further criteria which relate to the issuing and exercise of a warrant. The information below relates to those regulations.

Clause 189 replicates existing provision at section 22A of the Solicitor's Act 1974. Although this is significantly different, in that it allows the use of reasonable force to enter the premises, this is established policy which the Bill has not sought to change. The exercise of the other powers referred to above have procedural safeguards provided for in the Bill and are subject to judicial review.

**9. What matters does the Government consider to be relevant to the grant of a warrant for search and seizure?**

The matters which are relevant for grant of a warrant under clause 189 are set out on the face of the Bill at clause 189(1), which states that such a warrant may be granted if it is suspected the accused has been carrying on reserved instrument activities when not entitled to and has therefore committed an offence under clause 14.

The Government considers that there may be a variety of different matters which can be considered relevant to the grant of a warrant for search and seizure under clauses 41, 47 and 78. The primary consideration is satisfying the balance between the rights of a body or an individual, who might be subject to an entry search and seizure order, and the need for the continuing and effective administration of legal services.

There are also a number of practical considerations which could form part of the decision whether to issue a warrant. For instance, detail as to what information is required and why and as to the likelihood of the required information being at the premises intended for search and seizure. Furthermore, should the body applying for the warrant have to demonstrate that it had taken steps, prior to making an application, to secure the information by other means, for example issuing a request for the information. However, a consideration may be that where there is reason to believe that requiring materials from a person or body would result in those materials being removed, tampered with or destroyed, this may give greater justification for a search and seizure power being exercised. If another judge or justice of the peace has refused to issue a warrant, and a second application is made that is not materially different from the first, this is likely to be a consideration in determining that the search and seizure powers are not required.

**10. What conditions do the Government consider necessary to ensure that the exercise of search and seizure powers under the Bill are compatible with the rights of approved regulators, individual authorised persons and their clients' rights to respect for their private life?**

As well as giving consideration to the matters detailed in the paragraph above when making regulations about this, the Government considers that the following conditions may need to be satisfied in respect of the execution of a warrant under clauses 41, 47 and 78. The following list is not intended to be exhaustive: that a suitably qualified person attends for the purposes of overseeing the execution of the warrant; that the warrant is executed at a reasonable hour; that the material seized is necessary for the purposes of continuing regulation and that provision is made for the return of seized materials. In addition, we would anticipate that any regulations made by the Lord Chancellor would adequately distinguish between the private and professional life of an individual, for example, a warrant should be executed in relation to business rather than solely domestic premises, and stipulate a time frame within which a warrant can be executed, for example six months.

Also, in respect of provisions at clause 41, 47 and 78, we have not allowed for a body to use force to gain entry and execute the warrant, which limits the search and seizure powers meaning that the interference with Article 8 rights is proportionate to the needs of regulation.

Clause 189 has conditions laid out on the face of the Bill and therefore will not require regulations to be made by the Lord Chancellor. The conditions that must be complied with are: that the person executing the warrant is a weights and measures officer authorised by a local weights and measures authority; that the officer must produce evidence that they are a weights and measures officer upon request; that where the officer considers it appropriate, that officer is accompanied by a constable or other person; that entry to the premises has been or is likely to be refused to the officer and that if any production of documents relevant to the investigation of an offence was required, there is reasonable cause to believe that the documents would be hidden, tampered with, removed from the premises or destroyed. We consider that these safeguards properly safeguard the individual's Article 8 rights.

**11. What has persuaded the Government that these conditions cannot be specified on the face of the Bill?**

The proposals put forward are consistent with the existing policy of the Compensation Act 2006, and we would therefore suggest this is a suitable precedent which supports conditions relating to warrants being specified in regulations rather than on the face of the Bill. This is because flexibility is required to adapt to changes in the way the powers should be exercised. The conditions may change over time, and if they are set out in statute, it would require primary legislation in order to update and amend the conditions. For example, the definition of who is a "suitably qualified person", who has to be present during the execution of a warrant, may alter and we would want to reflect those changes in the regulations.

In addition, the fact that regulations specifying these conditions in the Bill must be made and will be made by an Order subject to affirmative resolution, means that there is adequate Parliamentary scrutiny to ensure that these powers will be exercised in accordance with the principles of human rights legislation.

**(4) Protection of Legal Professional Privilege**

**12. We note that the Government has amended the provisions in the Draft Bill to include greater protection for legal privilege owed to clients in ABS firms. What has persuaded the Government that these new provisions will be adequate to protect clients' rights under Article 6 and Article 8 ECHR to confidential communication with their legal advisers?**

Clauses 182(3) to (7) are constructed so that ABS clients will benefit from the same legal professional privilege (LPP) protections that they would have had, had they retained a traditional law firm. (It should be noted that clauses 182(1) to (2) simply reproduce existing section 63 of the Courts and Legal Services Act 1990, which is being repealed by virtue of consequential amendments to the Bill).

More particularly, clauses 182(3) to (7) are constructed to piggyback and maintain existing LPP protections and rules, using an adapted 'in like manner' formula that has previously been used in the statute book when new options for legal services providers were created, such as authorised advocates or litigators under the Courts and Legal Services Act 1990 (see section 63); bodies corporate under the Administration of Justice Act 1985 (see section 33); and patent and trade mark bodies under the Copyright, Designs and Patents Act 1988 (section 280) and the Trade Marks Act 1994 (section 87). Clause 182 uses a similar formula and adapts it for the potential multi-disciplinary format of ABS services, thereby providing that clients will have the same LPP protections that they would have had if they had retained a traditional law firm, provided that their communications comply with requirements that are consistent with existing LPP rules, such as the requirement that legal advice come from a lawyer, or someone under a lawyer's direction and supervision.

