House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny:
Marine and Coastal Access Bill; Government Response to the Committee's Thirteenth Report of Session 2008–09

Twenty-first Report of Session 2008-09

Drawing special attention to:
Marine and Coastal Access Bill
House of Lords
House of Commons
Joint Committee on Human Rights

Legislative Scrutiny: Marine and Coastal Access Bill; Government Response to the Committee's Thirteenth Report of Session 2008-09

Twenty-first Report of Session 2008-09

Report, together with formal minutes and written evidence

Ordered by The House of Lords to be printed 14 July 2009
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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

<table>
<thead>
<tr>
<th>HOUSE OF LORDS</th>
<th>HOUSE OF COMMONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lord Bowness</td>
<td>John Austin MP (Labour, Erith &amp; Thamesmead)</td>
</tr>
<tr>
<td>Lord Dubs</td>
<td>Mr Andrew Dismore MP (Labour, Hendon) (Chairman)</td>
</tr>
<tr>
<td>Lord Lester of Herne Hill</td>
<td>Dr Evan Harris MP (Liberal Democrat, Oxford West &amp; Abingdon)</td>
</tr>
<tr>
<td>Lord Morris of Handsworth OJ</td>
<td>Mr Virendra Sharma MP (Labour, Ealing, Southall)</td>
</tr>
<tr>
<td>The Earl of Onslow</td>
<td>Mr Richard Shepherd MP (Conservative, Aldridge-Brownhills)</td>
</tr>
<tr>
<td>Baroness Prashar</td>
<td>Mr Edward Timpson MP (Conservative, Crewe &amp; Nantwich)</td>
</tr>
</tbody>
</table>

Powers

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

Publications

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

Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Rebecca Neal (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Assistant Legal Advisers), James Clarke (Senior Committee Assistant), Emily Gregory and John Porter (Committee Assistants), Joanna Griffin (Lords Committee Assistant) and Keith Pryke (Office Support Assistant).

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# Contents

## Report

<table>
<thead>
<tr>
<th>Summary</th>
<th>3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government Bills</td>
<td>5</td>
</tr>
<tr>
<td>1 Marine and Coastal Access Bill</td>
<td>5</td>
</tr>
<tr>
<td>2 Government Response to 13th Report</td>
<td>8</td>
</tr>
</tbody>
</table>

## Written Evidence

| Letter from Lord Hunt of Kings Heath to the Chairman, dated 14 May 2009 | 9 |
| Letter from Lord Hunt of Kings Heath to Lord Pannick QC, dated 3 June 2009 | 9 |
| Part 9 (Coastal Access): Procedure for Consideration of Objections     | 9 |
| Letter from Lord Hunt of Kings Heath to Lord Pannick QC, dated 4 June 2009 | 11 |
| Compatibility with Article 6 ECHR                                      | 15 |
| Safeguards                                                             | 15 |
| Letter from Lord Hunt of Kings Heath to All Peers with an interest in the Marine and Coastal Access Bill, dated 5 June 2009 | 16 |
| Government Amendments                                                  | 16 |
| Amendments Relating to Part 9 – Coastal Access                         | 16 |
| Letter from the Chairman to Rt Hon Harriet Harman MP, Minister of State, Department for Constitutional Affairs, dated 19 December 2006 | 17 |
| Letter from the Rt Hon Harriet Harman QC MP, Minister of State, Department for Constitutional Affairs to the Chairman, dated 22 January 2007 | 22 |
| Letter from the Rt Hon Harriet Harman QC MP to the Chairman, dated 27 February 2007 | 28 |
| Letter from Rt Hon Jack Straw MP, Secretary of State for Justice, dated 30 June 2009 | 29 |

## List of Reports from the Committee during the current Parliament

| List of Reports from the Committee during the current Parliament | 31 |
Summary

The Committee welcomes the Government’s amendments to the Marine and Coastal Access Bill, which provide an opportunity for those affected by the proposed coastal path to challenge factual findings before an independent tribunal, as required by both Article 6(1) of the European Convention on Human Rights and the common law of procedural fairness. The Committee is satisfied that the Government’s amendments render the Bill human rights compatible. It looks forward to the Government building on the solution found in this Bill when this frequently recurring human rights issue comes up again in other contexts.
Government Bills

Bills drawn to the special attention of each House

1  Marine and Coastal Access Bill

Date introduced to first House  4 December 2008
Date introduced to second House  9 June 2009
Current Bill Number  Bill 108
Previous Reports  11th of 2008-09

1.1 The Marine and Coastal Access Bill completed its passage through the House of Lords on 8 June 2009 and is currently in Public Bill Committee in the Commons. It is due to complete its Committee stage by 16 July. The Part of the Bill which enables the creation of a walkable coastal path\(^1\) raises one significant human rights issue on which we have corresponded with the Government and previously reported.

1.2 In our Eleventh Report of this Session we reported that the lack of a right of appeal to an independent body rendered the relevant provisions in the Bill,\(^2\) concerning the creation of a coastal footpath, incompatible with the right of affected people to a fair hearing in the determination of their civil rights, both under Article 6(1) ECHR and the common law of procedural fairness.\(^3\) We were particularly concerned by the fact that those affected by the coastal access scheme did not, under the Bill as drafted, have an opportunity to make arguments about factual questions to an independent court or tribunal, which we considered to be incompatible with Article 6(1) ECHR in light of the decision of the European Court of Human Rights in Tsfayo v UK.\(^4\) We recommended that the Bill be amended in order to provide such a right of appeal, and that the Planning inspectorate was the most appropriate existing body to which an appeal should be made.\(^5\) The House of Lords Select Committee on the Constitution expressed similar concerns about the lack of a right of appeal.\(^6\)

1.3 The Government tabled amendments to the Bill at Report stage in the Lords in response to these concerns. The amendments were explained in a letter and accompanying paper sent to our Chair on 14 May 2009.\(^7\) The Government amendments introduced an objections mechanism which involved an independent person looking at objections to Natural England’s proposals and making recommendations to the Secretary of State. However, the amendments left the Secretary of State with an unfettered discretion to accept or reject the independent person’s recommendations. They did not therefore meet the human rights concerns we expressed in our earlier report about the lack of a right of appeal to an independent body.

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\(^1\) Part 9.
\(^2\) Section 296 and Schedule 19, inserting new Schedule 1A into the National Parks and Access to the Countryside Act 1949.
\(^4\) App. No. 60860/00, 14 November 2006.
\(^5\) Ibid. at para. 2.11.
\(^7\) Letter from Lord Hunt of Kings Heath to Andrew Dismore MP, 14 May 2009, Appendix 1.
1.4 Following criticism of the Government’s amendments during the debate on the Bill at Report stage, by Lord Pannick QC (a member of the House of Lords Constitution Committee), amongst others, the Minister met with Lord Pannick and our Legal Adviser to discuss the scope for improving the Bill further to address the concerns expressed by us and the House of Lords Constitution Committee. Following that meeting, the Government wrote again on 4 June 2009 explaining its position in more detail, but essentially maintaining the position it had taken at Report stage.8

1.5 On 5 June, however, the Government tabled further amendments to the Bill at Third Reading in the Lords, explained in a letter from the Minister to Lord Pannick dated 5 June 2009.9 The Bill now provides that the Secretary of State, in making his determination on a coastal access report, is bound by a statement of a finding of fact included in a report of the appointed person on an objection, except in certain defined circumstances.10 As the Minister’s letter explains, three of these circumstances mirror the standard criteria governing the limited circumstances in which a court on judicial review can quash a decision on a finding of fact: where there is insufficient evidence to make the finding, where the finding was made by reference to irrelevant factors or without regard to relevant factors, and where the finding was otherwise perverse or irrational.11

1.6 The other circumstance in which the Secretary of State is not bound by the findings of the appointed person is where the finding “involves an assessment of the significance of a matter to any person interested in land or to the public.”12 This exception is said to be necessary to ensure that the Secretary of State is not precluded from reaching a view on the significance to the landowner (or the public) of (for example) the proposed position of the route. This, the Government says, provides clarification that such an assessment is not to be treated as a finding of fact for the purposes of the Schedule.

1.7 The Government’s amendments also require the Secretary of State to state his reasons for not following a recommendation (including a statement of fact) in such a report, when making a determination.13

1.8 At Third Reading in the Lords the Government’s amendments were welcomed as going a long way towards meeting the concerns that had been raised about the lack of an independent right of appeal in the Bill. Some concern was expressed, however, about the exception which allows the Secretary of State to depart from the findings of the independent person where the finding involves an assessment of the significance of a matter to any person with a relevant interest in land or to the public.14 The concern was that this still left the Secretary of State with too much scope to substitute his own view for that of the independent person.

