



House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny: Children, Schools and Families Bill; other Bills

Eighth Report of Session 2009-10

*Report, together with formal minutes and
written evidence*

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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 made under Section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in Standing Order No. 73 (Lords)/151 (Commons) (Statutory Instruments (Joint Committee)).

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Contacts

All correspondence should be addressed to The Clerk of the Joint Committee on Human Rights, Committee Office House of Commons London SW1A 0AA. The telephone number for general inquiries is: 020 7219 2797; the Committee's e-mail address is jchr@parliament.uk.

Footnotes

In the footnotes of this Report, references to oral evidence are indicated by 'Q' followed by the question number. References to written evidence are indicated by the page number as in 'Ev 12'.

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Summary

Children, Schools and Families Bill

Parent and pupil guarantees

We welcome the requirement that the Secretary of State set out specific entitlements which pupils and parents are entitled to expect from their school. However, we have some concerns about the details of the plans. We recommend that the Secretary of State ensures that the entitlements fully reflect the relevant international human rights standards concerning the child's right to education and the rights of parents in relation to their children's education. We also suggest an expanded list of people to consult when drawing up the entitlements. In our view Article 6 of the ECHR may well apply to certain types of entitlement. We therefore have concerns that there will not be access to an independent and impartial court or tribunal of full jurisdiction.

Mandatory sex and relationships education

We welcome the proposal for mandatory sex and relationships education, with a parental right to opt out the child if the child is under the age of 15. However, we recommend the parental right of withdrawal should be limited by reference not to a child's age, but to the concept of "Gillick competence". We call for more research on the respective proportion of boys and girls who are withdrawn from sex and relationships education in order that a proper equality impact assessment can be carried out.

We are pleased that the Government has accepted that the teaching of sex and relationships in faith schools must present material that is accurate and balanced, must reflect a variety of views, must not present that faith's views as the only valid views, and must promote equality and diversity. However, we are concerned about the principle that PSHE be taught in a way that is appropriate to the religious and cultural backgrounds of the pupils. This may lead to teaching which is incompatible with the rights of certain children to respect for their private and family life and not to be discriminated against in their enjoyment of that right and their right to education on grounds of sexual orientation, birth or other status.

Teaching licenses

The Bill makes provision for the Secretary of State to introduce a licensing scheme for teachers. The Government does not consider that the right to peaceful enjoyment of possessions is engaged because it does not consider that a licence, or the right to practise as a teacher, will be a "possession". We do not agree with this view. The Government argues that, even if teachers' right to practise their profession does amount to a "possession", the interference would be justifiable as a proportionate measure with the legitimate aim of improving the quality of teaching. In principle this may be true. However, there is too little detail on the face of the Bill for us to be able to assess the merits of this argument. We recommend that more detail of the proposed licensing scheme be put on the face of the Bill. We also recommend that the Bill be amended to provide a right of appeal to a genuinely independent appellate body.

Reporting of family court proceedings

We are concerned about the proposals to enable wider reporting of family court proceedings. We recommend that the Bill be amended to include an express restriction on the publication of information where such publication would not be in the best interests of the child.

Constitutional Reform and Governance Bill

We publish without comment two human rights memoranda that we have received from the Government concerning its amendments to the Bill relating to MPs' expenses and reform of the voting system.

Bills drawn to the special attention of both Houses

1 Children, Schools and Families Bill

Date introduced to first House	19 November 2009
Date introduced to second House	
Current Bill Number	HC Bill 61
Previous Reports	None

Background

1.1 This is a Government Bill introduced in the House of Commons on 19 November 2009. The Bill received its Second Reading on 11 January 2010 and completed its Committee stage on 4 February 2010. Report stage is scheduled for 23 February 2010. The Secretary of State for Children, Schools and Families, the Rt Hon Ed Balls MP, has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998.

1.2 We wrote to the Secretary of State on 14 January 2010 asking a number of questions about certain aspects of the Bill with human rights implications. We received a full response, for which we are grateful, from Vernon Coaker MP, Minister of State, dated 2 February 2010. That correspondence is published with this Report.