For these reasons, in the Government's view, clause 182 ensures that ABS clients will benefit from the same LPP protections that they have had in retaining existing legal services providers.

I hope you have found the responses to the points that you raised sufficient. If you require any further clarification on these issues please do not hesitate to contact me.

## Appendix 5: Letter dated 19 December 2006, from the Chairman to The Rt Hon. Dr John Reid MP, Secretary of State for the Home Department, re Offender Management Bill

The Joint Committee on Human Rights is considering the human rights compatibility of the Offender Management Bill. Having carried out an initial examination of the Bill, the Committee would be grateful if you could provide a fuller explanation of the Government's view that the proposals in the Bill are compatible with the Convention rights guaranteed by the Human Rights Act 1998 in the following respects.

**(1) Whether providers will be "public authorities" for purposes of the HRA**

On the current state of the case law interpreting s. 6 of the HRA, there remains considerable legal uncertainty as to the scope of the definition of "public authority" in the Act. Recently, in *Johnson v Havering BC*, the High Court upheld the Court of Appeal's restrictive interpretation of the term in the *Leonard Cheshire* case, rejecting the argument made by the Department for Constitutional Affairs, intervening, that the *Leonard Cheshire* interpretation had been implicitly overruled by the later House of Lords decision in *Aston Cantlow*. We are aware that an appeal against the High Court's decision will be heard by the Court of Appeal in January.

**Q1. In the Government's view, will providers of probation services from the private or voluntary sectors be "public authorities" for the purposes of s. 6 of the Human Rights Act 1998?**

**Q2. Does the Government agree that on the current state of the case-law there is considerable uncertainty as to whether the courts will regard providers of probation services from the private or voluntary sectors as public authorities for the purposes of the Act? If not, why not?**

**(2) Information sharing**

The Committee is considering whether the power to disclose information for offender management purposes is sufficiently tightly defined and contains sufficient safeguards to make it likely that it will be exercised compatibly with the right to respect for private life in Article 8 ECHR.

The purposes for which disclosure may be made include "any other purposes connected with the management of offenders".

**Q3. Bearing in mind that the disclosure of information contemplated by the Bill may interfere with the right to respect for private life in Article 8 ECHR, on which of the enumerated legitimate aims in Article 8(2) ECHR does the Government rely in seeking to authorise disclosures for "any other purposes connected with the management of offenders"?**

The test for disclosure in the Bill is whether it is necessary "or expedient" for any of the specified purposes.

**Q4. In the Government's view, does a test of "expediency" satisfy the requirement that disclosures of information which interfere with the right to respect for private life in Article 8(1) ECHR must be "necessary in a democratic society"?**

**(3) New powers to search in private prisons**

The Committee is considering whether the removal of the restriction on the power of prisoner custody officers at contracted out prisons and secure training centres to search visitors, so as to enable them to require visitors to remove items of clothing which are not

merely an outer coat, jacket or gloves,[117] is accompanied by sufficient safeguards to be compatible with the right to respect for private life in Article 8 ECHR.

The European Court of Human Rights in *Wainwright v UK* has very recently reiterated the importance of stringent procedural safeguards accompanying any power to search visitors to prison.

**Q5. In light of that judgment, please provide a detailed explanation of the precise procedural safeguards which will accompany the new power to search visitors in a contracted out prison.**

**(4) New power to detain**

The Committee is considering whether the new power to detain for up to two hours in contracted out prisons and secure training centres whilst waiting for the arrival of a constable[118] is compatible with the right to liberty in Article 5 ECHR.

In the Explanatory Notes the Government states that Article 5 does not apply because requiring a person to wait for up to two hours does not amount to a deprivation of liberty. The House of Lords has held that a person who is stopped and searched under s. 44 of the Terrorism Act 2000 should not be regarded as being detained in the sense of confined or kept in custody, or in the sense of kept from proceeding or kept waiting.[119] Merely transitory detention will not therefore constitute a deprivation of liberty such as to engage Article 5 ECHR. Detention for as long as two hours, however, is unlikely to be regarded as merely transitory. The Court of Appeal in *Laporte v Chief Constable of Gloucestershire*, for example, held that detention on a coach for two and a half hours "went far beyond anything which could conceivably constitute transitory detention".[120]

**Q6. In light of the observation of the Court of Appeal in *Laporte*, that detention for two and a half hours went "far beyond" merely transitory detention, does the Government accept that requiring a person to wait for two hours pending arrival of a police constable would amount to a deprivation of liberty for the purposes of Article 5 ECHR? If not, why not?**

The Explanatory Notes alternatively say that, if Article 5 does apply, the power is compatible with that Article because it is within the scope of Article 5(1)(c), that is, a deprivation of liberty effected for the purpose of bringing the person before the competent legal authority on reasonable suspicion of having committed an offence.[121]

**Q7. Bearing in mind that the purpose of the detention is to await the arrival of a police** constable**, who has the power of arrest in order to bring the person before the competent legal authority, please provide a more detailed explanation of the Government's view that such detention is covered by Article 5(1)(c) ECHR.**

[117] Clauses 11 and 13.