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8 HL Deb 1 June 2009 col. 48.
9 Letter from Lord Hunt of Kings Heath to Lord Pannick, 4 June 2009, Appendix 2.
11 Para. 16(3) of new Schedule 1A to the National Parks and Access to the Countryside Act 1949, inserted by Schedule 19 of the Bill.
12 Para 16(3)(b)-(d) of new Schedule 1A.
13 Para 16(3)(a).
14 Para 17(5) of new Schedule 1A.
15 See e.g. Lord Pannick QC, HL Deb 8 June 2009 col. 445.
1.9 In Public Bill Committee in the Commons, however, the Minister went further in explaining the Government’s reasoning behind this exception. She explained that it is intended to distinguish between ordinary questions of fact and assessments which may be regarded as a mixture of fact and judgment or opinion. The Secretary of State would be bound by the independent person’s findings on the underlying factual questions, but not on the assessment of where a fair balance lies, which is a question of judgment not fact:

The appointed person may have made an assessment of the underlying facts on which the assessment of significance is based. For instance, those could include the periods during which the landowner uses his land for a particular purpose … the extent of the land subject to that use for those periods, or the effect on the landowner’s ability to use his land for that purpose. The Secretary of State would be bound by the findings of the appointed persons in any of those things, unless the finding was irrational and could be set aside by the court of judicial review. We do not consider it appropriate that the Secretary of State’s discretion in the essential question on which they are required to decide – that of where fair balance lies – should be constrained so as to make them bound by the decision of the appointed person.

1.10 We welcome the Government’s willingness to listen to the concerns that we and others have expressed about the lack of a right of appeal to an independent body on factual matters, and to bring forward amendments in response to those concerns. In light of the Government’s explanation in Public Bill Committee of the intention behind the relevant provisions, we are satisfied that the Bill now provides an opportunity to challenge factual findings before an independent tribunal whose findings are binding on the Secretary of State, subject only to narrowly drawn exceptions. We are therefore satisfied that the Bill as it stands is compatible with the right to a fair hearing, both under Article 6(1) ECHR and at common law, and we do not propose to subject the Bill to further scrutiny. The human rights concern raised by this Bill, namely the need for an opportunity to challenge factual determinations before an independent court or tribunal, is an issue which often arises in Bills in a number of different contexts, and we look forward to the Government building on the approach it has taken in this Bill when the issue arises again in the future.

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16 Ann McKechn MP, Parliamentary Under Secretary of State for Scotland, PBC 9 July 2009 col. 274.
2 Government Response to 13th Report

2.1 We are publishing with this Report the response we received from Jack Straw MP, Secretary of State for Justice, dated 30 June, in response to our thirteenth Report of 2008-09, entitled Prisoner Transfer Treaty with Libya.17 We may choose to comment on this letter in any future work on the Constitutional Renewal Bill, which is expected to include provisions relating to parliamentary scrutiny of treaties.

2.2 We are also publishing correspondence with the Ministry of Justice in 2006-07 on the draft Coroners Bill, which we have not previously published in hard copy.

Written Evidence

Letter from Lord Hunt of Kings Heath to the Chairman, dated 14 May 2009

I note the interest that the Joint Committee on Human Rights has expressed in the coastal access provisions of the Marine and Coastal Access Bill, and particularly in the process for making representations on Natural England’s Coastal Access report. This has also been discussed in committee where there was considerable strength of feeling in favour of amending the Bill. In view of this I said then that I was looking at proposals for an objections mechanism which would involve and independent person looking at objections to Natural England’s proposals (we envisage that this will be an inspector from the Planning Inspectorate). I have now tabled government amendments which will introduce such a mechanism, by inserting a new schedule, Schedule 1A, in the National Parks and Access to the Countryside Act 1949. Schedule 1A sets out the procedure for making and considering objections and representations about coastal access reports.

Letter from Lord Hunt of Kings Heath to Lord Pannick QC, dated 3 June 2009

Part 9 (Coastal Access): Procedure for Consideration of Objections

In response to the concerns you expressed in the House last night in relation to the compatibility of Part 9 with Article 6 ECHR, I thought I should write setting out the reasons why the Government has taken the course it has in the provisions introduced by Amendment 124U, which Lord Taylor and I tabled jointly.

You were of course correct in saying that, under the provisions of new Schedule 1A to the National Parks and Access to the Countryside Act 1949 ("the 1949 Act"), the Secretary of State will have a discretion whether to accept (in whole or part) or to reject the recommendation of the appointed person (who, as I indicated, I envisage being an inspector of the Planning Inspectorate).

You asked me to explain the policy reason why the appointed person had not been given power to decide the issue remitted to him, either instead or on behalf of the Secretary of State. You also expressed agreement with the views of the Joint Committee on Human Rights.

The structural reason for this, in terms of the domestic legislative framework, lies in the role of the Secretary of State under the 1949 Act, and in the central concept in Part 9 of a single English coastal route, comprising one or more long-distance routes which are to form a skeletal frame for a dependent area of coastal margin to the seaward of the route and to a much more limited degree to the landward.

The decision of the Secretary of State under section 52 of the 1949 Act is a decision to approve (with or without modifications), or reject, Natural England's proposals for a long-distance route as a whole. The consideration of a particular issue raised in a landowner’s objection is an element of that wider determination, but is not a preliminary decision
structurally distinct from that wider determination. Nor is it severable so as to be capable of being made a preliminary decision. This is not just because the 1949 Act does not allow for the separation out of constituent elements of the decision under section 52 in a way which would permit them to be decided in sequence, but more substantively because the overall decision is genuinely indivisible. This has a spatial and a temporal aspect, and an element of overall policy coherence.

Most obviously, a decision affecting the position or use of any part of the route will often have consequences for the adjacent stretches of the route, so that all affected stretches of the route need to be considered together.

Similarly, the Secretary of State's consideration of any constituent element of the route must take place at the time that he considers the route as a whole: we could not adopt a structure which allowed a decision in relation to one small part of the route to be taken ahead of the decision in relation to the route as a whole, with an interval between in which new developments may occur and fresh considerations may arise, with the result that the fresh considerations could not be taken into account, or the conclusion from such consideration was pre-empted.

And a decision affecting the position or use of any part of the route may also (if less tangibly) have implications for the consistency of the approach adopted in relation to the route as a whole.

Moreover, even if a decision in relation to a particular part of the route were severable, the Secretary of State would still have power under the existing provisions of section 52 to approve the proposals without the modifications recommended by the inspector, with different modifications from those recommended by the inspector, or with modifications in a case where the inspector has not recommended any.

Turning to compatibility with Article 6 ECHR, as you are aware, in my response of 27th February to the chairman of the Joint Committee on Human Rights, I indicated that the Government does not share the view that Article 6 requires there to be an appellate decision by an independent person, either on any questions of fact preliminary and incidental to a wider policy judgement or on the broader policy judgement itself. The Committee's response is contained in its Eleventh Report of Session 2008-9 published on 15 April, which includes a copy of my letter. I will not rehearse that discussion again, save to say that the Government's view remains unchanged.

In relation to the views expressed by the Committee, I would point out that (as noted in paragraph 2.6 of the Committee's report), the Committee's request was for an amendment which would "ensure that those affected by the coastal access scheme have an opportunity to make arguments about factual questions to an independent court or tribunal, preferably the Planning Inspectorate". I would make two points about this.

First, the Committee appears to have been seeking "an opportunity to make arguments...to an independent court or tribunal" about certain questions. The opportunity to ventilate the arguments before an independent tribunal, and to have them evaluated, with reasons being provided for the conclusions of that evaluation, is precisely what the new provisions provide for. The Committee's Report does not in terms indicate that the Committee is seeking a preliminary decision, as distinct from a recommendation, by the independent
tribunal. It is clear that the references to a "right of appeal" in paragraphs 2.10 and 2.11 embrace a procedure for consideration of a landowner’s objection at a stage prior to the Secretary of State’s decision on Natural England’s proposals as a whole.

Second, the Committee here appears to accept that it is not necessary for the independent tribunal to determine any question of whether a fair balance has been struck. That question involves an evaluation of fairness informed by considerations of public policy and their relationship to the considerations specific to the particular case. Instead the focus of the Committee’s comments is in relation to preliminary factual questions. To that extent, Amendment 124U goes beyond what the Committee was seeking in terms of independent consideration.

I do not think that it would practicable to provide a mechanism exclusively for the determination of questions of fact. In this context it would be difficult to isolate questions of fact from the assessment of their significance to the landowner or to the public interest. In so far as there are issues as to the significance of the facts, these will involve an evaluation which would be very difficult to separate from the evaluation of the fair balance between the interests of the landowner and those of the public.

