House of Lords
House of Commons

Joint Committee on Human Rights

Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills

Seventeenth Report of Session 2007-08

Drawing special attention to:

(1) Employment Bill
(2) Housing and Regeneration Bill
(3) Regulatory Enforcement and Sanctions Bill
(4) Health and Social Care Bill

HL Paper 95
HC 501

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Seventeenth Report of Session 2007-08

Report, together with formal minutes and appendices

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Joint Committee on Human Rights

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

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

Current membership

HOUSE OF LORDS	HOUSE OF COMMONS
Lord Bowness	John Austin MP (Labour, *Erith & Thamesmead*)
Lord Dubs	Mr Douglas Carswell MP (Conservative, *Harwich*)
Lord Lester of Herne Hill	Mr Andrew Dismore MP (Labour, *Hendon*) (Chairman)
Lord Morris of Handsworth OJ	Dr Evan Harris MP (Liberal Democrat, *Oxford West & Abingdon*)
The Earl of Onslow	Mr Virendra Sharma MP (Labour, *Ealing, Southall*)
Baroness Stern	Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)

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

Publications

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

Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Bill Sinton (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Committee Specialists), James Clarke (Committee Assistant), and Karen Barrett (Committee Secretary).

Contacts

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

Contents

Report

Summary

The Joint Committee on Human Rights examines the human rights implications of Government bills. In this report the Committee draws the special attention of both Houses to aspects of the Employment Bill and the Housing and Regeneration Bill. Proposed amendments to both Bills are included as an Annex. The Committee also publishes, without comment, the Government's response to its earlier Reports on the Health and Social Care Bill, and correspondence with the Government on the Regulatory Enforcement and Sanctions Bill.

In relation to the Employment Bill, the Committee accepts the Government's view that the Bill's provisions are mostly human rights compatible. The Committee has decided to subject one aspect of the Bill to further scrutiny. The Bill would change trade union membership law in order to comply with the judgment of the European Court of Human Rights (ECtHR) in *ASLEF v UK*, which concerned the compatibility with the European Convention on Human Rights (ECHR) of the restrictions in UK law on the ability of trade unions to exclude or expel people from the union because of their membership of a political party. The Committee has examined whether the Bill strikes the "fair balance" between the competing association rights of the union on the one hand and the individual on the other which Article 11 ECHR requires. In the Committee's view the need for legislation to remedy the incompatibility found by the ECtHR is clear. The question is how (paragraphs 1.1-1.22).

The issue at stake is whether Clause 18 of the Bill as drafted provides sufficient safeguards against possible abuse of the new power to exclude or expel for party political membership, and, if not, what additional safeguards are necessary. In the Committee's view, there are gaps in the existing safeguards which leave individuals exposed to possible abuse of a union's dominant position. The Committee therefore recommends that Clause 18 should be amended to provide additional safeguards to strike a "fair balance" and suggests wording to achieve this (paragraphs 1.23-1.30).

The Committee considers that some aspects of the Housing and Regeneration Bill raise human rights issues (paragraphs 2.1-2.8). The Committee does not agree with the view of the Department for Communities and Local Government that private providers of social housing should not generally be subject to the duty to act compatibly with Convention rights in Section 6 Human Rights Act 1998 (HRA). It recommends an amendment to make all provision of social housing directly subject to the HRA (paragraphs2.9-2.17).

The Committee recommends amendments to include in the objectives of Oftenant a reference to the human rights of individual tenants; and to make clear that Oftenant will have power to set standards for protecting the rights of tenants in social housing (paragraphs 2.18-2.24).

The Committee welcomes the measure in the Bill to bring local authority sites occupied by Travellers and Gypsies within the regulatory regime of the Mobile Homes Act 1983, but regrets the delay in the implementation of the ECtHR judgment in *Connors v UK* (paragraphs 2.25-2.29).

The Committee is concerned that, following declarations of incompatibility with ECHR of Section 185(4)(b) of the Housing Act 1996, the Government is taking a long while to reach a

settled policy. It proposes as an aid to debate an amendment providing for repeal and recommends that the Government should make its position clear (paragraphs 2.30-2.33).

The Committee is concerned that the Bill would give broad scope to Oftenant to share information about providers of social housing and their tenants. It recommends an amendment to limit these powers (paragraphs 2.34-2.37).

The Committee calls on the Government to confirm that the disability duties in the Disability Discrimination Act 1995, as amended, will apply to both the HCA and Oftenant. It recommends that the Government should in developing its policies respect not only the rights of individuals under the HRA and the International Covenant for Economic, Social and Cultural Rights, but also their rights under the UN Convention on the Rights of Persons with Disabilities (paragraphs 2.38-2.43).

Bills drawn to the special attention of both Houses

1 Employment Bill

Date introduced to first House	6 December 2007
Date introduced to second House	
Current Bill Number	HL Bill 49
Previous Reports	None

Background

1.1 This is a Government Bill introduced into the House of Lords on 6 December 2007. It has a variety of purposes, repealing and amending existing legislation in the field of employment and trade union law. These include changes to the law relating to dispute resolution in the workplace, changes to the enforcement regimes for the National Minimum Wage and employment agency standards, and changes to trade union membership law in order to comply with the judgment of the European Court of Human Rights in *ASLEF v UK*.[1] The Bill completed its Committee stage in the Lords on 3 April 2008. Lord Jones of Birmingham has made a statement of compatibility under s.19(1)(a) of the Human Rights Act 1998.

1.2 A number of the Bill's provisions engage human rights. In our view the reasons contained in the Explanatory Notes to the Bill explaining the Government's view that the Bill is human rights compatible,[2] which are reasonably comprehensive, are for the most part satisfactory. However, we decided to subject to further scrutiny the provision in the Bill[3] designed to implement the judgment of the European Court of Human Rights against the UK in the *ASLEF* case,[4] which concerned the compatibility with the ECHR of the restrictions in UK law on the ability of trade unions to exclude or expel people from membership of the union because of their membership of a political party.

1.3 In the *ASLEF* case the European Court of Human Rights upheld ASLEF's complaint that UK law was in breach of the right to freedom of association in Article 11 ECHR because it had prevented the union from expelling a member for his membership of the British National Party, even though that was an organisation whose objectives were inimical to those of the union.

1.4 The Court held that the relevant provision in UK law,[5] which prohibited a trade union from expelling a member for membership of a political party, failed to strike a fair balance between the right of the union to freedom of association and the right of the individual to freedom of association. The UK had gone too far in its protection of the individual

[1] Judgment of 27 February 2007.

[2] HL Bill 13-EN, paras 103-116.

[3] Clause 18 of the Bill as amended in Grand Committee.

[4] *ASLEF v UK*, 27 February 2007.

[5] Section 174 of the Trade Union and Labour Relations Consolidation Act 1992 ("TULRCA 1992").

member against measures taken against him by his union, at the expense of the right of the union to choose its members.

1.5 The Government accepted the need to amend the law in the light of the Strasbourg judgment and conducted a consultation on two options:

> Option A: to amend the relevant provision of trade union law (s. 174 TULRCA) to ensure there is no explicit reference to a special category of conduct relating to political party membership or activities (so that trade unions would in future be free to exclude or expel members for their membership of a political party);
>
> Option B: to retain the special category of conduct relating to political party membership or activities, but significantly amend the rights not to be excluded or expelled for such conduct. On this option, the amendment to s. 174 TULRCA 1992 would refer to the limited conditions under which it would still be unlawful for the trade union to exclude or expel an individual on grounds of their political party membership or activities. Those conditions would specify that the union's decision would be unlawful unless the political party membership or activity concerned was incompatible with a rule or objective of the union, and the decision to expel was taken in accordance with union rules or established procedures.

1.6 Following consultation, the Government decided that it preferred Option A. Its reasons for this preference are summarised in the Impact Assessment accompanying the Bill: it is simpler to understand and apply in practice and therefore provides less scope for unnecessary legal action.

1.7 The Bill therefore proposes to give effect to the judgment by amending s. 174 TULRCA 1992 by removing all reference to "protected conduct".[6] The effect is to enable trade unions to apply membership rules which prohibit individuals who belong or who have belonged to a particular political party from membership of the trade union.

The human rights compatibility issue

1.8 We decided to scrutinise further whether the Bill strikes the "fair balance" between the competing association rights of the union on the one hand and the individual on the other which Article 11 ECHR requires. We wrote to the Minister on 1 February 2008[7] asking three questions:

> 1. Please explain in more detail the Government's reasons for preferring Option A over Option B.

[6] Clause 18(2).

[7] Appendix 1.

2. In particular, please explain the existing safeguards which the Government considers to be adequate to ensure that a fair balance is struck in practice between the right of a union to control its membership, as defined in *ASLEF*, and the rights of the individual, including the right not to be expelled arbitrarily or in circumstances that would result in exceptional hardship?

3. What objection does the Government have in principle to circumscribing the scope of the power to expel by explicit reference to the union's rules and to compliance with the union's procedures?

1.9 We received a response from the Minister dated 20 February.[8] The Government states that its decision to prefer Option A over Option B was based on a number of considerations.

(i) Evidence based policy making and better regulation

1.10 The Minister states in his letter that the Government wishes to "ensure that policy is based firmly on evidence and the principles of better regulation", which are said to apply as much to trade union law as they do to any other aspect of employment legislation. Option A enhances union autonomy by giving trade unions greater freedom to apply membership rules concerning membership of political parties. Option B, by comparison, is more restrictive of union autonomy because it limits the power to exclude or expel for membership of a political party by including safeguards against the potential abuse of that power. Applying principles of better regulation, the Government decided whether those safeguards were necessary by assessing (a) whether there were other existing safeguards against abuse which served this purpose and (b) whether there was any evidence of a practical problem of abuse which needed to be addressed by further safeguards.

1.11 As far as safeguards are concerned, the Government points to other safeguards in the event that the union breaches its rules or commits other abuses when expelling or excluding a member. First, a member or former member of a trade union can make a complaint to the Certification Officer about a breach or threatened breach of union rule in relation to certain matters, including expulsion.[9] The Certification Officer can issue enforcement orders requiring a union to take steps to remedy a rule breach, and his decisions can be appealed to the Employment Appeal Tribunal. Second, a member or former member of a union can bring a claim for breach of contract in the civil courts if they have been, or are threatened with being, expelled in breach of the union's rules, or without the union's established procedures being followed, or without a fair procedure. The rule book of the union, including any disciplinary procedure laid down in the rules, form part of the contract, and the principles of natural justice (or procedural fairness) are implied into the union's rules. Taken together, the Government considers that these safeguards already provide adequate protection against abuse by unions, and considers it

[8] Appendix 2.

[9] Section 108A(2)(b) of TULRCA 1992.

questionable whether a further set of safeguards, enforceable by the employment tribunal, is really needed.

1.12 As for whether there is any evidence of a practical problem of abuse requiring additional safeguards, the Government argues, applying principles of better regulation, that there is no evidence that the power of trade unions to exclude or expel members for membership of a political party has ever been abused, and therefore to introduce further safeguards against abuse "runs the risk of over-regulating".[10]

(ii) Clarity and simplicity

1.13 The Government's decision to prefer Option A over Option B was also influenced by its desire to achieve clarity in the legislative framework and simplicity of its application in practice. Option B was considered to introduce a degree of complexity which the Government considered unnecessary given the safeguards against abuse which already exist and the lack of evidence of abuse being a practical problem.

(iii) Vexatious litigation

1.14 Because of its greater complexity, Option B was considered to introduce greater uncertainty into the law, providing an opportunity for vexatious litigation by political extremists seeking publicity through litigation.

(iv) Responses to consultation

1.15 The Government was also influenced to choose Option A by the fact that there was majority support for it in the responses to consultation, including amongst non-union organisations which responded.

The debate in Lords Grand Committee

1.16 The issue was debated in Grand Committee in the House of Lords on 13 March[11] and 3 April 2008.[12] Lord Lester of Herne Hill, a Member of our Committee argued that the Government's proposal to implement the *ASLEF* judgment through clause 18 is too broad because it would enable a trade union to exclude someone from membership of the union on the sole ground that the person concerned is or has been a member of a political party. This ignored the important caveat in the judgment of the European Court of Human Rights, that the State must ensure that individuals are protected from abuse of a dominant position by a trade union. The Court recognised (at para. 43) that

> "For the individual right to join a union to be effective, the State must nonetheless protect the individual against any abuse of a dominant position by trade unions ... Such abuse might occur, for example, where exclusion or expulsion from a trade union was not in accordance with

[10] Appendix 2, at para 9.

[11] HL Deb, 13 March 2008, cols GC300-GC318.

[12] HL Deb, 3 April 2008, cols GC171-GC182.

> union rules or where the rules were wholly unreasonable or arbitrary or where the consequences of exclusion or expulsion resulted in exceptional hardship."

1.17 Lord Lester therefore argued that clause 18 should be narrowed in two respects. First, a trade union should only be able to expel or exclude an individual if that individual belongs to a political party where the political values and ideals clash fundamentally with the political values and ideals of the trade union. Second, there should be a requirement that the exclusion of the individual must not prejudice his livelihood or conditions of employment or place him at risk of, or leave him unprotected from, arbitrary or unlawful action by his employer. He proposed an amendment designed to narrow the scope of the clause in these two ways.

1.18 In the course of debate Lord Wedderburn appeared to agree with the first part of Lord Lester's amendment, but queried whether there was any basis in the judgment of the European Court of Human Rights for the proposed new restriction concerning prejudice to "the individual's livelihood or conditions of employment".[13] Lord Lester in response pointed to the passage in the judgment (para. 43) referring to the obligation on the State under Article 11 to protect individuals against the abuse of a dominant position by a trade union and explained that his amendment had "tried to narrow it to the only form of abuse of a dominant position – or trade union muscle power – that really matter to the individual."[14] Lord Wedderburn replied that he too would like to see sensible wording which limits the judgment, and commented that Lord Lester's words in his amendment "are rather good because they are almost as narrow as you can get", but he asked Lord Lester to consider whether they could be even narrower.[15] Others speaking in the debate pointed out that trade unions cannot themselves affect an individual's terms and conditions of employment.[16]

1.19 The Minister, Lord Jones of Birmingham, opposed Lord Lester's amendment on essentially the same basis as that contained in the Government's response to the Committee's letter, summarised above: existing safeguards are sufficient, there is no evidence that abuse of the power is a practical issue, loss of union membership cannot affect an individual's livelihood or terms and conditions, and to create further safeguards is therefore unnecessary and would amount to "gold-plating".[17] Nevertheless, the Government agreed to reflect on the case for some form of additional statutory safeguard, and reiterated on the Bill's last day in Committee that it remains open to others' views on the clause.[18]

[13] HL Deb, 13 March 2008, col. GC309.

[14] Ibid.

[15] HL Deb, 13 March 2008, col. GC311.

[16] See e.g. Lord Hoyle at col. GC313.

[17] Lord Jones at cols GC314-316.

[18] HL Deb 3 April 2008 col GC 181.

Compatibility assessment

The need to remedy the incompatibility

1.20 During the debate on Lord Lester's amendment, an argument was advanced that Clause 18 should be deleted from the Bill altogether, because "the judgment of the European Court of Human Rights is not binding. We do not have to legislate on this."[19]

1.21 In fact the judgment is binding on the UK. By Article 46 ECHR the UK has undertaken to abide by the final judgment of the Court in any case to which the UK is a party.[20] Refusal to implement the judgment by the UK would be a serious violation of the UK's obligations under the ECHR, with grave consequences. Deliberate refusal to implement a judgment can ultimately lead to expulsion from the Council of Europe.

1.22 **Some legislation remedying the incompatibility is therefore necessary. We welcome the Government's recognition that it is an "important principle" that the UK abide by judgments of the European Court of Human Rights.[21] We also welcome the fact that there now appears to be a consensus across the parties that the Government is under such an obligation.[22] The need for remedial legislation is therefore uncontested. The only question is how that legislation should strike the balance between the competing interests under Article 11 ECHR.**

Balancing competing rights to freedom of association

1.23 The *ASLEF* judgment unequivocally recognises that trade unions enjoy, under Article 11 ECHR, a right to freedom of association which includes the *prima facie* freedom to set up their own rules concerning conditions of membership. The judgment, however, is equally clear that this right of trade union autonomy is not unlimited: the Court clearly envisages a positive obligation on the State under Article 11 ECHR to protect the freedom of association of the individual against abuse of a dominant position by trade unions. This is clear from para. 43 of the judgment, quoted above. The question therefore is essentially whether clause 18 as drafted provides sufficient safeguards against possible abuse of the new power to exclude or expel for political party membership, and, if not, precisely what additional safeguards are necessary.

1.24 The TUC and the Government argue that clause 18 already strikes the right balance between the competing interests under Article 11. In any event, the Government argues that the availability of such remedies does not matter, because, under the conditions created by UK law, including the absence of the closed shop, a union's decision to expel or exclude an individual cannot obviously result in severe hardship. Unlike in the days of the closed shop, the inability to obtain or retain union membership will not lead to loss of livelihood.

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[19] Lord Henley, HL Deb, 13 March 2008, col GC 313.

[20] For a full explanation of what this obligation entails, see our Sixteenth Report of 2006-07, *Monitoring the Government's Response to Court Judgments finding Breaches of Human Rights*, HL 128/HC 728 at paras 4-13.

[21] HL Deb, 3 April 2008, col GC178.

[22] Ibid.

1.25 The Government is clearly correct that certain safeguards against abuse already exist in the form of complaints to the Certification Officer and actions for breach of contract in the civil courts. We also accept that the effective prohibition of the closed shop means that the inability to obtain or retain union membership is unlikely to lead to loss of livelihood. However, there are some gaps in the safeguards which currently exist.

1.26 Neither of the safeguards, for example, are available to a person who has been excluded (as opposed to expelled) from membership of a trade union. Only a member or former member can complain to the Certification Officer or bring a claim for breach of contract. The Government acknowledges that the safeguards relied on do not apply in exclusion cases, but argues that in practice expulsions are much more common than exclusions for political activities.[23]

1.27 There appears to be another gap in the existing safeguards, concerning exclusions or expulsions which would result in hardship for the individual concerned. The Government asserts that a remedy would be available in court: "the principles of natural justice would prevent an expulsion in circumstances which would result in hardship for the individual concerned",[24] and "case-law indicates that the courts could intervene to prevent an exclusion which resulted in hardship."[25] It appears that the case-law that the Government has in mind here is an old line of administrative law decisions in which the courts held that the principles of natural justice (or, in other words, procedural fairness) apply to decisions by bodies, including trade unions, which have the effect of preventing an individual from pursuing a trade or profession or from working in their chosen field.[26] However, while the administrative law principles of procedural fairness are likely to apply in exclusion or expulsion cases involving loss of livelihood, they may not apply to such decisions involving less severe personal hardship, and in any event they may only bring an entitlement to certain procedures being followed rather than prevent exclusion or expulsion *per se*.

1.28 In any event, in our view, the Government's reliance on the availability of remedies after an abuse of power is insufficient. Individuals need protection in advance and the best way to secure this is to write some detailed safeguards into the legislation itself.

1.29 **There is clearly a positive obligation to provide some safeguards against abuse and, in our view, there do appear to be some gaps in the existing safeguards which leave individuals exposed to the possible abuse of a union's dominant position in a way which could have a detrimental impact on them. We therefore recommend that Clause 18 should be amended to provide additional safeguards in order to strike a "fair balance" between, on the one hand, the Article 11 right of a trade union to control its membership and, on the other, the Article 11 rights of the individual, including the right not to be excluded or expelled from a union arbitrarily or in circumstances that would result in exceptional hardship.**

[23] Appendix 2, para. 24.

[24] Ibid. para. 22.

[25] Ibid., para 24.

[26] Eg. *Lawlor v Union of Post Office Workers* [1965] Ch 712; *Nagle v Fielden* [1966] 1 All ER 689; *Edwards v SOGAT* [1971] Ch 354; *McInnes v Onslow-Fane* [1978] All ER 211.

1.30 **We recommend the following amendment to Clause 18, which seeks to take into account the criticism that unions cannot themselves directly affect a person's livelihood/conditions of employment, and to follow more closely the language of the judgment in the ASLEF case (particularly para. 43):**

> **Page 16, leave out lines 20 to 25 and insert-**
>
> > **(a) at the end of subsection (4A) insert "but does not include membership of a political party where the values and ideals of the party are incompatible with a rule or objective of the union.**
> >
> > **(b) after subsection (4B) insert-**
>
> **(4C) For the purposes of subsection (2)(d), the exclusion or expulsion of the individual is permitted only if-**
>
> > **(a) the decision to exclude or expel was taken in accordance with the union's rules and a fair procedure;**
> >
> > **(b) the union's rules are not wholly unreasonable; and**
> >
> > **(c) the consequences of exclusion or expulsion would not result in exceptional hardship.**

1.31 **We recognise that such a formulation may be regarded as an invitation to litigate the reasonableness of a union's rules and we therefore also suggest, as an alternative, a narrower amendment to Clause 18 which would leave out the requirement in proposed new subsection (4C)(b) that the union's rules are not wholly unreasonable.**

2 Housing and Regeneration Bill

Date introduced to first House	15 November 2007
Date introduced to second House	1 April 2008
Current Bill Number	HL Bill 47
Previous Reports	

Introduction

2.1 This is a Government Bill introduced in the House of Commons on 15 November 2007. The Bill completed its final stages in the House of Commons on 31 March 2008. Second Reading in the House of Lords is scheduled for 28 April 2008. Baroness Andrews has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998. The Explanatory Notes accompanying the Bill set out the Government's view of the Bill's compatibility with the Convention rights at paragraphs 986 - 999.[27]

2.2 We wrote to the Secretary of State for Communities and Local Government on 6 December 2007 to ask for a further explanation of the Government's views on the human rights implications of the Bill.[28] Our letter crossed with a letter sent by the Government to our Chair on 10 December 2007, intended to draw our attention to the human rights issues potentially raised by the Bill.[29] The Parliamentary Under Secretary for State, Mr Ian Wright MP, responded to our letter on 20 December 2007 and we are grateful for his prompt reply.[30] We publish this correspondence with this Report.

Background

2.3 The Bill is comprised of four parts. The Government explains that its broad purpose is to "deliver more social and affordable housing, and to promote regeneration".[31] The first part of the Bill creates a new Homes and Communities Agency (HCA) and abolishes the Urban Regeneration Agency and the Commission for New Towns (English Partnerships). The HCA takes on the functions of these organisations and certain functions of the Housing Corporation. Part 2 of the Bill creates a new regulator for social housing, the Office for Tenants and Social Landlords ("Oftenant") and sets out its objectives and powers. This new regulator will take on the powers of the Housing Corporation, which is abolished. The Bill makes other miscellaneous provision in relation to social housing and housing assistance, including providing the same security of tenure, and other rights and responsibilities, to Gypsies and Travellers on local authority sites as Gypsies and Travellers on private sites and occupants of other types of residential caravan sites.[32]

[27] HL Bill 47 – EN.

[28] Appendix 3.

[29] Appendix 4.

[30] Appendix 5.

[31] HL Bill 47 – EN, para. 3.

[32] Clause 316.

The relevant human rights standards

2.4 The ECHR requires the State to respect an individual's home, as well as private and family life,[33] but does not confer a positive, enforceable right to housing.[34] However, a number of the State's duties under the Convention may be engaged in relation to the need for adequate housing and shelter. For example, the individual right to respect for private and family life may be engaged where a disabled person is provided with social housing which seriously fails to meet their needs and which may undermine their health and well being.[35] In even more extreme circumstances, were a housing policy to lead to destitution of a vulnerable individual or a group of individuals, this could amount to a breach of the right to be free from inhuman and degrading treatment (as guaranteed by Article 3 ECHR).[36] Domestic rights to access social housing or housing assistance which engage those rights must also be provided without unjustified discrimination (Article 14 ECHR).

2.5 The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises: "the right of everyone to an adequate standard of living for himself and his family, including … housing, and to the continuous improvement of living conditions."[37] The United Kingdom, as a State Party to the Covenant is required to take steps towards the realisation of that goal.

2.6 In their General Comment on this right, the UN Committee on Economic, Social and Cultural Rights have stressed that it is a right which is important not only in developing nations, but in some of the most economically developed societies, where significant problems of homelessness and inadequate housing may also exist. It is recognised that this right may be secured through a number of methods, including through private or public housing. The right is a right to adequate housing and although adequacy must be determined in part by social, economic, cultural and other factors, there are certain aspects of this right which must apply regardless of context. These include:

- Legal security of tenure;
- Availability of services, materials, facilities and infrastructure;
- Affordability;
- Habitability;
- Accessibility;
- Location; and
- Cultural adequacy.[38]

[33] Article 8 ECHR.

[34] *Chapman v UK* [2001] 33 EHRR 18.

[35] *Bernard v. London Borough of Enfield* [2002] EWHC 2282 Admin.

[36] *Limbuela v Secretary of State for the Home Department* [2005] UKHL 66.

[37] Article 11.

[38] UN Committee on Economic, Social and Cultural Rights, General Comment 4, *The Right to Adequate Housing*, Sixth Session, 1991.

2.7 The stated purpose of this Bill is to provide more effective social and affordable housing. This is clearly a positive aim, in so far as it seeks to meet individual housing needs more appropriately, supporting individual rights to adequate standards of living and housing. There are clear political disagreements about how best to secure this goal, which have been expressed during debates on this Bill in the House of Commons. Although these policy questions about how best to achieve the aim find no clear answer in human rights law, we think it is important for Parliament to appreciate that the policy choices available are circumscribed by the UK's human rights obligations which recognise the right of the individual to an adequate standard of housing and require the State to ensure that housing conditions do not violate the right to respect for private and family life or the right not to be subjected to inhuman and degrading treatment, and require access to housing and related assistance to be enjoyed without unjustifiable discrimination.

2.8 Against this background, there are five matters in relation to the Bill which raise significant human rights issues. We consider these below and make recommendations for amendments to the Bill.

Social housing and the Human Rights Act

2.9 Part 2 of the Bill makes provision for the replacement of the scheme of registered social landlords in England with registration for "providers of social housing". The registered social landlords scheme will continue in Wales. Registered providers of social housing will be private providers, whether charitable or commercial, of low cost rental accommodation or low cost home ownership accommodation. Low cost rental accommodation will be considered low cost if the rent required is below the market rate and the accommodation is made available in accordance with rules for eligibility designed to ensure that it is occupied by people whose needs are not adequately served by the commercial housing market.[39] Low cost home ownership accommodation is accommodation occupied in accordance with shared ownership arrangements or equity percentage arrangements or shared ownership trusts, according to rules for eligibility designed to ensure that it is occupied by people whose needs are not adequately served by the commercial housing market.[40]

The application of the Human Rights Act

2.10 The Department for Communities and Local Government told us that, in its view, registered social landlords should not be considered subject to the duty to act compatibly with Convention rights under section 6 of the Human Rights Act (HRA). It explained that (a) this would cause practical problems; (b) this would duplicate existing protection for their tenants unnecessarily; and (c) it would cause providers to leave the market.[41] In contrast, Shelter told our predecessors in 2004 that:

> The definition as it stands fails to recognise that [Registered Social Landlords] and [Housing Associations] are providing a changing and expanding public role in

[39] Clause 70.