[118] Clause 12.

[119] *Gillan v Metropolitan Police Commissioner* [2006] UKHL 12 at para. 25.

[120] [2004] EWCA Civ 1639 at para. 47 (this aspect of the Court of Appeal's decision is not affected by the decision of the House of Lords [2006] UKHL 55).

[121] EN para. 160.

### (5) New power to adjudicate disciplinary charges

The Committee is considering whether the new power of a director of a contracted-out prison to inquire into a disciplinary charge against a prisoner, conduct the hearing and make an award in respect of any charge risks giving rise to breaches of the right to a fair hearing before an independent and impartial tribunal in Article 6(1) ECHR.

The Bill would remove the current statutory prohibition that prevents a director of a contracted-out prison from exercising certain adjudication and segregation functions.[122] The Explanatory Notes state that it is not considered that this gives rise to any ECHR issues.[123] Article 6(1) ECHR, however, requires there to be structural independence between those with the prosecuting and those with the adjudicating roles.[124] Such structural separation is unlikely to apply in a contracted out prison in which persons answerable to the contractor will have been responsible for drafting and laying the charges, investigating and prosecuting those charges, and determining the prisoner's guilt or innocence of those charges as well as his or her sentence.

**Q8. How will the proposed new adjudication powers for directors of contracted-out prisons satisfy the requirement in Article 6(1) ECHR that there be structural independence between those with the prosecuting and those with the adjudicating roles?**

### (6) New criminal offence of removing documents from a prison

The Committee is considering whether the proposed new criminal offence of removing or electronically transmitting "restricted documents" from a prison is so broad as to amount to a disproportionate interference with the right to freedom of expression in Article 10 ECHR.

The Bill would create a new offence of removing or transmitting, without authorisation, a "restricted document" from prison. Restricted documents are defined to include any document which contains "information relating to any matter connected with the prison or its operation if the disclosure of that information would or might prejudicially affect the security or operation of the prison."[125] The Explanatory Notes acknowledge that this could, in certain circumstances, interfere with rights under Article 10 ECHR, but state the Government's view that the interference will be justified for the protection of the rights of prison staff and the security of the prison.[126]

The Bill does provide that it is a defence to show that in all the circumstances there was an overriding public interest which justified the removal or transmission of the document.[127] Nevertheless, a prisoner's right to communicate with those outside the prison is regarded

[122] Clause 14.

[123] EN para. 161.

[124] *Whitfield v UK*, App No 46357/99, Judgment, 12 April 2005, at para. 47.

[125] New s. 40E(4)(d)(ii) of the Prison Act 1952, as inserted by clause 18 of the Bill.

[126] EN para. 162.

[127] Proposed new s. 40D(4)(b).

as an important bulwark against the risk of wrongful conviction or mistreatment in prison.[128]

**Q9. Why is it considered necessary to create an offence of such width?**

**Q10. What is the justification for including within the scope of the offence information the disclosure of which "might prejudicially affect the operation of the prison"?**

**(7) Removal of requirement to appoint medical officer**

The Committee is considering whether the removal of the requirement for prisons to appoint a medical officer is compatible with international minimum standards for the detention of prisoners.

The Bill removes the requirement in the Prison Act 1952 that prisons must appoint a medical officer.[129] The Explanatory Notes explain that the reason for this change is that the provision of medical care is now contracted out to primary care trusts and the role of medical officers has become redundant.[130] It is not considered by the Government to create any ECHR issues.

**Q11. In view of the importance of having some medical expertise on site in any place where vulnerable people reside or may arrive at short notice, why does the Government consider that the abolition of this requirement is compatible with international minimum standards for the detention of prisoners such as the European Prison Rules and the UN Basic Principles for the Treatment of Prisoners?**

**(8) Power to send to prison at 18**

The Committee is considering whether there will be adequate safeguards accompanying the proposed power of the Secretary of State to send people who receive a detention and training order to prison when they turn 18.

The Explanatory Notes state that there will be policy guidelines in place to ensure that transfer to prison takes place only in appropriate cases, with due consideration to the requirements of the ECHR.[131]

**Q12. Will a** draft **copy of the proposed policy guidelines be made available in draft while the Bill is before Parliament? If not, what, in outline, will be the likely content of the proposed "policy guidelines"?**

I would be grateful for your response by 19 January 2007.

[128] See eg. *Daly v Secretary of State for the Home Department*.

[129] Clause 20.

[130] EN para. 165.

[131] EN para. 166.

## Appendix 6: Letter dated 17 January 2007, from Gerry Sutcliffe MP, Parliamentary Under Secretary of State, Home Office, re Offender Management Bill

1. Thank you for your letter of 19 December to the Home Secretary, seeking a fuller explanation of certain aspects of the Government's view that the proposals in the Bill are compatible with the Convention rights guaranteed by the Human Rights Act 1998. I am replying as the Minister primarily responsible for the Bill.

2. I am very grateful to the Committee for the careful consideration of this Bill and I welcome the scrutiny and expertise it can contribute to the debate. As you know, the Government takes its obligations under human rights instruments seriously, and we have given careful consideration to their implications as we have developed the Bill.