But equally, in so far as any issues which are exclusively questions of fact arise, I do not think it likely that the Secretary of State would generally be in a position to reach a view in conflict with that of the appointed person, who will have considered the evidence in depth and in many cases on the basis of oral evidence. If the Secretary of State did so without any proper basis he would be at risk of judicial review.

I hardly need say that the Government is not only very conscious of its obligations with regard to human rights, but also concerned to avoid legislating in a way that would be likely to give rise to legal uncertainty. It is also of course conscious that human rights is an area where absolute certainty is not always possible in the absence of further clarification by the courts. But the Government considers that it was justified in its view that Part 9 as introduced into the House was compatible with Article 6, and is confident that the amendments now adopted by the House can only make it more firmly so.

I believe my office has been in touch to propose a meeting for us to discuss this matter further, and would very much welcome the opportunity to do so.

Letter from Lord Hunt of Kings Heath to Lord Pannick QC, dated 4 June 2009

I am most grateful to you and Murray Hunt for finding time to meet me yesterday to explain in more detail your concerns, and those of the Joint Committee on Human Rights.

As I mentioned, I thought it might be helpful to write briefly by way of supplementing the points in my letter of 3 June.

You indicated that your concerns related in part to the policy approach of reserving to the Secretary of State power to reach a decision at variance with the conclusions of the appointed person, even on a question of pure fact, and in part to the compatibility of this approach with Article 6 ECHR, in particular the legitimacy, for Article 6 purposes, of reliance on a combination of the new Schedule 1A procedure and judicial review in
relation to questions of fact. You asked whether there would not be scope for including some additional safeguard, such as a constraint on the discretion of the Secretary of State to depart from the conclusions of the appointed person on questions of fact. I note that Lord Goodlad has now tabled a 3” reading amendment to the Bill relating to the freedom of the Secretary of State to differ from the recommendations of the appointed person, to which you have added your name. Perhaps I could address these points in turn (though I think they overlap to some extent).

Policy

The starting point of the policy is that the decision as to whether a fair balance has been struck between the interests of the landowner and the interests of the public is one which is most appropriately taken by a Minister who is democratically accountable, rather than by an appointee. This is because it involves evaluating the strength of the public interest in a particular result (for example, the position of the route close to a cliff edge) weighed against the strength of the landowner’s interest in a different result, and there is a wide margin within which this discretionary judgement may be exercised, with in many cases a range of possible options. Whilst it would be possible of course to maintain the Minister’s nominal (and legal) accountability by providing for an appointee to make the decision on the Minister’s behalf, the Minister would have no real involvement in a decision made in that way. As is often the case, the extent to which a legal device of this kind enables one to have one’s cake and eat it is more apparent than real. (Indeed, the wisdom of the Secretary of State retaining legal accountability for a decision in which he has not in reality participated might be open to question.)

The Secretary of State’s role in approving the proposals as a whole also enables him to ensure that the general approach taken in the proposals is so far as possible consistent in relation to the whole stretch of route which they cover, and also in relation to other stretches of the English coastal route.

This policy stance precluded the possible alternative approach of conferring on an independent appointed person the power to approve Natural England’s proposals for coastal access as a whole (whatever the mechanism for achieving them legislatively).

By contrast, a procedure in which the appointed person makes recommendations in relation together a fair balance has been struck does not infringe the principle that the appropriate decision-maker in relation to the fair balance is the Secretary of State. The purposes served by a procedure of that kind are, firstly, fairness and transparency of the process that provides the groundwork for the decision (the opportunity to have objections considered objectively, and for oral hearings where appropriate, the opportunity for inclusive consultation on any modifications that may be appropriate in the light of the objection, and a conspicuous process of evaluation with reasons set out in the report of the appointed person), and secondly, a context against which the rationality of the Secretary of State’s decision can be measured on judicial review.

I would add that the body we intend will carry out the role of the appointed person (which, as we have said, is the Planning Inspectorate) have indicated that they are unwilling to take on such a role for management reasons.
Given that policy starting point, the 1949 Act appeared an apt mechanism because its essential approach is to give the Secretary of State power to approve Natural England's proposals for a long-distance route. But what constrains the structural approach is not the choice of the 1949 Act as a vehicle, but the coherence of the underlying policy.

If we were to imagine a process which gave the appointed person power to make decisions determinative of landowners' objections, it would need to be clear how this function fitted into the statutory framework, and what the status and effect of these decisions were, in other words for what purpose the appointed person was making such decisions. If the context is a structure in which the Secretary of State approves Natural England's proposals, decisions of the appointed person would need to be a part of that approval process. But this would appear to mean giving the appointed person power to approve Natural England's proposals in the respect to which the objection relates, imposing on him a coastal access duty corresponding to that of the Secretary of State and the related duties in clause 287, and requiring him to consider the full breadth of considerations which the Secretary of State has to take into account in approving the route as a whole. I think there would be a number of conceptual difficulties with this.

First, it would be difficult to reconcile the role of the Secretary of State in approving the proposals as a whole with the fact that in relation to a particular part of the proposals (perhaps a particular part of the route) the decision had already been taken by the appointed person in a way which is binding on the Secretary of State. Excising elements of the decision which had been predetermined by the appointed person would leave the Secretary of State approving not the proposals as a whole but only such parts as had not already been approved (a piece of lace).

Second, there is a (somewhat unquantifiable) risk to the consistency of approach, both in relation to other parts of the proposals which are the subject of the same report and in relation to proposals in other reports that relate to other parts of the English coastal route. There may well be generic types of topography (headlands, for example) where (in the absence of local circumstances justifying a difference of approach) it might be anomalous (and unfair) not to adopt a broadly consistent approach. There are likely also to be other parts of the route where similar considerations arise but which have not been the subject of objections, and the question would then arise whether the decision of the appointed person in relation to an objection relating to one part of the route constrained the Secretary of State from achieving consistency as between that part and other parts where no objections had been raised, or constrained him to achieve consistency only in the manner of the appointed person's decision in relation to the objection. There could also be conflicts of approach as between different appointed persons considering different reports.

Third, I think it would be difficult to require the inspector to consider everything that is taken into account by the Secretary of State. For example, it would not really seem appropriate to require the inspector to consider representations relating to other parts of the route that are not subject to an objection. But these representations might mention considerations that are relevant to maintaining a consistent approach to the route which is the subject of the report as a whole, or to the English coastal route as a whole.

Fourth, assuming the Secretary of State has a power to propose modifications himself (as the 1949 Act provides), the appointed person cannot know in advance what these might
be. Modifications proposed by the Secretary of State in relation to contiguous land might necessitate consequential changes to the modifications proposed by the inspector in relation to the land which is the subject of the objection, if the continuity of the route is to be preserved without a hiatus or mismatch. Or the Secretary of State might propose more extensive and radical modifications to the proposals, making the appointed person’s decision in relation to a particular spot no longer applicable. For example, in a case where the objection relates to a part of the route which runs along an estuary or around a headland, the Secretary of State might decide that the route should not run up that section of estuary at all, or should run across the neck of the headland; where the proposed route crosses the neck of a headland, he might decide that the route should instead go round the periphery of the headland; or where the route crosses in front of a house, he might decide that the route should skirt not only behind that house but also behind an area of land comprising several other houses as well. In cases of this kind, the decision of the appointed person in relation to the particular spot which is the subject of the objection might well be superseded by the more radical modifications proposed by the Secretary of State, so it would be inappropriate for the appointed person’s decision to be binding on the Secretary of State.

For these reasons also, I think it would be inappropriate, and inconsistent with our policy position, to include provision which constrained the Secretary of State’s discretion, so that he was bound by the decision of the appointed person, even if the constraint was qualified so as not to apply in "exceptional circumstances" (as proposed in the amendment which you and Lord Goodlad have tabled).

In addition, if any such constraint were limited so as to apply only in relation to pure questions of fact, I think the difficulty of isolating such questions would make it hard to frame a workable constraint. I understand that the courts have also recognised in recent cases that the distinction between pure questions of fact and questions of mixed fact and policy, or facts containing an element of discretionary judgement, is an elusive one.18

In particular, in this context, I think it would be difficult to distinguish between pure facts and the evaluation of fact, or to describe the latter clearly in the legislation. There will clearly be certain kinds of fact which do not require any evaluation, but there will be others which entail some evaluation (for example, whether particular terrain is suitable ground for the route), and others again which involve a great deal of evaluation, such as the significance to the landowner of the route lying one side or the other of his property (whether this is significance in terms of perceived amenity value or in terms of hard financial value), or the significance in terms of the recreational value of the route to the public of its doing the converse. These questions of significance shade into the questions to be addressed in evaluating whether a fair balance has been struck, because that evaluation is concerned with relative significance. A “factual” assessment of the significance of the route going one way or the other would then have to be “moderated”, and brought into perspective or adjusted, for the purpose of the relative assessment of the significance of competing interests that has to be carried out in evaluating where the fair balance lies. I

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18 Lawyers have referred to paragraph 58 of Lord Hoffman’s speech in Runa Begum v. Tower Hamlets LBC (2003) UKHL 5 r (I think a spectrum of the relative degree of factual and discretionary content is too uncertain”), and paragraph 25(ii) of Thomas LJ’s judgment in Ali v. Birmingham CC (2008) EWCA Civ 1228 r A scheme which enabled certain factual issues 10 be subject to a full right of appeal and others which would not be so subject would be too uncertain and too complex.”)
think it would be difficult for the Secretary of State to be precluded from weighing the significance to the landowner of a particular matter if he were then required to weigh its significance in the balance of competing interests.