1.3 We have also been assisted by a number of representations¹ about this Bill which we received in response to our call for evidence in January, in which we identified the human rights issues that we were likely to be prioritising in our legislative scrutiny work in what will be a shorter than usual parliamentary session. We have considered these carefully and are grateful to all those who took the trouble to submit evidence to us.

Purposes of the Bill

1.4 The Bill contains a wide range of measures, the most relevant of which for our purposes are the introduction of a system of “guarantees” for parents and pupils; the introduction of mandatory sex and relationships education in schools; provision about publication of information relating to family proceedings; and the introduction of a licensing scheme for teachers.

Explanatory Notes

1.5 The section of the Explanatory Notes to the Bill dealing with its compatibility with the European Convention on Human Rights provides, in relation to certain aspects of the Bill, some helpful clarification of the Government’s reasons for its view that the Bill is ECHR compatible.² There are some notable omissions from the analysis (it does not deal at all, for example, with the important human rights issues which arise in the teaching of sex and

1 We received evidence from British Institute of Human Rights, Brook, the Children’s Rights Alliance, CAF/CASS, Family Education Trust, Family Planning Association, the Law Society, Marie Stopes International, Stonewall and a number of individuals.

2 Bill 8-EN paras 204-225.

relationships education in faith schools³) and the analysis of the human rights issues which arise in connection with the introduction of a new licensing regime for teachers⁴ is cursory to say the least.⁵

1.6 However, we also received from the Department, prior to the Bill's introduction, a human rights memorandum, setting out in more detail the Government's consideration of the main human rights issues relating to the Bill.⁶ This was sent in response to our call for evidence on the Government's Draft Legislative Programme in July 2009.⁷ The Department did the same in relation to the Apprenticeships, Skills, Children and Learning Bill in the last session, sending a human rights memorandum in response to our call for evidence on the Government's Draft Legislative Programme prior to the Bill's introduction. In our report on that Bill we welcomed the human rights memorandum sent to us by the Department before the publication of the Bill and we encouraged other departments to follow the same practice in future.⁸ We regret to report that, during this Session, no other Department has done so.

1.7 Officials in the Bill team also made themselves available to meet with our Legal Adviser and Lords Clerk in December 2009 to discuss some of the human rights issues raised by the Bill. At that meeting further information was identified which we would find useful in our scrutiny of the Bill and on 15 January 2010 a further letter was sent responding in detail to some of the questions raised at the meeting with our staff.⁹ As we have indicated above, we also received a detailed letter from the Minister on 2 February 2010 in response to our detailed queries about the Bill.

1.8 We welcome the Department's degree of engagement with our human rights scrutiny of this Bill. Although the comprehensiveness and quality of the human rights analysis in the Explanatory Notes is open to criticism, the Department's subsequent proactive provision of information, its preparedness to make officials available to answer questions and its full response to requests for further information have all been of considerable assistance to the Committee in its scrutiny of the Bill for human rights compatibility. We commend the Department's practices to other departments as examples of best practice.

Significant human rights issues

(1) Enforceable entitlements for parents and pupils

1.9 The Bill requires the Secretary of State to issue documents setting out pupil and parent "guarantees": a set of specific entitlements which pupils and parents are entitled to expect from their school.¹⁰ The guarantees are intended to "embody the most important aspects of

3 See below, paras. 1.26–1.51

4 EN paras 210–212.

5 See below, paras 1.52–1.65.

6 Ev 46–49.

7 Press Notice No. 57, 28 July 2009. See:

http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchrpn057_280709.cfm

8 Fourteenth Report of Session 2008–09, *Legislative Scrutiny: Welfare Reform Bill; Apprenticeships, Skills, Children and Learning Bill; Health Bill*, HL 78/HC 414, at paras 2.5–2.6.