3. I will address the questions raised by the Committee in chronological order.

**(1) Whether providers will be "public authorities" for purposes of the HRA.**

**Q1. In the Government's view, will providers of probation services from the private or voluntary sectors be "public authorities" for the purposes of section 6 of the Human Rights Act 1998?**

4. In the Government's view providers of probation services from the private or voluntary sector will be functional "public authorities" for the purposes of section 6 of the Human Rights Act 1998 ("the HRA").

**Q2. Does the Government agree that on the current state of the case-law there is considerable uncertainty as to whether the courts will regard providers of probation services from the private or voluntary sectors as public authorities for the purposes of the Act? If not, why not?**

5. The Government is clear that providers of probation services from the private or voluntary sector will be functional "public authorities" as stated above. We hope that this clear statement will assist the court in the event that they find themselves in any difficulty.

**(2) Information sharing.**

**Q3. Bearing in mind that the disclosure of information contemplated by the Bill may interfere with the right to respect for private life in Article 8 ECHR, on which of the enumerated legitimate aims in Article 8(2) ECHR does the Government rely in seeking to authorise disclosures for "any other purposes connected with the management of offenders"?**

6. The Government's view is that many instances of disclosure using the power in clause 10 will not engage Article 8. That will particularly be the case where data is anonymised prior to disclosure by one party to another, as typically occurs when undertaking research.

7. That said, there will clearly be cases where the identity of the individual to whom the data relates will not be anonymised prior to disclosure. In those cases, Article 8 may be engaged, particularly, but not necessarily, if the individual in question has not consented to the disclosure. If the view is taken that Article 8 is engaged and disclosure amounts to an interference with a protected right, it will of course be incumbent upon the party proposing to make the disclosure to satisfy himself that any such interference is necessary in order to pursue a legitimate aim and is a proportionate means of achieving it.

8. Where making a disclosure for "*any other purposes connected with the management of offenders*" the Government envisages that, dependent on the circumstances of each particular case, it will rely on one or more of the following legitimate aims listed in Article 8(2):

a) the interests of public safety;

b) the prevention of crime or disorder;

c) the protection of health or morals; or

d) the protection of rights and freedoms of others.

9. The Government takes the view that those aims will be relevant where disclosure seeks to achieve an offender management purpose, because of the nature of those individuals in respect of whom data may be shared under clause 10. Those offenders dealt with by the criminal justice system have, to differing degrees, inflicted some harm on society and pose a threat to public safety or individual members of the public as a result. Where offenders are passing through the prison system or are released into the community under supervision, it is necessary to maximise their prospects of rehabilitation and minimise the possibility of their reoffending. Success in furthering those purposes (which are clearly offender management purposes) will benefit both the offender and society at large. Consequently, where disclosure is considered to be necessary for these purposes or in order to assist them, either in individual cases or in a wider research context, the Government's view is that such disclosure will usually be necessary for one or more of the listed Article 8(2) aims.

10. Of course, should the Government conclude that the specific disclosure for an offender management purpose meet one or more of those aims, it will be required to undertake a separate assessment of whether any interference occasioned by the proposed disclosure a proportionate means of achieving the aims in question.

11. The test for disclosure in the Bill is whether it is necessary "or expedient" for any of the specified purposes.

**Q4. In the Government's view, does a test of "expediency" satisfy the requirement that disclosures of information which interfere with the right to respect for private life in Article 8(1) ECHR must be "necessary in a democratic society"?**

12. The Government takes seriously its obligation to ensure the compatibility of any disclosure with Article 8 in those instances in which it is engaged. The Government

recognises that where disclosure amounts to a potential interference with the rights given by Article 8(1), it must be assessed as being necessary in the interests of the democratic society in order to fall within one of the qualifications in Article 8(2). That being so, the Government accepts that a conclusion that disclosure may be "*expedient*" will not, of itself, satisfy the requirement of necessity set out in Article 8(2). Of course, in most cases an expedient disclosure may also be one that is necessary in an Article 8(2) sense. But there is no guarantee of that and the issue of necessity for Article 8 purposes must therefore be approached rigorously on a case-by-case basis.

13. However, there will be many occasions in which satisfying the test of expediency will be enough to render lawful a proposed disclosure. In those cases where an individual cannot be identified from the data proposed to be disclosed, no test of necessity (either under the ECHR or separately under the Data Protection Act 1998) will have to be satisfied before disclosure can take place. Accordingly, the fact that a disclosure may be expedient will be sufficient to bring the proposed disclosure within the ambit of the power.

**(3) New powers to search in private prisons.**

**Q5. Please provide a detailed explanation of the precise procedural safeguards which will accompany the new power to search visitors in a contracted out prison.**

14. The provision in the Bill merely seeks to replicate existing search powers that currently apply to 90% of the prison population i.e. those managed in the public sector. Our aim is to remove a restriction upon the powers of Prisoner Custody Officers in privately-run prisons that was created by the Criminal Justice Act 1991. This will increase security in private prisons by making it more difficult for people to smuggle drugs, contraband and other unauthorised items.

15. Currently, searching of visitors in prisons is regulated under Rule 71 of the Prison Rules 1999. These rules apply equally in both public and private sector establishments and nothing in these proposals in any way alters that. The rules require that searching "a person shall be carried out in as seemly a manner as is consistent with discovering anything concealed on the person or their belongings".