Furthermore, there could be cases in which it would be entirely appropriate for the Secretary of State to reach a different conclusion from the inspector on questions of fact. The Secretary of State might wish to reject an appointed person’s finding of fact if it were perverse or irrational, or there was no evidence to support it, or it was made by reference to irrelevant factors or without regard to relevant factors.

**Compatibility with Article 6 ECHR**

I am advised that the Government’s understanding of the law, as derived from recent legal cases, and as it currently stands, is as follows.

The question of whether the limited jurisdiction of judicial review will suffice for the purposes of Article 6 must be determined by an examination of the statutory scheme as a whole, Judicial review will generally suffice if the statutory scheme generally or systematically requires the application of judgement or the exercise of discretion, rather than the determination of primary fact, or if any issues of fact which arise are merely incidental, or a staging post on the way, to the reaching of a broader judgement of policy or expediency which it is for the democratically accountable authority to take. In such cases, the exercise of administrative functions does not require a mechanism for independent findings of fact or a full appeal, though it does need to be lawful and fair. This is particularly the case with a classic exercise of administrative discretion which merely involves preliminary findings of fact, but can even be the case where the finding of fact is determinative of the issue, if warranted by the need to maintain the coherence of the statutory scheme on examination of the scheme as a whole.

The Government considers that a decision as to whether the proposals strike a fair balance between competing interests is a classic exercise of administrative discretion, involving an evaluation of those interests and of their relative weight, which in the context of coastal access is by no means straightforward.

**Safeguards**

I have explained why I do not consider that a constraint on the discretion of the Secretary of State to depart from the conclusions of the appointed person on questions of fact would be workable.

There are, however, other safeguards in the legislation. Section 52 of the 1949 Act requires the Secretary of State, before reaching a determination whether to approve Natural England’s proposals, with or without modifications, to consult Natural England and such

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19 As we mentioned, the position may well be clarified by the House of Lords in *M and A v. Lambeth and Croydon LBC*. This case is listed for hearing on 20-23 July.


21 See in particular the speech of Lord Hoffman in *Runa Begum v. Tower Hamlets*.

22 See *Ali v. Birmingham*, at paragraphs 24-25, in particular 25 (ii) and (iv).
other authorities and persons as he thinks fit. Paragraph 16(3) - (5) of new Schedule 1A gives the Secretary of State power to make provision in regulations about the procedure to be followed where he is minded to approve proposals with modifications other than modifications made in accordance with a recommendation by the appointed person, and to apply any provision of Schedule 1A. Any requirement imposed by such regulations is in addition to the duty to consult under section 52(1) (see paragraph 16(6)).

I am happy to give an assurance that it is the Government’s intention to exercise that power, so as to provide for consultation before the Secretary of State decides to approve the proposals with modifications other than any recommended by the appointed person.

I would also like to offer the assurance that I envisage that it is only in very exceptional cases that the Secretary of State would wish, or be in a position, to differ from the appointed person on a pure question of fact. Moreover, I understand that this view merely reflects the legal reality. The Secretary of State would be at risk of judicial review if he came to a different view on a question of pure fact without any proper basis for doing so. My advice is that his position in relation to a question of pure fact would be very similar to that of the court in exercising its supervisory jurisdiction on judicial review, and would in general be likely to be limited to the kinds of case I mention above (where the finding was perverse or irrational, or there was no evidence to support it, or it was made by reference to irrelevant factors or without regard to relevant factors). But I trust such cases would be rare. It would be particularly difficult for the Secretary of State to arrive at a different conclusion on a finding of pure fact where this finding was based on an assessment of oral evidence.

I very much hope that you can agree with this analysis and take comfort from my assurances on these points.

Letter from Lord Hunt of Kings Heath to All Peers with an interest in the Marine and Coastal Access Bill, dated 5 June 2009

Government Amendments

In advance of third reading on the Marine and Coastal Access Bill scheduled for the 8th June I have today tabled two amendments on the objections procedure contained in Schedule 19 to the Bill relating to the Coastal Access provisions. These are in addition to the Government Amendments I wrote to you about on the 2nd of June. I apologise for the short notice of these amendments.

Amendments Relating to Part 9 – Coastal Access

Schedule 19 – Schedule 19 deals with Coastal Access reports, including procedures for making and objection on these.

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23 See Lord Millett’s description of this jurisdiction in paragraph 99 of Runa Begum v. Tower Hamlets.

24 See the observations of Lord Hoffman in paragraph 47 of Runa Begum v. Tower Hamlets that “Even with a full right of appeal it is not easy for an appellate tribunal which has not itself seen the witness to differ from the decision-maker on questions of primary fact.”
The first amendment that I have tabled says that the Secretary of State, in making his determination on a coastal access report, is bound by a statement of a finding of fact included in a report of the appointed person on an objection, except in certain circumstances.

The first circumstance is that the finding involves an assessment of the significance of a matter to any person with a relevant interest in land or to the public, and is necessary to ensure that the Secretary of State is not precluded from reaching a view on the significance to the landowner (or the public) of (for example) the proposed position of the route. This provides clarification that such an assessment is not to be treated as a “finding of fact” for the purpose of the Schedule.

The other circumstances are that there is insufficient evidence to make the finding, that the finding was made by reference to irrelevant factors or without regard to relevant factors, or that the finding was otherwise perverse or irrational. These other circumstances mirror the standard criteria governing the limited circumstances in which a court on judicial review can quash a decision on a finding of fact.

The second amendment which I have tabled requires the Secretary of State to state his reasons for not following a recommendation (whether a statement of fact or otherwise) in such a report, when making a determination.

I look forward to discussing these amendments during the course of third reading.

**Letter from the Chairman to Rt Hon Harriet Harman MP, Minister of State, Department for Constitutional Affairs, dated 19 December 2006**

The Joint Committee on Human Rights is considering the human rights compatibility of the Draft Coroner’s Bill. We are aware that this Bill has been subject to detailed pre-legislative scrutiny by the House of Commons Constitutional Affairs Committee. Although the Government had expressed a commitment to bringing forward a Coroner’s Bill in this parliamentary session, there was no reference to a Coroner’s Bill made in the Queen’s Speech, nor is there any reference to a Bill on the website of the Leader of the House. The Government have indicated to the Committee of Ministers that, in relation to the enforcement of the implementation of general measures to meet the United Kingdom’s procedural obligations under Article 2 ECHR, that legislative measures to reform Coroner’s are underway. The Committee of Ministers Deputies are awaiting further information from the United Kingdom on the progress of these reforms.25

1. We would be grateful if you could update us on the Government’s progress on the draft Bill, and whether it is likely that the Government will continue with its proposed reforms in this parliamentary session. If not, why not?

Having undertaken initial scrutiny of the draft Bill, we recognise that the Bill clearly has the potential to be a human rights enhancing measure; by increasing the effectiveness of

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25 Main Cases pending supervision, database, presented 17 October 2006 to the Committee of Ministers; Execution of Edwards v United Kingdom App 46477/99 (page 218). We note that the Committee of Ministers Deputies have reopened their consideration of the implementation of this judgment and are awaiting further information. http://www.coe.int/T/e/human_rights/execution/02_documents/PPcasesExecution_Nov%202006.pdf
Coroners’ investigations and addressing the requirement for an effective investigation into deaths which engage the State’s responsibility to protect individuals’ right to life (as guaranteed by Article 2 ECHR). However, we would be grateful if you could provide a fuller explanation of the Government’s view that the proposals in the Bill are compatible with the Convention rights guaranteed by the Human Rights Act 1998, in the following respects.

(1) Reform of death investigation: Article 2 ECHR

There are a number of developments in the Bill which have the potential to enhance the ability of Coroners’ investigations to satisfy the requirements of Article 2 ECHR for a full and effective investigation, including, a) widening the statutory duty to conduct investigations, including a broad duty to conduct investigations into the death of anyone “lawfully detained in custody”, as opposed to the current duty to investigate deaths “in prison”\(^{26}\) and b) the introduction of new rights of participation and appeal for bereaved families and other “interested parties”. We welcome the proposed introduction of a Charter for bereaved families, a policy objective which our predecessor Committee praised in its report into deaths in custody (2004-05, Third Report, para 295).