[40] Clause 71.

[41] Ninth Report of Session 2006-07, *Meaning of Public Authority under the Human Rights Act*, HL Paper 77, HC 410, Memorandum 20, Ev 55-58.

> relation to social housing. In many cases [they] are taking over the functions that were previously the responsibility of local housing authorities. The growth of [large scale voluntary transfers] and the fact that in many instances RSLs are now responsible for homelessness and allocation functions also support this argument.
>
> Such a restrictive definition also appears to contradict the current direction of housing policy. Rent restructuring, the aim of having a single "social tenancy" and the equal ability of Has and RSLs to issue anti-social behaviour orders (ASBOs) to their tenants all point towards a policy of parity between HAs/RSLs and Las which is not reflected in the current definition. […]
>
> The existing interpretation also fails to give sufficient recognition to the fact that in some areas, there is little to distinguish between LHAs and HAs/RSLs. [42]

2.11 Since these submissions, the House of Lords has ruled, in *YL v Birmingham City Council*, that the application of Section 6(2)(b) HRA to functions performed by private bodies is limited. In that case, the House of Lords decided that a publicly funded resident of a private care home could not bring a claim against their service provider under the HRA.[43] In our recent reports, we have consistently expressed our view, which is shared by the Government, that this restricted interpretation undermines the original intention of Parliament that services which are wholly or partly publicly funded, would be subject to the application of the HRA, regardless of whether they are provided by private or public providers.[44]

2.12 We wrote to the Minister to ask whether it was the Government's view that registered providers of social housing would be undertaking any public functions for the purposes of the HRA 1998. We welcome the Minister's acknowledgement that, in the Government's view, there may be "circumstances where some registered providers of social housing will be performing public functions, as is the case at present in relation to registered social landlords, for example, functions related to anti-social behaviour orders". However, the Minister told us that the decision as to when registered providers of social housing are performing public functions will be a decision for the Courts. He explained that:

> The judgment in the *YL* case will no doubt be a source of reference for lower courts when deciding whether any particular public function is a public function for these purposes.

2.13 The Minister went on to explain that the Government did not generally consider that the provision of social housing for rent, and other core functions of registered providers, were public functions:

> because they are identical in substance to functions which have been and can be carried out by commercial organisations as well as by Government.

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[42] Seventh Report of 2003-04, *The Meaning of Public Authority for the Purposes of the Human Rights Act*, HL 39/HC 382, Memorandum from Shelter, Ev 29-32 (First Report).

[43] [2008] 1 AC 95.

[44] Ninth Report of Session 2006-07, *the Meaning of Public Authority Under the Human Rights Act*, paras 60 – 63, (Second Report).

2.14 We are concerned that this view takes a very narrow and simplistic approach not only to the operation of the HRA, but also to the function and purpose of social housing. The Minister's response implies that simply because a function can be performed by a mixture of private and public bodies, that function cannot be "public" in its nature. This interpretation would undermine the HRA, which draws a clear distinction between public institutions and public functions. Such functions could be performed by private providers, subject to the duty to comply with Convention rights. The application of this duty would not extend to its other functions and those providers would retain their private status. As our predecessor Committee explained:

> A number of submissions expressed concern that a wider meaning of public authority would jeopardise both the perceived and the actual status of organisations, such as housing associations, as independent of the government. In particular, they emphasised the need to preserve the administrative and financial independence of these non-governmental organisations […]
>
> We do not believe that identification as a functional public authority, that is, a private sector body that is performing a public function for the purposes of section 6 of the Human Rights Act, would jeopardise the independence from the state of a non-governmental body. Functional public authority status should not imply that an organisation is institutionally connected with the State, nor need it require that the State exercise control over its management or operation. Rather, it acknowledges that the function being performed, or the service being provided, is public in nature, irrespective of the public or private status of the organisation involved.
>
> We appreciate that the duty to comply with Convention human rights imposes restraints on the delivery of services by private sector providers. Those restraints are necessary and desirable, and are consistent with good practice in service delivery. However, compliance with these responsibilities may also impose a financial burden. The burden should not be excessive: where the application of the Act is established, the Convention rights themselves contain, to varying degrees, balances between essential public policy considerations and the rights of the individual, and the concept of proportionality is fundamental to the jurisprudence on rights. Within the application of this principled framework, considerations of the efficient working of essential services should be taken into account.[45]

2.15 The Housing Law Practitioners Association have called for the Bill to ensure that registered providers of public housing are subject to the application of the HRA.[46] Concerns have been raised during debates on this Bill about undermining private sector, registered providers of social housing to raise private finance as the Bill may be taken to blur the distinction between private and public for this purpose.[47] Our predecessor Committee went on to explain that concerns about the distinction between public and private functions in relation to finance were unfounded in relation to the application of the HRA 1998:

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[45] First Report, paras 60-65.

[46] Parliamentary Briefing, HLPA, Housing and Regeneration Bill 2007-08, Amendment: Registered providers to be public bodies, January 2008.

[47] See for example PBC Deb, 29 January 2008, c619; Cols 647-51

> There was particular concern amongst some private sector service providers that identification as a "public authority" under the Human Rights Act would, by redefining the organisations as public bodies in general terms, prevent them from raising money outside Treasury controls. Private finance raised by organisations such as housing associations is not counted as public sector borrowing. The success of Registered Social Landlords was seen as dependent on their ability to raise finance outside Treasury constraints, and the Chartered Institute of Housing argued that bodies such as housing associations "rely on private sector freedoms for their effectiveness".
>
> This line of argument seems to us wholly misconceived and without basis in law or public policy. Nonetheless, we put this concern to the Secretary of State for Constitutional Affairs, who agreed that it was highly unlikely that Human Rights Act public authority status should affect an organisation's capacity to raise private finance.[48]

2.16 We share the view of our predecessor Committee. There is no basis for the belief that the application of the duty to act compatibly with Convention rights will change the status or nature of an individual provider from private to public for any purpose other than the applicability of the Human Rights Act.[49] Compliance with Convention rights in the housing sphere will be straightforward for those providers who provide a good service and who observe the standards which are likely to be set by the new social housing regulator. On 29 March 2000, the Rt Hon Jack Straw MP, the then Home Secretary and current Lord Chancellor and Secretary of State for Constitutional Affairs, made clear that housing associations exercise public functions for the purposes of the Human Rights Act. He explained:

> The Act gives a wide meaning to "public authority". There is quite a bit of background and law to this, but the basic effect is that a court can treat you, or a part of you, as a public authority even if you are outside the central or local government machine. What matters is what you do and how that affects people's rights. And I guess that what most of you here today do includes some public authority function […] Nursing homes. Housing associations. Bodies like Group 4, though a private, not nationalised, concern, with both private and public authority functions. [50]

2.17 He went on to explain that the application of the Human Rights Act would not only be good for the better provision of public services, but good for business:

> The arrival of the Act confirms what we all knew. That the *[…] privilege* of providing public services carries with it a special duty of care. A duty to deliver them in a way that respects fairness and the dignity of the human person.

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[48] Ibid, paras 64-65.

[49] Other statutory obligations based in rights apply to private providers of private services, including private landlords; see for example Race Relations Act 1976 (as amended), the Sex Discrimination Act 1975(as amended) and the Disability Discrimination Act 1995 (as amended). See also Equality Act 1975 (Sexual Orientation) Regulations 2007 and Equality Act 2000, Part 2.

[50] Keynote Speech, Human Rights Act – Standing up for Britain and Corporate Citizenship, Home Secretary, 29 March 2000, http://www.nationalarchives.gov.uk/ERORecords/HO/415/1/hract/ipprspee.pdf (Accessed 21 April 2008).

> The Human Rights Act helps you define fairness and the dignity of the human person. It tells you what the guiding principles are. You can develop and demonstrate your best practice using that framework. You don't need me to tell you that demonstrating best practice can help to improve a company's corporate reputation.[51]

2.18 The direct application of the Act to those in low cost housing supported by the State, however, will provide a valuable direct remedy in those cases where Convention rights may be engaged, for example where the condition of the housing is such that requiring an individual to live there amounts to inhuman and degrading treatment, or otherwise amounts to a violation of the right to respect for private and family life.

2.19 In *Donoghoe v Poplar Housing and Regeneration Community Association,* Mrs Donoghue was a tenant of a registered housing association who sought to resist possession proceedings brought by her Housing Association on the grounds that her eviction would breach her right to respect for private and family life and the home. In that case, the Court was only persuaded that the Housing Association was performing a public function as a result of its very close relationship with the local council. Mrs Donoghoe was only able to rely on the provisions of the HRA as a result of the settlement between the local council and her Housing Association. As our predecessor Committee explained:

> The tests being applied by the courts to determine whether a function is a "public function" within the meaning of section 6(3)(b) of the Human Rights Act are, in human rights terms, highly problematic. Their application results in many instances where an organisation "stands in the shoes of the State" and yet does not have responsibilities under the Human Rights Act. It means that the protection of human rights is dependent not on the type of power being exercised, nor on its capacity to interfere with human rights, but on the relatively arbitrary (in human rights terms) criterion of the body's administrative links with the State.[52]

2.20 **The effect of the House of Lords judgment in YL is that some tenants in social housing will benefit from the application of the HRA while others will not, depending on whether their provider is a local authority or a private entity such as a housing association or a registered social landlord. This means that there is differential protection of the human rights of people living in social housing as well as no legal certainty either for providers or for tenants.**

2.21 On 27 March 2008 the Minister for Care Services, Ivan Lewis MP, announced that the Government intends to "amend the Health and Social Care Bill currently going through Parliament to make care homes providing publicly-arranged accommodation directly subject to duties under the Human Rights Act, reversing the effect of a recent court decision."[53] At present, we can see no basis for distinguishing between registered care homes providing publicly-arranged accommodation and providers of social housing. Just as private care homes now provide care services previously provided directly by local social services authorities, so private providers of social housing are now increasingly taking over

[51] Ibid.

[52] Seventh Report of Session 2003-04, *The Meaning of Public Authority under the Human Rights Act*, HL Paper 39/HC 382, para 41.

[53] Department of Health Press Release, 27 March 2008.

housing functions that were previously the responsibility of local housing authorities. **We therefore recommend that the Bill be amended to make providers of social housing directly subject to duties under the Human Rights Act, by the addition of a new clause in the following terms:**

> ***Provision of social housing to be a function of a public nature***
>
> **'Provision of social housing under this Part shall be deemed to be a function of a public nature for the purposes of Section 6 of the Human Rights Act 1998 (c.42).'**

Regulatory objectives and standards in social housing

2.22 The Bill proposes that Oftenant will perform its functions which a view to achieving, as far as possible, a number of fundamental objectives. These include:

- To encourage and support a supply of well-managed social housing, of appropriate quality, sufficient to meet reasonable demands;
- To ensure that actual or potential tenants of social housing have an appropriate degree of choice and protection;
- To ensure that tenants of social housing have the opportunity to be involved in its management;
- To ensure that registered providers of social housing perform their functions efficiently, effectively and economically, and to ensure that they are financially viable and properly managed;
- To encourage registered providers of social housing to contribute to the environmental, social and economic well-being of the areas in which the housing is situated;
- To encourage investment in social housing, to avoid the imposition of an unreasonable burden on public funds and to guard against misuse of public funds;
- To regulate in a way which "minimises interference" and which is proportionate, transparent and accountable.[54]

2.23 The Bill proposes that Oftenant will have the power, subject to direction by the Secretary of State, to set standards for the provision of social housing.[55] These standards will apply to all registered providers of social housing and failure to comply with the relevant standards may lead to enforcement action by the regulator.[56]

2.24 **These regulatory objectives and proposed standards are generally positive from a human rights perspective, and we particularly welcome the express inclusion of a role**

[54] Clause 88.

[55] Clause 191.

[56] Clause 217.

for Oftenant in relation to individual landlords' contribution to "the environmental, social and economic well-being of the areas in which their property is situated".

2.25 A Government amendment to the Bill requires the regulator, when setting standards, to "have regard to the desirability of registered providers being free to choose how to provide services and conduct business".[57] This amendment was proposed after concerns were raised in the Public Bill Committee in the Commons about the possibility of regulatory standards deterring private sector providers from entering the market for social housing.

2.26 The Government accepts that Oftenant will be a public authority for the purposes of Section 6 HRA.[58] Although it will be required to have regard to the desirability of promoting autonomy for registered providers of social housing, in performing its functions and in particular, when setting standards, it will also be required to act in a manner compatible with the Convention rights of individual tenants. We have previously recommended that all service providers take a positive approach to this duty.[59]

2.27 While we welcome the proposals that the regulator should incorporate some element of environmental and social responsibilities into the standards which it may set, it is disappointing that the Bill makes no reference to the functions of the regulator and the human rights of individual tenants. We consider that the regulator could helpfully set standards on meeting the rights of tenants, not least in relation to the ICECSR right to adequate housing, as elaborated in the relevant General Comment of the UN Committee on Social Rights, and the right to respect for private and family life guaranteed by the ECHR. The regulator could also provide clear guidance on the role of a rights based approach in service provision, including guidance on how and when the HRA may apply to the provision of social housing. It would also set a clear message that the regulator should take a positive approach to its obligations under the HRA, if human rights of tenants were mentioned in the regulator's fundamental objectives. **We recommend that the fundamental objectives of the new Office for Tenants and Social Landlords are amended to include an express reference to the human rights of individual tenants:**

Clause 88, page 40, line 24, after 'protection' insert:

', including protection for their human rights.'

Clause 88, page 41, line 2, at end insert-

'(11A) Pursuit of the protection of tenants' human rights, pursuant to Objective 2, includes, but is not necessarily limited to, rights protected by the Human Rights Act 1998 (c.42) and the International Covenant on Economic, Social and Cultural Rights'.

[57] Clause 191(3).

[58] Appendix 4.

[59] Seventh Report of Session 2007-08, *A Life Like Any Other? Human Rights of Adults with Learning Disabilities,* HL Paper 40-1/HC 73-1. para 117.

2.28 **We also recommend that the Bill is amended to make it clear that the new Office for Tenants and Social Landlords will have the power to set standards for the protection of the rights of tenants in social housing.**

> **Clause 191, page 81, line 39, at end insert-**
>
> **'(k) the protection of the human rights of tenants, including but not necessarily limited to, the rights guaranteed by the Human Rights Act 1998 (c.42) and the International Covenant on Economic, Social and Cultural Rights'.**

Security of tenure for Travellers and Gypsies

2.29 The Bill removes an exemption for local authorities from the application of the Mobile Homes Act 1983. This will give residents on local authority Gypsy and Traveller sites the same rights and responsibilities as those on private sites and residents of other types of residential caravan sites such as private and park home sites. The purpose of these provisions is to implement the judgment of the European Court of Human Rights (ECtHR) in *Connors v UK*.[60] In *Connors,* the ECtHR found that the summary eviction of a family from a local authority Gypsy caravan site, without reasoned justification or sufficient procedural safeguards, breached the right to respect for private life and the home under Article 8 ECHR. The Impact Assessment which accompanies this part of the Bill explains that, although the Government is committed to improving security of tenure of Travellers and Gypsies, taking no further action would mean:

> The Government would come under increasing pressure from the Joint Committee on Human Rights and European Commission (*sic*), to take action

2.30 The amendment to the Mobile Homes Act 1983 is identical to that suggested by our predecessor Committee as long ago as July 2004. In a letter to the Minister following up the judgment in *Connors*, it said "In our view rectification of the incompatibility identified by the Court could be achieved by a straightforward amendment to the definition of 'protected site' under the Mobile Homes Act 1983", and it suggested that, in view of the gravity of the interference with the Article 8 rights of Gypsies and Travellers, the incompatibility should be rectified as soon as possible by an amendment to the Housing Bill which was then before Parliament.[61] The Government rejected this suggestion, preferring to refer the question of security of tenure to the Law Commission.[62] The Law Commission's final Report "Renting Homes", published in May 2006, however, did not deal with the issue of security of tenure for Gypsy and Traveller residents on caravan sites. We expressed our concern over the continuing delay in the implementation of this judgment during the last parliamentary session.[63]

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[60] Thirteenth Report of Session 2005-06, *Implementation of Strasbourg Judgments: First Progress Report*, HL Paper 133, HC 954, para 13; Sixteenth Report of Session 2006-07, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, HL Paper 128, HC 728, paras 100-102.

[61] Twentieth Report of Session 2003-04, *Scrutiny of Bills: Eighth Progress Report*, HL Paper 210, HC 1282, Appendix 2b-2c

[62] Twenty-third Report of Session 2003-04, *Scrutiny of Bills: Final Progress Report*, HL Paper 210, HC 1282, Appendix 2c

[63] Sixteenth Report of Session 2006-07, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, HL Paper 128, HC 728, paras 100-102.

2.31 In our reports on the implementation of court judgments finding breaches of human rights, we have consistently criticised the lack of urgency on the part of the Government when introducing the measures necessary to remedy human rights breaches found by courts.[64] A delay of almost four years before bringing forward precisely the amendment suggested by the Joint Committee demonstrates our point. The delay has unnecessarily prolonged the inferior protection enjoyed by Gypsies and Travellers for their right to respect for their home and exposed an already vulnerable group to unnecessary insecurity. We intend to return to the question of how to reduce unnecessary delays in remedying incompatibilities in our next report on monitoring the Government's response to court judgments finding breaches of human rights.

2.32 The Travellers Law Reform Project has warmly welcomed these proposals, subject to some concerns, including in relation to independent resolution of disputes between local authorities and site residents.[65]

2.33 **Although we regret the unnecessary four year delay in its introduction, we welcome the measure in the Bill to bring local authority sites occupied by Travellers and Gypsies within the regulatory regime imposed by the Mobile Homes Act 1983, which in our view remedies the incompatibility identified in the judgment in *Connors v UK*.**

Discrimination in access to housing support

2.34 In our report on *Monitoring Human Rights Judgments*, we commented on the Government's response to the declarations of incompatibility made in the cases of *Morris* and *Gabaj*.[66] In those cases, domestic courts declared that Section 185(4)(b) of the Housing Act 1996 was incompatible with the right to respect for private and family life without unjustified discrimination, in so far as it requires local authorities to disregard dependants (in *Morris*, a child and in *Gabaj*, a pregnant wife), who are subject to immigration control, when considering whether an applicant has a priority need for housing assistance. The Housing Law Practitioners Association (HLPA) and the Law Society have previously written to us urging a speedy resolution to this declaration of incompatibility and the repeal of Section 185(4)(b).[67] The Government is looking for a remedy which will remove the incompatibility with the Convention, but maintain the policy objective:

> Ensuring that people who do not have a right to be in the UK cannot confer entitlement to substantive housing assistance.

2.35 We have already expressed our concern that the solution previously proposed by the Minister would not remedy the incompatibility identified in *Morris*, as it would leave in place the distinction based on immigration status which was objectionable.[68] The Minister

[64] Thirteenth Report of Session 2005-06, *Implementation of Strasburg Judgments*, HL Paper 133/HC 954, paras 8-14; Sixteenth Report, Paras 94-108; 141-3.

[65] http://www.TravellerTravellerslaw.org.uk/pdfs/housingregeneration.pdf and http://www.TravellerTravellerslaw.org.uk/pdfs/hr_bill_final.pdf (Last Accessed 9 April 2008)

[66] Sixteenth Report of Session 2006-07, *Monitoring the Governments response to Court judgments finding breaches of Human Rights*, paras 125 – 134.

[67] Ibid, Appendix 35 and Appendix 36.

[68] Ibid, para 130-132.

has told us that the Government is still working on a suitable remedy, but that, if possible, the Government proposes to make provision for a remedy in this Bill.[69] An amendment was proposed during Public Bill Committee that would have repealed Section 185(4) of the Housing Act 1996. [70] This amendment was withdrawn after a reassurance by the Minister that the Government was committed to introducing a "remedy as soon as we can". The Minister explained that the Government considered that this matter raised some:

> difficult policy issues about ineligible persons from abroad being able to confer entitlement to housing on another person, as well as difficult issues about human rights.

The Minister went on to explain:

> I am no lawyer - simply repealing section 185(4)(b) is not the answer. We need to find the right balance – an appropriate balance – between our strong policy that persons from abroad who are not eligible for assistance should not be able to confer entitlement on someone else, and the requirements and conditions of the European convention on human rights.

2.36 **We are concerned at the time which the Government has taken to reach a settled policy on this issue. If the Government intends to allow the incompatibility to stand, in order to maintain its policy, it should make their position clear. While we have previously been reassured during last session that a solution would be forthcoming early in this session, the Government's proposals have now been withdrawn and the issue is being re-examined within Government. The Government did not appeal the Court of Appeal decision in *Morris*; the decision stands and Section 185(4) remains incompatible with Convention rights. We propose an amendment that would provide for repeal, for the purposes of provoking further discussion on this issue in the House of Lords:**

> **After Clause 313, insert the following new clause-**
>
> ***Eligibility for housing assistance***
>
> **'In section 185 of the Housing Act 1996 (c. 52) (Persons from abroad not eligible for housing assistance), subsection (4)(b) is omitted'.**

2.37 **The Minister should explain whether the Government intends to propose a remedy during this session and, if so, provide a timetable for action. If the proposals are intended to be introduced during the passage of this Bill, we would be grateful for a draft copy of any amendments as soon as they are available. If not, the Minister should commit to the introduction of a remedial order as soon as possible.**

[69] Appendix 5.

[70] PBC Deb, 24 Jan 2008, Cols 521 - 523

Information sharing powers

2.38 The Bill proposes broad powers for Oftenant to disclose information to any "public authority" for any "purpose connected with the regulator's functions" or "connected with the authority's functions". The Bill defines public authority using the definition in the Human Rights Act: "a person having functions of a public nature". This information sharing gateway will apply whether or not the functions of a public nature are exercised in the UK. A reciprocal power will extend to the regulator to receive information from any "public authority" for any purpose connected with its functions. It is likely that, given the broad functions of the regulator, it will hold personal information about tenants as well as regulated providers of social housing.

2.39 This clause creates an extremely broad information sharing gateway. The only safeguard applied to the disclosure of information is that disclosure may be "subject to restrictions on further disclosure", subject to criminal sanctions. The Bill does not explain what those restrictions will be or who should determine when those restrictions should apply.

2.40 The Minister told us that our concerns about the breadth of these powers were unfounded. He explained that (a) these powers broadly reflect existing statutory powers exercised by the Housing Corporation; (b) that the Data Protection Act 1998 will continue to apply to the information which is shared; and (c) that the regulator will be subject to the duty to act in a Convention compatible way (Section 6, HRA).[71]

2.41 In our recent report on the Human Fertilisation and Embryology Bill, we raised our concerns about increasing numbers of information sharing proposals with little protection for personal information in primary legislation.[72] In relation to that Bill, we expressed our concern that information could be shared where expedient and recommended that the test for disclosure should be necessity. In this Bill, there is no trigger for disclosure, any public authority may disclose information to Oftenant, provided the disclosure is for a purpose connected to its functions. Oftenant may disclose information to any other public authority for purposes connected with their functions. **We recommend that, at a minimum, the Bill is amended to ensure that information held by the new Office for Tenants and Social Landlords may only be shared when necessary to perform its functions or the functions of the body which is seeking the information it holds A corresponding necessity test should apply when it seeks information from other public bodies. We recommend that the Bill be amended as follows:**

Clause 110, page 47, line 2, after regulator, insert, 'which is necessary'.

Clause 110, page 47, line 4, after 'public authority', insert, 'which is necessary'.

[71] Appendix 5.

[72] Fifteenth Report of Session 2007-08, *Legislative Scrutiny,* HL Paper 81/HC 440 paras 4.20 – 4.25; See also Fourteenth Report of Session 2007-08, *Data Protection and human rights*, HL Paper 72/HC 132.

Disability and accessible housing

2.42 In the course of our recent inquiry on human rights and adults with learning disabilities, we received a number of submissions which referred to the lack of choice which disabled people meet when seeking accessible and appropriate accommodation.[73] During debates on this Bill in the House of Commons, amendments were proposed to ensure social housing of an acceptable standard would be available to people with disabilities.[74] The aim of these amendments was to enhance the protection of the rights of the disabled to enjoy access to social housing without discrimination. For example, Sir George Young moved several new clauses, all of which were resisted by the Government. These included:

- Proposals to amend building regulations to improve the minimum standards of accessibility in newly built homes;[75]

- Proposals to extend the application of the Disability Equality Duty under the amended Discrimination Act 1995 to both the Homes and Communities Agency (HCA) and Oftenant;[76]

- Proposals to place a duty on local authorities to establish 'choice-based' disability housing registers. There registers would gather data on vacant accessible or adapted properties to ensure that they are let to people who most need those facilities.[77]

2.43 The United Nations Convention on the Rights of Persons with Disabilities (UN Disability Rights Convention) requires States to take steps to ensure access by persons with disabilities to public housing programmes.[78] It also reiterates the right of persons with disabilities to enjoy an adequate standard of living without discrimination:

> States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.[79]

2.44 The United Kingdom has signed but not ratified this Convention, which will come into force in May. The Minister for Disabled People has committed the Government to ratification before the end of 2008.[80]

2.45 **We welcome the Government's commitment to ensuring that the amended Disability Discrimination Act 1995, including the general positive Disability Equality**

[73] Seventh Report of Session 2007-08, paras 82-83.

[74] Proposed new Clause 9; PBC Deb, 22 January 2008, Cols 454-5.

[75] The amendment of Building Regulations for this purpose is supported by Age Concern England and Help the Aged, in their joint briefing on this Bill. See: www.helptheaged.org.uk.

[76] Proposed new Clause 10: PBC Deb, 22 January 2008, Cols 457-9.

[77] Proposed new Clause 11; PBC Deb, 22 January 2008, Cols 459-464.

[78] Article 28 (2)(d).

[79] Article 28(1).

[80] Seventh Report of Session 2007-08, paras 68-70.