16. To ensure a consistent, reasonable and lawful approach to searching common techniques apply across all prisons (both public and private sector) of a similar security category, these techniques are expressly detailed in the National Security Framework. This is a mandatory Prison Service Order (Prison Service Order 1000) which is not made publicly available due to its restricted security status and impact on operational matters. However, it is freely accessible to staff in both public and private prisons. Prison Service Orders are formal statements of operational policy. PSOs have no legal status *per se* but they are treated as being binding on those who are subject to them, other than in exceptional circumstances which justify departing from them. Each prison (public or private) must have a Local Security Framework which is consistent with these procedures as described in the National Security Framework and this is subject to an external compliance audit by the Standards Audit Unit in the Prison Service.. These audits take place in the same manner, using the same baselines and to the same frequency in both

public and private prisons and the same teams of auditors cover both sectors. It is a contractual requirement of a private prison to have in place a Local Security Framework that has been assessed as compliant by the Standards Audit Unit. Additionally, private prisons are contractually obliged to undertake a regular programme of self-audits of their procedural compliance with correct searching techniques.

17. Further safeguards common across both sectors are provided by inspection from HM Inspectorate of Prisons, the Independent Monitoring Board at each prison and ultimately via an avenue of complaint to the Prison and Probation Ombudsman.

18. Consequently, we feel appropriate safeguards have been provided to ensure the procedures and techniques employed to conduct searches are explicitly defined and will be precisely the same as are currently utilised in public sector prisons. Adherence to proper regulation and control of these methods will be a requirement either directly by operation of law or through the detailed and legally binding operating contract of each prison. There is adequate monitoring of procedures to ensure compliance.

19. In addition specific safeguards apply to the conduct of those involved in the management and operation of privately run prisons.

20. First, on the face of the Bill, we have expressly prevented the use of intimate searching techniques by staff in private prisons. This reflects precisely the practice adopted by staff in the public sector but we thought it important to ensure that this was made absolutely clear in relation to the privately run sector.

21. Importantly, the search power in question remains exercisable only by a Prisoner Custody Officer. These officers are required to be certificated as competent to do so by the Controller as a condition of being appointed as a Prisoner Custody Officer. Modules on the correct searching techniques and the limits of search powers are already elements of the training course which must be successfully completed by all staff prior to certification as a Prisoner Custody Officer.

22. Finally, and more generally, monitoring of the day-to-day running of a private prison is conducted by the prison's Controller. A Controller (a Crown Servant who monitors the delivery of the contract and conditions for prisoners) is obliged by section 85(4) of the 1991 Act to monitor performance of the contracted out functions in a private prison. In practice the Controller is permitted by the contracts governing performance in the private sector to observe and monitor the contractor's staff as they conduct searches. Furthermore, the Controller, when performing his general monitoring duties under the 1991 Act, is able to observe staff as they undertake these duties.

**(4) New power to detain.**

**Q6. In light of the observation of the Court of Appeal in Laporte, that detention for two and a half hours went "far beyond" merely transitory detention, does the Government accept that requiring a person to wait for two hours pending arrival of a police constable would amount to a deprivation of liberty for the purposes of Article 5 ECHR? If not, why not?**

23. The Government does not accept that detention under the power for up to two hours necessarily connotes a deprivation of liberty so as to engage Article 5.

24. The Strasbourg case law bearing on what amounts to a deprivation of liberty for the purposes of Article 5 clearly establishes that one must look at the facts of each individual case before reaching a conclusion. In assessing those facts, account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the act in question that is said to constitute a deprivation of liberty[132]. To suggest that detention under the power for two hours will always engage, or even that it is necessarily capable of engaging, is inconsistent with that approach.

25. Consequently, caution must be exercised when seeking to draw any general lesson from previous case law dealing with detention that may, superficially at least, resemble the sort of detention that may be effected under Clause 12. Indeed, this is an echo of the position taken by House of Lords on this point, expressed in the following terms by Lord Bingham: "*The Strasbourg jurisprudence is closely focused on the facts of particular cases and this makes it perilous to transpose the outcome of one case to another where the facts are different*".[133]

26. That said, the Government takes the view that existing case law favours its view that detention under the clause, even for a period of up to two hours, will not amount to a deprivation of liberty within the meaning of Article 5(1). For example, in *X v Austria*[134] it was held that there was no deprivation of liberty where a 10-year old child was held in a (sometimes unlocked) police cell for two hours for the purposes of questioning. The Government would contend that detention in that case was not materially different in its nature from the sort of detention that would be effected under this clause, which may not even require confinement in one locked or enclosed place.

27. Further support to the Government's view is given by the House of Lords judgement in *Gillan*, in light of which the view of the Court of Appeal in *Laporte* (which is only of persuasive value following the overturning of its decision by the House of Lords, before which Article 5 was not argued) must be read. In *Gillan*, which involved an allegation that detention for up to 30 minutes pending completion of a stop and search procedure under the Terrorism Act 2000, it was contended that such detention engaged Article 5 on the basis that it was involuntary because of the power of the police to detain, the power to use reasonable force to ensure compliance and the existence of a criminal sanction imposed for non-compliance. These, of course, are all features of the clause 12 power. In response to this contention, it was held that there was no deprivation of liberty for the purposes of Article 5. The Lords reached their conclusion on the basis that the detention in question was in the nature of being kept waiting or kept from proceeding, rather than detention in the nature of confinement or custody. It was significant that during the procedure an individual would not be arrested, handcuffed, confined or removed to a different place. The Government submits that such a position reflects very closely, if not precisely, the

[132] See Guzzardi v Italy (1980) 3 EHRR 333 at paragraphs 92 to 93.