The draft Explanatory Notes accept that a significant number of the Bill’s clauses engage Article 2 ECHR and the obligation to conduct an effective investigation. The Government explain that certain parts of the Bill “are designed to discharge the obligation to conduct an effective investigation.”\(^{27}\) However, the draft Explanatory Notes do not explain why the Government is persuaded that the provisions of the Bill discharge that obligation effectively. We hope that a full explanation of the human rights impact of the proposals in the Coroners Bill will be provided to the Committee, including an explanation of those proposals which the Government considers enhance the United Kingdom’s ability to meet the procedural requirements of Article 2 ECHR, and containing an explanation of the Government’s reasons for its assessment.

Coroners’ Investigations: Recommendations of the Coroner

The draft Bill makes provision similar to that already established under Rule 43 of the Coroners Rules 1984. Under Clause 12(2), where a coroner believes, as a result of an investigation, that action should be taken to prevent similar fatalities, the coroner may report the matter both to a person who has power to take such action and to the Chief Coroner. There is no power for the coroner to compel the person to take action or to report back as to what action, if any, has been taken. The Constitutional Affairs Committee, in their report, recommended that the Government take a bolder approach to the Coroners’ preventative role in public health and safety matters (see paragraph 211). Liberty have submitted that the Coroner should be required to make recommendations at the end of every inquest and that these should be centrally recorded and monitored.\(^{28}\) Article 2(1) ECHR requires the state to take appropriate steps to safeguard the lives of those within their jurisdiction. The Court will take into consideration the effectiveness of any preventative steps taken by the State in their consideration of the compatibility of any State acts or omissions in respect of a death which engages Article 2 ECHR.

\(^{26}\) Clause 1. See Coroners Act 1988, Section 8(1).

\(^{27}\) Ibid, page 116

\(^{28}\) “The Draft Coroners Bill”, Liberty Briefing, para 12.
2. Has the Government any plans to enhance the powers of the Chief Coroner to act on recommendations made by coroners with a view to identifying patterns in deaths which require investigation and preventing similar fatalities, in light of the recommendations of the Constitutional Affairs Committee?

Coroners’ Investigations: Evidence

For example, Clause 43(2) would give the Lord Chancellor a wide power to limit the power of the Coroner to call certain evidence or require the production of certain documents. Although the Explanatory Notes explain that this power would “only be exercised in a way that is compatible with ECHR obligations”, the Committee has previously expressed their concern where issues which may raise significant human rights issues are left to secondary legislation. It is clear from the case law of the European Court of Human Rights that the effectiveness of an individual investigation for the purposes of Article 2 ECHR, where one is required, will be significantly affected by the scope of the evidence taken or heard, and any relevant procedural limitations.29

3. What has persuaded the Government that it is appropriate to grant the Lord Chancellor a wide power to direct the Coroners’ treatment of evidence?

4. In what circumstances do the Government consider that this power could be exercised in a case engaging Article 2 ECHR, without unduly restricting effectiveness of the Coroner’s investigation for the purposes of Article 2 ECHR?

Suspension of Coroners Inquests

Clause 22 provides that where certain inquests are suspended, it will be within the discretion of a senior Coroner to resume the inquest, if he thinks there is “sufficient reason” for doing so. Although the Explanatory Notes explain that “where the proceedings for which his investigation was suspended have not met the State’s ECHR obligations, that would provide a good reason for resuming the inquest”, Liberty are concerned that if an inquest is suspended when a criminal prosecution begins, there is a risk that inquests may not be resumed even where a criminal prosecution fails, or where the substance of a trial does not adequately meet Article 2 ECHR standards.30

5. Has the Government considered how to ensure that Coroners will, in practice, be free to reopen suspended investigations in circumstances where a prosecution or other investigation has not met the UK’s obligation to conduct an effective inquiry into a death?

   a. Has the Government considered Liberty’s suggestion that there should be a presumption, on the face of the Bill, that where an investigation which triggers the suspension of an inquiry fails to satisfy the requirements of Article 2 ECHR (and fails to identify by what means and in what circumstances a person came by their death) that the inquest will automatically resume?

29 Jordan v United Kingdom (2003) 37 EHRR 2, para 141 (Failure to disclose witness statements and/or take evidence from various members of the security forces in breach of Article 2 ECHR)

30 Liberty, Briefing on Draft Coroners Bill, September 2006
b. Does the Government intend to provide guidance to Coroners which emphasises the role which Coroners will play in ensuring that the UK’s obligations under Article 2 ECHR are met?

Clause 19 requires the Coroner to suspend an inquest where the Lord Chancellor informs him that the circumstances of an individual’s death will be considered in the course of a public inquiry pursuant to the Inquiries Act 2005, unless there are “exceptional reasons” for not doing so. This provision mirrors amendments to the Coroners Act 1988 made to address concerns about overlapping inquiries, and to avoid any conflict or duplication with public inquiries.31 The Explanatory Notes do not explain whether the Coroner would be able to refuse to suspend an investigation where it was his view that the Inquiries Act inquiry would not be adequate for the purposes of Article 2 ECHR, or whether the Coroner would have the power to reinstate his investigation where he thought that the scope of the inquiry conducted was not adequate to meet the need for a Convention compliant investigation. In their Report on the Inquiries Bill, the Committee concluded that there was a risk that an inquiry held under the Inquiries Act would not be sufficiently independent to satisfy the requirements of Article 2 ECHR. The Committee were particularly concerned that the power of the Minister to issue “restriction notices” which could limit the scope of an inquiry and the power of the Minister to withhold publication of inquiry reports in the “public interest” would limit the institutional independence and effectiveness of any inquiry.32

6. Does the Government consider that a reasonable belief that the inquiry proposed by the Lord Chancellor under the Inquiries Act 2005 was unlikely to meet the requirements of Article 2 ECHR, because the scope of that inquiry was restricted, or because there was a risk that the inquiry would not be considered independent, would be an “exceptional reason” which would justify a refusal to suspend an investigation?

Clause 30(1) provides that the Coroner may issue directions prohibiting the publication of information gathered in the course of an investigation. Any Article 2 ECHR compliant investigation must have an adequate degree of transparency to ensure that it is open to public scrutiny to a degree sufficient to provide accountability in the circumstances of the case. The Government considers that “this power is justified, in that it seeks to strike a balance between rights under Articles 8 and 10”. Clause 41 confirms that, subject to Coroners Rules, inquests are to be held in public. The Explanatory Notes provide that “the Coroners Rules…will set out the grounds on which the public may be excluded from inquests” (see Clause 67).

7. What has persuaded the Government that the discretion afforded to the Coroner under Clause 30(1), and to the Lord Chancellor under Clause 67, is adequately defined to ensure that public scrutiny is not circumscribed arbitrarily or inappropriately and that the provisions in the Bill which permit the restricted publication of information relating to an investigation are compatible with Article 2 ECHR?

(2) Legal assistance for bereaved families

31 Coroners Act 1988, Section 17A, inserted by Access to Justice Act 1999, s71(1)
32 2004-05, Eighth Report, 3.1-3.18 (See also 2004-05, Fourth Report)
Next of kin must be involved in any Convention compliant death investigation to the extent “necessary to safeguard [their] legitimate interest”. This may include a positive obligation on the State to provide legal aid. The Luce Report (“Death Certification in England, Wales and Northern Ireland: The Report of a Fundamental Review 2003) recommended that funding for legal representation should be available to families in all Coroners’ cases where a public authority is also legally represented. In our predecessor Committee’s Report on Deaths in Custody, it recommended that, at least in relation to deaths in custody, funding should be made available to all next of kin participating in an investigation into the death of their family member. At present, families can apply for funding based on significant public interest. However, the Committee has previously heard evidence that many families involved in cases involving deaths in custody have had to fund their own involvement in inquests.

8. What has persuaded the Government that the current provision for legal funding for bereaved families is adequate to ensure that their participation in Coroners’ investigations is effective for the purposes of the procedural requirements of Article 2 ECHR?

(3) Reporting Restrictions

The Committee is considering whether the reporting restrictions which may be imposed by the Coroner pursuant to Clause 30 strike an appropriate balance between the rights of the deceased person’s family under Article 8 ECHR and the rights of the press under Article 10 ECHR. This is a new power. The draft Explanatory Notes explain that the department considers that this power is justified, “in that it seeks to strike a balance between rights under Articles 8 and 10”.

9. What has persuaded the Government that the power to impose reporting restrictions provided by the Bill is proportionate to the need to protect bereaved families’ right to respect for their private life?