9 Ev 10–16.

10 Clause 1(1).

what parents and pupils can rightly expect from schools.”¹¹ The Secretary of State must define the specific entitlements in the pupil and parent guarantees with a view to realising various pupil and parent “ambitions” which are listed in the Bill.¹²

1.10 The guarantees may impose requirements on local authorities, governing bodies and head teachers,¹³ and are intended to be enforceable through certain enforcement mechanisms. The fact that the guarantee documents are able to impose mandatory requirements on local authorities, governing bodies and teachers means that “in principle the guarantee documents will be capable of providing entitlements to parents and pupils that would, in theory at least, be enforceable through judicial review.”¹⁴

1.11 However, one of the intentions behind the guarantees documents is to avoid litigation by offering parents and pupils an accessible, cost-effective and swift method of redress. Pupils and parents will be entitled to complain to the Local Government Ombudsman about failure to meet the guarantees.¹⁵ The Ombudsman is empowered to investigate such complaints, report and make recommendations, including, in the case of local authorities, recommendations of financial compensation. It is envisaged that judicial review of the Local Government Ombudsman will be in principle available.

(a) Giving legal effect to economic and social rights

1.12 This part of the Bill raises again an important human rights issue which we have recently considered in detail in our reports on *A Bill of Rights for the UK?*¹⁶ and on the Child Poverty Bill¹⁷: whether economic and social rights such as the right to education¹⁸ can be given some legal effect by being made the subject of specific individual entitlements, with some means of redress, without subverting democratic accountability for public expenditure.

1.13 In our report on the Child Poverty Bill we welcomed that Bill as a human rights enhancing measure¹⁹ because it provides a mechanism for the progressive realisation of children’s right to an adequate standard of living.²⁰ We welcomed in particular the use of the model of “target-setting legislation” to bring about the progressive realisation of that important economic and social right.²¹ As our predecessor Committee noted in its Report on *The International Covenant on Economic, Social and Cultural Rights*,²² progressive realisation is one of the principal obligations on the State under Article 2(1) ICESCR:

11 Ev 6–10.

12 Clause 1(3)-(4).

13 Clause 1(2).

14 Ev 6.

15 Clause 3

16 Twenty-ninth Report of Session 2007-08, *A Bill of Rights for the UK?*, HL 165-I/HC 150-I, chapter 5.

17 Twenty-eighth Report of Session 2008-09, *Legislative Scrutiny: Child Poverty Bill*, HL 183/HC 1114.

18 The right to education is recognised in Article 13 of the International Covenant on Economic, Social and Cultural Rights and Article 28 of the UN Convention on the Rights of the Child, as well as in Article 2, Protocol 1 of the ECHR.

19 JCHR, *Child Poverty Bill* (as above, note 17), at para. 1.22.

20 Article 27 of the UN Convention on the Rights of the Child and Article 11 of the International Covenant on Economic, Social and Cultural Rights.

21 *Ibid.* at para. 1.23.

22 Twenty-First Report of Session 2003-04, *The International Covenant on Economic, Social and Cultural Rights*, HL 183/HC 1188 at para. 44.

“Each State Party to the present Covenant undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

1.14 Progressive realisation, however, is not the only obligation on the State under the ICESCR. States are also under an obligation to guarantee a minimum core content in relation to the rights in the Covenant. As our predecessor Committee also pointed out,²³ in General Comment No. 3 on the Nature of State Parties’ Obligations under the Covenant, the UN Committee on Economic, Social and Cultural Rights (the international monitoring body for the treaty) said:²⁴

“the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.”

1.15 We note the similarity between the idea in human rights law that there is a “minimum core obligation” under the ICESCR to ensure minimum essential levels of each of the economic and social rights in the Covenant and the work of the Public Administration Select Committee on Public Service Guarantees.²⁵ In a series of reports, the Public Administration Select Committee has set out the case for a clear and precise statement of entitlements to minimum standards of public services, or “public service guarantees”. The public services deliver many of the rights, such as health and education, found in the ICESCR. Setting out minimum levels of entitlement to such service provision in the form of Public Service Guarantees will therefore help to fulfil the UK’s “minimum core obligation” under that human rights treaty to ensure minimum essential levels of rights such as the right to education.

1.16 In view of this significant human rights dimension,²⁶ we asked the Government about the extent to which the new proposed pupil and parent guarantees might contribute to the fulfilment of the UK’s obligations under the ICESCR, and whether the Government’s recent more rights-oriented approach to the delivery of public services had been influenced by the work of the Public Administration Select Committee on Public Service Guarantees.