[133] See Gillan v Commissioner of Police for the Metropolis [2006] UKHL 12 at paragraph 23.

[134] (1979) 18 DR 154.

position applying during detention under Clause 12. To this end the Joint Committee is requested to note that the power is framed in terms of there being a power to impose a requirement to wait, as opposed to there being a power to confine.

28. In stating its view that Article 5 is not in play, the Government would also point out that the deprivation in *Laporte* lasted for a period longer than can ever be permitted by Clause 12. Further, the Government anticipates that the two and a half hour period in *Laporte* will be substantially longer than a period of detention effected under Clause 12 in the clear majority of cases in which it is used. Finally, detention under Clause 12 is properly "transitory" detention of the type referred to as being outside Article 5 in *Laporte*. Detention is only ever effected for the purpose of handing the individual over to a police officer on arrival and, for this reason, detention will only ever be for the shortest possible period in the circumstances of the case. Each of these factors is highly significant.

**Q7. Bearing in mind that the purpose of the detention is to await the arrival of a police constable, who has the power of arrest in order to bring the person before the competent legal authority, please provide a more detailed explanation of the Government's view that such detention is covered by Article 5(1)(c) ECHR.**

29. If Article 5 is engaged, the Government's view is that detention effected by a Prisoner Custody Officer acting under Clause 12(1) will be covered by Article 5(1)(c) for the following reasons. The government would ask the Joint Committee to note that Article 5(1)(c) consists of two "limbs". The first permits detention for the purpose of bringing an individual before the competent authority on suspicion of an offence having been committed. The second permits detention where reasonably necessary to prevent a person committing an offence or fleeing, having done so. The Joint Committee's question focuses ostensibly on the first limb. However, this response will deal with both limbs, given that the detention envisaged by Clause 12 is capable of falling within both of them.

30. The first limb is likely to be most relevant when, upon having conducted a search of a visitor, a Prisoner Custody Officer reasonably determines that a crime has been committed by the person he has searched. With regard to this limb, Article 5(1)(c) does not require that detention in these circumstances may only be effected following an arrest in order for that detention to be authorised. It authorises detention more widely than that. It is clear that detention effected without arrest is within Article 5(1)(c) where it is lawful and is effected for the purpose of bringing a person before the competent legal authority on suspicion that an offence has been committed. That is because Article 5(1)(c) authorises "*arrest or detention*" for that purpose. Such detention in the circumstances covered by Clause 12(1) will be lawful in the wider sense, as it is effected by the Prisoner Custody Officer exercising the very power which the Clause gives to him. For that power to be exercised the Prisoner Custody Officer must hold a reasonable suspicion that specified offences have been committed.

31. That being the case, the Government's view is that detention by a Prisoner Custody Officer pending future arrest by a Police Officer is permitted by the first limb of the Article. The detention will have been effected with the sole purpose of ensuring that a person is brought before the competent authority on reasonable suspicion of having committed an

offence. The fact that custody of the person may subsequently be transferred to a Police Officer, once such detention has been effected, in order to further the purpose referred to in Article 5(1)(c), does not change the fact that the initial act of detention by the PCO was effected for that same purpose. On that analysis, detention by the Prisoner Custody Officer is detention authorised by first limb of the Article.

32. The second limb is likely to be most relevant in one of two circumstances. The first, where a Prisoner Custody Officer determines that a crime has been committed by a visitor and he takes the view that detention is necessary in order to prevent the visitor escaping. The second is where a suspicion is formed that a visitor may be about to commit an offence but detention is required in order to enable a Police Officer to arrive in order to carry out an intimate search.

33. The first example given here is clearly covered by the second limb, as Article 5(1)(c) authorises detention that is effected for the purpose of preventing a person from fleeing, provided that there exists a reasonable suspicion that he has committed an offence. As set out above, the clause 12 power is only available in instances where such a reasonable suspicion exists.

34. The second instance is similarly covered by this limb. Where a Prisoner Custody Officer detains a person pending the arrival of a Police Officer to conduct an intimate search, the clause again enables him to do so only where he has formed a reasonable suspicion that an offence has been committed and could be prevented from being committed on a continuing basis by the visitor gaining entry to the rest of the prison. Detention in these circumstances enables a Police Officer to attend to verify whether an offence has been committed by means of a more intrusive search. The Police Officer may then take such further action as may be necessary. Detention after that point may well also be covered by the first limb of Article 5(1)(c) if a decision is made that the visitor should be arrested and taken to a Police station with a view to charging him.

35. The Government would like to take this opportunity to set out its view that detention under clause 12 would also be authorised by Article 5(1)(b) were Article 5 held to be engaged.

36. Paragraph 71 of the Prison Rules 1999 states that "*Any person or vehicle entering or leaving a prison may be stopped, examined and searched and in addition any such person may be photographed, fingerprinted or required to submit to some other physical requirement.*" Consequently, upon seeking to enter or leave a prison a visitor can be required to submit to a search in a manner prescribed by law. That will particularly be appropriate where a reasonable suspicion has been formed that the visitor may have committed an offence.