Duty, will apply to both the HCA and the Office for Tenants and Social Landlords.[81] However, although the Minister confirmed that regulations would be introduced during the transition period to extend the specific disability duties in the Disability Discrimination Act 1995 to the HCA, he made no mention of the Office for Tenants and Social Landlords. **We call on the Government to confirm that the specific disability duties in the Disability Discrimination Act 1995, as amended, will apply to both the HCA and the Office for Tenants and Social Landlords.**

2.46 **We also welcome the commitment of the Government to work towards lifetime homes standards and to "choice-based lettings policy" and examining the effectiveness of disabled housing registers.** [82] **We agree with the Minister that:**

> **It is of enormous importance that people with disabilities and access needs are housed appropriately.**

2.47 **In developing these policies, the Government should respect not only the rights of individuals under the HRA and the International Covenant for Economic, Social and Cultural Rights, but the rights set out in the UN Disability Rights Convention.**

[81] PBC Deb, 22 January 2008, Cols 457-9.

[82] PBC Deb , 22 January 2008, Cols 459 – 464.

3 Regulatory Enforcement and Sanctions Bill

Date introduced to first House	8 November 2007
Date introduced to second House	
Current Bill Number	HL Bill 46
Previous Reports	

3.1 This is a Government Bill introduced in the House of Lords on 8 November 2007. The Bill will have its Third Reading in the House of Lords on 28 April 2008. Lord Jones of Birmingham has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998. The Explanatory Notes accompanying the Bill set out the Government's view of the Bill's compatibility with the Convention rights at paragraphs 170 - 179.[83]

3.2 We wrote to the Minister on 20 December 2007 to ask for further information on the Government's view that the provisions of the Bill were compatible with Convention rights.[84] The Minister for Employment Relations, Pat McFadden MP responded on 14 January 2008.[85] We are grateful to the Minister for his quick response and we publish this correspondence with this Report to inform further parliamentary debate.

[83] HL Bill 7 – EN.

[84] Appendix 6.

[85] Appendix 7.

4 Health and Social Care Bill

Date introduced to first House	15 November 2007
Date introduced to second House	19 February 2008
Current Bill Number	HL Bill 33
Previous Reports	8th, 12th, 15th Reports of Session 2007-08

4.1 We have reported on this Bill in three earlier Reports. The Bill is currently in Committee in the House of Lords. We received a response to our previous Reports in a letter dated 16 April 2008 from the Minister of State for Health Services, Ben Bradshaw MP. We publish this response as an Appendix to this Report, without comment by us, to inform further parliamentary debate.[86]

[86] Appendix 8.

Annex: Proposed Committee amendments

In this Annex, we suggest amendments to give effect to some of our recommendations in this report and to assist parliamentarians in ensuring that some of the matters we have raised are debated in Parliament.

Employment Bill[87]

The following amendment is intended to add safeguards for individual rights, including the right not be excluded or expelled arbitrarily from a Union or in circumstances that would result in exceptional hardship.[88]

Page 16, leave out lines 19 to 25 and insert-

(a) at the end of subsection (4A) insert "but does not include membership of a political party where the values and ideals of the party are incompatible with a rule or objective of the union.

(b) after subsection (4B) insert-

(4C) For the purposes of subsection (2)(d), the exclusion or expulsion of the individual is permitted only if-

(a) the decision to exclude or expel was taken in accordance with the union's rules and a fair procedure;

(b) the union's rules are not wholly unreasonable; and

(c) the consequences of exclusion or expulsion would not result in exceptional hardship.

Housing and Regeneration Bill[89]

The following amendment is intended to make provision of social housing a public function for the purposes of the Human Rights Act.[90]

Page 38, line 21, at end insert-

'Provision of social housing to be a function of a public nature

Provision of social housing under this Part shall be deemed to be a function of a public nature for the purposes of Section 6 of the Human Rights Act 1998 (c.42)'.

The following amendment is intended to ensure that the fundamental objectives of the new Office for Tenants and Social Landlords include an express reference to the human rights of individual tenants.[91]

[87] Page, clause and line references are to HL Bill 49.

[88] Paragraph 1.30 – 1.31 of this Report.

[89] Page, clause and line references are to HL Bill 47.

[90] Paragraph 2.21 of this Report.

Clause 88, page 40, line 24, after 'protection' insert:

', including protection for their human rights.'

Clause 88, page 41, line 2, at end insert-

'(11A) Pursuit of the protection of tenants' human rights, pursuant to Objective 2, includes, but is not necessarily limited to, rights protected by the Human Rights Act 1998 (c.42) and the International Covenant on Economic, Social and Cultural Rights.'

The following amendment is intended to give the new Office for Tenants and Social Landlords the power to set standards for the protection of the rights of tenants in social housing.[92]

Clause 191, page 81, line 39, at end insert-

'(k) the protection of the human rights of tenants, including but not necessarily limited to, the rights guaranteed by the Human Rights Act 1998 (c.42) and the International Covenant on Economic, Social and Cultural Rights'.

The following amendment provides for repeal of section 185(4)(b) Housing Act 1996. Domestic courts including the Court of Appeal, have declared that this provision is incompatible with the Convention right to respect for family life without discrimination.[93]

After Clause 313, insert the following new clause-

Eligibility for housing assistance

In section 185 of the Housing Act 1996 (c. 52) (Persons from abroad not eligible for housing assistance), subsection (4)(b) is omitted.

The following amendments are intended to ensure that information held by the new Office for Tenants and Social Landlords may only be shared when necessary to perform its functions or the functions of the body which is seeking the information it holds A corresponding necessity test will apply when it seeks information from other public bodies.

Clause 110, page 47, line 2, after regulator, insert, 'which is necessary'

Clause 110, page 47, line 4, after 'public authority', insert, 'which is necessary'

[91] Paragraph 2.24 – 2.28 of this Report.

[92] Ibid.

[93] Paragraphs 2.34 0 2.37 of this Report.

Conclusions and recommendations

Employment Bill

1. We welcome the Government's recognition that it is an "important principle" that the UK abide by judgments of the European Court of Human Rights. We also welcome the fact that there now appears to be a consensus across the parties that the Government is under such an obligation. (Paragraph 1.22)

2. The need for remedial legislation [to meet the judgment in *ASLEF v UK*] is therefore uncontested. The only question is how that legislation should strike the balance between the competing interests under Article 11 ECHR. (Paragraph 1.22)

3. There is clearly a positive obligation to provide some safeguards against abuse and, in our view, there do appear to be some gaps in the existing safeguards which leave individuals exposed to the possible abuse of a union's dominant position in a way which could have a detrimental impact on them. We therefore recommend that Clause 18 should be amended to provide additional safeguards in order to strike a "fair balance" between, on the one hand, the Article 11 right of a trade union to control its membership and, on the other, the Article 11 rights of the individual, including the right not to be excluded or expelled from a union arbitrarily or in circumstances that would result in exceptional hardship. (Paragraph 1.29) We recognise that such a formulation may be regarded as an invitation to litigate the reasonableness of a union's rules and we therefore also suggest, as an alternative, a narrower amendment to Clause 18 which would leave out the requirement in proposed new subsection (4C)(b) that the union's rules are not wholly unreasonable. (Paragraph 1.31)

Housing and Regeneration Bill

4. The effect of the House of Lords judgment in [*YL v Birmingham County Council*] is that some tenants in social housing will benefit from the application of the HRA while others will not, depending on whether their provider is a local authority or a private entity such as a housing association or a registered social landlord. This means that there is differential protection of the human rights of people living in social housing as well as no legal certainty either for providers or for tenants. (Paragraph 2.20) We recommend that this Bill is amended to specify that the provision of social housing should be a public function for the purposes of the HRA(Paragraph 2.201)

5. The regulatory objectives and proposed standards [in the Bill] are generally positive from a human rights perspective, and we particularly welcome the express inclusion of a role for Oftenant in relation to individual landlords' contribution to "the environmental, social and economic well-being of the areas in which their property is situated". (Paragraph 2.24) We recommend that the fundamental objectives of Oftenant are amended to include an express reference to the human rights of tenants. We also recommend that the new Office for Tenants and Social Landlords

will have the power to set standards for the protection of the rights of tenants in Social Housing. (Paragraph 2.27)

6. Although we regret the unnecessary four year delay in its introduction, we welcome the measure in the Bill to bring local authority sites occupied by Travellers and Gypsies within the regulatory regime imposed by the Mobile Homes Act 1983, which in our view remedies the incompatibility identified in the judgment in *Connors v UK*. (Paragraph 2.33)

7. We are concerned at the time which the Government has taken to reach a settled policy on [the declarations of incompatibility with Convention rights made in relation to section 185(4)(b) of the Housing Act 1996 and discrimination to access to social housing]. If the Government intends to allow the incompatibility to stand, in order to maintain its policy, it should make their position clear. While we have previously been reassured during last session that a solution would be forthcoming early in this session, the Government's proposals have now been withdrawn and the issue is being re-examined within Government. The Government did not appeal the Court of Appeal decision in *Morris*; the decision stands and Section 185(4) remains incompatible with Convention rights. (Paragraph 2.36)

8. The Minister should explain whether the Government intends to propose a remedy during this session and, if so, provide a timetable for action. If the proposals are intended to be introduced during the passage of this Bill, we would be grateful for a draft copy of any amendments as soon as they are available. If not, the Minister should commit to the introduction of a remedial order as soon as possible. (Paragraph 2.37)

9. We welcome the Government's commitment to ensuring that the amended Disability Discrimination Act 1995, including the general positive Disability Equality Duty, will apply to both the HCA and the Office for Tenants and Social Landlords. (Paragraph 2.45)

10. We call on the Government to confirm that the specific disability duties in the Disability Discrimination Act 1995, as amended, will apply to both the HCA and the Office for Tenants and Social Landlords. (Paragraph 2.45)

11. We also welcome the commitment of the Government to work towards lifetime homes standards and to "choice-based lettings policy" and examining the effectiveness of disabled housing registers. We agree with the Minister that:

"It is of enormous importance that people with disabilities and access needs are housed appropriately." (Paragraph 2.46)

12. In developing these policies, the Government should respect not only the rights of individuals under the HRA and the International Covenant for Economic, Social and Cultural Rights, but the rights set out in the UN Disability Rights Convention. (Paragraph 2.47)

Formal Minutes

Tuesday 22 April 2008

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	John Austin MP
Lord Dubs	Dr Evan Harris MP
Lord Lester of Herne Hill	Mr Richard Shepherd MP
The Earl of Onslow	
Lord Morris of Handsworth	
Baroness Stern	

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Draft Report (*Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills*), 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 4.1 read and agreed to.

Annex read and agreed to.

Summary read and agreed to.

Several Papers were ordered to be appended to the Report.

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

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

[Adjourned till Tuesday 29 April at 1.30pm.

Appendices

Appendix 1: Letter to Lord Jones of Birmingham, Minister of State for Trade and Investment, Department for Business, Enterprise and Regulatory Reform, dated 1 February 2008

Employment Bill

The Joint Committee on Human Rights is considering the compatibility of the Employment Bill with the United Kingdom's human rights obligations. One of the issues which we are considering is whether clause 17(2) of the Bill strikes the "fair balance" required by Article 11 ECHR between the competing association rights of the union on the one hand and the individual on the other.

One of the Bill's purposes is to meet the requirements of the judgment against the United Kingdom in the *ASLEF* case.[94] We welcome the Government's acceptance of the need to amend the law in the light of the Strasbourg judgment. We are aware that the Government consulted on two options for amending the relevant provision in the Trade Union and Labour Relations Consolidation Act 1992:

> Option A: to amend s. 174 TULRCA to ensure there is no explicit reference to a special category of conduct relating to political party membership or activities; and
>
> Option B: to retain the special category of conduct relating to political party membership or activities, but significantly amend the rights not to be excluded or expelled for such conduct.

The Bill as drafted opts for Option A. We understand, from the Government's impact assessment and its summary of consultation responses, that the Government's reasons for preferring Option A were that it would be simpler to understand and apply in practice and would therefore provide less scope for unnecessary legal action. We note however that those reasons are only very shortly stated in those documents and we have been unable to find them elaborated upon elsewhere.

We note that the Bill does not contain any express safeguards against the arbitrary use of the very wide power to expel a trade union member. It would appear to permit expulsion from a trade union for membership of a mainstream political party, e.g. the Conservative Party, where that political party's objectives were considered to be at odds with the objectives of the union as set out in its rules. Option B, by comparison, would provide such safeguards by circumscribing the scope of the power to expel by explicit reference to the union's rules and to compliance with the union's procedures.

The *ASLEF* judgment itself recognised (at para. 43) that

> "For the individual right to join a union to be effective, the State must nonetheless protect the individual against any abuse of a dominant position by trade unions ... Such abuse might occur, for example, where exclusion or expulsion from a trade

[94] Judgment of 27 February 2007.

union was not in accordance with union rules or where the rules were wholly unreasonable or arbitrary or where the consequences of exclusion or expulsion resulted in exceptional hardship."

1. Please explain in more detail the Government's reasons for preferring Option A over Option B.

2. In particular, please explain the existing safeguards which the Government considers to be adequate to ensure that a fair balance is struck in practice between the right of a union to control its membership, as defined in *ASLEF*, and the rights of the individual, including the right not to be expelled arbitrarily or in circumstances that would result in exceptional hardship?

3. What objection does the Government have in principle to circumscribing the scope of the power to expel by explicit reference to the union's rules and to compliance with the union's procedures?

We are also considering whether the Bill provides an opportunity to introduce other changes to trade union and employment law which are required to remedy other outstanding findings of violations of international human rights standards in the ILO Conventions and the European Social Charter. I may write to you again concerning that issue in due course.

In the meantime, I would be grateful for your response to the above questions by 15 February 2008.

Appendix 2: Letter from Lord Jones of Birmingham, Minister of State for Trade and Investment, Department for Business Enterprise and Regulatory Reform, dated 20 February 2008

Employment Bill

Thank you for your letter of 1 February regarding Clause 17 of the Employment Bill. I am glad to hear that the Committee is considering the Bill.

In order to assist with the Committee's consideration of the Bill, I am enclosing a memorandum which addresses the three questions you pose. The memorandum describes the rationale behind the Clause and it explains why the Government adopted the response to the ECHR judgment in Aslef v UK which is the basis of clause 17.

We wish to ensure that policy is based firmly on evidence and the principles of better regulation. Those principles apply as much to trade union law as they do to any other aspect of employment legislation.

Please do not hesitate to contact me again if you think that I can be of further assistance.

Memorandum by the Department of Business, Enterprise and Regulatory Reform to the Joint Committee on Human Rights

Introduction

1. In its letter to Lord Jones of 1 February 2008, the Joint Committee on Human Rights asked three questions relating to Clause 1 7 of the Employment Bill, now at Committee Stage in the House of Lords. As the Joint Committee recognises, Clause 17 seeks to ensure UK compliance with the 27 February 2007 ruling of the European Court of Human Rights (ECtHR) in the *Aslef vs. UK* case.

2. The Government launched a full three-month public consultation on the implications of ECtHR judgment in May 2007, based on a consultation document which contained a copy of the judgment. The consultation document was sent to around 400 organisations, including employers' organisations, trade unions and a range of legal and public bodies. The document was also placed on the DTI web site. The Government published its response to this consultation in November 2007.

3. The memorandum answers the three questions posed by the Joint Committee, dealing with each in turn.

Question 1 - Please explain in more detail the Government's reasons for preferring Option A over Option B.

4. As the Joint Committee noted in its letter, the Government consulted on two different options to revise trade union law in response to the ECtHR judgement:

Option A: To amend section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the "1992 Act") to ensure there is no explicit reference to a special category of conduct (termed "protected conduct") relating to political party membership or activities.

Option B: To retain the special category of conduct relating to political party membership or activities but significantly amend the rights not to be expelled or excluded for such protected conduct. Under Option B, section 174 would set certain conditions under which it would remain unlawful for a trade union to expel or exclude an individual on the grounds of their political party membership or activities. Those conditions would specify that the union's decision would be unlawful unless the political party membership or activity concerned was incompatible with a rule or objective of the union, and the decision to exclude or expel was taken in accordance with union rules or established procedures.

5. Following consultation on these two options, the Government opted for Option A. This decision was based on a number of considerations.

Evidence-based policy-making and proportionate regulation

6. The ECtHR judgment concerns union autonomy and the need to provide greater freedom to trade unions where setting and applying their own membership rules regarding political party engagement. Option B would limit union autonomy to a greater extent than Option A by introducing extra statutory conditions relating to exclusion and expulsion on these grounds. Those conditions would aim to provide safeguards against potential abuse by trade unions relating to their treatment of the political party engagement of their members and prospective members. In deciding whether Option B was necessary, the Government assessed:

(a) whether there were other existing safeguards against abuse which served this purpose; and

(b) whether there was any evidence of a practical problem of abuse which needed to be addressed by further safeguards.

This memorandum deals with point (a) under Question 2.

7. As regards point (b), the Government is aware that since 1993 (when a specific political party provision within section 174 was first introduced), the cases of expulsion or exclusion on these grounds are limited to individuals belonging to (and participating in the activities of) extremist parties, whose political platforms are clearly incompatible with the values and policies of the trade unions concerned. The Joint Committee's letter refers, by way of example, to the possibility of the expulsion of Conservative Party members. There is no evidence that, since 1 993, members of the Conservative Party or other mainstream political parties have been expelled or excluded for their political activities. Before 1993, the position was very similar, and there are no known examples where members of mainstream parties were expelled or excluded because of their political party membership. It is understood that any expulsions or exclusions before 1993 were few and limited to members of extreme political parties of the left or right.

8. By removing the category of 'protected conduct' from section 174, Option A would return to the situation which existed in 1993. This would enable trade unions to expel or exclude individuals on the sole basis of their *membership* of a political party.

9. The Government is generally wary of regulating for a hypothetical threat which has never occurred. Option B does make the actions of unions more limited but it could be argued it also runs the risk of over-regulating.

Clarity of legislation and simplicity of application in practice

10. The relevant provisions within sections 174 of the 1992 Act are already complex. For example, they draw distinctions between political party "activities" and political party "membership", which might create interpretational problems for unions and their members alike. Option B is undoubtedly a more complicated approach than Option A as it introduces an extra set of conditions for a union to satisfy when deciding to expel or exclude an individual. Whilst the rules of a union may in general be readily ascertained, there may be more difficulty identifying the "aims', "objectives" or "established procedures". For example, would a resolution passed at a union conference concerning anti-racism qualify as an union "objective" for these purposes or would it constitute a union "policy", which may not qualify as an "objective"?

11. Any lack of clarity would require unions and their members to spend greater time and effort in attempting to understand the law and apply it to different circumstances. This could have cost implications for the parties concerned, perhaps requiring them to obtain specialist legal advice.

12. It is often the case that the meaning of legal provisions may be uncertain, at least at the margins. When legislating, it is therefore important to ensure that extra provisions are

indeed necessary. Complexity is of course not the only issue. When dealing with matters of belief and political affiliation, it is important to guard against abuse.

Opportunity for vexatious litigation

13. Option B is unquestionably the more complicated. As discussed above, it is likely to introduce provisions whose meaning is not completely clear and could create new grounds for a union decision to be challenged. The political extremists which trade unions have tried to exclude from their ranks have not been reluctant in the past to take or threaten legal action. Trade unions argue that extremist political parties actively encourage their members to take legal action to publicise themselves or to take advantage of any legal uncertainty. Option B, if it introduces new uncertainty into the law, could therefore provide an opportunity for vexatious and politically-inspired litigation. Therefore, in contrast to the legal clarity of Option A, Option B could risk further legal action in order to introduce seemingly unnecessary safeguards.

Stakeholder responses

14. The Government consulted widely on the options. The majority of respondents were trade unions who, when asked to choose, expressed a preference for Option A. Among non-union organisations however, there was also majority support for Option A.

15. More legal organisations supported Option A than Option B. For example, the Employment Lawyers' Association stated that they did not "consider that special safeguards against abuse are necessary as would occur if Option B was chosen". They also emphasised that in their experience exclusions and expulsions in relation to political activity are "not at all common"; "trade unions are in the business of recruitment and retention of as many members as possible".

16. The Government took all the stakeholder views into account when deciding to choose Option A.

Question 2 - In particular, please explain the existing safeguards which the Government considers to be adequate to ensure that a fair balance is struck in practice between the right of a union to control its membership, as defined in ASLEF, and the rights of the individual, including the right not to be expelled arbitrarily or in circumstances that would result in exceptional hardship.

17. In addition to protections within section 174 (which is enforced by employment tribunals), there are other safeguards in the event that the union breaches its rules or commits other abuses when expelling or excluding a member. These mechanisms would continue to function as now under both Option A and Option B.

(i) Complaint to the Certification Officer (CO) under section 108A of the 1992 Act.

18. Under section 108A of the 1992 Act, a member or former member of a trade union may make a complaint about a breach or threatened breach of union rule in relation to certain matters, including "disciplinary proceedings by the union (including expulsion)" (section 108A(2)(b), inserted by the Employment Relations Act 1999.) The CO is empowered to issue enforcement orders requiring a trade union to take steps to remedy a rule breach. His decisions can be appealed to the Employment Appeal Tribunal.

19. The CO is an accessible, inexpensive and relatively rapid method of determining alleged breaches of union rule. He is also an acknowledged authority on trade union law and practice who brings considerable expertise to the judicial tasks he performs. As a result, the CO is an attractive option available to union members to pursue their complaints. He has considered a significant number of cases relating to breach of rule. For example, during the period 1 April 2006 to 31 March 2007, the CO issued 79 decisions on 17 applications of breach of rule,

(ii) Complaint to the Courts about Breach of Contract of Membership or Natural Justice

20. An individual's membership of a trade union is governed by contract law, the primary source of that contract being the rule book of the trade union. Where a union breaches its rules, a current or former union member can bring a claim for breach of contract in the civil courts. If a complaint is upheld, the court may award damages or grant an injunction.

21. As the rule book is the primary source of the contract of association for union members, expulsion for conduct which does not breach union rules would give rise to a claim for breach of contract. A union would also need to follow any disciplinary procedure laid down in the rule book to ensure that there was no breach of contract.

22. In addition, unions must adhere to the principles of natural justice, which are generally implied into the rules of a union. As well as securing the observance of a fair procedure in relation to union disciplinary proceedings, the principles of natural justice would prevent an expulsion in circumstances which would result in hardship for the individual concerned.

23. Case law during the 60s and 70s involved the courts intervening to prevent hardship resulting from loss of union membership. Those interventions reflected the particular circumstances of the times (in particular, the existence of the closed shop) when the inability to obtain or retain union membership led to a loss of livelihood. The courts recognised a common law "right to work" and applied that right to prevent arbitrary union decisions to expel or exclude an individual. Whilst, for reasons noted by the European Court of Human Rights (see below), loss of union membership is unlikely to cause hardship, the courts could be expected to apply natural justice principles in the event of such hardship arising.

24. The Joint Committee's letter refers only to expulsions (that is to say, decisions to withdraw membership from an existing union member), and not to exclusions (decisions not to admit an applicant to a union). However, it must be said that the aforementioned safeguards apply more obviously to cases of union expulsion. The CO can only consider a complaint from a current or former union member, not from an individual who is denied access to the union. Nor can an excluded individual bring a breach of contract claim in the civil courts. However, case law indicates that the courts could intervene to prevent an exclusion which resulted in hardship. In practice, expulsions are much more prevalent than exclusions in the context of political activities. This is unsurprising. Unions rarely know much about the political allegiances of individuals before they apply for membership and application forms do not ask for information about political party membership. So it is intrinsically difficult for unions to deny membership to individuals on these grounds, even if they wanted to do so.

25. Taken together, these safeguards provide recourse for individuals who believe they have been treated unfairly by the union in this area. It is therefore questionable whether another set of closely related safeguards enforceable by the employment tribunal is needed, especially as the incidence of abuse is so rare.

26. The Joint Committee's question refers to situations where the loss of union membership could result in exceptional hardship. It is important to note that under the conditions created by UK law, a union's decision to expel or exclude an individual cannot obviously result in severe hardship. This appreciation was central to the ECtHR's assessment of the need to curtail union autonomy. The ECtHR judgment clearly emphasised that although it took "due consideration" of "the importance of safeguarding individual rights" it was:

> ...not persuaded however that the measure of expulsion impinged in any significant way on [the individual]'s exercise of freedom of expression or his lawful political activities.
>
> Nor it is apparent that [the individual] suffered any particular detriment save loss of membership itself in the union. (paragraph 50 of the Judgment)

The judgment then stated explicitly that:

> As there was no closed shop agreement for example, there was no apparent prejudice suffered by [the individual] in terms of his livelihood or his conditions of employment.. Aslef represents all workers in the collective bargaining context and there is nothing to suggest in the present case that [the individual] is at any individual risk, or is unprotected from any arbitrary or unlawful action by the employer. (paragraph 50 of the Judgment)

Question 3 - What objection does the Government have in principle to circumscribing the scope of the power to expel by explicit reference to the union's rules and compliance with the union's procedures?

27. The issue is not government objection. Both options A and B are, in our view, compatible with the Aslef judgment. The Government aims to produce legislation founded on three key principles: compliance with the ECtHR's judgment; evidence based policymaking; and the application of better regulation principles.

28. As described in the reply to Question 1, the Government believes that Option A better satisfies these criteria than Option B.

29. The Government recognises the particular qualities of trade unions and the important contribution they can make at the workplace and to society more generally. If Option B were pursued, it would still subject trade unions to unique treatment in terms of deciding whether to use political party engagement as a membership criterion. No other membership-based organisation faces similar statutory restrictions, even though some of them for example, the Institute of Directors, the RSPB or the National Trust - provide important services to their members which cannot be duplicated elsewhere. It is also the case that there are no specific laws in this country preventing discrimination in employment on grounds of political party membership or belief. Among other things, this

means it is lawful for employers to refuse employment on grounds of political party membership. The Government has no intention of introducing new anti-discrimination laws in this area or new regulation to limit the ability of other membership-based organisations to determine their own rules. We believe that, in principle, trade unions should be treated on the same footing.

February 2008

Appendix 3: Letter to Hazel Blears MP, Secretary of State for Communities and Local Government, Department for Communities and Local Government, dated 6 December 2007

Housing and Regeneration Bill

The Joint Committee on Human Rights is considering the compatibility of the Housing and

Regeneration Bill with the United Kingdom's human rights obligations.

The Committee would be grateful if you could provide a further 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 particular, we would be grateful for an explanation of the Government's views on a number of matters which we consider capable of raising significant human rights issues.