1.17 The Government responded that the creation of the Pupil and Parent Guarantees is “an example of the way the Government promotes social and economic rights across a range of public services.”²⁷ It explains that, as with entitlements to healthcare, these are not generally referred to as rights because they are not generally justiciable in the way in which ECHR rights can be enforced in litigation by individuals against public authorities (although it is acknowledged that some of the Pupil and Parent Guarantees will be so enforceable). However, the Government disavows any suggestion that the Guarantees are a way of giving legal effect to constitutionally recognised economic and social rights: “as with

23 Ibid. at para. 47.

24 General Comment No. 3 on the Nature of State Parties’ Obligations under the Covenant(14 December 1990) at para. 10.

25 See e.g., Public Administration Select Committee, Twelfth Report of Session 2007-08, *From Citizen’s Charter to Public Service Guarantees: Entitlements to Public Services*, HC 411.

26 The Children’s Rights Alliance drew attention to the importance of having regard to the right to education in the UNCRC when the Secretary of State is drawing up the guarantees., para 13, Ev 44.

27 Ev 11.

similar provisions in the Child Poverty Bill and areas of health policy, they pursue more specific policy goals rather than fulfilling an overarching constitutional purpose.”

1.18 The Government was more positive about the connection with the work of the Public Administration Select Committee on Public Service Guarantees. The Minister pointed out that in September 2009 Liam Byrne had written to PASC saying that the Government’s recent shift from an approach to public services based on targets and central direction to one where individuals have service entitlements²⁸ was a shift which reflected PASC’s overall approach to Public Service Guarantees.

1.19 We welcome the Government’s embrace of legally enforceable guarantees to a minimum set of entitlements in education in this Bill. In our view this is capable of giving effect to the minimum core obligation which human rights law places on the UK to ensure a minimum essential level of provision for the right to education. This indicates a continued and welcome evolution in the Government’s position since 2008 when, in its evidence to our Bill of Rights inquiry, it was distinctly unenthusiastic about any legally enforceable social or economic rights. For the reasons we have explained, an approach based on individual service entitlements is likely to improve the UK’s compliance with its human rights obligations under the ICESCR.

1.20 To ensure that the human rights dimension of the pupil and parent guarantees is not overlooked, we recommend that the Secretary of State ensures that the pupil and parent guarantees he issues fully reflect the relevant international human rights standards concerning the child’s right to education (including Articles 28 and 29 of the UNCRC, as interpreted by the UN Committee on the Rights of the Child²⁹, and Article 13 ICESCR, as interpreted by the UN Committee on Economic, Social and Cultural Rights) and the rights of parents in relation to their children’s education. We also recommend that when drawing up the pupil and parent guarantees the persons the Secretary of State consults under clause 2(2) of the Bill include children, in accordance with Article 12 UNCRC, the Children’s Commissioners, and appropriate children’s and parents’ organisations with expertise in education.

(b) The right to a fair hearing in determining whether a guarantee has been breached

1.21 The Explanatory Notes to the Bill do not address whether the procedures available for complaining about any infringement of the minimum entitlements satisfy the right to a fair hearing, whether at common law or under human rights treaties. The Government’s human rights memorandum, however, states that, even though the guarantees can impose mandatory requirements on local authorities, governing bodies and head teachers, the Department does not consider that a parent’s or pupil’s rights under Article 6 ECHR are engaged by these provisions on pupil and parent guarantees.³⁰ The reason given for this is that, in the Government’s view, the entitlements provided by the guarantees are unlikely to

28 HM Government, *Building Britain’s Future*, Cm 7654, June 2009.

29 UNCRC General Comment No. 1: The aims of education, Article 29(1), CRC/GC/2001/1 (2001)

30 Ev 46.

amount to “civil rights” within the meaning of Article 6 ECHR, citing a decision of the old European Commission of Human Rights, *Simpson v UK*.³¹

1.22 The Minister’s response to our queries explains the Government’s reasoning more fully. It characterises the subject matter of the guarantees, which elsewhere are described as “minimum entitlements”, as “entitlements to expect” and “self-evidently, benefits within the school system.”³² The Government asserts that the European Court has consistently held that the right to education, and elements of it, are not ‘civil rights’ within the meaning of Article 6 ECHR. It relies on the *Simpson* case as being “still good law” and notes that it has been relied upon in the domestic context in several cases³³ in which the English courts also found that there was no private law right to education of the sort that would engage Article 6. To the extent that rights are conferred, it is argued, they are clearly public law rights only. Financial compensation is not available through the complaints process against head teachers or governing bodies and even in relation to local authorities it can only be “recommended” by the Local Government Ombudsman.