37. The Government accepts that detention in accordance with Article 5(1)(b) should, in this context at least, be warranted by the specific circumstances of each case in order to prevent unnecessary detention. To this end, the Government contends that the requirement that detention may only take place in order to conduct a search upon reasonable suspicion that an offence has been committed satisfies that requirement. That

limitation will act as an effective safeguard against arbitrary detention of any visitor who indicates that they have valid reasons for refusing to submit to a search.

38. The Government will ensure that the above review is reflected in future versions of the Explanatory Notes.

**(5) New power to adjudicate disciplinary charges.**

**Q8. How will the proposed new adjudication powers for directors of contracted-out prisons satisfy the requirement in Article 6(1) ECHR that there be structural independence between those with the prosecuting and those with the adjudicating roles?**

39. The proposed changes to the adjudication arrangements in contracted out prisons will simply mirror the existing system that operates in the public sector. The guarantees of structural independence contained in Article 6(1) are relevant to adjudications only in so far as that Article is engaged by disciplinary proceedings which are considered during an adjudication. Following the judgment of the European Court of Human Rights in *Ezeh & Connors v United Kingdom*,[135] Article 6 is engaged only where consideration is given to making an award of additional days as a punishment. In such cases, disciplinary hearings may involve the determination of a criminal penalty and are subject to Article 6(1).

40. To ensure that the requirements of Article 6(1) are met the Prison Rules 1999 were amended to set out a clear and fully independent procedure to deal with such cases. The amended Rules (see paragraph 53A(3)) provide that, where a Governor determines that a charge is so serious that it may merit an award of additional days, he must refer that case to be considered by an independent adjudicator. Once such a reference has been made a Governor has no further involvement in the disciplinary process. For these purposes, an independent adjudicator is a District Judge or Deputy District judge approved by the Lord Chancellor for the purpose of performing such a role.

41. These Rules apply equally in privately run prisons, with the Controller at present taking the role of the Governor in assessing the seriousness of the disciplinary offence. The amendment to the Criminal Justice Act 1991 made by Clause 14 of Bill does nothing to alter that procedure and simply seeks to give the role of the Controller to the Governor. Consequently, a Director will only have the power to conduct an adjudication he has determined does not involve an award of additional days and which does not therefore attract the protection given by Article 6(1). The Joint Committee may wish to note that, in non-Article 6 cases, Directors will be contractually required to fully comply with the same discipline system (set out in the Prison Discipline Manual) as operates in the public sector Prison Service.

**(6) New criminal offence of removing documents from a prison.**

**Q9. Why is it considered necessary to create an offence of such width?**

[135] (2004) 39 EHRR 1.

42. New section 40D is intended to address certain short-comings in the existing legislation, section 41 of the Prison Act 1952, which were exposed in the case of a journalist who obtained employment at a prison in 2003. He took photographs of a high-profile remand prisoner and of areas of the prison. These appeared with accompanying articles in a tabloid newspaper. The subsequent prosecution under section 41 of the Prison Act 1952 was dismissed by a District Judge on the grounds that the act committed could not be an offence under the existing law. The new offences created by the Bill seek to ensure that an offence would be committed should similar events take place in future.

43. The Government recognises the concerns that the Joint Committee has raised but believes that the offences created in new section 40D are compatible with the ECHR. The Government accepts that in certain circumstances new section 40D could engage and interfere with rights under Article 10 of the ECHR. However, it is anticipated that in most circumstances such an interference would be justified for the following reasons:

- the protection of the security and good order of the prison;
- the protection of the rights of prisoners, staff and visitors;
- securing compliance with the State's obligation to afford protection / anonymity to persons whose physical or mental health or safety would be endangered by disclosure of their identities or whereabouts;
- the protection of the integrity of the trial process by avoiding prejudicial media coverage; and
- the protection of the public.

44. New section 40D(E) provides that it is a defence to show that the accused reasonably believed that he had authorisation to do the act or that in all the circumstances there was an overriding public interest which justified the doing of the act. The Government believes that this defence counters the concerns that the Joint Committee may have regarding a prisoner's right to communicate with those outside the prison as an important safeguard against the risk of wrongful conviction or mistreatment in prison.

**Q10. What is the justification for including within the scope of the offence information the disclosure of which "might prejudicially affect the operation of the prison"?**

45. The Government needs to ensure the secure operation of the prisons in order to enable them to carry out their primary function of holding prisoners safely and securely during the period of their imprisonment. If the operation of the prison were to be disrupted by unauthorised disclosure of information that might prejudice its operation, then this might jeopardise the security of the prison, or the ability of its staff to provide the necessary level of security. This could put public safety at risk, as well as that of the prisoners and staff.

46. The Government believes that the potential risk to public and prison safety is substantial and that this is justification for ensuring that the offence covers disclosure of information which 'might prejudicially affect the operation of the prison'.

47. Again, the Government would emphasise that the availability of the public interest defence strikes the right balance between the justifiable interference with ECHR rights and the exercise of those rights in the public interest.