(1) Information Gathering, Storage and Sharing (Clauses 104, 106, 245)

Clause 106 provides broad powers for the regulator to disclose information to any "public authority" for any "purpose connected with the regulator's functions" or "connected with the authority's functions". The Bill defines public authority using the definition in the Human Rights Act: "a person having functions of a public nature". This information sharing gateway will apply whether or not the functions of a public nature are exercised in the UK. A reciprocal power will extend to the regulator to receive information from any "public authority" for any purpose connected with its functions. This appears to create a very broad information sharing gateway.

1. I would be grateful if you could explain (a) what type of information the Government considers the proposed regulator will be sharing under these provision, (b) whether that information will include personal information, and (c) what public authorities the Government consider will be sharing information with the regulator.

2. I would be grateful if you could provide a further explanation of the Government's view that these provisions comply with Article 8 ECHR.

Specifically:

(a) whether, in light of recent events involving data handling and HMRC, the Government considers that reliance on the application of the DPA 1998 and Section 6 HRA 1998 will be adequate to ensure that data shared under Clause 106 will be processed in a manner compatible with the individual right to respect for personal

information (as protected by Article 8 ECHR), or whether more detailed safeguards are required on the face of the Bill;

(b) without a more specific definition of which "public authorities" the regulator may share information with or the purposes for which data is shared:

- **why the Government is persuaded that, in practice, this provision will be exercised in a manner compatible with Article 8 ECHR; and**
- **why the Government is persuaded that these provisions are sufficiently precise to be considered as prescribed by law for the purposes of Article 8(2) ECHR?**

Clause 245 of the Bill enables the Secretary of State in England or the Welsh Ministers to create a "register of sustainability certificates". Access to the register may be prescribed for public purposes or purposes of private undertakings or "other persons" (in effect, for any purpose).

3. Whether the Government considers that sustainability certificates or the register proposed by Clause 245 would contain personal information which would engage the right to respect for private life guaranteed by Article 8 ECHR?

4. If personal information will be contained, whether, in light of recent events involving data handling and HMRC, the Government considers that reliance on the application of the DPA 1998 and Section 6 HRA 1998 will be adequate to ensure that data shared under Clause 106 will be processed in a manner compatible with the individual right to respect for personal information (as protected by Article 8 ECHR), or whether more detailed safeguards are required on the face of the Bill?

5. If personal information will be contained, without further definition of (a) how the register will operate, (b) what information it will hold, (c) the circumstances in which information may be disclosed or (d) for what purposes:

- **why the Government is persuaded that in practice this provision will be exercised in a manner compatible with Article 8 ECHR; and**
- **why the Government is persuaded that these provisions are sufficiently precise to be considered prescribed by law for the purposes of Article 8(2) ECHR?**

(2) Registered Providers of Social Housing: Application of the HRA (Part 2)

Part 2 of the Bill makes provision for the replacement of the scheme of registered social landlords in England. Although this scheme will continue in Wales, the Bill makes provision for registration for "providers of social housing". In evidence to the Committee, published with its last report on the Meaning of Public Authority for the Purposes of the Human Rights Act, the Department for Communities and Local Government told the Committee that, in its view, registered social landlords should not be considered subject to the duty to act compatibly with Convention rights contained in Section 6 HRA 1998. They explained that (a) this would cause practical problems; (b) this would duplicate existing

protection for their tenants unnecessarily and (c) it would cause providers to leave the market.[95]

6. Can you tell us whether the Government considers that registered providers of social housing will be performing any public functions for the purposes of the Human Rights Act 1998?

7. If so, can you explain how the Government proposes to ensure that Section 6, Human Rights Act 1998 will be treated by the courts as applying to registered providers of social housing when they are exercising those public functions, despite the judgment of the House of Lords in *YL v Birmingham CC*?

8. If not, can you explain how your view on the intended application of Section 6, HRA 1998 differs from the Ministry of Justice, and specifically from the former Lord Chancellor, Lord Falconer, and the current Minister of State for Human Rights, Michael Wills MP?

(3) Discrimination and access to social housing (Morris; Gabaj)

In its report on Monitoring Human Rights Judgments, the Committee commented on the Government's response to the declarations of incompatibility made in the cases of *Morris* and *Gabaj*.[96] In those cases, domestic courts declared that Section 185(4) of the Housing Act 1996 was incompatible with Articles 8 and 14 ECHR in so far as it requires local authorities to disregard dependants (in *Morris*, a child and in *Gabaj*, a pregnant wife), who are subject to immigration control, when considering whether an applicant has a priority need for housing assistance.

The Government intends to provide a remedy to this declaration of incompatibility and set out a proposal for amendment of Section 185(4) in response to correspondence with the Committee before its Report on Monitoring Human Rights Judgments. The Government had previously arrived at a solution which it considered would remove this incompatibility, but maintain the policy objective of "ensuring that people who do not have a right to be in the UK cannot confer entitlement to substantive housing assistance". The Committee expressed some concern in its Report on Monitoring Human Rights Judgments about the solution proposed by the Government.

In response to the Committee's Report, the Minister indicated that a remedial order would be brought forward to remedy this declaration of incompatibility early in this session. On 26 November 2007, the Committee asked Michael Wills MP about the proposed timetable for this remedial order. He told us that the Department of Communities and Local Government, in consultation with the Home Office, had not yet found a consensus on the best way to proceed. We understand that further work is now being done by your Department, working with the Home Office.

9. Can you confirm whether or not the Government intends to proceed with a remedial order during this session to meet the declarations of incompatibility which stand in

[95] Ninth Report of Session 2006-07, Meaning of Public Authority under the Human Rights Act, HL Paper 77, HC 410, Appendix 20.

[96] Sixteenth Report of Session 2006-07, Monitoring the Governments response to Court judgments finding breaches of Human Rights, paras 125 – 134.

relation to Section 185(4) of the Housing Act 1996? If it does intend to proceed by way of remedial order, can you please give your best estimate of when the draft order will be laid?

10. Can you explain why the Government's original preferred solution has not been put forward as one of the proposals in this Bill?

11. Can the Government explain whether there are any reasons, other than the maintenance of the Government's incompatible policy on foreign dependents and the provision of housing assistance, why this Bill should not be amended to repeal Section 185(4) of the Housing Act 1996?

I would be grateful for your response to these questions by 21 December 2007.

Appendix 4: Letter from Iain Wright MP, Parliamentary Under Secretary of State, Department for Communities and Local Government, dated 10 December 2007

Housing and Regeneration Bill

The Housing and Regeneration Bill was introduced in the House of Commons on 15 November 2007, with its Second Reading on 27th November and I am writing to draw your attention to the human rights issues potentially raised by the measures included in this Bill. The Department's view is that all of the measures within the Bill are compatible with the rights set out in the European Convention on Human Rights.

Summary of Bill

This Bill has 4 Parts:

- **Part 1** provides for the establishment of the Homes and Communities Agency ("HCA");
- **Part 2** provides for the regulation of social landlords in England;
- **Part 3** contains other provisions about housing;
- **Part 4** contains supplementary and final provisions.

Proposals in Parts 1, 2 and 3 of this Bill raise potential Convention issues which are discussed below; provisions not mentioned do not in our view raise any potential ECHR issues.

Discussion of Convention rights potentially engaged under the Bill

The articles of the ECHR which may be engaged under the Bill are:

- Article 6 – right to a fair trial;
- Article 7 – no punishment without law;
- Article 8 – right to respect for private and family life, the home and correspondence; and

- Article 1 of the First Protocol – protection of property.

In addition, a public authority is required under section 6 of the HRA 1998 to act in a manner compatible with the ECHR when performing its functions.

Part 1 – the Homes and Communities Agency

Part 1 of the Bill provides for the establishment of the Homes and Communities Agency ("the HCA") which will bring together housing and regeneration activities currently undertaken by the Department for Communities and Local Government, the Urban Regeneration Agency ("the URA"), the Housing Corporation and the Commission for New Towns.

The objects of the new agency are set out in clause 2. These are:

- to improve the supply and quality of housing in England;
- to secure the regeneration or development of land or infrastructure in England; and
- to support in other ways the creation, regeneration or development of communities in England or their continued well-being, with a view to meeting the needs of people living in England.

Clause 9 and Schedule 2: Acquisition of land

The HCA will have powers to acquire land (which, by definition, includes rights over, and interests in, land) by agreement or, upon being authorised to do so by the Secretary of State, compulsorily. The power expressly allows the HCA to acquire new rights over compulsorily, although this is again subject to the consent of the Secretary of State.

The power to acquire land compulsorily may engage Article 8, Article 6 and Article 1 of the First Protocol of the European Convention on Human Rights ("the ECHR"). The power is, however, only to be exercised for the purposes of the HCA's objects or for purposes incidental to those objects. It seems clear that these objects fall within the meaning of "the public interest" as that term is used in Article 1 of the First Protocol. The HCA is also a public body for the purposes of the Human Rights Act 1998 ("the HRA 1998") so is required to act proportionately and in a manner which is compatible with Convention rights. With regard to Article 8, it is considered that the HCA's objects fall also within the interests of the "economic well-being of the country".

By virtue of Schedule 2, the compulsory acquisition of land or rights in land must be authorised by the Secretary of State in accordance with the procedure laid down by the Acquisition of Land Act 1981 ("the ALA 1981"). The procedural model contained in the ALA 1981 is the most commonly used model. Under the ALA 1981 the HCA, like the URA before it, will make a compulsory purchase order, which it will submit to the confirming authority, the relevant Secretary of State, for confirmation. If there are 'remaining objections' (defined in section 13A of the ALA 1981) from a 'qualifying person' (defined in section 12 of the ALA 1981), the Secretary of State will arrange a public inquiry unless the qualifying person agrees to the written representations procedure, before determining whether or not to confirm the CPO. The procedure in relation to inquiries is set out in the

Compulsory Purchase by Non-Ministerial Acquiring Authorities (Inquiries Procedure) Rules 1990[97].

Schedule 2 also provides that the usual regime for compensation linked to the value of the property will apply, which is critical to the issue of justifiable interference and proportionality under Article 1 of the First Protocol. Compensation must also be linked to the value of the property in order for the acquisition to be justified (*Gaganus v Turkey* [2002]). Proportionality is considered in terms of the means used and the aim being pursued, and again the compensation terms are important in determining proportionality.

In our view these provisions are compatible with the ECHR. In particular, the availability of adequate compensation and the statutory procedure for the consideration and confirmation of any compulsory purchase order strike the right balance between the public and private interests involved.

Clause 11: Main powers in relation to acquired land and Schedule 3: Main powers in relation to land of the HCA

Part 1 of the Schedule: Powers to override easements etc.

The provisions give the HCA power to interfere with a right or interest (except where the right is vested in or belongs to statutory undertakers for the purpose of their undertaking), or to breach a restriction as to the user of land arising by virtue of a contract, on land of the HCA. An interference may arise as a result of use of the land by the HCA or any other person, or by the HCA or any other person undertaking any construction or maintenance works.

These provisions engage Article 6 and Article 8 of, and Article 1 of the First Protocol to the ECHR. However, any use of the land by the HCA must be in accordance with planning permission and compensation is payable to affected persons. The objects of the HCA incorporate a clear public interest test and the HCA, as a public authority for the purposes of the HRA 1998, must act in a manner which is compatible with Convention rights.

Part 2: Powers to extinguish public rights of way

These provisions authorise the Secretary of State to extinguish any public right of way over land owned by the HCA.

In our view, an interference with a public right of way could impact upon a person's right to respect for their home and private life under Article 8. The statutory procedure set out in Part 2 of the Schedule requires the Secretary of State to publish and serve notices stating the effect of the order and to consider any objections and there are opportunities for objectors to be heard. The Secretary of State should exercise these discretionary powers in a manner which is compatible with the Convention. Compensation is also available. It is therefore considered that these provisions comply with the Convention.

Part 3: Powers in relation to burial grounds and consecrated land etc

[97] S.I. 1990/512.

These provisions authorise the HCA to use any of their land which consists in, or forms part of, a burial ground, consecrated land and other land connected to religious worship, provided any use is in accordance with planning permission and complies with the prescribed requirements. Requirements will be prescribed by regulations made by the Secretary of State. In respect of burial grounds, the power to use the land does not arise until the prescribed requirements have been complied with; in respect of consecrated land and other land connected to religious worship, use must be in accordance with the prescribed requirements (and the regulations could prohibit or restrict the use of the land in particular circumstances).

Although Article 8 is potentially engaged by these provisions, any use of burial grounds, consecrated land and other land connect to religious worship would need to be for a legitimate purpose in pursuit of the HCA's objects. In relation to human remains, any regulations made under this power must provide for relatives to undertake the removal and reinterment of the remains of the deceased, with costs to be met by the HCA. This seeks to balance the rights of relatives against the wider public need. Any use of such land must also comply with planning permission, which has an established statutory procedure. It is therefore considered that these provisions comply with the Convention.

Clause 12 and Schedule 4: Powers in relation to, and for, statutory undertakers

Schedule 4 set out various powers in relation to, and for, statutory undertakers. For example, the HCA may serve a notice to extinguish a right vested in or belonging to statutory undertakers in respect of land owned by the HCA, or statutory undertakers may serve a notice where they consider that development on land of the HCA will require the removal or re-siting of their apparatus.

Part 3 of the Schedule makes provision for the functions of statutory undertakers to be modified or extended following representations to the Secretary of State and the appropriate Minister by either the statutory undertaker or the HCA. An order made under this Part of the Schedule may include giving power to statutory undertakers to acquire land, in which case Articles 6 and 8 of, and Article 1 of the First Protocol to, the ECHR may be engaged.

However, the power to make such an order only arises in circumstances connected with the HCA pursuing its objects under Part 1 of the Bill. The statutory procedure set out in the Schedule requires the Secretary of State and the appropriate Minister to consider any objections and there are opportunities for objectors to be heard. The Secretary of State and the appropriate Minister have a power to apply enactments relating to the acquisition of land, which would ensure compensation was payable where applicable. The Secretary of State and the appropriate Minister should exercise their discretionary powers in a manner which is compatible with the Convention. Orders under Part 3 of the Schedule are also subject to special parliamentary procedure, ensuring a high level of parliamentary scrutiny. It is therefore considered that these provisions comply with the Convention.

Clauses 13 – 17: Planning

Clauses 13 and 14 give the Secretary of State power to designate an area in England and confer certain functions on the HCA in relation to that designated area. A designation

order under clause 13 may apply clauses 15-17 in relation to the area of land designated in the order.

The functions which may be conferred on the HCA in relation to the designated area under clause 14 are found in four Acts; the Town and Country Planning Act 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Hazardous Substances) Act 1990, and the Planning and Compulsory Purchase Act 2004. Even where the HCA is designated as the planning authority for an area, the Secretary of State will retain call in and appeal powers; the Secretary of State's role in relation to the determination of planning applications will not change under the Bill.

The planning system, which is not amended under the Bill, allows for a full balancing of interests and rights and has been repeatedly held to be compliant with the Human Rights Act 1998. Nevertheless, the provisions which enable the HCA to act as the local planning authority for a designated area introduce land use controls provisions into the Bill which could, in our view, engage Article 6, Article 8 and Article 1 of the First Protocol of the ECHR.

With regard to Article 6 rights, the landmark decision is *Alconbury*[98] where the House of Lords agreed that determination of administrative matters such as planning decisions involved the determination of "civil rights and obligations" within the meaning of the Convention and therefore people were entitled to the protection of Article 6. The House of Lords determined that there was sufficient judicial control within the planning process, including the scope for judicial review, to ensure a determination by an independent and impartial tribunal.

The effect of Article 8 and Article 1 of the First Protocol in relation to the planning system have also been considered in a number of cases. In *David Lough v First Secretary of State*[99] the Court of Appeal determined that recognition needed to be given to the fact that these Articles are part of the law of England and Wales and that they should be considered as an integral part of the decision maker's approach to material considerations. In determining applications for planning permission full consideration needs to be given to the effect of the decision on the interests of affected persons. This may include third party interests, as well as the interests of the person applying for planning permission.

In our view clauses 13 and 14 could potentially engage Convention rights, but the planning system has been previously challenged in relation to these rights and found to be sound. The HCA acting as local planning authority for an area would be responsible for determining planning applications in line with Convention rights.

Clauses 15 and 16 are not expected to engage any Convention rights. Clause 17 potentially may engage Article 8 and Article 1 of the First Protocol where a Traffic Regulation Order impacts on a person's interests. There is no clear case law on this subject but in the event that it does engage these rights, the Secretary of State in deciding whether to issue a traffic regulation order following a request by the HCA, would need to balance the rights and interest of individuals against the need for the order.

[98] *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions; R (on the application of Holding and Barnes) v Secretary of State for the Environment Transport and the Regions; and Secretary of State for the Environment, Transport and the Regions v Legal and General Society Ltd [2001] 2WLR 1389.*

[99] Case No. C3/2004/0183.

Clause 19: Power to enter and survey land

This clause gives any person authorised by the HCA the power to enter land at any reasonable time for the purpose of surveying it or estimating its value. The exercise of the power is limited to authorised persons and may only be exercised in connection with any proposal for the HCA to acquire land or any claim for compensation in respect of an acquisition of land.

The power potentially engages Article 8 of, and Article 1 of the First Protocol to, the ECHR, but it is considered that any interference with the rights protected by these Articles is justified. Further, the exercise of the power is limited to authorised persons and may only be exercised in connection with any proposal for the HCA to acquire land or any claim for compensation in respect of any acquisition of land. An authorised person cannot demand entry of right unless the HCA has served notice at least 28 days before. Provision is also made for compensation to be paid if any damage is done to the land in the exercise of any right of entry or in making a survey. It is therefore considered that this clause is compatible with the Convention.

Conclusion

In our view Part 1 of the Housing and Regeneration Bill, and in particular clauses 9, 11, 12, 13, 14, 15, 16, 17 and 19 (and the corresponding schedules) strike the right balance between the wider public interest as set out in the HCA's objects in clause 2 and the interests of individuals whose rights under Article 6, Article 8 and/or Article 1 of the First Protocol to the ECHR may be affected.

Part 2 – Regulation of Social Housing

Clauses 61 to 241: Regulation of Social Housing

Part 2 of the Bill provides for a new system of regulation of social landlords in England, to implement the Cave Review of the Regulation of Social Housing[100]. Providers of social housing will be able to register with, and be regulated by a new body, the Office for Tenants and Social Landlords ("the regulator"). This system will replace regulation by the Housing Corporation of "registered social landlords" ("RSLs") under the Housing Act 1996 ("HA 1996").

All RSLs currently registered with the Housing Corporation in England will automatically become registered non-profit providers (clause 241(3)). No-one else will be required to register with the regulator, but could choose to do so. The register will record whether a body is profit-making or non-profit, depending on whether it meets the tests in clause 111(2) to (6).

The regulator's functions include:

a) setting standards about social housing (e.g. as to repairs or tenancy terms including security of tenure), connected services and facilities provided by registered providers, and as to the management of their financial and other affairs (clauses 173 and 174);

[100] See http://www.communities.gov.uk/pub/422/EveryTenantMattersAreviewofsocialhousingregulationReportbyProfessorMartinCave_id1511422.pdf

b) consenting to disposals of social housing by for-profit registered providers, and of land by non-profit providers (clauses 160 to 165);

c) consenting to the restructuring, dissolution or winding up of, and to changes to the constitution of non-profit registered providers (clauses 150 to 155 and 187 to 190);

d) applying to wind up insolvent or failing non-profit registered providers (clause 156);

e) powers to restrict disposals and transactions, and make proposals for ownership and management of assets of registered providers whose creditors seek to enforce their security (clauses 135 to 149);

f) monitoring compliance by registered providers with standards it has set, e.g. by surveying premises, carrying out inspections, requiring the provision of information, or ordering an independent inquiry into a registered provider's affairs (clauses 179 to 182);

g) exercising enforcement powers in response to breaches of standards set by it, misconduct or mismanagement by registered providers. These include enforcement notices, compensation, fines, appointment of a manager, directed tender or transfer of a registered provider's management functions, transfer of a provider's assets, appointment or removal of board members to non-profit providers (Part 2, Chapter 7);

h) accepting undertakings by registered providers e.g. as an alternative to exercising its enforcement powers (clause 121).

The new regulator will be a public authority for the purposes of the Human Rights Act 1998. It will therefore be required by section 6 of that Act to act compatibly with the Convention rights when performing its functions. It will also have a statutory objective (clause 86(11)) to regulate in a manner which minimises interference and is proportionate, consistent, transparent and accountable: additional reassurance that it will exercise its powers compatibly with the Convention

Clauses 135 to 149: insolvency etc

The regulator will have a specific statutory objective to ensure that providers of social housing are financially stable and properly managed. Clauses 135 to 149 will give the regulator a suite of powers, based on current Housing Corporation powers, which will be exercisable where the financial viability or stability of the registered provider is under threat.

Persons proposing to take steps to enforce any security over land held by the non-profit registered provider or petitioning for the winding up of the registered provider must give notice to the regulator. Where any such steps are taken, clauses 138 to 140 provide for a 28 day moratorium on the disposal (sale, lease, mortgage, charge etc) of land held by non-profit registered provider, during which the consent of the regulator is required for any such disposal. During the moratorium, the regulator may make proposals for future ownership and management. Where proposals are agreed (including by secured creditors of the provider), the regulator may then appoint a manager to implement these proposals, and apply to a court to ensure compliance.

These powers will amount to a control on the use of the registered provider's property under Article 1 of the First Protocol to the ECHR. However we believe that they are fair, proportionate and justified in the public interest in terms of protection for:

- tenants of social housing (from the difficulties which would arise if their landlord became insolvent and unable to meet its obligations, including repairing obligations owed to tenants);
- registered providers' creditors e.g. banks who lent money to build or improve social housing owned by the providers; and
- taxpayers who funded social housing through Housing Corporation grants.

Clause 156: winding up petition by regulator

The regulator will have power to petition the court to wind up a registered provider which is failing properly to carry out its purposes or objects, unable to pay its debts, or which the regulator has directed to transfer all its assets to another person. Because a court would make the decision as to whether to grant the petition, this ensures Article 6 compliance. Such decisions would be in the public interest, as they would be aimed at protecting the rights and interests of the registered provider's creditors (if it were unable to pay its debts) or the rights and interests of tenants of the social housing, lenders and the taxpayer, if the winding up was on the basis that the registered provider failed properly to carry out its purposes or objects.

Clauses 160 to 171: disposal of property

Non-profit registered providers must obtain the consent of the regulator for any disposals of land, and profit-making registered providers must obtain the regulator's consent to any disposals of social housing. Disposals of houses (other than of a single dwelling to one or more individuals) without the regulator's consent will be void.

These restrictions on the powers of private bodies to dispose of land and housing they own are a control on the use of their property for the purposes of Article 1 of the First Protocol to the ECHR. We consider that such a control is in the public interest, proportionate and strikes a fair balance.

The new regulatory system is designed to protect the interests of tenants of social housing (who are often very vulnerable). Requiring the regulator's consent for disposals prevents registered providers from evading the standards set by the regulator to protect tenants by disposing of social housing to unregistered bodies.

Regulation of social housing, and in particular a disposal consent requirement, is also justified by the protection of public funding. Much, but by no means all, social housing has been constructed as a result of grant funding from central government either directly or through the Housing Corporation.

No person or body who is not currently registered as a social landlord will be required to register and thus to be subject to the disposal consent requirements and other potential enforcement powers of the regulator. We therefore believe that the disposal consent requirements strike a fair balance between the general interests of the community (in

particular taxpayers and social housing tenants) and the interests of the persons or bodies providing social housing.

Clause 179: survey

Where the regulator suspects that a registered provider may be failing to maintain premises in accordance with standards set by it under clause 173, it can authorise a person to enter the premises at any reasonable time and survey their condition. The authorised person must first give the registered provider at least 28 days' notice, and the registered provider who receives such notice must give each occupier at least 7 days' notice of the survey.

This enforced survey power is a control over the use of property, and thus an interference with the registered provider's rights under Article 1 of the First Protocol. It may involve an interference with the rights to respect for home and family life of any occupier of the premises under Article 8 of the Convention, since the premises to be surveyed will be homes, social housing, in respect of which the regulator has set standards for repairs.

We do not expect that the regulator will have to exercise the survey powers frequently, but their availability will strengthen the its ability to secure compliance with the repairing standards it sets.

We believe that any interference with the registered provider's rights under Article 1 of the First Protocol is justified in the general interest, since poor housing conditions contribute to accidents and ill-health. Ensuring that their homes are maintained to acceptable standards is in the interests of (often old or vulnerable) social housing tenants.

Any interference with tenants' rights under Article 8 is also justified to protect their health and their rights, such as under their tenancy agreement (e.g. the statutory repairing obligation imposed by section 11 of the Landlord and Tenant Act 1985 on landlords of dwellings let for up to seven years).

The interferences are also justified in the interests of the economic-wellbeing of the country, given the taxpayers' investment in social housing which should not go to waste through poor maintenance of publicly funded property.

Clauses 183 to 185: statutory inquiries etc

The regulator will be able to direct an inquiry into the affairs of a registered provider under clause 183, to be carried out by a person independent of the regulator, if it appears to the regulator that the affairs of the registered provider have been mismanaged. Mismanaged is defined as meaning managed in contravention of a provision of this Part or of anything done under this Part, or otherwise conducted improperly or inappropriately. The person appointed will have the regulator's information and enforcement powers under clauses 104 and 105, as well as powers to require someone to give evidence on oath – see clause 185. The appointed person will report on the inquiry to the regulator.

Clause 186 will allow the regulator, for the purposes of an inquiry, to require the registered provider's accounts and balance sheet to be subject to extraordinary audit. The regulator will be able, if it has reasonable grounds to believe that there has been misconduct or mismanagement in the registered provider's affairs and that immediate action is needed to protect the tenants' interests or the registered provider's assets, to make interim orders

suspending officers, employees and agents of the registered provider, and to restrict transactions that the registered provider can enter into, and can restrict money transfers by the registered provider.[101]

Certain of the regulator's enforcement powers will only be available against registered providers following such an independent inquiry.

Clauses 195 - 202: Enforcement notice

The regulator will be able to give an enforcement notice to a registered provider requiring it to take specified action to resolve a specified failure or other problem under clauses 195 to 202.

Clause 196 of the Bill provides that the regulator can give an enforcement notice to a registered provider if it is satisfied that either:

- the registered provider has failed to meet a prescribed standard; or
- the affairs of the registered provider have been mismanaged;
- the interests of tenants of the registered provider require protection; or
- the assets of the registered provider require protection; or
- the registered provider has given an undertaking and failed to comply with it,

and the regulator is satisfied that giving an enforcement notice is appropriate (whether it is likely to be sufficient in itself or a prelude to further action).