1.23 Even if Article 6 applies, the Government argues, the Bill’s provision of an effective form of redress, both through the Ombudsman and, if necessary, through judicial review, is sufficient to satisfy the requirements of the Article.³⁴

1.24 We do not share the Government’s confidence that Article 6 ECHR does not apply to “entitlements” which derive their status as such from mandatory requirements imposed on public authorities by statute. The trend in the Strasbourg case-law on the applicability of Article 6 is to move away from the approach relied on by the Government, that Article 6 ECHR does not apply merely because a right arises in a public law context. *Simpson* is a decision of the European Commission and now more than 20 years old. More indicative of today’s approach by the Strasbourg Court is the 2008 decision in *Arac v Turkey*, in which the Court considered that the applicant’s right of access to an institution of higher education was a civil right and that Article 6(1) therefore applied.³⁵ Nor is the position of the English courts on the applicability of Article 6 ECHR in the education context as clear as the Government asserts. In a Court of Appeal decision which post-dates the case relied on by the Government, the court made the following assumption before going on to consider the substance of the Article 6 argument being made;

“As to the applicability of Article 6, there may be difficulties, in the light of the present jurisprudence of the Strasbourg Court, in holding that a school exclusion appeal panel is a body which determines a pupil’s civil rights, whether to education or to reputation. ... But let us make the perfectly tenable assumption ... that domestic human rights law, and arguably the ECHR’s jurisprudence too, will today regard at least the right not to be permanently excluded from school without good reason as a civil right for Article 6 purposes.”

1.25 In view of these more recent developments in the case-law concerning the scope of “civil rights” in Article 6 ECHR, we take the view that Article 6 ECHR may well apply to

31 (1989) 64 DR 188, European Commission of Human Rights.

32 Ev 6.

33 The example relied on by the Government is *R (B) v Alperton Community School* [2001] All ER (D) 312.

34 Ev 46.

35 App no. 9907/02 (23 September 2008).

those entitlements in the pupil and parent guarantees which are underpinned by mandatory requirement on local authorities, governing bodies or head teachers. If we are correct about that, we do not accept that the availability of a complaint to the Local Government Ombudsman followed by judicial review of the Ombudsman is sufficient to satisfy the requirement of Article 6 that there be access to an independent and impartial court or tribunal of full jurisdiction in the determination of one's civil rights. Provision would need to be made for an appeal to an appropriate court or tribunal such as the Health, Education and Social Care Chamber of the First Tier Tribunal.

(2) Mandatory sex and relationships education

(a) Children's right of access to health information

1.26 The Bill provides for mandatory sex and relationships education³⁶ with a parental right to opt out the child if the child is under the age of 15.³⁷

1.27 Children have a well established right in human rights law of access to information which is essential for their health and development.³⁸ This is most specifically recognised in the UN Convention on the Rights of the Child, which has been interpreted by the UN Committee on the Rights of the Child to mean that:³⁹

Adolescents have the right to adequate information essential for their health and development ... It is the obligation of States parties to ensure that all adolescent girls and boys ... are provided with, and not denied, accurate and appropriate information on how to protect their health and development and practise healthy behaviours. This should include information on ... safe and respectful social and sexual behaviours.

1.28 Given that the UK has one of the highest rates of teenage pregnancy in Europe, and the recent increase in the number of sexually transmitted infections in under 16s,⁴⁰ **we regard the provision of mandatory sex and relationships education and the removal of the parental right to withdraw children aged 15 or above as significant human rights enhancing measures, for the reasons given in the explanatory material accompanying the Bill⁴¹. The fact that all children will in future be guaranteed a minimum of one year's sex and relationships education before they reach the age of consent (16), significantly enhances the right of children and young people to be provided with important information necessary to their sexual health and personal development under Articles 8 and 10 ECHR and Article 2 of Protocol 1 ECHR, and their right under Article 12 of the UN Convention on the Rights of the Child to have their views taken into consideration. The measure gives effect to a longstanding recommendation of the**

36 Clause 11, amending the Education Act 2002 to introduce Personal, Social, Health and Economic ("PSHE") education as a foundation subject within the National Curriculum for England at maintained schools. Sex and relationships education is one of the components of PSHE.