10. Will members of the press be considered “interested persons” for the purposes of asking the senior coroner to vary a direction imposing reporting restrictions, or bringing an appeal against such a direction?

(4) Powers of Search and Seizure

The Committee is considering whether the powers of search and seizure granted to Coroners by the Bill contain adequate safeguards for the protection of individual rights under Articles 6 and 8 ECHR (Clauses 50 – 51). These are relatively broad powers. They will extend to all premises, including residential premises. It appears that there are a number of safeguards which generally accompany intrusive rights of search and seizure in the United Kingdom which are not, as yet, reflected on the face of the Bill. For example a) the draft Bill grants powers of search and seizure to the Senior Coroner, as an entity, without any guarantee as to the identity of the individual conducting the search. It is important that any search is in fact conducted only by an authorised person with an adequate degree of training to exercise this intrusive power; b) it provides no procedure for

33 Jordan v United Kingdom (2003) 37 EHRR 2, para 109; R (Khan) v Secretary of State for Health [2004] 1 WLR 971
dealing with the treatment or return of seized materials, and c) it provides no means of redress for those aggrieved by the conduct of any search.

Have the Government considered whether there are adequate safeguards on the face of the draft Bill to ensure that any interference with the right to respect for the home and private life and the right to the peaceful enjoyment of possessions is proportionate? Have the Government considered incorporating safeguards, similar to those set out in Part II of the Police and Criminal Evidence Act 1984, and if not, why not?

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

**Letter from the Rt Hon Harriet Harman QC MP, Minister of State, Department for Constitutional Affairs to the Chairman, dated 22 January 2007**

Thank you for your letter of 19 December about the human rights compatibility of the draft Coroner’s Bill.

The main purpose of the Bill is to improve the way that the coroners system serves the public interest and meets bereaved families’ concerns. The Bill will give families involved in the inquest process a clear legal standing in the system. For the first time, families will have rights, through the introduction of a charter for bereaved people, laying out the level of service in relation to information and consultation that families can expect, and through a new appeals system, enabling them to challenge a coroner’s decision.

A second important aim is to create a national structure for coroner’s work. For the first time there will be a Chief Coroner who will provide national leadership for coroners, as the Lord Chief Justice dies for judges. This will be supported by national standards, a coronial advisory council, a proper inspection system and national training for coroners and their officers.

And the third main aim of reform is to strengthen coroners’ work and make the appointment system more transparent. The Bill will provide coroners with new powers and procedures to conduct more effective investigations, and will establish a proper appointments system, approved by the Judicial Appointments Commission.

You have sought additional information about certain aspects of the Bill in relation to human rights compatibility. I have set out below your questions together with my response for ease of reference.

1. **We would be grateful if you could update us on the Government’s progress on the draft Bill, and whether it is likely that the Government will continue with its proposed reforms in this parliamentary session. If not, why not?**

The Coroner’s Bill is not part of the main programme for this session, but this gives us additional time for further detailed work, including more consultation with stakeholders, so that the legislation can be improved. We will also explore, in consultation with those who deliver and fund the service and those who represent people with experience of it whether, there are other changes that can be made to improve the system in advance of and
to complement legislation. The comments of the Joint Committee on Human Rights are therefore particularly welcome and timely.

Coroners’ Investigations: Recommendation of the Coroner

2. Has the Government any plans to enhance the powers of the Chief Coroner to act on recommendations made by coroners with a view to identifying patterns in deaths which require investigation and preventing similar fatalities, in light of the recommendations of the Constitutional Affairs Committee?

Clause 12(2) of the draft Bill gives the coroner power to report his findings to a person who may have power to take action to prevent the recurrence of fatalities similar to that which is being investigated, with a view to preventing similar deaths in the future.

Following the consultation process, I am considering amending the Bill to make it a requirement for the Chief Coroner to include – in his or her annual report to the Lord Chancellor (who is, in turn, required to lay it before Parliament) – a summary of the reports made by coroners and responses to such reports. I am also considering making it a requirement for the person to whom the report is made to formally respond. More details on procedures to support these new arrangements will be dealt with in secondary legislation.

Coroners’ Investigations: Evidence

3. What has persuaded the Government that it is appropriate to grant the Lord Chancellor a wide power to direct the Coroners’ treatment of evidence?

4. In what circumstances do the Government consider that this power could be exercised in a case engaging Article 2 ECHR, without unduly restricting effectiveness of the Coroner’s investigation for the purposes of Article 2 ECHR?

The Bill provides coroners with a power to compel a person to attend to give evidence (clause 42). Powers to compel evidence are a necessary corollary of the state’s duty to discharge obligations under Article 2. Lack of power to compel witnesses may diminish the effectiveness of an inquiry. A person may argue that he may not be compelled to give evidence where it would not be reasonable (clause 42(4)). A further procedural safeguard enables a person to argue that he should not be required to give, produce or provide evidence if doing so will tend to incriminate him, if the evidence is covered by legal professional privilege or on the grounds of public interest immunity (clause 43).

The Government is currently reviewing whether these provisions are a sufficient safeguard for witnesses and whether the provision in clause 43(2) is necessary. If further provision is considered to be necessary it is intended that the Bill will list the evidence or documents to which section 42 does not apply and that the Lord Chancellor’s power will be limited to altering this list by subordinate legislation, which will follow the affirmative resolution procedure.

Suspension of Coroners Inquests

5. Has the Government considered how to ensure that Coroners will, in practice, be free to reopen suspended investigations in circumstances where a prosecution or other investigation has not met the UK’s obligation to conduct an effective inquiry into a death?

   a. Has the Government considered Liberty’s suggestion that there should be a presumption, on the face of the Bill, that where an investigation which triggers the suspension of an inquiry fails to satisfy the requirements of Article 2 ECHR (and fails to identify by what means and in what circumstances a person came by their death) that the inquest will automatically resume?

   b. Does the Government intend to provide guidance to Coroners which emphasises the role which Coroners will play in ensuring that the UK's obligations under Article 2 ECHR are met?

6. Does the Government consider that a reasonable belief that the inquiry proposed by the Lord Chancellor under the Inquiries Act 2005 was unlikely to meet the requirements of Article 2 ECHR, because the scope of that inquiry was restricted, or because there was a risk that the inquiry would not be considered independent, would be an “exceptional reason” which would justify a refusal to suspend an investigation?

The Bill requires the coroner to suspend an investigation in the event that certain criminal proceedings may be brought, have been brought, or in the event of an inquiry under the Inquiries Act 2005 (clauses 17 to 19). A coroner who suspends an investigation on the ground that criminal proceedings might be brought (clause 17) is required to resume the investigation once the period of suspension has ended. A coroner who suspends an investigation on the ground that criminal proceedings have been brought (clause 18) or that an inquiry is being held (clause 19) has power to resume the investigation once the proceedings or inquiry is complete if he or she thinks there is sufficient reason for doing so. This gives him the power to resume an investigation, for example, where he or she thinks that the State’s obligations have not been met under the ECHR.

I consider that the provision as currently worded is sufficient to ensure ECHR compliance. Since a coroner is a public authority and, whether or not the Bill requires him or her to, at the end of the criminal proceedings or inquiry, as the case may be, he or she will be required to assess whether those proceedings met the Article 2 obligation and, if not, he or she will be required to resume the inquest in any event, unless the obligation will be met in any other way.

As to whether the government will issue guidance to coroners emphasising the role which they should carry out in ensuring the obligations of Article 2 are met, this will be a responsibility of the proposed new Chief Coroner as a part of his or her leadership role, which will include a requirement to ensure consistency across coroner areas.

Finally, on your question about inquiries under the Inquiries Act, the Government does consider that a reasonable belief that the inquiry proposed by the Lord Chancellor would not meet Article 2 requirements because of its scope, would be an exceptional reason which would justify a coroner’s refusal to suspend an investigation.
7. What has persuaded the Government that the discretion afforded to the Coroner under Clause 30(1), and to the Lord Chancellor under Clause 67, is adequately defined to ensure that public scrutiny is not circumscribed arbitrarily or inappropriately and that the provisions in the Bill which permit the restricted publication of information relating to an investigation are compatible with Article 2 ECHR?

Clause 30 provides a senior coroner with the power to give a direction prohibiting publication of the name of the deceased and any interested person within clause 76(2)(a) and any information which could lead to the identification of the deceased. Any publication in contravention of a direction will constitute a contempt of court. When considering whether to give such a direction, a coroner will be bound by existing case law as to the circumstances in which it is appropriate to allow a name to be withheld. In addition and so as to ensure the public scrutiny of an investigation is not compromised, I am considering amending this clause so as to limit the discretion of a coroner to cases where he or she considers that exceptional circumstances apply to justify the imposition of reporting restrictions. It may also be amended so that a coroner will no longer be able to make a direction under clause 30 of his own motion but only where an application is made by an interested party. In his or her function of providing leadership to coroners, the Chief Coroner will have power to issue guidance to coroners setting out the type of exceptional circumstances that would justify the coroner exercising his decision.