The regulator can also give an enforcement notice to a person other than a registered provider instead of prosecuting for one of a number of regulatory criminal offences set out in the Bill, all of which replicate existing offences in the HA 1996. (See clauses 104(5), 104(6), 106(4), 180(3), 180(4), 182(3) for the offences). These offences are for matters such as failure to provide information required by the regulator, obstruction of an authorised person surveying premises under clause 179.

Before giving an enforcement notice, the regulator must give a pre-enforcement warning notice (clause 198), warning that it is considering giving an enforcement notice, the proposed grounds, and indicating the extent to which it would accept a voluntary undertaking under clause 121 instead of, or to mitigate an enforcement notice.

Clause 199 gives the recipient of a pre-enforcement warning notice at least 28 days to make written representations to the regulator, after which the regulator shall consider any representations made or defences put forward and decide whether to give the enforcement notice.

Clause 200 provides for a right of appeal to the High Court against an enforcement notice.

We do not believe that the enforcement notice powers amount to determination of a criminal charge for the purposes of Article 6. The purpose of giving an enforcement notice

[101] HA 1996, Schedule 1, para 23.

is not punitive or deterrent,[102] but is intended to require the registered provider to comply with its obligations, for example relating to the management of its social housing stock for the benefit of its tenants.

We consider that the combination of the clause 199 right to make representations, and the clause 200 appeal right will add further safeguards to the civil sanctions regime and further guarantee that convention rights remain secure. In particular it will address any concerns under Article 6 and the right to access an independent tribunal in reasonable time.

We are therefore satisfied that the enforcement notice provisions are compliant with the ECHR.

Clauses 203 to 212: penalty

Clauses 203 to 212 will allow the regulator to impose (monetary) penalties, referred to in clause 203 as fines, in two broad classes of case.

- The first relates to various forms of mismanagement by registered providers:
- failure to meet a prescribed standard;
- where the affairs of the registered provider have been mismanaged;
- failure to comply with an enforcement notice;
- failure to comply with an undertaking given by the registered provider.

A monetary penalty on one of these grounds cannot exceed £5,000.

The second is instead of prosecution for a regulatory criminal offence in clauses 104(5), 104(6), 106(4), 180(3), 180(4) and 182(3). In these cases, the monetary penalty cannot exceed the maximum fine the magistrates' court could impose on conviction for the offence.

Procedural safeguards are provided for the penalty procedure as for the enforcement notice procedure: a prior warning notice; at least 28 days to make representations; and a right of appeal to the High Court. An unpaid monetary penalty is recoverable as a civil debt (clause 211(1)).

We are satisfied that monetary penalty provisions are compliant with Article 6 of the Convention, given the procedural safeguards and the limit on the maximum amounts of the penalties.

Clauses 223 and 224: Management tender

Clauses 223 and 224 will allow the regulator to direct a registered provider to put out to tender some or all of its management functions relating to social housing, where the regulator is satisfied either that the registered provider has failed to meet a prescribed standard or that the affairs of a registered provider in relation to social housing have been mismanaged. Before exercising this power, the regulator would be required to give the regulator a warning notice.

[102] See *Lutz v Germany* 9912/82, 25/06/87 para 54.

Whilst we recognise that such provisions will allow for a control on the use of the registered provider's property, for the purposes of Article 1 of the First Protocol, we believe that it would be a proportionate and justified response on the grounds of protecting the tenants rights and interests, and the public investment in the social housing stock, where it was being mismanaged to the degree that the regulator considered that exercise of this power would be appropriate.

Clauses 225 and 226: management transfer

Where, following a statutory inquiry under clause 183 the regulator is satisfied that-

- a registered provider has failed to meet a prescribed standard;
- the affairs of a registered provider have been mismanaged in relation to social housing; or
- a transfer of certain of a registered provider's management functions would be likely to improve the management of some or all of its social housing,

the regulator can require a registered provider to transfer management functions to a specified person.

The registered provider will not be in control of the process of selecting the new manager of its stock. This is therefore a greater interference with the registered provider's rights to control the use of its property under Article 1 of the First Protocol to the ECHR, than the regulator's power to direct a registered provider to put some or all of its management functions out to competitive tender.

We consider that giving the regulator such a power is justified in the public interest, in particular, the protection of tenants' rights (for example as to the repair and condition of their homes), and the public investment in social housing stock.

We consider that the fact that the regulator cannot require the transfer of management without being satisfied as a result of an independent inquiry that one of the grounds in subsection (1) of clause 225 has been made out; combined with the registered provider's right to appeal to the High Court under subsection (6) of clause 226 satisfies the requirements of Article 6 of the ECHR.

Clause 229: Transfer of land

Clause 229 allows the regulator to direct a registered provider to transfer its land to another registered provider. The regulator will be able to direct a registered provider to transfer land where, as the result of an inquiry under clauses 183 to 185, the regulator is satisfied that the affairs of a registered provider have been mismanaged in relation to social housing, the provider has failed to meet a standard set by the regulator, or that the management of the provider's land would be improved if its land were transferred.

Clause 229 provides that the price paid for the property shall be not less than the amount the property would command on a voluntary sale. This ensures the compensation required by Article 1 of the First Protocol where there is a deprivation of property.

We believe that the interferences with the registered provider's rights under Article 1 of the First Protocol under this and the other enforcement provisions are justified in the public interest. We have not provided for a right of appeal to the High Court, we are happy that judicial review would ensure Article 6 compatibility for the process.

This power is based on the Housing Corporation's power under paragraph 27 of Schedule 1 to the HA 1996. The Corporation's use of this power was upheld by the Court of Appeal in *R (Clays Lane Housing Co-operative Ltd) v Housing Corporation* [2004] EWCA Civ 1658 [2005] 1 WLR 2229, where the claimant's challenge on ECHR grounds failed.

Clauses 231 to 233: removal and appointment of officers of non-profit registered providers

Clauses 231 and 232 allow the regulator to remove a director, trustee or committee member ("an officer") of a non-profit registered provider in the event of that individual's insolvency; disqualification from being a company director or charity trustee, incapacity due to mental disorder; absence or failure to act or disappearance (where this impedes the proper management of the registered provider's affairs). The regulator can appoint a replacement (clause 233). Removal of an officer of a non-profit registered provider affects that individual's civil rights. The individual removed has a right of appeal to the High Court. This will ensure Article 6 compliance.

Part 3 – Other Provisions

Sustainability Certificates

Clause 248 and Schedule 8: Penalty charge notices

Penalty charges are provided for in clause 248 and Schedule 8 for breaches of the duty in clause 242 to provide either a sustainability certificate or a statement that there is no such certificate to the purchaser of a new home, or of the duty in clause 247 to produce a copy of any such document to an officer of the enforcement authority. The duties are qualified by references to reasonableness. Enforcement is undertaken by weights and measures authorities. We consider that these provisions are fully compatible with Article 6. In particular: first, a maximum penalty is provided for; secondly, recipients of a notice must be informed that they may request a review of the notice and make representations; thirdly, the representations must be considered on the review; fourthly, if the notice is confirmed the recipients may appeal by way of a rehearing to a county court.

Landlord and Tenant Matters

Clauses 260 and 261: Family Intervention Tenancies

Clause 260 excludes "Family Intervention Tenancies" ("FITs") from being secure or assured tenancies; they will therefore have very little security of tenure and will be terminable on 28 days notice to quit. These tenancies will be available to local authority ("LA") landlords and registered social landlords ("RSLs) to deal with anti-social LA secure tenants and RSL assured tenants who require, or who it is deemed will benefit from specific support services and who are in danger of losing their existing secure or assured tenancy. The FIT is part of a rehabilitation programme ("Family Intervention Projects" – "FIPs")

which will allow certain tenants to avoid losing a home altogether whilst providing them with support to hopefully re-enter the social rented sector.

The FITs provisions potentially engage Articles 6 and 8 and Article 1 of the First Protocol in respect of their application to local authority FITs[103].

The decision of the LA landlord to issue a notice to quit which will terminate the tenancy would qualify as an administrative decision that has a direct effect on the tenant's property rights and therefore attracts the protections of Article 6. These decisions will usually be taken by a local authority housing officer in circumstances where the tenants have failed to comply with the programme and continue to flout the rules of that programme and their tenancy.

The local housing officer's decision to issue a notice to quit in respect of the FIT will be subject to a first tier review (the procedure of such to be prescribed by regulations, as set out in clause 261) and then ultimately judicial review. We are of the view that this composite review approach will satisfy Article 6 for the reasons given below.

Firstly, whilst the decision to issue a notice to quit is taken on the facts of the particular case, there is implicit in that decision a consideration of the wider housing needs of other people (e.g. the homeless) to whom the LA may or does owe a duty to house. In addition, in deciding to issue a notice to quit the housing officer will implicitly have considered the needs and rights of neighbouring tenants, the matters that may have led to the notice to quit (likely to be anti-social behaviour or failure to comply with the project) and the wider community where the defendant tenant is housed.

Secondly, in making the decision to issue a notice to quit and then to issue possession proceedings, the housing officer (whose decision will be subject to internal review) is exercising a level of discretion based on his professional knowledge, not simply whether the allegations of any breaches of the tenancy agreement are founded but whether in the circumstances it is reasonable to issue a notice to quit and take possession proceedings.

In respect of Article 8, we are of the view that this Article is likely to be engaged in relation to any possession proceedings and or permanent removal of security of tenure in respect of LA FIT tenancies but that such interference is justified for the reasons set out below.

The rights of other tenants and neighbours have to be considered and weighed up in relation to the removal of security of tenure from the FIT tenant. Other tenants and neighbours need to be protected from anti-social behaviour of the FIT tenant who will have proved that they are unable to sustain a secure tenancy and live in the community. In addition, social housing is a scarce resource and one that must be used to meet those in housing need. Where a FIT tenant has failed to work with the housing association and rehabilitate sufficiently and/or has continually flouted the rules, in our view, the rights of other tenants outweigh those of the FIT tenant and action to evict them is in the interests of public safety, the prevention of disorder and crime and the protection of the rights and freedoms of others (Article 8(2)). What is more, the eviction would allow for a more

[103] We are of the view that RSL FITs will not engage Article 6 because there will be no "dispute" – the landlord will merely be invoking the 28 day notice provision under the tenancy agreement (akin to an agreed contractual provision). Unlike LA FITs an RSL FIT tenant will not be able to invoke convention rights such as Article 8 because an RSL is not deemed to be a public body for the purposes of the HRA. On the other hand, because an LA FIT tenant could invoke Article 8 rights the review procedure must be Article 6 compliant.

deserving candidate to take up the FIT tenancy and/or any vacant social housing stock to go to a person in greater housing need and who again would be more deserving of that accommodation.

We are of the view that a secure tenancy is likely to be deemed a possession under Article 1 of the First Protocol and/or that the FIT provision is likely to be a control of use of property. We have however taken the view that because the secure tenant is voluntarily surrendering their secure tenancy (there is no compulsion to give up the secure tenancy: see clause 260), Article 1 of Protocol 1 is not effectively breached.

In any event, if the surrender of the secure tenancy is deemed to fall within Article 1 of the First Protocol even though the surrender of it is voluntary, in view of the wide margin of appreciation given to a state under Article 1 of the First Protocol, we are of the view that a successful challenge on this ground is unlikely. Where the tenant complies with the programme they will recover their security of tenure (albeit likely at a different property). In addition, the FIT regime is for the very worst cases of anti-social behaviour and other related problems and is aimed at families who are likely to be evicted from their properties in any event. Provision of FITs and the surrender of their existing secure tenancy are in the general interest and is a proportionate measure to deal with the problem being addressed: namely the rehabilitation and reintroduction of severe problem tenants whom the social sector has been unable to control. The surrender of a secure tenancy and provision of less secure tenancies for this particular group of tenants is necessary if FIPs are to have any teeth and force and such a measure is proportionate, justifiable and in the public interest.

Clauses 262 to 266: Right to buy etc.: miscellaneous

The minor amendments made to the right to buy (RTB) scheme under Part 5 of the Housing Act 1985 ("the 1985 Act") apply also to the Preserved Right to Buy (the RTB carrying over on stock transfer, also under the 1985 Act) and to the Right to Acquire (for tenants of RSLs under the Housing Act 1996) with the exception of clause 265 which applies only to the RTB, and clause 266(2) which applies to the RTB and PRTB but not the RTA. Clauses 264 and 265 are not considered to raise ECHR issues.

Clause 262: Exclusion from right to buy: possession orders (amendment to section 121)

The purpose of section 121 of the 1985 Act is to prevent a secure tenant from exercising the right to buy where he or she is subject to a possession order. The current wording of section 121 provides that the right to buy cannot be exercised "if the tenant is obliged to give up possession of the dwelling-house in pursuance of an order of the court or will be so obliged at a date specified in the order". It is considered that there is some ambiguity as to how this wording applies to the recently introduced postponed possession orders, using the wording recommended by HM Courts Service in July 2006, because in such orders possession is postponed but no date for possession is specified.

This provision restores the intended statutory position by ensuring that the right to buy continues to be excluded whatever wording is used in the court order. This may result in the right to buy not being exercisable by tenants subject to postponed possession orders who would be entitled to do so under the current wording of section 121.

Technically this may amount to a deprivation or control of use of a possession. However it is not considered appropriate that any compensation for the effect of this provision should be provided for tenants subject to postponed possession orders. Firstly, it is not certain that they are being deprived of a possession which they would otherwise have, since the question of whether section 121 in its present wording would exclude the RTB has not been tested in the courts. Secondly, the effect of the amendment is merely to clarify the current legislative position.

Clause 263: Review of determination of value

Clause 263 enables correction of an error in the valuation of a RTB property. The price at which the landlord agrees to sell the property must be based on its open market value. A tenant who considers that the landlord's offer price is incorrect may request a second opinion in the form of a determination of value by the District Valuer (DV - an officer of the Valuation Office Agency).

The proposed new sections 128A and 128B to the 1985 Act enable the DV to withdraw and replace an erroneous determination of value where the error is clearly apparent and has a significant effect. Referral to the County Court is not permitted with regard to valuation decisions, and the DV's decision is therefore final and binding on both parties. However it is not considered that this provision raises significant ECHR issues, because valuation is an administrative matter, and in terms of oversight by the courts judicial review is available to the parties.

Clause 266 makes two corrections, the second of which raises no ECHR issues. The first correction, in clause 266(2), removes a right of appeal and therefore does potentially do so. However the correction merely restores the position before the Housing Act 2004. That Act introduced an error which inadvertently created the right of appeal.

The background is that under paragraph 5 of Schedule 11 to the 1985 Act an RTB request may be refused by the landlord if the property is particularly suitable for occupation by elderly persons ("a paragraph 5 exclusion"). The 2004 Act replaced appeals to the Secretary of State from the landlord's decision on paragraph 5 exclusions with appeals to a Residential Property Tribunal (RPT). This is one of many RPT jurisdictions, and section 231 of the 2004 Act provides in most cases for appeals from an RPT to go to the Lands Tribunal, excluding appeal to the High Court. However in paragraph 5 exclusion cases the RPT decision was to be final, with no further appeal to the Lands Tribunal. Unfortunately in excluding the Lands Tribunal appeal for these cases, the appeal right to the High Court was unintentionally made possible. The amendment restores the intended position.

We do not consider that any substantive ECHR issue arises from this correcting amendment. The Convention does not guarantee a right of appeal, and residential property tribunals satisfy the test for a tribunal under the Article 6 right to an independent and impartial court or tribunal established by law. Judicial review remains available to the parties.

Housing Finance and Other Provisions

Clause 272: Protected mobile home sites to include sites for Gypsies and Travellers

This provision amends the Mobile Homes Act 1983, which currently excludes land occupied by a local authority as a caravan site providing accommodation for Gypsies from the definition of "protected site" and therefore excludes the occupants of such sites from the operation of the Act. The provision is being enacted in order to remedy the incompatibility identified by the European Court of Human Rights in the case of Connors v UK[104] and thus responds to the judgement in that case[105]. When enacted the provision will import the implied terms in Schedule 1 to the Mobile Homes Act 1983 into the existing licence agreement between the site occupants and the local authority, and so will interfere with the existing contractual relationship between local authorities and Gypsies and therefore engage Article 1 of the First Protocol.

The effect of the application of the implied terms to the existing licence agreements will be to impose some minor additional burdens on the site occupants, such as the obligation to give notice terminating the agreement, but overall the effect will be to enhance the rights of the occupants of the site most notably in relation to security of tenure. Site owners will now have to apply to the courts when they wish to remove site occupants, and the court will have to be satisfied that a possession order is reasonable before it is granted. Schedule 1 to the Mobile Homes Act gives a list of implied terms which clearly sets out the grounds for possession, and also clarifies the rights and responsibilities both of site owners and of occupants.

Local authorities are affected by the proposal because it will restrict their rights to obtain possession of their property, however, local authorities are governmental organisations and so do not have rights under Article 1 of the First Protocol.

I attach a copy of the Bill and a copy of the Explanatory Notes for the Bill[106].

Appendix 5: Letter from Iain Wright MP, Parliamentary Under Secretary of State, Department for Communities and Local Government, dated 20 December 2007

Housing and Regeneration Bill

1. Thank you for your letter of 6th December setting out a number of questions regarding the compatibility of the Housing and Regeneration Bill with the United Kingdom's human rights obligations.

2. You may have already seen my letter of 10th December 2007, setting out a detailed analysis of the human rights implications of the Bill's main provisions. I attach a copy of this letter for ease of reference.

3. I have set out below an explanation of the Government's views on the questions posed in your letter.

Question 1a): What type of information the Government considers the proposed regulator will be sharing under these provisions.

[104] *See* App No 66746/01, Judgment of 27 May 2004.

[105] *See* paragraph 13 of the 13th Report of the JCHR (27/02/06) - Delay in Implementation: Outstanding Judgments.

[106] Not published here.

4. The information the Government considers the proposed regulator will be sharing under clause 106 will include:

a) anonymised statistical data, relating for example, to letting trends (tenancy details, household characteristics, household incomes, previous housing situation, letting application or referral routes) and property details (property references, physical attributes of property, property management and ownership details, accessibility standards, stock flow information and rent charges);

b) information about the financial situation and management of a registered provider of social housing, including information about whether the body has been mismanaged, and who the regulator believes is responsible for the mismanagement;

c) information about the performance of a registered provider (the extent to which it has met the standards set by the regulator, and the regulator's concerns about it);

d) information about criminal offences which the regulator discovered have been committed (for example by staff or board members of a registered provider), and information about who the regulator believes is responsible for them.

Question 1b): Whether that information will include personal information.

5. The information disclosed by the regulator may in some circumstances include personal data and even sensitive personal data (within the meaning in section 2 of the Data Protection Act 1998).

6. For example if the regulator discovers that an individual, e.g. a member of staff of a registered provider, may have committed fraud, it may want to inform the police. Under section 2(g) of the Data Protection Act 1998 information about the commission or alleged commission by an individual data subject of any offence would be sensitive personal data.

7. We do not, however, envisage that the regulator will be routinely sharing personal information, nor sensitive personal information, but we consider it necessary to give the regulator powers to do so.

Question 1c): What public authorities the Government consider will be sharing information with the regulator.

8. The new regulator of social housing's information sharing powers are based on those available to the Housing Corporation (which currently regulates registered social landlords) under section 33 of the Housing Act 1996, although the language of clause 106 is not identical.

9. Section 33(2) of the Housing Act 1996 allows the regulator to disclose any information received by it relating to a registered social landlord to:

a) any government department (including a Northern Ireland department);

b) any local authority;

c) any constable; and

d) any other body or person discharging functions of a public nature (including a body or person discharging regulatory functions in relation to any description of activities), including such bodies or persons in a country or territory outside the United Kingdom.

10. Clause 106 simply permits the regulator to disclose information to a "public authority", defined in subsection (6) as a person having functions of a public nature (whether or not in the United Kingdom). (This power is modelled on that in section 59(5) of the Companies (Audit, Investigations and Community Enterprise) Act 2004, which gives similar powers of disclosure to the Regulator of Community Interest Companies).

11. The definition of public authority in clause 106(6) is broad enough to cover the persons and bodies specifically named in paragraphs (a) to (c) of section 33(2) of the Housing Act 1996, so that there is no need to list them separately. It is to such persons or bodies that we envisaged the regulator will disclose information.

12. We envisage the regulator providing central Government, particularly Communities and Local Government, with anonymised statistical data (referred to in paragraph (a)(i) above. This information would be provided to help the Department develop housing policy relating to, for example, overcrowding and housing need.

13. The regulator may need to provide information to local authorities about a registered provider, for example relating to the extent to which the provider has complied with:

- any standards set by the regulator relating to the provider's contribution to the environmental, social and economic well-being of the area in which its property is situated (which standards may require the provider to work with local authorities); or

- the duty to be imposed by clause 122 of the Bill requiring the provider to co-operate with a local authority in the preparation or modification of the local authority's sustainable community strategy, where invited to do so by the authority).

14. If the regulator has serious concerns about the governance and financial viability of a registered provider, it may wish to alert the Homes and Communities Agency, so that the latter body can consider whether it would be sensible to decide to give financial assistance, or to continue to make payments of grant, to the registered provider.

15. If the regulator has information that grant paid to a registered provider has been used for purposes other than those for which it was paid, the regulator may want to inform the body paying the grant (for example the Homes and Communities Agency).

16. Some registered providers of social housing will be registered charities also regulated by the Charity Commission. The regulator may want to inform the Charity Commission if it discovers wider issues of mismanagement of a charitable registered provider, so that the Charity Commission can consider whether to exercise its own regulatory powers.

17. Where the regulator wants the Audit Commission to inspect a registered provider, under clause 181 (which is to be amended to make clear that the regulator can arrange for an inspection to be carried out by another person authorised by the regulator in writing) the regulator may need to disclose information to the Audit Commission about the

management, financial viability or performance of the registered provider, and the particular concerns about the provider which has led the regulator to commission the inspection.

Question 2: Further explanation of the Government's view that these provisions comply with Article 8 ECHR.

Specifically:

(a) whether, in light of recent events involving data handling and HMRC, the Government considers that reliance on the application of the DPA 1998 and section 6 HRA 1998 will be adequate to ensure that data shared under clause 106 will be processed in a manner compatible with the individual right to respect for personal information (as protected by Article 8 ECHR), or whether more detailed safeguards are required on the face of the Bill;

(b) without a more specific definition of which "public authorities" the regulator may share information with or the purposes for which data is shared:

- **why the Government is persuaded that, in practice, this provision will be exercised in a manner compatible with Article 8 ECHR; and**
- **why the Government is persuaded that these provisions are sufficiently precise to be considered as prescribed by law for the purposes of Article 8(2) ECHR?**

18. We expect that the majority of the information shared by the regulator will not be personal information protected by article 8 ECHR or the Data Protection Act 1998, although some will be.

19. Where the regulator does disclose personal information protected by article 8 ECHR, we consider that reliance on the application of the DPA 1998 and section 6 HRA 1998 will be adequate to ensure that data shared under clause 106 will be processed with a manner compatible with article 8 ECHR.

20. Where the information to be shared is personal data within the DPA, clause 106, as a gateway provision, provides express statutory power for the disclosure of information (so that the disclosure would be a lawful processing within the first data protection principle).

21. Even with a gateway provision, processing of personal data, including disclosure, must be in accordance with the eight data protection principles. Disclosure will not be lawful, despite complying with any regulations, if the provisions of the DPA are also not satisfied. To be compliant with the DPA any disclosure will need to be shown to be processed fairly and lawfully, and must meet at least one of the conditions set out in Schedule 2 of the DPA, and if it is sensitive personal data, at least one of the conditions set out in Schedule 3 of the DPA.

22. Unless consent is given, the Schedule 2 conditions require that disclosure is 'necessary' for various purposes. Paragraph 6 of Schedule 2 to the DPA would appear particularly relevant (processing necessary for the purposes of legitimate interests pursued by the data controller or third party to which the data are disclosed), since the regulator will only be

able to disclose information to a public authority under clause 106 for a purpose connected with the regulator's functions, or for a purpose connected with the authority's functions. If paragraph 6 does not apply, we consider that paragraph 5 (allowing processing for administration of justice, for the exercise of any functions conferred on any person by or under any enactment, for the exercise of any functions of a government department, or for the exercise of any other functions of a public nature exercised in the public interest by any person) would also permit the disclosure.

23. In the limited circumstances in which we think the regulator may disclose sensitive personal data, paragraph 7 of Schedule 3 (where the processing is necessary for the exercise of any functions conferred on any person by or under an enactment, for the exercise of any other functions of a public nature exercised in the public interest by any person) would be relevant.

24. Any processing must still be fair and necessary. The threshold of 'necessary' involves being satisfied that the purposes for which the data are being processed are valid, that such purposes can only be achieved by the processing of personal data and, the processing is proportionate to the aim pursued. This threshold will ensure that information is disclosed only where the regulator is satisfied that the information will be of significant help to the public authority in achieving a legitimate purpose.

25. The regulator will be a public authority subject to the duty to act compatibly with Convention rights in section 6 of the HRA 1998.

26. We believe that the regulator's disclosure of any information to which article 8 applies, will be either in the interests of the economic well-being of the country, the prevention of disorder or crime or the protection of the rights and freedoms of others (for example tenants of registered providers who are failing to comply with their legal obligations relating to the safety and maintenance of rented homes).

27. In addition to the duty under s 6 of the HRA 1998, the regulator's statutory objectives in clause 86, include an objective to regulate in a manner which (a) minimises interference, and (b) is proportionate, consistent, transparent and accountable. This objective emphasises the need for the regulator to consider the proportionality, and thus legality under article 8(2) ECHR, of any proposed disclosure by it of personal information.

28. Additional safeguards in relation to data sharing are provided by clause 106(3), which allows the regulator to impose restrictions on further disclosure of information by a public authority to which it has disclosed information. It also allows a public authority which discloses information to the regulator under clause 106(1) to impose such restrictions on the further disclosure by the regulator.

29. We also plan to instruct counsel to provide the regulator's power to disclose information to others is subject to express restrictions elsewhere. Section 32(3) of the Housing Act 1996 imposes such a restriction on bodies disclosing information to the Housing Corporation.

30. As noted above, we do not believe that the definition of public authorities in clause 106 is wider in practice than the definition in section 33(2) of the Housing Act 1996.

31. We are unaware of any concern having been expressed about the ECHR compatibility of the Housing Corporation's data sharing powers under section 33(2), nor about section 59(5) of the Companies (Audit, Investigations and Community Enterprise) Act 2004. (The Joint Committee did not express any concerns about that provision in its 10th report of session 2003-04 in which it examined the Bill which became that 2004 Act).