**(7) Removal of requirement to appoint medical officer**

**Q11. In view of the importance of having some medical expertise on site in any place where vulnerable people reside or may arrive at short notice, why does the Government consider that the abolition of this requirement is compatible with international minimum standards for the detention of prisoners such as the European Prison Rules and the UN Basic Principles for the Treatment of Prisoners?**

48. The abolition of this requirement supports the continued improvement of prison health services, exemplified by their recent transfer to the NHS, and brings them into line with health services available to the general population.

49. The requirement for prisons to have a medical officer post was until recently the route by which health services were provided to prisoners. Between April 2003 and April 2006, responsibility for prison health services transferred from the Prison Service to the NHS, and the framework to do this already existed in legal requirements in the NHS Act 1977. The Secretary of State has a general duty under section 1 of the National Health Service Act 1977 to continue to promote a comprehensive health service in England and for that purpose to provide or secure the effective provision of services in accordance with the Act. More specifically the Secretary of State has a duty under section 3 of the 1977 Act to provide medical and certain other services "to such extent as he considers necessary to meet all reasonable requirements". This duty has been delegated to Primary Care Trusts. Each Primary Care Trust must, to the extent that it considers necessary to meet all reasonable requirements, exercise its powers so as to provide primary medical services within its area, or secure their provision within its area. This means that prisoners' services are provided in the same way for prisoners as it is for the general public.

50. The original medical officer role is now at odds with modern professional management of health services and the development of multi-disciplinary clinical teams and the role as intended by the original legislation has become defunct. Removing this outdated role reflects the considerable improvement and modernisation of prison health services in recent years and also ensures that the future of prison health services remains with the NHS by being provided via the NHS Act 1977. The transfer of services to the NHS complies fully with the European Prison Rules which require medical services in prisons to be organised in close relation with the general health administration of the community or nation and health policy in prisons to be integrated into, and compatible with, national health policy.

51. Removal of the medical officer role will in itself not affect the level of service available on site to prisoners. All prisoners are screened by healthcare staff on entry into custody as part of the reception process. Prisons health services are now required to undertake a comprehensive health needs assessment of their population and ensure that appropriate medical services are provided to meet these identified needs, which determines the services

available at each establishment. This includes local arrangements for emergency and out of hours on-call cover by general practitioners, in the same way as for individuals in the community, so that medical expertise is always available for prisoners that need it. Prisons are also required to have in place a protocol with the local ambulance service to ensure that speedy access to emergency hospital services is available for those prisoners that require it. Together these measures ensure compliance with the European Rule that requires arrangements to be made to ensure at all times that a qualified medical practitioner is available without delay in cases of urgency.

52. The transfer of prison health services to the NHS also ensures that prisoners have access to the same medical care as individuals in the community and no longer have to leave the care of the NHS for the period during which they are in custody. This in turn contributes to better continuity of care. This meets the UN Basic Principle for the Treatment of Prisoners "that prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation".

**(8) Power to send to prison at 18.**

**Q12. Will a draft copy of the proposed policy guidelines be made available in draft while the Bill is before Parliament? If not, what, in outline, will be the likely content of the proposed "policy guidelines"?**

53. We do not intend to make use of the power to place an 18 year old serving a Detention and Training Order in an adult prison, unless young offender institutions for young adults are no longer provided. That may, or may not, occur after section 61 of the Criminal Justice and Court Services Act 2000 is brought into force. Section 61 has the effect of reducing the minimum age of (adult) imprisonment to 18. But it has yet to be decided how young adults sentenced to imprisonment would be accommodated after that event.

54. The power to place in a prison is therefore a contingency measure. We do not intend to prepare guidance on it until the policy on young adults is settled. But the guidance would need to set out a procedure for identifying and excluding highly vulnerable trainees who would be likely to find life in an adult establishment particularly challenging.

55. I would very happy to address any further points that the Committee considers that the Bill raises.

# Bills Reported on by the Committee (Session 2006-07)

*indicates a Government Bill

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

| *BILL TITLE* | *REPORT NO* |
|---|---|
| Bournemouth Borough Council Bill | 2nd |
| **Concessionary Bus Travel Bill*** | **3rd** |
| Consolidated Fund Bill* | 2nd |
| **Consumers, Estate Agents and Redress Bill*** | **2nd** |
| **Corporate Manslaughter and Corporate Homicide Bill*** | **2nd** |
| Crossrail Bill* | 2nd |
| Digital Switchover (Disclosure of Information) Bill* | 2nd |
| **Fraud (Trials without a Jury) Bill*** | **2nd** |
| Further Education and Training Bill* | 2nd |
| Greater London Authority Bill* | 2nd |
| Income Tax Bill* | 2nd |
| Investment Exchanges and Clearing Houses Bill* | 2nd |
| **Legal Services Bill*** | **3rd** |
| London Local Authorities Bill | 2nd |
| London Local Authorities and Transport for London Bill | 2nd |
| Manchester City Council Bill | 2nd |
| National Trust (Northern Ireland) Bill | 2nd |
| Northern Ireland (St Andrews Agreement) Bill* | 2nd |
| **Offender Management Bill*** | **3rd** |
| Planning-Gain Supplement (Preparations) Bill* | 2nd |
| Pensions Bill* | 2nd |
| Statistics and Registration Service Bill* | 2nd |
| **Tribunals, Courts and Enforcement Bill*** | **2nd** |
| **Welfare Reform Bill*** | **2nd** |
| Whitehaven Harbour Bill | 2nd |