In the Government’s view, exceptional circumstances are only likely to exist if there is a reason for not publicising the name and the case does not raise issues of public interest or matters of public protection or if there is no third party or organisation implicated in or connected to the death. In addition, the Chief Coroner will monitor use of this discretionary power, and he or she will be required to report to the Lord Chancellor the number and outcome of applications under this provision, including the number and outcome of any appeals.

Clause 41 is likely to be amended so that the cases where an inquest may be held in private will be set out on the face of the Bill. The only circumstance when this will be permitted is if there are national security issues.

Legal Assistance for Bereaved Families

8. What has persuaded the Government that the current provision for legal funding for bereaved families is adequate to ensure that their participation in Coroners’ investigations is effective for the purposes of the procedural requirements of Article 2 ECHR?

In some cases, Article 2 ECHR places a substantive investigative obligation on the State. In any case that requires an inquest, it is necessary to consider whether the investigative duty under Article 2 is triggered on the facts of the case and if there is such a duty, whether what has become known as the “Jordan fifth” criteria applies. The Jordan criteria derives from the judgement in the case of Jordan (Hugh Jordan v. the United Kingdom – 24746/94 [2001] ECHR 327 (4 May 2001)), and is that “the next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests” (para. 109). If that criteria does apply, a further issue arises, namely whether or not this requires the grant of public legal funding for the coroner’s inquest.
The courts have also made clear that in the vast majority of inquests the coroner can conduct an effective investigation, with the family’s participation, without the family of the deceased needing to be legally represented. For example, in the case of Khan, the court found that:

“… the function of an inquest is inquisitorial, and in the overwhelming majority of cases the coroner can conduct an effective judicial investigation himself without there being any need for the family of the deceased to be represented…” (para 74., Khan v Secretary of State for Health [2003] EWCA Civ 1129).

This view was subsequently reiterated in the case of Challender where the court considered that:

“I see nothing in the cases post-dating Khan to support a broader approach than that expressed in Khan itself when it was said that in the overwhelming majority of cases the coroner can conduct an effective judicial investigation himself and that only in exceptional cases will article 2 require legal representation for the family of the deceased” (p. 71, R (Challender) v Legal Services Commission [2004] EWHC 925 (Admin)).

Normally, the holding of the inquest will be sufficient to discharge the State’s Article 2 obligations to conduct an effective investigation into the death. For those exceptional circumstances, funding may be required. In such cases, the Lord Chancellor or his Ministers can grant funding, where it requested by the LSC, under the powers granted by section 6(8)(b) of the Access to Justice Act 1999.

In addition to this, Legal Help is available for an inquest, (subject to financial eligibility and the usual test sets out in the LSC funding code). Legal Help would fund all the preparatory work associated with the inquest, which may include preparing written submissions to the Coroner. Legal Help will also fund someone to attend the inquest as a 'Mackenzie Friend', to offer informal advice in Court, providing the Coroner gives permission.

Other than in exceptional cases, funding for representation at an inquest is not usually available because an inquest is a relatively informal inquisitorial process, rather than an adversarial one. The role of the coroner is to question witnesses and to actively elicit explanations as to how the deceased came by his death. An inquest is not a trial. There are no defendants, only interested parties, and witnesses are not expected to present legal arguments. I am, however, concerned about coroners’ investigations where the substantive investigative duty under Article 2 is not triggered and when public authorities choose to be legally represented at inquests, where a bereaved family member is not entitled to public funding for representation. This is something I am considering further.

Reporting Restrictions

9. What has persuaded the Government that the power to impose reporting restrictions provided by the Bill is proportionate to the need to protect bereaved families’ right to respect for their private life?
10. Will members of the press be considered “interested persons” for the purposes of asking the senior coroner to vary a direction imposing reporting restrictions, or bringing an appeal against such a direction?

Draft clause 30 polarised opinion in the responses to our public consultation. Some strong views were received from the media, who felt that the proposal was against the principle of open justice and would not be in the public interest. On the other hand, many voluntary groups were supportive of the proposal and felt it was an important step towards protecting families in sensitive cases where there is no justification for names being made public.

The exercise of this power may engage Article 8 and Article 10. The decision to give a direction will involve a balancing of these rights. There is no automatic precedence as between these Articles and both are subject to qualification where, among other considerations, the rights of others are engaged. The coroners will follow the approach of the House of Lords in Re S (a child)\[37\] that the foundation of the inherent jurisdiction to impose reporting restrictions now derives from Convention rights.

As mentioned at paragraph 7, I am considering a number of amendments to this clause to ensure compliance with the ECHR.

It is intended that the amendments will allay the fears, expressed by the media, that there will be a ‘widespread ban’ on the reporting of inquests and investigations, yet still provide the necessary protection for vulnerable families in cases where there is no public interest in the publication of information that could lead to the identification of those involved. In clause 76(2), the media will be included as an ‘interested person’ who may appeal a direction on reporting restrictions.

Powers of search and seizure

11. Have the Government considered whether there are adequate safeguards on the face of the draft Bill to ensure that any interference with the right to respect for the home and private life and the right to the peaceful enjoyment of possessions is proportionate? Have the Government considered incorporating safeguards, similar to those set out in Part II of the Police and Criminal Evidence Act 1984, and if not, why not?

Clause 50 enables a coroner to enter and search premises and to seize property or inspect and take copies of documents. Clause 51 enables property seized to be retained. Reasonable force may be used in the exercise of the power.

The powers of search and retention of property may engage Article 8 rights. However, I consider that any interference will be justified in accordance with Article 8(2) as any search is likely to be in the interests of either public safety, prevention of crime or for the protection of the rights and freedoms of others. The inability to acquire evidence and material may inhibit the coroner’s duty to conduct an effective investigation.

I consider that the powers are proportionate to the achievement of a legitimate aim. The power to enter and search may only be used if the Chief Coroner has given his or her authorisation (clause 50(2)). Furthermore, authorisation will only be given if the coroner

\[37\] In [2004] UKHL 47
has reasonable cause to suspect that there may be anything on the premises which relates to a matter which is relevant to the investigation (clause 50(3)); and either-

- it is not practicable to communicate with a person entitled to grant permission to enter and search the premises,

- permission to enter and search the premises has been refused, or

- the coroner has reason to believe that such permission would be refused if requested (clause 50(4)).

The power to seize anything on the premises and inspect and take copies of documents may only be used if the coroner believes that it may assist the investigation and, in the case of seizure, only if it is necessary to prevent the item being concealed, lost, altered or destroyed (clause 51(1)).

The power to seize articles may engage rights to peaceful enjoyment of possessions under Article 1, Protocol 1. However the Department considers that interference with this right is justified in the public interest and is proportionate. Any items seized will only be retained for as long as is necessary in all the circumstances (clause 51 (4)). Furthermore, by virtue of clause 66(2)(f) and (g), the Lord Chancellor has power to make regulations which may contain provision, in relation to authorisations under clause 50(2), which is equivalent to that made by any provision of sections 15 and 16 of the Police and Criminal Evidence Act 1984 and which may contain provision, in relation to the power of seizure of property, which is equivalent to that made by any provision in section 21 of the Police and Criminal Evidence Act 1984. It is intended that the regulations will require a coroner to provide a record of items seized to a person who is the occupier of premises from which the item was seized or who had control of the item before it was seized. It is also intended that such a person will be allowed access to the item for the purpose of photographing it.

A coroner's decision to seize and retain an item will be capable of challenge by way of appeal to the Chief Coroner. Article 6 rights may be engaged in this context, in which case the appeal proceedings which the Bill puts in place will be capable of meeting its requirements.

Letter from the Rt Hon Harriet Harman QC MP to the Chairman, dated 27 February 2007

Draft Coroners Bill

Report of Public Panel Scrutiny and Consultation responses

I am writing to inform you of a written statement that I made to the House today announcing two reports following our consultation exercise on the draft Coroners Bill.

In the Bill we aim to do three things. Firstly, we will improve the way that the system serves the public interest and meet bereaved families’ concerns. The Bill will give families involved in the inquest process a clear legal standing in the system. We will also give families new rights through a new complaints and appeals system, enabling them to challenge a coroners’ decision, and the introduction of a Charter for Bereaved People which lays out the level of service families can expect. Secondly, we will strengthen
coroners’ work. The Bill will establish a proper appointments system for coroners, who will have to be legally qualified and will have to work full time as coroners, instead of having another job and working part time as coroners. Thirdly, we will create a national structure for coroners’ work. For the first time there will be a Chief Coroner, supported by a Chief Medical Advisor, who will provide national leadership for coroners, as the Lord Chief Justice does for judges. This will be supported by national standards, a coronial advisory council, a proper inspection system and national training for coroners and their officers.