32. We are satisfied that these provisions are sufficiently precise to be considered as prescribed by law for the purposes of article 8(2) ECHR. The phrase "person having functions of a public nature" is very close to the phrase used in section 6(3) of the HRA 1998 "person certain of whose functions are functions of a public nature". If such language is sufficiently precise for the HRA obligations to be "prescribed by law", it is sufficiently precise for the purposes of clause 106.

33. The regulator, in addition to being bound by the HRA, as a public authority under s 6 itself, will therefore only be able to disclose information under clause 106 to a person or body who will be bound by section 6 of the HRA to act compatibly with the Convention rights.

34. The power to disclose under clause 106 is not unlimited, but only permits disclosure for a purpose connected with the regulator's functions or the public authority's functions.

35. We believe that the regulator's disclosure of any information to which article 8 applies, will be either in the interests of the economic well-being of the country, the prevention of disorder or crime or the protection of the rights and freedoms of others (for example tenants of registered providers who are failing to comply with their legal obligations relating to the safety and maintenance of rented homes).

36. The regulator's statutory objectives under clause 86 of the Bill, including in particular objective 10, requiring it to regulate in a proportionate manner, constrain the way the regulator can exercise its functions.

Question 3: Whether the government considers that sustainability certificates or the register proposed by Clause 245 would contain personal information which would engage the right to respect for private life guaranteed by Article 8 ECHR?

37. Sustainability certificates for new homes as proposed in the Housing and Regeneration Bill, and the register of such certificates which appropriate national authorities are empowered to establish by clause 245, have very limited capacity to contain personal information which would engage the right to respect for private and family life, home and correspondence, guaranteed by Article 8 of the European Convention on Human Rights.

38. The information entered on the register will relate to the home itself, and make no reference to the owner or occupier. The certificate as envisaged will give only an overall rating expressed as a number of stars and a breakdown expressed in points of the performance of the home against sustainability criteria. It is likely that there will also be lodged on the register the data form on the basis of which the points are assessed however, and this will contain a quantity of information on details of design and construction of the home.

39. The address of the home will be on the register. Accordingly, if the electoral register were searched in relation to the address and the names of those eligible to vote and residing in the home identified, then a number of details in relation to their living accommodation might be revealed from the stored data, if access were allowed, along with the star rating and the points earned in relation to Code categories as shown on the certificate. It is to this extent only that the register would contain personal information, other than information on the person responsible for preparing the certificate. Access to the register will moreover be very restricted, as described below.

Question 4: If personal information will be contained, whether, in light of recent events involving data handling and HMRC, the Government considers that reliance on the application of the DPA 1998 and Section 6 HRA 1998 will be adequate to ensure that data shared under Clause 106 *(it is presumed that clause 245 was meant)* **will be processed in a manner compatible with the individual right to respect for personal information (as protected by Article 8 ECHR), or whether more detailed safeguards are required on the face of the Bill?**

40. The certificate will contain personal information in the form of the name and the professional address of the authorised assessor who produces the certificate. It can be presumed that a person who makes himself available to perform such work will, as part of the process of his authorisation, have given the appropriate consent, in accordance with the provisions of the Data Protection Act 1998, for his name to be recorded on the register and to be given out in accordance with the conditions for disclosure of information from the register set out in the regulations to be made under clause 245(6).

41. In relation to the wider issues of disclosure of personal information raised in relation to persons living in the home, clause 245(5) provides that no disclosure of the register or from it may be made except in accordance with regulations made under clause 245(1). Clause 245(8) imposes a criminal sanction for breach of this. Clause 245(6) makes explicit provision for the regulations to provide for the circumstances and purposes in respect of which inspection of and disclosure from the register is permitted, and clause 245(7) establishes that such purposes may be 'public purposes or purposes of private undertakings or other purposes'.

42. The regulations ultimately to be made by the appropriate national authorities will be subject to scrutiny by Parliament and by the National Assembly for Wales. The Secretary of State and the Welsh Ministers will be under a duty under section 6 HRA 1998 to act compatibly with Convention rights in drawing up those regulations. Any disclosure under the regulations will in addition be governed by the Data Protection Act 1998 ("the DPA 1998"). We consider that, in respect of any personal information so disclosed, reliance on the operation of the DPA 1998 and section 6 HRA 1998 will be adequate to ensure that any disclosure under regulations made under clause 245 will be made in a manner compatible with Article 8 ECHR.

43. The DPA 1998 requires that any personal data be processed fairly and lawfully, and must meet at least one of the conditions set out in the DPA 1998 Schedule 2. The Schedule 2 conditions require either consent by the subject to disclosure, or that disclosure is 'necessary' for listed purposes. It is not envisaged that any disclosure permitted under the regulations to be made would fall outside the allowed purposes. In particular, paragraphs 5

(processing necessary for the administration of justice, for the exercise of any functions conferred on any person by or under an enactment, for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or the exercise of any other functions of a public nature exercised in the public interest by any person) and 6 (processing necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed) are applicable in this case.

44. The provision in clause 245(5) for disclosure only in accordance with the regulations meets the requirement that any data be processed lawfully. Such processing must however still be still made fairly and be necessary. In respect of the processing being necessary, the data controller must be satisfied that the purposes for which the data are being processed are valid, that it is reasonable to seek to achieve such purposes by the processing of personal data, and that the degree of processing is proportionate to the aim pursued. This will ensure that information is disclosed only where the appropriate national authority is satisfied that the information will be of significant help to the requestor in achieving an allowed purpose.

45. Adequate security safeguards will be in place for the data on the register. We propose that the register will be a stand-alone electronic database maintained on behalf of the Government with a secure server into which the information will be deposited. It is proposed that operating procedures for the database itself will be established to maintain the security of the information therein.

Question 5: If personal information will be contained, without further definition of (a) how the register will operate, (b) what information it will hold, (c) the circumstances in which information may be disclosed or (d) for what purposes:

1. why the Government is persuaded that in practice this provision will be exercised in a manner compatible with Article 8 ECHR; and

2. why the Government is persuaded that these provisions are sufficiently precise to be considered prescribed by law for the purposes of Article 8(2) ECHR?

46. As described above, the register will be a secure electronic database maintained on behalf of the Government. It will hold sustainability certificates and the background information on the basis of which those certificates are drawn up. The purpose of the register is to allow for the authentication of certificates, quality control procedures, and to allow for statistical research for Government purposes. If a register is to be in place for those purposes, it is right to give access also to the owner of the home for as long as the certificate and any other document are retained on the register.

47. It is envisaged that disclosure will be made only to enforcement authorities for the discharge of their functions, to authorised assessors and their accreditation bodies in connection with their own work of assessment and certification and for purposes of quality assurance of that work, to owners of the homes concerned, and, on a suitably anonymised basis for statistical and research purposes, to local and national Government or those working on their behalf. In the latter case Article 8 would in any event not be engaged. It is within these parameters that the power to make regulations in clause 245(6) and (7) will be exercised. The reference in clause 245(7) to 'public purposes or purposes of private undertakings or other purposes' is drafted to allow amongst other things for provision to

be made for access by homeowners and the operation of the registers by contractors to Government, rather than as a basis for allowing widespread access for purposes yet to be determined. The detail of the provision to be made under clause 245(6) and (7) is however of its nature suitable to be left to secondary legislation. This is particularly so with regard to the need to adapt administrative provisions to meet situations arising in a fast-developing area of activity. The limited engagement of Convention rights involved in the clauses is not sufficient in our view to make such an approach inappropriate in the present case.

48. The encouragement of the provision of sustainability certification, covering as it does social, economic and environmental aspects of the design and construction of new homes, is an important element in the Government's plans to ensure the provision of more and better homes. Sustainability standards moreover provide a model for early adoption of energy-saving measures in advance of the Government's intention to secure that all new homes will by 2016 be zero-rated for carbon emissions. Such limited engagement of Article 8 rights as the operation of the register may give rise to will be in accordance with the law, in the shape both of the primary legislation and of the detailed regulations to be made there under, which will moreover be made by the appropriate national authorities in conformity with section 6 HRA 1998 and the DPA 1998. It will moreover be necessary for the economic well-being of the country and for the protection of health, and proportionate to those aims.

Questions 6: Can you tell us whether the Government considers that registered providers of social housing will be performing any public functions for the purposes of the Human Rights Act 1998?

49. We do not consider that this Bill adds any additional public functions for registered providers of social housing (previously called registered social landlords) for the purposes of the Human Rights Act 1998. There may be circumstances where some registered providers of social housing will be performing public functions, as is the case at present in relation to registered social landlords, for example functions related to anti-social behaviour orders. The provision of social housing for rent and other core activities of registered providers are not public functions, because they are identical in substance to functions which have been and can be carried out by commercial organisations as well as sometimes by government.

Questions 7 and 8: If so, can you explain how the Government proposes to ensure that section 6, Human Rights Act 1998 will be treated by the courts as applying to registered providers of social housing when they are exercising those public functions, despite the judgement of the House of Lords in YL vs Birmingham CC? If not, can you explain how your view on the intended application of Section 6, HRA 1998 differs from the Ministry of Justice, and specifically the former Lord Chancellor, Lord Falconer, and the current Minister of State for Human Rights, Michael Willis MP?

50. Where registered providers are performing public functions for the purposes of the Human Rights Act, section 6 will apply. The judgment in YL case will no doubt be a source of reference for lower courts when deciding whether any particular function is a public function for these purposes.

51. My colleague Michael Wills confirmed during the meeting with the Committee on 26th November, that the Government will address the wider issue of the definition of "public authority" in the context of the forthcoming consultation on the British Bill of Rights and Responsibilities. During that process of consultation, the Government will be able to draw on wide range of expertise.

Questions 9, 10 and 11: Can you confirm whether or not the Government intends to proceed with a remedial order during this session to meet the declarations of incompatibility which stand in relation to Section 185(4) of the Housing Act 1996? If it does intend to proceed by way of a remedial order, can you please give your best estimate of when the draft order will be laid? Can you explain why the Government's original preferred solution has not been put forward as one of the proposals in the Bill? Can the Government explain whether there are any reasons, other than the maintenance of the Government's incompatible policy on foreign dependents and the provision of housing assistance, why his Bill should not be amended to repeal Section 185(4) of the Housing Act 1996?

52. You have referred to the declarations of incompatibility regarding section 185(4) of the Housing Act 1996, made in the cases of *Morris* and *Gabaj*. The Government proposes to remedy the incompatibility as soon as a suitable remedy has been identified, which can maintain the government's policy in respect of migrants' access to homelessness assistance and social housing. The Department of Communities and Local Government is continuing to work with the Home Office to find a compatible solution. The Government hopes to implement a remedy during this session. If possible, provision will be made in the Housing and Regeneration Bill.

53. I hope this is helpful. Please do not, hesitate to contact me if you have any further questions.

Appendix 6: Letter to Lord Jones of Birmingham, Minister of State for Trade and Investment, Department for Business Enterprise and Regulatory Reform, dated 20 December 2007

Regulatory Enforcement and Sanctions Bill

The Joint Committee on Human Rights is considering the compatibility of the Regulatory Enforcement and Sanctions Bill with the United Kingdom's human rights obligations.

(1) Civil Sanctions: Right to a Fair Hearing (Article 6 ECHR)

Article 6(2): "Satisfied the person has committed a Relevant Offence"

The Bill provides that regulators who are granted the power to impose a fixed monetary penalty or any of a series of discretionary penalties must be satisfied, beyond reasonable doubt, that the regulated person has committed an offence[107] The Explanatory Notes make it clear that the Government envisages the CPS or the police passing information to a regulator where they consider that an act no longer merits a criminal prosecution.[108] The Committee has previously expressed its concern that the imposition of regulatory

[107] Including fixed monetary penalties (Clause 37(2)), discretionary requirements (Clause 40(2); Clause 41(4)(a)).

[108] EN, para 158

penalties, which imply guilt in relation to a criminal offence, may lead to a risk of incompatibility with Article 6(2) ECHR.[109]

1) I would be grateful if you could provide me with an explanation for the Government's view that a regulatory, administrative penalty based on a decision that an individual has "committed an offence" will be compatible with Article 6 ECHR, and specifically, with Article 6(2) ECHR?

Article 6: Right to a fair hearing before an independent and impartial tribunal

The Explanatory Notes explain that there are a number of safeguards in the Bill that protect individual rights under Article 6 (and Article 8, and Article 1, Protocol 1 ECHR). These include the requirement that in relation to fixed financial penalties and discretionary requirements, a regulator must be satisfied to a criminal standard; that a person subject to the regulatory sanctions in the Bill must be given notice and either an opportunity to ask for a review (in relation to fixed financial penalties) or an opportunity to make written representations (in relation to discretionary requirements). All of the civil sanctions will be subject to appeal, except for an "enforcement undertaking" which is accepted voluntarily.

The Bill makes provision for different decision-making processes which the Secretary of State may provide for regulators should the power to impose certain civil sanctions be granted. For example, if a regulator is to have the power to impose a fixed monetary penalty, the Bill makes no provision for written or oral representations, but does provide that a person subject to a penalty must be able to ask for an "internal review" (the composition or procedure to be followed by any internal review body is not specified). On the other hand, where a regulator is empowered to impose a monetary penalty which is not fixed, but subject to its discretion, there is no right to an internal review, but the person subject to the penalty must be given an opportunity to make written representations.

2. In light of the importance of the safeguards proposed by the Explanatory Notes for compatibility with the right to a fair hearing by an independent and impartial tribunal, and other Convention rights, I would be grateful if you could explain why the Government considers that it is appropriate to leave a number of those safeguards to secondary legislation (particularly, the detailed provisions for appeal in Clause 52)?

3. Why does the Government consider that where a penalty is fixed, an individual should have recourse to an "internal review", but, where a penalty is discretionary, there is no right to review, but a regulated person may make written representations?

4. I would be grateful if you could provide an explanation of the Government's reasoning behind the different procedures for each proposed penalty, particularly in relation to the ability of a regulated individual to make representations before a penalty is imposed?

5. Does the Government consider that it is compatible with Article 6 ECHR and the common law of procedural fairness to permit any administrative body to impose a fixed monetary penalty without an opportunity for either written or oral representations?

[109] Second Report of Session 2006-07, Legislative Scrutiny: First Progress Report, paras 4.15 – 4.21 (Consumers, Estate Agents and Redress Bill)

6. What does the Government consider will be the grounds and procedure for an "internal review"?

The Bill will enable the Secretary of State to grant wider powers to impose civil sanctions to a very significant number of regulatory bodies, all of whom have different terms of appointment, composition, purposes and procedures. The Secretary of State will retain a power to suspend a regulator's powers by issuing directions and may then lift that suspension, again by issuing directions (Clauses 63 and 64).

7. Does the Government accept that in the circumstances envisaged by the Bill for the imposition of civil sanctions by regulators, it is very unlikely that any of the relevant regulators will, in their own right, be considered to be independent and impartial tribunals for the purposes of Article 6 ECHR?

The Bill provides that any appeal will be to the First Tier Tribunal, or "another tribunal established by enactment" and specified by the Secretary of State. The Secretary of State may also make provision for the powers of any appellate body (Clause 52). The Explanatory Notes explain: "this exception is to cater for tribunals which will not form part of the First Tier Tribunal, such as the employment tribunals, which currently hear some health and safety appeals and may be an appropriate venue for hearing certain appeals under this part".110 The discretion in the Bill is broad and would allow the Secretary of State to deem any tribunal, however constituted, as a tribunal for the purposes of hearing appeals against civil sanctions. This broad discretion means that it is very difficult to assess whether these provisions will ensure that an individual subject to the sanctions will have access to a hearing by an independent and impartial tribunal.

8. Does the Government consider that the First Tier Tribunal, or other tribunals which are currently named in the Explanatory Notes (such as the employment tribunal) will not be able to deal adequately with appeals against the sanctions proposed by this Bill?

9. Why does the Government consider that it is appropriate, and compatible with the principle of legal certainty, that the Secretary of State should retain a broad discretion to determine the mechanism for appeal from sanctions under this Bill, other than by reference to a list of existing tribunals?

(2) Disclosure of Information

Clause 66 allows information to be passed by the police or the CPS (or the equivalent in Wales and Northern Ireland) to any regulator exercising powers created under Part 3. Information may only be shared if the police or CPS have an "enforcement function" in relation to the offence for which the Regulator has the power to impose civil sanctions. The Explanatory Notes explain that the Government accepts that these provisions may engage Article 8 ECHR, which safeguards the right to respect for personal information. However, in the Government's view, if Article 8 ECHR is engaged, this information sharing power is justified and proportionate. Clause 66 contains some safeguards, including that information may only be disclosed for the purpose of exercising powers created by this Act. However, disclosure may include information gathered using police powers. The Clause provides that any disclosure under the Act is not to be taken to breach "any restriction on

[110] EN, paras 127-129

the disclosure of information however imposed", but it also provides that nothing in its provisions authorises disclosure in breach of the Data Protection Act 1998 or Part 1 of the Regulation of Investigatory Powers Act 2000.

10. I would be grateful if you could provide a further explanation of the Government's view that these provisions will operate in a manner compatible with Article 8 ECHR. Specifically, I would be grateful for:

a. an explanation of the legitimate aim which this provision serves, including which of the aims identified in Article 8(2) includes "in the interests of effective regulation"

b. an explanation of the Government's reasons for concluding that these powers will always be exercised in a proportionate way.

11. Could you confirm that it is the Government's intention that disclosure and processing of information under these provisions will remain subject to a) the Data Protection Act 1998; b) the Regulation of Investigatory Powers Act 1998 and c) Section 6 of the Human Rights Act 1998?

12. I also would be grateful if you could explain the Government's view that these powers of disclosure will be compatible with common law rights to procedural fairness and the right to a fair hearing as guaranteed by Article 6 ECHR.

I would be grateful for your response by 15 January 2007.

Appendix 7: Letter from Pat McFadden MP, Minister for Employment Relations & Postal Affairs, Department for Business Enterprise and Regulatory Reform, dated 14 January 2008

Response to the JCHR Letter of 20 December 2007 on the Regulatory Enforcement and Sanctions Bill

1. Thank you for your letter of 20 December 2007. This asked for a fuller explanation of the Government's view that the provisions in the Bill are compatible with the Convention rights guaranteed by the Human Rights Act 1998. I set out our further explanation below.

2. Before turning to the questions in your letter, it may be helpful to set out the background to the Bill's policy and structure. Part 3 of the Bill implements a number of recommendations from the Macrory Review[111]. Professor Macrory found that regulatory regimes generally suffer a compliance deficit whereby regulatory non-compliance is not addressed because the regulator lacks an appropriate and effective enforcement tool. Criminal prosecution was not always effective in promoting change in offender's behaviour; for example, by not adequately removing financial gain made by offenders. Furthermore, criminal prosecution was sometimes a disproportionate response to minor, non-culpable instances of non-compliance such as failure to provide certain information on time. The Government agreed with Professor Macrory's recommendations that a number of administrative sanctions should be introduced so as to address, where necessary, the compliance deficit in regulatory regimes.

[111] Regulatory Justice: Making Sanctions Effective Professor Richard Macrory November 2006

3. It is not intended for these administrative sanctioning powers to be conferred upon all regulators. Instead, the Government has adopted the approach of allowing these sanctions to be conferred upon regulators by way of an enabling power. Regulators must show that there is a need for them to have access such sanctions and that they are ready to use them responsibly.

4. This approach has resulted in an innovative and ambitious piece of legislation covering some 60 regulators as well as local authorities. The Bill has needed to balance flexibility, so that administrative sanctions can be fitted seamlessly into a number of existing regulatory regimes, against legal certainty, so as to ensure that the regulated community understand the rights and safeguards to which it is entitled. This Bill has been subject to extensive public consultation and my officials have engaged closely with business and regulator stakeholders. The Bill has undergone a number of changes as a result of this consultation.

5. The European Court of Human Rights has endorsed other decriminalising measures. It was noted in the *Ozturk*[112] judgment that by removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual as well as the needs of the proper administration of justice. The Court stressed this would not be acceptable if it were to lead to the exclusion of Convention rights. The Bill has sought to ensure that the administrative sanctioning powers can be used compatibly with Convention rights.

6. We welcome the opportunity to explore the important matters raised by the Committee's letter. We trust that the explanations in this letter will assuage any concerns the Committee may have. I now turn to the questions in your letter.

(1) Civil Sanctions: Right to a Fair Hearing (Article 6)

Question 1: Your letter asks for "an explanation for the Government's view that a regulatory, administrative penalty based on a decision that an individual has "committed an offence" will be compatible with Article 6 ECHR, and specifically, with Article 6(2) ECHR".

7. Before a regulator may impose one of the administrative sanctions, it must undergo a robust process of establishing a person's liability. In the case of monetary penalties and discretionary requirements, the regulator must be satisfied beyond reasonable doubt that the person has committed an offence. This will undoubtedly involve the regulator in conducting a rigorous investigation to gather and assess the weight of evidence in the same way as if it were pursuing as criminal prosecution. It is implicit in carrying out this exercise that the burden of proof is on the regulator and there is no presumption of guilt on the person potentially liable to the administrative sanction. The regulator must garner sufficient evidence to satisfy itself, to the criminal standard, that the person has indeed committed an offence. Should that evidence be lacking, the regulator will not be legitimately able to impose the administrative sanction upon that person. Furthermore, as a matter of general administrative law, the regulator, as a public authority, should assess the evidence with an open mind.

8. There are a number of additional safeguards written into the Bill to ensure that a person accused of an offence will have the benefit of the procedural rights under Article 6(1). The

[112] *Ozturk v Germany (1984) 6 EHRR 409 at paragraph 49*

person will be notified of the substance of the case against him by way of notice. He will be able to make representations against this case by way of internal review for fixed monetary penalties, after the notice of intent for discretionary requirements, or at appeal for stop notices. In all cases, a person subject to an administrative sanction will have access to a public hearing before an independent and impartial tribunal by way of rights of appeal. The appellate tribunal will be able to examine both matters of law and fact and will have powers to withdraw the requirement or notice. If it decides that the regulator's decision is based on evidence that does not meet the requisite standard, the tribunal will have to quash the decision. The appellate tribunal will also be able to ensure that the regulator has not approached the evidence with a closed-mind or has taken irrelevant considerations into account. By providing access to an appellate tribunal in this way, we are content that the provisions are compatible with Article 6(1) ECHR.

9. In the case of fixed monetary penalties and stop notices, we recognise that sanctions may be imposed before the person liable has had a formal opportunity to make representations. However, firstly, we believe context is important. Regulators are expected to behave in accordance with Hampton and Macrory principles of better regulation[113] and should thus take action only when necessary and appropriate. In practice, we would also expect regulators to have been in communication with those they regulate before proposing to impose a sanction. Against this background, although there is no specific procedure in the Bill under which a person would make representations or objections before a fixed monetary penalty or stop notice is imposed, this may in practice occur. Secondly, in any event, there is no breach of the presumption of innocence under Article 6(2). This is because the burden of proof lies with the regulator; the sanction cannot be lawfully imposed unless and until the burden has been met. This determination is then subject to scrutiny by an independent and impartial tribunal.

10. In the case of fixed monetary penalties, the regulator must have sufficient evidence to meet the criminal standard of proof that the person has committed a relevant offence. In the case of stop notices, the burden is on the regulator to show that the activity subject to the notice will involve or is likely to involve the commission of a relevant offence. In both cases, the person liable may challenge this determination before the appellate tribunal. The person must demonstrate that there are grounds for appealing against the decision to impose the sanction. This does not make the procedure incompatible with Article 6(2) (see *Lingens v Austria (1981) 26 DR 171*). It is not dissimilar to the burden faced by defendants in criminal prosecution. Once the prosecution has discharged its burden of proving the case, the burden then transfers to the defendant to avoid liability by raising a defence or reasonable doubt.

[113] *Reducing Administrative Burdens: Effective Inspection and Enforcement*. Phillip Hamtpon. March 2005 Principles – page 7, paragraph 3; *Regulatory Justice: Making Sanctions Effective*. Professor Richard Macrory. November 2006 –page 10, paragraph 3. See also the Compliance Code for Regulators which comes into force in April 2008
http://bre.berr.gov.uk/regulation/documents/compliance_code/compliance_code_071217.pdf

11. Furthermore, even if the imposition of the administrative sanction by a regulator is regarded as giving rise to a presumption of guilt, the provision of opportunities to rebut such a presumption by way of making objections and representations and by appealing to a tribunal constitute sufficient safeguards of a person's rights under Article 6(2) (see *Janosevic v Sweden 23/7/2002*)

Question 2: Your letter asks for an explanation as to why the Government considers that it is appropriate to leave a number of the safeguards concerning the right to a fair hearing by an independent and impartial tribunal to secondary legislation (particularly, the detailed provisions for appeal in Clause 52).

12. We consider it important to ensure that persons liable to an administrative sanction under this Bill should have a right to a fair hearing by an independent and impartial tribunal. The Bill therefore creates appeal rights in clauses 38(2)(e), 41(2)(e), 45(2)(b) and (g), and 51(4)(d). Each appeal right has an associated provision specifying the minimum grounds of appeal that may be raised before the appellate tribunal. For example, the grounds of appeal for fixed monetary penalties are set out in clause 38(6). The Bill specifies that the venue for the appeals should be to either the First-tier Tribunal or a specified statutory tribunal. The tribunal will be entirely separate from the regulator. The independence of the First-tier Tribunal's judiciary is also guaranteed by section 1 of the TCE Act. Members of the First-tier Tribunal will be appointed independently of the regulator by the Lord Chancellor following selection by the Judicial Appointments Commission in accordance with the procedures set out in the Constitutional Reform Act. We believe that these measures taken together will constitute a sufficient guarantee of independence. The matter of specified statutory tribunals is dealt with in more detail in answer to questions 8 and 9 of your letter.

13. The provision at Clause 52(3)(b) makes provision as to the powers of the appellate tribunal whether it is the First-tier Tribunal or some specified tribunal. Subsection (4) sets out examples of what powers the tribunal should have. It gives a clearer picture of the whole process of imposing and appealing an administrative sanction. The Bill does not need to make detailed provision as to the practice and procedure governing these powers. This is because there is provision in the TCE Act which provides for Tribunal Procedure Rules for the First-tier Tribunal to be made on such matters. Similarly, for specified tribunals, the establishing legislation will have detailed provision as to the practice and procedure governing the powers of that tribunal. These rules will govern matters such as the conduct of hearings, the use of evidence, and rights of audience. These rules will be made by statutory instrument and will therefore be subject to Parliamentary scrutiny. We are confident that powers in existing legislation will be able to provide the safeguards concerning the right to a fair hearing. Nonetheless, the provision at Clause 52(3)(b) will provide a useful power to address any shortcomings of the existing powers of the First-tier Tribunal or any specified tribunal.

Question 4 of your letter asks for an explanation of the Government's reasoning behind the different procedures for each proposed penalty. Question 3 asks why there is an internal review for fixed monetary penalties and not for discretionary requirements. Question 6 asks for information as to the likely grounds and procedure for an internal review.

14. We have grouped your questions 3, 4 and 6 together as they address similar matters. It might be helpful if, in addition to answering your questions, we explained the sort of behaviour the different penalties are intended to address.

Fixed Monetary Penalties

15. As the Guide to the Bill (which we published in November 2007) makes clear, fixed monetary penalties are aimed at addressing low level non-compliance. Fixed monetary penalties are intended to address offences which involve factually simple instances of non-compliance which may or may not involve culpable conduct. Examples could include failure to hold a licence for a particular activity, failure to keep records up to date, or failure to ensure food labelling on individual items complies with current legislation. In particular, it is envisaged, for example, that notices will be used for some '*strict liability*' offences, that is, cases where liability is satisfied simply by a person committing a particular act without the need to show an intention to act, or any blameworthy conduct. The regulator may only impose a fixed penalty for the offence and has no discretion over the amount of penalty. Fixed monetary penalties allow such low level instances of non-compliance to be dealt with more efficiently without both parties incurring the high cost and stigma of criminal prosecution. Fixed monetary penalties are not intended to be used for more serious or more complex instances of non-compliance.

16. A fixed monetary penalty is imposed by way of a fixed penalty notice which a person may challenge by requesting an internal review. The review must take place within 28 days of the request and is envisaged as a paper-based exercise. We would expect that the request for an internal review would set out the person's reasons for challenging the penalty notice. The person would be able to raise any defences against the sanction, including any common law defences. He would also be able to plead extenuating circumstances which make the imposition of the penalty unreasonable. The regulator would be able to ask for more information or explanation about the basis for challenging the penalty notice. At the end of the review, the regulator must either withdraw or confirm the penalty and give reasons for its decision. Under the provisions of the Bill, the regulator *must* withdraw the penalty if it is satisfied that the person has a defence to the relevant offence.

17. The Bill does not make any mandatory provision as to the composition or procedure of any internal review body. This is because of the differing nature of the regulators covered by the Bill. They range from large regulators such as the Health and Safety Executive to small regulators such as the British Hallmarking Council. Some regulators would be able to resource more formal internal review procedures and bodies. For example, larger regulators may have sufficient staff and resources to have an internal review panel wholly separate to the regulator's enforcement arm. Smaller regulators may not be able to do this. It is for this reason that the Bill does not make detailed provision as to the composition of any internal review body as the nature of such a body will have to differ according to the character of the regulator.

18. Similarly, the Bill is not prescriptive as to the grounds and procedure for an internal review. This is intended to ensure that the process is flexible for both regulator and the regulated. We did not wish to impose restrictive provisions on persons specifying what they could or could not plead during an internal review. We wish for the process to be as accessible as possible for the regulated. That is not to say however that an order conferring

the fixed monetary penalties will not contain such provision. We would expect implementing departments to provide greater detail as to the grounds and procedure for an internal review. These matters would take account of the size and nature of the regulator as well as the type of regulatory field within which it operates. For example, regulators of individuals or small businesses may prefer to have less formal and more accessible internal review procedures.

19. We have also provided guidance to implementing departments and regulators in the form of the Guide to the Bill to complement the legislative provisions. The Guide makes certain recommendations about the conduct of internal reviews. For example, it recommends that the person(s) conducting the review should not have been involved with the original decision to issue the notice. It also recommends that the reviewer should work or have worked in the relevant area of regulation and, where possible, should be more senior and experienced than the person imposing the notice. We expect to have an ongoing role in providing guidance to implementing departments and regulators about the detailed implementation of the powers in the Bill.

Variable Monetary Penalties and Discretionary Requirements

20. In contrast to fixed monetary penalties, variable monetary penalties and other discretionary requirements are aimed at more serious and complex examples of non-compliance. The non-compliance is likely to involve more complex events with a number of different consequences and effects which need to be addressed. For example, a business may illegally deposit waste on parkland. To adequately address this behaviour, the regulator will need to order the business to clear up the waste, make good any damage to the environment and will want to capture any financial benefit that the business has gained so as to act as a sufficient deterrent for the next time. Discretionary requirements allow the regulator to do all these things.

21. Given the more complex nature of the offences which discretionary requirements are intended to address, the procedure for imposing the requirements allows for the person liable to make objections and representations before the final notice is imposed. This allows the person to raise any defences or objections to the imposition of the sanction before it is imposed. The Bill provides that a final notice may not be imposed if the regulator is satisfied that the person has a defence to the offence. It also allows the person to make representations as to the nature of the compliance or restoration requirements to be imposed. For example, it could submit that the proposed restoration requirement would not have the intended effect of making good the damage made and make an alternative suggestion as to the nature of the requirement. The objections and representations stage is also an opportunity for the person to offer an undertaking to take action to benefit affected third parties so as to mitigate the intended sanction.

22. The internal review stage for fixed monetary penalties is intended to give a comparable opportunity to make representations and objections to that available before discretionary requirements are imposed. Although in the case of fixed monetary penalties, this stage will take place after a decision that has already been taken it will still give an opportunity for a person to make representations and objections to overturn the sanction. For discretionary requirements, a final decision to impose a sanction has not yet been taken and the stage is therefore described as a representations and objections, rather than review, stage. In both

cases, the person subject or potentially subject to the sanction, has the opportunity to raise defences, objections and representations to challenge the imposition of the sanction. The regulator is obligated under principles of good administration to consider such submissions before deciding further action. It should be noted that although it is envisaged that these stages will be paper-based exercises, the Bill does not exclude the possibility for oral representations being made or for persons subject to the penalty to request a meeting with the regulator.

Stop Notices

23. Stop notices require a business to cease an activity that is causing harm or presents a significant risk of causing serious harm. They will perform two related functions. Where the business served with a notice is already carrying on the activity they will prohibit the activity being further carried on until the business has taken the steps specified in the notice. They may also be used for more preventative purposes. A stop notice may be imposed where an activity which is likely to be carried on in the near future gives rise to or is likely to give rise to a significant risk of serious harm. The objective, in both cases, is to prohibit the business from carrying on the activity until the steps needed to reduce or remove the harm or risk of harm and, by that means, to encourage the business back into compliance. While the notice is in force, it will serve the further valuable purpose of protecting the public from the harmful effects of carrying on the activity in a way that does not comply with the law.

24. The offences that stop notices will be used for are those that involve activities which may present a risk of harm to human health, the environment, and the financial interests of consumers. Given that the activity (or likely activity) is causing (or is likely to cause) serious harm or presents a significant risk of causing such harm, the procedure for imposing a stop notice needs to take account of the need to take immediate action to address such harm as well as ensuring that there are appropriate safeguards for those subject to the notice. Thus, in the interests of protecting the public and environment, we do not consider there is a need for a statutory mechanism to give an opportunity for a person to make representations or objections before a stop notice is imposed. This prevents delay in addressing the risk to the public and environment. The notice must however contain details of the grounds for serving the notice and the rights of appeal. The person upon whom the notice has been served is, therefore fully informed of the case against him and his rights of challenge. This is similar to the procedure of a number of existing examples of stop notices such as prohibition notices under section 22 the Health and Safety at Work, etc, Act 1974. The person subject to the notice will have a direct route of appeal to an appellate tribunal which has wide powers to examine the decision to serve the stop notice. We expect that tribunal rules will ensure that such appeals are dealt with expeditiously.

Enforcement Undertakings

25. Enforcement undertakings are undertakings to take certain action given by persons suspected of having committed a relevant offence. They can be accepted, at the discretion of the regulator, in place of the imposition of a civil sanction or prosecution for the criminal offence. They may be offered at any time during an investigation for a relevant offence. In principle, enforcement undertakings are available for any offence which is subject to a fixed monetary penalty, discretionary requirement or stop notice. In practice,

we would not envisage many circumstances in which it would be appropriate for a regulator to accept an enforcement undertaking in place of a stop notice. The undertakings are offered by a person under investigation and are not requested or imposed by the regulator. There is therefore no provision as to the procedure for imposing undertakings: it cannot be done. As no specific concerns were raised about enforcement undertakings, we do not propose to go into any more detail about this sanction.

Your letter asks at question 5 for the Government's view over the compatibility with Article 6 ECHR and the common law of procedural fairness to permit any administrative body to impose a fixed monetary penalty without an opportunity for either written or oral representations.

26. The assessment as to whether a particular administrative decision is compatible with Article 6 ECHR and the common law of procedural fairness is to be based on the course of the proceedings as a whole rather than focussing on any particular stage (see *Khan v United Kingdom (2000) 31 EHRR 1016*). It would clearly be unfair if a person was to suffer a penalty without any opportunity to make a case against that penalty but that is not the case here. The person subject to the fixed monetary penalty is not able to make representations before the penalty is imposed but it is not accurate to say that the person has no opportunity to make representations. The person is able to make representations and objections at the internal review stage of proceedings and the regulator may withdraw the penalty following the review. Indeed, the regulator must withdraw the penalty if it is satisfied that the person has a defence to the relevant offence. The regulator will therefore hear the other party's side of the case. That party will be able to have the penalty decision overturned following the making of such representations and objections. The process is similar to the enforcement of parking offences.

27. The decision-making procedure for imposing the fixed monetary penalty does not need to satisfy all the conditions of Article 6 provided that the regulator's decision is subject to control by a judicial body which can provide the Article 6 guarantees (see *Albert and Le Compte v Belgium (1983) 5 EHRR 533, De Cubber v Belgium (1985) 7 EHRR 236,and Schmautzer v Austria (1996) 21 EHRR 511*)). Under the Bill, a person subject to a fixed monetary penalty may appeal a regulator's decision to confirm the penalty after an internal review to an appellate tribunal. The minimum grounds of appeal for fixed monetary penalties are that the decision was based on an error of fact, was wrong in law or was unreasonable. The appellate tribunal will therefore be able to examine all aspects of the decision to confirm the penalty. Under Clause 52, the appellate tribunal will be able to quash the decision and is able to substitute its own decision for the regulator. As noted above, the independence and impartiality of the appellate tribunal is guaranteed in other legislation. We are therefore content that the provisions of the Bill concerning fixed monetary penalties are compatible with Article 6.

Your letter asks at question 7 whether the regulators within scope of the Bill will, in their own right, be considered to be independent and impartial tribunals for the purposes of Article 6 ECHR.

28. We do not generally regard the regulators within scope of the Bill as independent and impartial tribunals for the purposes of Article 6 ECHR although we do not exclude the possibility that one or two regulators may satisfy the criteria (for example, an offence

enforced by the Plant Varieties and Seeds Tribunal falls within scope of the Bill). For the purposes of simplicity of argument, we will assume that all the regulators within scope are not independent and impartial tribunals. In our view, we do not think that this in itself gives rise to incompatibility with Article 6 ECHR. As noted above, compatibility is to be assessed by examining the entire process of determining a person's civil rights and obligations or criminal charge. The Bill provides for each person subject to a sanction of a fixed monetary penalty, discretionary requirement or stop notice to have access to an independent and impartial tribunal, in the form of an appellate tribunal, to appeal against a regulator's determination of liability. Furthermore, the appellate tribunals that are intended to hear these appeals will be able to provide persons with adequate Article 6 guarantees.

Your letter asks at question 8 for the Government's view about whether the First-tier Tribunal and the employment tribunals would be able to deal adequately with appeals against sanctions proposed by the Bill.

29. We are confident that the First-tier Tribunal and employment tribunals will be able to deal adequately with appeals against sanctions proposed by the Bill. As Professor Macrory concluded in his review, there are two main advantages of a tribunal hearing appeals over criminal courts. First, tribunals can comprise members with both legal and specialist expertise in the subject matter before the tribunal thereby providing the tribunal with a fuller understanding of the issues. Second, a tribunal would not consider regulatory cases alongside cases of conventional crime which constitute the main workload of criminal courts.

30. As noted above, the First-tier Tribunal has powers provided by the TCE Act and other legislation which will enable it to deal with appeals adequately. For example, tribunal procedural rules may make provision as to the conduct of hearings, evidence, witnesses and costs and expenses. As for specified tribunals, of which the employment tribunal may be one, we would expect that the establishing legislation of the tribunals will make similar provision.

At question 9, your letter asks for an explanation for the Government's proposal to retain a discretion at clause 52 to determine the mechanism for appeal from sanctions rather than by reference to a list of existing tribunals.

31. The First-tier Tribunal is to be set up under the TCE Act and will consolidate the jurisdictions of a number of existing tribunals such as VAT and Duties Tribunals, Financial Service and Markets Tribunals and the Pension Regulator Tribunal. There remain however a number of tribunals whose jurisdictions will not be incorporated into the First-tier Tribunal. The Explanatory Notes give the example of employment tribunals but there are other tribunals who will not come within the First-tier Tribunal. Another example is the Competition Appeal Tribunal. It was therefore not sufficient to name the First-tier Tribunal as the only venue for appeals.

32. The Bill retains a discretion to name any statutory tribunal as a venue for appeals. It is not strictly accurate that the Secretary of State could specify any tribunal, however constituted, as a tribunal for the purposes of hearing appeals against sanctions. The discretion is restricted to statutory tribunals and would therefore exclude administrative tribunals or other less formal hearing panels.

33. We did not take the approach of listing tribunals as potential exceptions to the First-tier Tribunal under clause 52. This is because it will only become clear whether these tribunals will be likely venues for appeals as and when the administrative sanctioning powers are taken up. Furthermore, other tribunals may in future be transferred over to the First-tier Tribunal.

34 We understand the Committee's concern that there is a risk that a person subject to the sanctions will not be granted access to a hearing by an independent and impartial tribunal. We think that there are a number of constraints on the Minister in exercising the discretion at clause 52 which will mean that this risk will not be realised. First, as noted above, the Minister will only be able to specify a tribunal created under enactment. This means that only statutory tribunals will be able to hear appeals. As these will be tribunals set up under an enactment, they will have been subject to Parliamentary scrutiny and their compatibility with Convention rights will have been considered. As such tribunals will be established by legislation, it is likely that that the tribunal will have formal powers and guarantees of independence and impartiality. Secondly, the Minister is himself constrained to acting in compliance with his duty under section 6 of the Human Rights Act 1998. The Minister will therefore not be able specify a tribunal that is not independent or impartial for the purposes of Article 6 ECHR or was not able to provide Article 6 guarantees.

(2) Disclosure of information

Your letter asks for an explanation of how clause 66 will operate in a manner compatible with Article 8 ECHR. In particular, you seek explanations as to the legitimate aim which the provision serves and the view that the power will be exercised proportionately.

Purpose of Clause 66

35. Before providing the explanations the Committee seeks, it may be helpful to set out the purpose of clause 66. The police and prosecution authorities such as the CPS will not have the power to impose the administrative sanctions provided for under the Bill as they have been excluded under clause 35(3). We did not think that it was appropriate for these authorities to have access to these administrative sanctioning powers because of the nature of their activities. The provision at clause 66 is necessary to deal with the consequences of excluding the police and CPS from the scope of the alternative sanctioning powers. The exclusion of these authorities without the supplementary provision at clause 66 would mean that the sanctions to which a person would be subject would depend on who discovered the non-compliance first. If it were the regulator, then the person could be subject to either a criminal or administrative sanction. This would be based on a risk-based analysis in compliance with the Hampton and Macrory principles of better regulation. If it were the police, then the defaulter could only be subject to criminal prosecution, assuming charges were pressed. This would maintain the existing "compliance gap" identified during the Macrory Review and would not be in keeping with the policy aim of ensuring that sanctions are proportionate and effective. This perverse outcome could be avoided by allowing the police and CPS to pass on information to regulators with concurrent enforcement functions so that they may impose one of the alternative administrative sanctions if they thought it appropriate.

36. We envisage that the information gateway between regulators and police and prosecution authorities will be used only occasionally. We would expect that where the police is seized of a matter, it is likely that they will see it through to its conclusion. There may however be circumstances where it may be more appropriate to pass on the matter to a regulator. For example, the police may have discovered in the course of an investigation of a mainstream criminal matter the commission of a minor regulatory criminal offence. It may choose to concentrate on investigating the mainstream criminal matter and pass on details of the regulatory criminal offence to a regulator who has concurrent enforcement functions. Another example may be where the police discover another instance of a regulatory criminal offence committed by a person who is already under investigation by a regulator. It would be more efficient if the matter is passed to the regulator to deal with.

Article 8 ECHR

37. Firstly, we note that in many cases, it is likely, or at least arguable, that the protections of Article 8 will not apply at all to the information with which these provisions are concerned. Much of the regulated community with which administrative sanctions are concerned are companies, charities and other bodies to whom the protection of Article 8 ECHR are not, or are at best only arguably, available. The information likely to be held by police and prosecution authorities will be information about the business practices of these types of bodies.

38. In any event, however, to the extent that the protections of Article 8 may be relevant to or be engaged by the holding and protection of information about a person (for example, where information about individuals is concerned), we believe that the provisions are compatible.

39. Disclosure to a regulator under clause 66 would be compatible Article 8 if it were made in accordance with the law and was necessary in a democratic society for a legitimate aim. The latter part of this test includes a requirement that any disclosure should be proportionate to the legitimate aim. It is our view that disclosure under clause 66 will be compatible with Article 8.

40. In this case, any disclosure by police and prosecution authorities would be authorised by clause 66 of the Bill. Under this provision, the police and prosecution authority must have an enforcement function in relation to the offence. Thus, they will have to have come across this information in the course of an investigation. The recipient regulator must also have an enforcement function in relation to the offence. It does not permit disclosure to the world at large. Disclosure must be for the purpose of the exercise by the regulator of the powers conferred under the Bill. The disclosure would also need to be in accordance with the Data Protection Act 1998 and the Regulation of Investigatory Powers Act 2000. Furthermore, it would also have to be made with regard to the public authority's duty under section 6 of the Human Rights Act 1998. Therefore it would be in accordance with the law.

41. The necessity of having such information gateways in order to pursue a legitimate aim such as the prevention of crime and disorder is reflected in the existence of a number of precedents in other legislation for information gateways between regulators and police and prosecution authorities. For example, section 350 Gambling Act 2005 allows for the

exchange of information between enforcers of gambling regulation, that is, between the Gambling Commission, the police and local authorities. A similar provision exists at section 436 Proceeds of Crime Act 2002. That provision allows permitted persons to disclose information to the Director of the Assets Recovery Agency for the purpose of the exercise of his functions.

42. The purpose of clause 66 in this Bill is to facilitate more effective and proportionate responses to regulatory non-compliance and to diminish the regulatory compliance gap that arises as a result of police and prosecution authorities having been excluded from access to the civil sanctioning powers in the Bill. Failure to allow disclosure of information could lead to some non-compliant behaviour going unsanctioned or being subject to criminal prosecution only. The wide range of regulators and regulatory offences covered by the Bill mean that the following aims may be served by the disclosure: protection of public safety, maintaining the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others. For example, where the recipient is a regulator such as the Health and Safety Executive or the Environment Agency, the purpose of disclosure would be to allow them to exercise their functions in service of the aims of public safety and the protection of health. Another example is where the offence relates to consumer protection matters, the aim of protection of the economic well-being of the country is likely to be engaged.

43. The Bill contains a number of safeguards that will ensure that any disclosure is proportionate. First, both the person exercising the power in clause 66 and the recipient regulator will have to act compatibly with Convention rights in accordance with their duty under section 6 Human Rights Act 1998. Second, the information may only be disclosed for the purpose of the exercise by the regulator of any powers conferred by the Bill in relation to the offence in question. This means that information must be disclosed for a specific purpose and cannot be used for a different purpose or disclosed more widely under this provision. Third, information can only be disclosed to a small class of bodies, that is, regulators with a concurrent enforcement function in relation to the offence. Finally, the data subject will be able to challenge the accuracy of the information if it is relied upon by the regulator to impose a sanction and the legitimacy of relying on such evidence. He may assert his rights under the Data Protection Act 1998. The data subject will be able to do this in the course of the administrative procedure for imposing the sanction and during an appeal against the sanction or by seeking enforcement of though the Information Commissioner.

Your letter asks for confirmation that disclosure and processing of information under these provisions will remain subject to a) the Data Protection Act 1998; b) the Regulation of Investigatory Powers Act 2000 and c) section 6 of the Human Rights Act 1998.

44. As noted above, disclosure in contravention of the Data Protection Act 1998 and the Regulation of Investigatory Powers Act 2000 will not be permitted under clause 66. It is implicit that section 6 of the Human Rights Act 1998 applies to disclosures made under clause 66. Regulators and police and prosecution authorities are likely to be public authorities for the purposes of the Human Rights Act 1998 and therefore subject to the duty in section 6. This will mean that they will need to have regard to Convention rights when they exercise the power in clause 66. It is unlawful for them to act in a way which is incompatible with a Convention right.

Your letter asks for an explanation about whether these powers of disclosure will be compatible with common law rights to procedural fairness and the right to a fair hearing as guaranteed by Article 6 ECHR.

45. We are confident that the power under clause 66 will be exercised compatibly with Article 6 and common law rights. In the unlikely event that disclosure under this clause is made in contravention of a person's Convention rights, there are a number of safeguards available to that person. After receipt of information under clause 66, a regulator will still need to fulfil the mandatory procedural requirements for imposing the sanction. In the course of this process, the data subject will be able to challenge the accuracy of the information obtained and relied upon by the regulator when making representations and objections. The data subject may also object to reliance upon that information on the basis that, in his view, it had been obtained in contravention of his Convention rights. He may also complain to the Information Commissioner under the Data Protection Act 1998.

46. If the matter proceeds to an appeal, the person subject to the penalty may challenge the decision to impose the sanction as being wrong in law for having relied on evidence that was obtained in contravention of Article 8. The appellate tribunal will have its own procedural rules and may, if thought appropriate, exclude evidence that has been obtained in contravention of Convention rights. For example, Tribunal Procedure Rules under section 22 of the TCE Act may make provision about the use of evidence in proceedings. Alternatively, the appellate tribunal may decide to quash the decision to impose the sanction on the basis of an error of law.

47. We are satisfied that such safeguards will preserve the rights to procedural fairness and to a fair hearing.

48. I trust that the above has provided sufficient explanation for the Committee.

Appendix 8: Letter from Ben Bradshaw MP, Minister of State for Health Services, Department of Health, dated 16 April 2008

Legislative Scrutiny of the Health and Social Care Bill: Eighth and Twelfth Reports of Sessions 2007-08

1. This letter is a response to the Joint Committee on Human Rights legislative scrutiny of the Health and Social Care Bill. In particular, it responds to the Committee's Eighth[114] and Twelfth[115] Reports of Session 2007-08. The Government proposes to deal with the amendments proposed by the Committee in its Fifteenth Report[116] of Session 2007-08 during debate in the Committee Stage in the House of Lords. A copy of this letter will be published on the Department of Health's website and I will also arrange for it to be sent to interested Peers and placed in the House Library.

Eighth Report of Session 2007-08

[114] HL Paper 46, HC 303, published on 6 February 2008.

[115] HL Paper 66, HC 379, published on 11 March 2008.

[116] HL Paper 81, HC 440, published on 25 March 2008.

2. The amendments proposed by the Committee in its Eighth Report of this session were debated at Report Stage in the House of Commons. This response therefore reflects the response given by me in the course of debate.

Scope of the Human Rights Act: private sector care homes

3. At Report Stage in the House of Commons, I undertook on behalf of the Government to consider the issue of publicly arranged health and adult social care and the Human Rights Act in the context of the Health and Social Care Bill with a view to reporting back on that issue during the passage of the Bill in the House of Lords.

4. My ministerial colleague Lord Darzi reaffirmed this commitment, in his opening speech during Second Reading in the House of Lords, saying:

> "I also want to touch on an issue that has been raised by the Joint Committee on Human Rights and others in connection with the Care Quality Commission — namely the Human Rights Act and its application to publicly arranged health and adult social care. I can confirm that we are currently considering this issue again, in the context of the Bill, in consultation with key stakeholders, with a view to reporting back as the Bill progresses through its Committee and Report stages."[117]

5. He will be writing to you separately to set out our approach to this issue in advance of debate at Committee stage in the House of Lords.

6. The Committee also proposed that the regulations governing the operation of health and social care providers under clause 16 (regulation of regulated activities) of the Bill should make reference to human rights and that the making of regulations should be mandatory.

7. Again, as Lord Darzi said at Second Reading,

> "In addition, we intend to use the Bill to ensure that the Care Quality Commission can enforce regulatory requirements which are in line with the spirit of the European convention."[118]

Regulations under clause 16 will set out specific requirements that will be in line with the spirit of the European Convention of Human Rights, but which are relevant to the provision of health and social care services. It will be by enforcing those specific requirements that the Commission will support the promotion of human rights. The inclusion of express reference to the Convention rights is unnecessary and gives rise to uncertainty as the extent of the obligation is not easy to determine. The Government does not believe that the Commission should act as some sort of quasi judicial body and therefore would not wish to make regulations under clause 16 about the enforcement of human rights in relation to residents of care homes. In so far as the obligation might be interpreted in narrower terms — the power already is sufficiently wide to enable regulations to be made in relation to the health and safety and welfare of service users and to secure their Convention rights in so doing.

Scope of the Human Rights Act: wider concerns

[117] HL Deb, 25 March, Col. 450.

[118] HL Deb, 25 March, Col. 450-451

8. The Committee invites the Government to bring forward an interpretative statute dealing with section 6 of the Human Rights Act. The Ministry of Justice proposes to write to the Committee separately on this point and I will therefore not deal with it here.

Implementing recommendations of the Older People in Healthcare Report

Amendments relating to the Care Quality Commission

Adoption of a human rights framework

9. The Committee proposed various amendments which would ensure that the Care Quality Commission adopts a human rights approach to its work. (Paragraph 1.28)

10. The Government does not accept the proposed amendments. As a public authority for the purposes of the Human Rights Act, the Care Quality Commission will need to take account of the Convention rights in the exercise of its functions. The Government believes that embedding of human rights values in the requirements in regulations under clause 16 of the Bill is sufficient to ensure that the protection and promotion of human rights will be central to the performance of functions of the Commission.