Our consultation on the Bill included an event which took place last November, when I invited members of the public with recent experience of the coroner service to sit on a panel in Parliament to consider the draft Coroners Bill. A key objective of the Bill is to ensure the system serves bereaved relatives better. The aim of pre-legislative scrutiny by bereaved relatives was to satisfy ourselves that the changes in the Bill will indeed achieve that objective. MPs were invited to attend during the day to observe the discussion. Today I will be publishing the report on the public pre-legislative scrutiny event.

The panel discussion provided an opportunity to hear first hand what bereaved relatives with recent experience of the coroners system thought of the changes proposed in the draft Bill. The findings from the discussion will enable us to have a fully informed debate when a Bill is introduced and emerge with the best result possible.

The second publication is the report of responses to the wider public consultation on the draft Bill, which can be found at: http://www.dca.gov.uk/corbur/coron03.htm. Over 150 organisations and individuals responded to the consultation, with further feedback received from regional conferences for those involved in delivering or funding the service, such as coroners, their staff, police and local authorities, and from a number of meetings held with voluntary sector organisations. The report outlines action we are taking in several policy areas to refine the proposals in the draft Bill. The Bill will be introduced to Parliament as soon as time allows.

**Letter from Rt Hon Jack Straw MP, Secretary of State for Justice, dated 30 June 2009**

Thank you for your Committee’s Report “Prisoner Transfer Treaty with Libya” published on 15 April 2009.

I note the Committee’s view that when a committee states that it intends to scrutinise a treaty, ratification should be delayed until the committee’s inquiry has concluded.

The Government recognises and supports the valuable work undertaken by parliamentary committees in scrutinising treaties. This is an important part of our constitutional arrangements. When a committee seeks additional time to scrutinise a treaty the Government would aim to respond positively to such requests provided circumstances permit and cases are justified, in accordance with the undertaking given to the House of Commons Procedure Committee in October 2000. Wherever possible the Government would prefer to delay ratification of a treaty until the relevant committee’s inquiries are complete. However, the circumstances of each case must be considered and this may not always be possible.
I want to assure you and your committee that I considered your request for an extension of the time allowed under the Ponsonby Rule to consider the prisoner transfer agreement with Libya very carefully. The decision not to grant the full extension requested and to proceed with ratification was not taken lightly. However, given the circumstances outlined to you in my letter of 12 March, I felt that we went as far as was feasible in granting additional time to the Committee and ensuring a prompt response to the questions set out in your letter of 17 March.

The Committees second point relates to whether or not prisoners subject to deportation have a right of appeal. Foreign nationals subject to a decision to make a deportation order do have a statutory right of appeal against that immigration decision (s82 (2) (j) and s82 (3A) of the Nationality, Immigration and Asylum Act 2002). The exercise of that appeal suspends deportation (i.e. the appeal is “in country”) unless it is an appeal against a decision to make a deportation order in accordance with s32 (5) of the UK Borders Act 2007 (i.e. the “automatic deportation provisions” that apply to foreign criminals sentenced to a period of imprisonment of at least 12 months). Under the automatic deportation provisions, there is an appeal against the application of s32 (5) but it would ordinarily only be exercised after deportation (s92 (2) of the 2002 Act). Also, even where an individual is being deported under the automatic deportation provisions, an appeal from within the UK still lies when the individual has made an asylum or human rights claim while in the UK by virtue of s92(4)(a) of the 2002 Act.

Once domestic appeals are determined, judicial reviews are sometime applied for in relation to further representations when they are not considered “fresh claims” or when claims are certified for being unfounded or for being raised too late. Judicial Review may also be brought in relation to the actual removal directions that are set after the deportation order is made.
**List of Reports from the Committee during the current Parliament**

<table>
<thead>
<tr>
<th>First Report</th>
<th>The UN Convention on the Rights of Persons with Disabilities</th>
<th>HL Paper 9/HC 93</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fourth Report</td>
<td>Legislative Scrutiny: Political Parties and Elections Bill</td>
<td>HL Paper 23/ HC 204</td>
</tr>
<tr>
<td>Eighth Report</td>
<td>Legislative Scrutiny: Coroners and Justice Bill</td>
<td>HL Paper 57/HC 362</td>
</tr>
<tr>
<td>Tenth Report</td>
<td>Legislative Scrutiny: Policing and Crime Bill</td>
<td>HL Paper 68/HC 395</td>
</tr>
<tr>
<td>Eleventh Report</td>
<td>Legislative Scrutiny: 1) Health Bill and 2) Marine and Coastal Access Bill</td>
<td>HL Paper 69/HC 396</td>
</tr>
<tr>
<td>Twelfth Report</td>
<td>Disability Rights Convention</td>
<td>HL Paper 70/HC 397</td>
</tr>
<tr>
<td>Thirteenth Report</td>
<td>Prisoner Transfer Treaty with Libya</td>
<td>HL Paper 71/HC 398</td>
</tr>
<tr>
<td>Fourteenth Report</td>
<td>Legislative Scrutiny: Welfare Reform Bill; Apprenticeships, Skills, Children and Learning Bill; Health Bill</td>
<td>HL Paper 78/HC 414</td>
</tr>
<tr>
<td>Fifteenth Report</td>
<td>Legislative Scrutiny: Policing and Crime Bill (gangs injunctions)</td>
<td>HL Paper 81/HC 441</td>
</tr>
<tr>
<td>Sixteenth Report</td>
<td>Legislative Scrutiny: Coroners and Justice Bill (certified inquests)</td>
<td>HL Paper 94/HC 524</td>
</tr>
<tr>
<td>Seventeenth Report</td>
<td>Government Replies to the 2nd, 4th, 8th, 9th and 12th reports of Session 2008-09</td>
<td>HL Paper /HC 592</td>
</tr>
<tr>
<td>Nineteenth Report</td>
<td>Legislative Scrutiny: Parliamentary Standards Bill</td>
<td>HL Paper 124/HC 844</td>
</tr>
<tr>
<td>Twentieth Report</td>
<td>Legislative Scrutiny: Finance Bill; Government Responses to the Committee’s Sixteenth Report of Session 2008-09, Coroners and Justice Bill (certified inquests)</td>
<td>HL Paper 133/ HC 882</td>
</tr>
<tr>
<td>Twenty First Report</td>
<td>Legislative Scrutiny: Marine and Coastal Access Bill;</td>
<td>HL Paper 142/ HC 918</td>
</tr>
<tr>
<td>Number &amp; Title</td>
<td>Summary</td>
<td>Paper No.</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------</td>
<td>-----------------</td>
</tr>
<tr>
<td>Twenty Second Report</td>
<td>Demonstrating respect for rights? Follow-up</td>
<td>HL Paper 141/HC 522</td>
</tr>
</tbody>
</table>

### Session 2007-08

<p>| 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 |
| 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 |
| 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 |
| Eleventh Report                                                               | The Use of Restraint in Secure Training Centres                                            | HL Paper 65/HC 378 |
| 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 |
| Nineteenth Report                                                             | Legislative Scrutiny: Education and Skills Bill                                            | HL Paper 107/HC 553 |</p>
<table>
<thead>
<tr>
<th>Reports</th>
<th>Title</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Twentieth Report</td>
<td>Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill</td>
<td>HL Paper 108/HC 554</td>
</tr>
<tr>
<td>Twenty-First Report</td>
<td>Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies</td>
<td>HL Paper 116/HC 635</td>
</tr>
<tr>
<td>Twenty-Fourth Report</td>
<td>Counter-Terrorism Policy and Human Rights: Government Responses to the Committee’s Twentieth and Twenty-first Reports of Session 2007-08 and other correspondence</td>
<td>HL Paper 127/HC 756</td>
</tr>
<tr>
<td>Twenty-sixth Report</td>
<td>Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill</td>
<td>HL Paper 153/HC 950</td>
</tr>
<tr>
<td>Twenty-seventh Report</td>
<td>The Use of Restraint in Secure Training Centres: Government Response to the Committee’s Eleventh Report</td>
<td>HL Paper 154/HC 979</td>
</tr>
<tr>
<td>Twenty-eighth Report</td>
<td>UN Convention against Torture: Discrepancies in Evidence given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq</td>
<td>HL Paper 157/HC 527</td>
</tr>
<tr>
<td>Twenty-ninth Report</td>
<td>A Bill of Rights for the UK?: Volume II Oral and Written Evidence</td>
<td>HL Paper 165-II/HC 150-II</td>
</tr>
</tbody>
</table>