Functions of the Commission: information about human rights

11. The Committee considers the availability of clear and accessible information about how human rights apply to hospitals and care homes to be vital if patients and care home residents are to know how to go about seeking redress. (Paragraph 1.31)

12. The Government agrees that it is important for patients and care home residents to have information about their rights and entitlements so that they can make informed decisions about their care and treatment. The Government has already distributed guidance and a toolkit on human rights and health care to the NHS and that is available to the public. Although the Government has produced guidance, there is a clear role for others, particularly patients' organisations and those representing users of care homes and human rights organisations as well as for public bodies to provide guidance and information on human rights in health and social care. The Government does not agree that it is appropriate for the Care Quality Commission to be given an express function in this regard.

Functions of the Commission: complaints

13. The Committee recommends that the Care Quality Commission should be capable of dealing with individual complaints and secondly, that the Care Quality Commission should have a role overseeing the adequacy of complaints procedures throughout the health and social care sector. (Paragraph 1.34)

14. As set out in our response to the consultation on "Making Experiences Count", published 7 February 2008[119], we are working to ensure there are local arrangements for dealing with complaints in both the NHS and social care in a robust and flexible manner. Under the new arrangements, with emphasis on effective local resolution, and with an independent view available through the relevant Ombudsman, additional, external

[119] http: //www.dh.gov.uk/eri/Consultations/Responsestoconsultations/DH082715

consideration should not be necessary. Although it will not intervene in individual cases, the new Care Quality Commission will need to take account of concerns, complaints and allegations when determining whether services are being provided safely and are of appropriate quality.

15. All people whose care is commissioned or funded by the NHS or local authorities have access to statutory complaints procedures, regardless of what organisation provides the care. If the response does not satisfy the complainant, they have access to the relevant Ombudsman. This procedure applies even if the person is paying for the full costs of their care under the local authority means-testing system.

16. As for people who choose to seek care independently of the NHS or local authority, we are considering what options could be available to them. Of course, where people are unhappy with the service they receive from an independent health or social care provider, they are likely to seek alternatives and can choose civil redress through the courts.

Functions of the Commission: advocacy

17. The Committee proposes that the adequacy of advocacy services should be one of the factors that the Care Quality Commission takes into account in undertaking its work. (Paragraph 1.37)

18. The Government recognises the importance of good advocacy services for those who make complaints about their care. Section 12 of the Health and Social Care Act 2001 places a duty on the Secretary of State for Health to make arrangements to provide Independent Advocacy Services to assist individuals to make complaints against the NHS.

19. The Government has established the Independent Complaints Advocacy Service to support patients and members of the public wishing to complain about their NHS care or treatment.

20. In relation to social care, the Government's intention is to provide equal access to advocacy alongside the new complaints arrangements. The Government is considering how this could be best achieved.

21. While the Care Quality Commission will encourage the provision of good advocacy services through its review functions and by monitoring the adequacy of complaints processes operated by service providers, the Government does not consider that that should be central to its role. It would therefore be inappropriate to include it in the list of matters to which the Care Quality Commission must have regard as a matter of course when carrying out its functions.

Standards of health and social care

22. The Committee proposes a number of changes to the Bill in relation to standards relating to health care. (Paragraphs 1.40-1.43)

23. Clause 41 (standards set by Secretary of State) of the Bill enables the Secretary of State to publish statements relating to health care provided and commissioned by Primary Care Trusts. The standards will provide a practical set of benchmarks for different services. It is

intended that the standards should represent best practice. It is for this reason that the clause allows the Secretary of State to ask others to develop standards on his behalf.

24. Standards under clause 41 will be designed as improvement tools to help deliver high quality publicly funded healthcare. It is envisaged that they will be used primarily by clinicians and managers to measure and improve the care that they give to patients, and by patients to make informed choices about treatment providers.

25. Standards will be issued only where it is clear that they can contribute to enhancing the quality of care of patients, where there is a need for a common framework and terminology and where there is a broad consensus between the Department of Health, clinicians, managers and patients about the role that standards can play in driving forward improvements.

26. The Government intends to have wide-ranging discussions with patients and clinicians on the detailed contents of the standards. This is to ensure that they will deliver real improvements in care. The Government considers that it would not be appropriate to set out details in the Bill in advance of those discussions. Moreover, the Government is not convinced that the standards should be prescribed in primary legislation in the way proposed by the Committee.

Qualifications of health and social care professionals

27. The Committee wishes to ensure that human rights training be part of the training, accreditation and re-licensing of health care professionals. (Paragraph 1.44)

28. The Government does not consider it necessary or appropriate to make provision in primary legislation about the training of health care professionals on the Human Rights Act. Whilst the Government of course accepts the need and importance of health care professionals to respect human rights and to be aware of the framework for the protection of human rights, it does not agree that it is necessary to provide in legislation for health care professionals to receive human rights training. Health and social care professionals are currently receiving training on human rights — whether as part of their academic studies or through training provided by the NHS or local authority. There are many excellent examples to be found of work with health and social care professionals to create a human rights based approach to the delivery of health and social care. Legislation is not the best or most effective way forward.

Twelfth Report of Session 2007-08

Protection of Public Health and Compulsory Powers (Part 3)

29. The Government welcomes recognition by the Committee that amending the Public Health (Control of Disease) Act 1984 ("the 1984 Act") so that public health controls may be tailored to ensure that they are proportionate, means the Bill has the "potential to be a human rights enhancing measure". The Government is pleased that the Committee approves of many of the safeguards already present in the legislation.

Secondary legislation

30. The Committee considers it inappropriate for legislation which has serious implications for individual rights to be based principally on enabling powers with detailed safeguards left to secondary legislation. (Paragraph 1.12)

31. The Government has already set out in published policy statements and in the delegated powers memorandum the reasons some provisions must necessarily be dealt with in secondary legislation. The Government cannot foretell every measure that might be needed to protect the public from significant health risks. The Delegated Powers and Regulatory Reform Committee, in their report on the Bill, consider the delegation of the powers to secondary legislation through new section 45C (health protection regulations: domestic) of the 1984 Act to be appropriate, because there are sufficient safeguards in new section 45D.

Safeguards on detention

32. The Committee opines that the Bill "clearly makes provision for the deprivation of liberty in respect of both "infection" and "contamination", through provision for detention at hospital or elsewhere and through the use of isolation and quarantine measures, without limitation on duration or the circumstances in which an individual may be held". (Paragraph 1.14)

33. The Government does not agree with the Committee's assessment of the provisions. The Bill clearly sets out the criteria that must be fulfilled before an individual can be isolated, detained or quarantined by a justice of the peace. It also sets a maximum upper limit on detention and provides a power to make regulations limiting any extension of the order. New section 45F of the 1984 Act also require regulations made under section 45C to provide for a right of appeal to a magistrates' court and a right of periodic review in relation to any decision under the regulations requiring detention, isolation or quarantine. They restrict the circumstances for the use of the provisions to serious and imminent threats, and require the decision maker to determine that using such a measure is proportionate to what is sought to be achieved.

ECHR compatible

34. The Committee thinks that with proper safeguards, it likely that the European Court of Human Rights would accept the Government's argument that diseases caused by contamination fall within the listed exemptions to the Convention right to liberty. (Paragraph 1.18)

35. The Government welcomes the Committee's interpretation of "disease" and "contamination". Article 5(1)(e) of the European Convention on Human Rights enables a restriction of liberty to be imposed for the prevention of the spreading of infectious diseases. However, the Convention is a living instrument to be interpreted in the light of current circumstances. Article 3 of the International Health Regulations (principles) requires that implementation of the IHR now recognises diseases caused by contamination. The Government considers that Article 5(1)(e) may now be read as allowing the restriction of the right to liberty for the prevention of contamination. The Government is satisfied that there are proper safeguards in place to ensure that this interpretation holds no pitfalls.

Clarity of provisions relating to detention

36. The Government intends to address in debate in the Committee Stage in the House of Lords the Committee's proposed amendment to clarify the fact that health protection regulations can be used to enable a decision maker, in the event of a serious and imminent threat, to require that an individual is medically examined, detained, isolated or quarantined.

Arbitrary detention

37. The Committee would have the Government provide evidence of the need for the Secretary of State, or the Welsh Ministers in Wales, to impose administrative detention, quarantine or isolation. The Committee calls for clear and effective safeguards on the face of the Bill to ensure that health protection regulations operate in a way which ensures that people are protected from arbitrary detention in breach of the right to liberty. (Paragraph 1.24)

38. The Government expects that in most circumstances individuals will act in the interests of public health as well as their own interests, but recognises that this does not always happen. Orders of a justice of the peace have long been necessary where an individual is putting others at risk and action needs to be taken to protect the public.

39. However the Government envisages occasions when the extent of an infection or contamination is so great that relying on identifying non cooperative individuals and sending their case to a justice of the peace may not be the most effective or appropriate way to act. Indeed where an incident is significant, fear in the community could reduce the likelihood of individuals voluntarily taking action to protect others. In such a situation it may be necessary to enable appropriate decision makers to make case by case decisions based on the proportionate response to a serious and imminent threat. The Government envisages that, depending on the situation, these decision makers could be doctors, trained chemical, biological, radiological and nuclear (CBRN) experts, consultants in communicable disease control, or even the Secretary of State.

40. During the SARS outbreak of 2002 — 2003, initially there was uncertainty over the identity of the disease-causing agent; no diagnostic test or effective vaccine was available. Given this predicament, and the increasing number of fatalities, several countries including Hong Kong and Canada used quarantine powers on significant numbers of individuals. Beijing quarantined 30,000 people, while Canada quarantined 2,000 people who were showing no symptoms of SARS at the time of quarantine. These actions may sound disproportionate but the World Health Organisation believes that it was these control mechanisms which led to the interruption of transmission in July 2003.

41. If a similar situation were to occur in this country, it could be more appropriate to enable doctors diagnosing cases to determine whether isolation was necessary. In one case during the SARS outbreak an entire hospital was quarantined and medical personnel worked in 'working quarantine' keeping themselves separate from their loved ones to reduce the risk of transmission. If an entire hospital were to be closed, containing possibly thousands of patients and workers, it would be appropriate for this decision to be made by the Secretary of State.

42. The Government cannot ascertain what incident would require use of these measures, if any. Nonetheless the Government needs to ensure that it has the appropriate legislative tools to deal with public health threats when they do occur.

43. The Bill does contain safeguards to ensure that individuals are protected from arbitrary detention under the regulations. These safeguards include a proportionality test, a right to appeal, a right to periodic review, and limitations to the use of detention only in situations where there is a serious and imminent public health risk. The Government agrees that it is important to safeguard an individual's freedom, but the Government also has a duty to safeguard public health. In the Government's view the provisions achieve the appropriate balance.

Limiting the regulation-making power

44. The Committee recommends that the Minister explain to Parliament why the general power to impose restrictions and requirements should not be more comprehensively defined in the Bill. In particular, the Committee wishes the Government to explain why the power to enable the imposition of special restrictions and requirements should not be expressly limited to defined circumstances where a uniform, national response may be necessary to meet a serious and imminent threat to public health. (Paragraph 1.32)

45. If the Government could foretell every measure that might be needed in order to protect the public from significant health risks each could be written into legislation - although it might be impracticable to include the necessary level of detail in primary legislation. However the existing 1984 Act illustrates that not only is it hard to predict what actions might need to be taken, it is difficult to keep the range of possible measures up to date. For example, the 1984 Act allows a local authority to disinfect or destroy a plague infected library book, but not a borrowed CD or DVD.

46. Placing the provisions in secondary legislation allows the legislation to be kept up to date. It also allows the necessary safeguards to be tailored to each individual measure and kept up to date alongside it. Finally, it prevents provisions being included in the statute book which are never in fact needed or used.

47. The Government is pleased the Committee recognises that "fast, effective and coordinated action may be required to protect the public from serious public health risks". The aim of regulations enabling the imposition of special restrictions or requirements is to create a co-ordinated and uniform response to an incident. However, the incidents of infection or contamination that might require these powers to be transferred from a justice of the peace to an alternative decision maker may be significant in scale, but will not always be incidents of national proportion. That is why it would be inappropriate to restrict the imposition of special restrictions and requirements to "circumstances where a uniform, national response may be required."

Safeguards

48. The Committee reiterates its view that section 6 of the Human Rights Act should not be used as a "safety-net" to ensure that broadly drafted powers are exercised in a way which affords respect for individual rights. The Committee stresses that in order to foster legal

certainty and to reduce the risk that individuals' rights are unnecessarily endangered, appropriate safeguards should be included on the face of the Bill. (Paragraph 1.34)

49. The Government agrees that the Human Rights Act alone cannot be relied on to ensure that measures are implemented with respect to an individual's human rights. Therefore the legislation does contain safeguards on the face of the Bill, some of which are listed in the Committee's twelfth report. However, section 6 of the Human Rights Act is an important limitation on the exercise of powers by public authorities and offers significant protections to individuals. The Government does not rely upon section 6 in this context as a safety net.

Statement of compatibility with ECHR

50. The Committee suggests that health protection regulations made under the new provisions would benefit from a clear statement from the Government about compatibility with Convention rights, accompanied by sufficient analysis to aid parliamentary scrutiny. (Paragraph 1.35)

51. All regulations presented to Parliament should be accompanied by an Impact Assessment. Part of this, the Equality Impact Assessment, looks at human rights issues relating to the provisions. This analysis can aid Parliament's scrutiny of the regulations. In addition, regulations subject to an affirmative resolution will contain a statement of compatibility. Regulations that are made by negative resolution will have a very low impact on human rights, and it is therefore unnecessary for them to carry a statement of compatibility with Convention rights. The Secretary of State (or Welsh Ministers) is prohibited under the Human Rights Act from making regulations that would not be compatible with Convention rights.

Subjectiveness of Proportionality test

52. The Committee recommends that the provisions be amended to remove the subjective element from the analysis of proportionality (in new section 45D) and to require that any restriction or requirement imposed is proportionate to its aims, including both to its immediate goal and the threat posed to public health. (Paragraph 1.37)

53. The Government does not agree with the Committee that the proportionality test is subjective. The determination whether a proposed measure is proportionate must be taken by a responsible person — either the Minister writing the regulations or the decision maker specified in the regulations. The person making the decision must necessarily be reasonable and properly informed. Therefore, the decision they make is in no relevant sense of the word, a subjective decision.

54. In the case of regulations under section 45C(3)(c) which impose or enable the imposition of a restriction or requirement, there is the further safeguard that the regulations must either bear the declaration described at section 45Q(3) or be subject to the affirmative resolution procedure. The affirmative procedure enables Parliament to decide whether the regulations are proportionate.

Restrictions on the regulations

55. The Government intends to address in the Committee Stage in the House of Lords the Committee's proposed amendments on: (a) a renewable maximum time limit on the time a

person may be subject to special restrictions or requirements imposed by health protection regulations; (b) lifting special restrictions or requirements when they are no longer either necessary or proportionate to meet the serious and imminent threat they are designed to meet; and, (c) providing a clearly defined mechanism of review in order to ensure that the restrictions continue to be necessary and proportionate to the risk or threat posed to public health. (Paragraph 1.40).

Appeals and reviews

56. The Committee acknowledges that the requirements for health protection regulations which impose a special restriction or requirement to provide for an appeal to a magistrates court and for a "right of periodic review" are important and valuable safeguards, but expresses concern that substantive details of these rights are to be left to secondary legislation and need not be consistently applied in relation to each set of health protection regulations. (Paragraph 1.41)

57. The Government understands the Committee's concern that provisions for appeals and periodic reviews are set out in greater detail on the face of the Bill in respect of orders of a justice of the peace than for health protection regulations. However, without knowing the specific situations that regulations may be needed to address it is difficult to provide appropriately for these safeguards on the face of the Bill. For example, it is likely that it would be appropriate for a periodic review to be carried out by the same authority that placed the initial restriction or requirement on the individual. However, this will vary depending on the situation. For example, if individuals are mainly quarantined in hospitals it may be appropriate for the hospital to carry out regular reviews, whereas if individuals are required to stay off work it may be the local authority who are better placed to review the cases. It is not possible to state on the face of the Bill who should carry out a periodic review when different situations could result in different authorities being the appropriate reviewer.

Parliamentary scrutiny

58. The Committee thinks it inappropriate for a Minister subjectively to determine the process for parliamentary consideration of measures which may engage individual rights on a case by case basis. The Committee suggests that where individual rights may be engaged, the relevant provisions should be contained in primary legislation and subject to full parliamentary scrutiny. Failing that, the Committee believes that affirmative resolution procedure should always apply to any categories of regulations which may engage individual rights. (Paragraph 1.42)

59. The Government has aimed to ensure in drafting new sections 45C and 45Q that where individuals' rights may be engaged, the affirmative procedure will be used. Because of the broad nature of the regulation-making provisions at section 45C, it is difficult to separate on the face of the Bill straightforward administrative provisions from those that might engage human rights. The Government does not want to unnecessarily waste Parliamentary time debating straightforward administrative provisions. The Government believes that the solution at section 45Q is an adequate safeguard to ensure that the affirmative procedure is used, unless the Minister is prepared to include a declaration in the regulations that there are no restrictions or requirements that would have a significant

effect on an individual's rights. The Delegated Powers and Regulatory Reform Committee have stated that in their opinion, "this strikes the right balance between affirmative and negative procedures for provision of this kind".

Civil Contingency Act and emergency powers

60. The Committee contrasts the Bill provisions with those in the Civil Contingencies Act 2004 and expresses concern that as the Bill does not require Parliament to be recalled during a recess to approve health protection regulations made under the emergency procedure, such regulations might remain in place from late July to November. The Committee considers that, in the light of the types of emergency which the Government considers these regulations may be necessary to meet (for example a nationwide outbreak of Ebola, SARS or another life-threatening illness) the emergency procedure in this Bill should be amended to reflect the provisions of the Civil Contingencies Act 2004. (Paragraph 1.43)

61. The Government understands the Committee's concerns that regulations allowing detention, isolation and quarantine could be in effect from July to November without debate. However, the urgency provisions could equally be used for non intrusive measures such as setting up a new surveillance system for a new disease. It would be necessary to start the surveillance as a matter of urgency, but it would not be a measure of necessary significance to require the recall of Parliament. The Government does not support the Committee's suggestion that regulations made under the emergency procedures should be open to amendment like those under the Civil Contingencies Act. The regulations that may be need to be in place in times of a significant threat to public health may be technical and based on scientific understanding and advice from experts such as the World Health Organisation and the Health Protection Agency. It would not be appropriate to enable such regulations to be amended during their passage through both Houses on the basis of decisions that could be taken on a political rather than scientific basis.

Last resort

62. The Committee considers that protection of the individual right to liberty would be enhanced by express acknowledgement on the face of the Bill that detention, isolation and quarantine are measures of last resort which should only be imposed if no other measures are capable of effectively reducing or removing the risk to public health. (Paragraph 1.49)

63. The Government has sympathy with the principle behind this proposal. However, the term 'last resort' holds complications. The basis of a 'last resort' needs to be considered in the context of the risk posed. While it might be appropriate to spend several weeks working with an individual who has TB, to try and convince them to return to treatment and isolation voluntarily, this would not be appropriate where an individual has highly contagious Lassa fever. The level of risk to others is higher, and this warrants a faster move towards the decision to use such intrusive measures.

64. The Committee themselves agree that the "level and type of evidence necessary to support a public health order should be linked to the level of the threat posed to public health." Where, the risk is high, the opportunity to exhaust all the options decreases, and the words "last resort" become problematic.

65. The Government believes that requiring the order to be necessary is a more appropriate safeguard, and achieves the principle of 'last resort' while balancing it with an assessment of risk.

Limit on length of detention

66. The Committee recommends that the Bill be amended to provide greater protection for persons against the continued arbitrary application of a series of orders without review, particularly where those orders relate to detention, isolation or quarantine. (Paragraph 1.50)

67. The Government agrees that it is necessary to ensure that individuals are protected from the arbitrary application of orders without review. That is why the Government has placed regulation-making powers on the face of the Bill which allow a maximum detention period before review to be set.

28 day limit on initial detention

68. The Government intends to address in the Committee Stage in the House of Lords the Committee's proposed amendments to reduce the maximum duration of public health orders imposing detention, quarantine or isolation to 14 days, with the requirement for automatic review by a justice of the peace at 7 day intervals thereafter. (Paragraph 1.50)

Evidence to support public health orders

69. The Government also intends to address in the Committee Stage the Committee's proposed amendment requiring regulations made under section 45G(7) to include a requirement that no public health order may be made, or remain in force, without objective medical evidence. (Paragraph 1.53)

Regulations consultation

70. The Committee expects that any draft regulations proposed under this Part of the Bill should be made available well in advance of their being laid before Parliament to allow for full debate, and looks forward to receiving a copy of draft regulations when they are available. (Paragraph 1.54)

71. The Government is working with stakeholder groups to develop the regulations. The Government intends to carry out a full twelve-week consultation on the regulations before they are presented to Parliament. Peers and Members of Parliament are of course invited to comment on the draft regulations as part of the consultation.

Powers of the Office of the Health Professions Adjudicator

72. The Government welcomes the Joint Committee's response, concerning the use of the heightened civil standard, which accords with our own view (paragraph 1.60). We believe that the flexible application of the civil standard of proof will ensure that proceedings are fair whilst ensuring that the public are protected. We also welcome the Joint Committee's views on the importance of the role to be played by legal assessors. We agree that the Office of the Health Professions Adjudicator and the regulatory bodies should ensure that legal

assessors have received recent and appropriate training in the flexible application of the civil standard of proof.

Information Sharing: Duties and Disclosure

Care Quality Commission

73. The Committee asked why it is necessary to have a broad defence to the offences which apply to disclosure of information by staff of the Care Quality Commission based on reasonable belief in the expediency of providing material to a person or body in pursuit of their statutory functions. (Paragraph 1.65)

74. As the Committee notes clause 73 (defence) establishes a defence to prosecution for an offence under clause 72 (disclosure of confidential personal information: offence). The circumstances in which the defence arises are set out in subsection (2). Those circumstances are virtually identical to those set out in section 137(2) of the Health and Social Care (Community Health and Standards) Act 2003 ("the 2003 Act").

75. Subsection (2)(g) enables the Care Quality Commission to share personal confidential information with other persons or bodies performing statutory functions. For example, it will enable the Care Quality Commission to share information with the General Medical Council ("GMC"), whose main objective in exercising its statutory functions is to protect, promote and maintain the health of the public. The GMC's role includes fitness to practice hearings, at which evidence of a practitioner's fitness to practice may be considered.

76. Subsection (1)(b) provides that it is sufficient for a person to have reasonable belief that one of the circumstances listed in subsection (2) applies. This is also the case under section 137(1)(b) of the 2003 Act: there is no change in policy in this respect. The defence is put in this way since it is in the overwhelming public interest that staff at the Care Quality Commission should, on the facts of any case, feel able to disclose information to other bodies performing functions concerned with protection of the public without the threat of prosecution.

77. Where a person reasonably believes that disclosure is so required that belief should therefore be a defence to prosecution under clause 72. Where a criminal prosecution is commenced and a person relies on a subsection (2) or (3) defence, subsection (4) provides that where evidence is adduced which is sufficient to raise an issue with respect to that defence, the prosecution must prove beyond reasonable doubt that the defence is not satisfied. This makes clear that subsection (1) places an evidential burden to raise a defence but does not reverse the legal burden of proof.

78. In this way a proper balance is struck between the rights of persons whose information may be disclosed and the vital role played by statutory bodies, including the GMC.

Co-operation between prescribed bodies (clause 116)

79. The Government welcomes the Committee's support for the intention underlying this clause, that is to improve the protection of patients by requiring healthcare organisations to share relevant information about potential issues of performance and conduct of health professionals. However, the Committee expressed disappointment that draft copies of the

regulations to be made under this clause have not been made available in time to inform parliamentary debate (paragraph 1.68).

80. Recent high profile inquiries into the serious misconduct of certain healthcare professionals highlighted the need for greater joining up of information held by healthcare organisations. The Government agrees that this is necessary to improve the protection of patients. However, the Government accepts that there is an element of balance (between this fundamental objective of protecting patients and the human rights of the health professionals concerned) involved in whether a disclosure will be proportionate to the risk which it seeks to meet. To that end the Department of Health is obtaining advice from an expert group, involving all key stakeholders, on the content of the regulations and in particular on the safeguards to be incorporated. Janice Barber, a leading solicitor who has worked on most of the recent inquiries, is leading the group. We expect to receive that advice in the coming months and to have draft regulations in the summer. These draft regulations will then be subject to a full public consultation.

81. The Committee also recommended that the Minister should be asked to explain why the ability (under clause 116(1)(b)) to disclose information in response to a request should not also be limited by reference to a threat to patient safety (paragraph 1.69). The Government believes that limiting the ability to disclose, rather than request, information in this way would place too great a constraint on the ability to join up relevant information. The Government agrees that healthcare organisations should only seek information of this kind from other bodies where they are satisfied that the information requested is needed to help them to determine whether or not there is a threat to patient safety. The Government believes that this is implicit in the legislation as drafted and plans to set this out in detail in the regulations.

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty–First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132
Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501

Session 2006–07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350
Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human Rights Act	HL Paper 77/HC 410
Tenth Report	The Treatment of Asylum Seekers: Volume I Report and Formal Minutes	HL Paper 81-I/HC 60-I
Tenth Report	The Treatment of Asylum Seekers: Volume II Oral and Written Evidence	HL Paper 81-II/HC 60-II
Eleventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 83/HC 424
Twelfth Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 91/HC 490
Thirteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 105/HC 538
Fourteenth Report	Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)	HL Paper 106/HC 539
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 112/HC 555
Sixteenth Report	Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights	HL Paper 128/HC 728
Seventeenth Report	Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers	HL Paper 134/HC 790
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume I- Report and Formal Minutes	HL Paper 156-I/HC 378-I
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume II- Oral and Written Evidence	HL Paper 156-II/HC 378-II
Nineteenth Report	Counter–Terrorism Policy and Human Rights: 28 days, intercept and post–charge questioning	HL Paper 157/HC 394
Twentieth Report	Highly Skilled Migrants: Changes to the Immigration Rules	HL Paper 173/HC 993
Twenty-first Report	Human Trafficking: Update	HL Paper 179/HC 1056

Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I

Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/ HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/ HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547
Twenty-third Report	The Committee's Future Working Practices	HL Paper 239/HC 1575
Twenty-fourth Report	Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention	HL Paper 240/HC 1576
Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
Twenty-sixth Report	Human trafficking	HL Paper 245-I/HC 1127-I
Twenty-seventh Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626
Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)	HL Paper 276/HC 1714
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716