37 Clause 14, amending the existing parental right of withdrawal from sex education in s. 405 of the Education Act 1996, by limiting it to children under 15.

38 See eg. UNCRC Articles 17, 24 and 29; Article 8 ECHR. See FPA, Ev 56); CRAE para. 14 (Ev 42); Marie Stopes International, paras 2.1 and 2.4 (Ev 67–68); Stonewall para. 4 (Ev 70); Brook (Ev 28).

39 UNCRC General Comment No. 4, CRC/GC/2003/4 (1 July 2003).

40 Marie Stopes International, para 2.2, Ev 67.

41 EN paras 208-9; DCSF, Ev 47–48

UN Committee on the Rights of the Child that health education should form part of the school curriculum.⁴²

1.29 However, the continued provision of a parental right of withdrawal from sex and relationships education raises questions about the Bill's compatibility with the rights of children and young people detailed above, while the limitation of the parental right of withdrawal to those under 15 also raises issues concerning the right of parents to respect for their religious and philosophical convictions in the education of their children (Article 2 Protocol 1).⁴³ Making sex and relationships education compulsory also raises starkly the question whether it is compatible with the rights of children not to be discriminated against to allow faith schools to teach as part of those subjects the views of their faith on issues such as homosexuality, marriage, family structures, abortion and contraception. We consider each of these issues below.

(b) The right of parental withdrawal

1.30 The ECHR requires the State to respect the right of parents to ensure education and teaching of their children in conformity with their own religious and philosophical convictions.⁴⁴ This is not an absolute right and it does not entitle parents to withdraw their children from elements of the curriculum to which they object. In an early case called *Kjeldsen v Denmark*, the European Court of Human Rights rejected the argument of a group of Christian parents that the provision of compulsory sex education in state schools was a breach of their right to ensure the education of their children in conformity with their religious and philosophical convictions.⁴⁵ The Court held that there was no violation of the parents' rights because the intention of the sex education was to impart knowledge objectively and in the public interest, and the education was conveyed in a "neutral, objective, critical and pluralistic way."

1.31 It is clear that the issue of sex and relationships education in schools and whether there should be a right of withdrawal from that education, is a controversial issue. The full range of views was represented in written evidence to us. The Family Education Trust argued against any change to the right of parental withdrawal. Marie Stopes International argue against any right of parental withdrawal and CRAE pointed out that more than one hundred NGOs called for the removal of the right of parental withdrawal in a submission to the UN Committee on the Rights of the Child in 2008. Brook and Stonewall both welcome the Bill's reduction of the right to withdraw to those under 15, but do not indicate in their submissions whether they would prefer to go further. Our task in this debate is to make an assessment of what the relevant human rights standards require.

1.32 The explanatory material which the Government has supplied shows that the Government was clear that the present law, which permits parents to withdraw their children from sex education until their 19th birthday, is unsustainable on human rights grounds. This is in light of ECHR case-law on a child's right to respect for their private life under Article 8 ECHR and the principles of the UN Convention on the Rights of the Child,

42 UNCRC Concluding Observations 2002.

43 Family Education Trust, Ev 55–56; Mr Patrick Mockridge, Ev 62–63; Mr Allan Jackson, Ev 59

44 Second sentence of Article 2 Protocol 1 to the ECHR.

45 *Kjeldsen, Busk, Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711.

in particular Article 12 which entitles a child to be able to express their own views and to have them given due weight.

1.33 However, the Government intends to maintain a partial right of withdrawal for parents in relation to the teaching of sex and relationships education to their children. It says that it aims to achieve an acceptable balance between the competing rights of both parents and children, and to balance sincerely held but widely divergent views on the subject. The Government considers that a right of withdrawal for parents up to the point at which a child attains the age of 15 properly satisfies a parental right pursuant to Article 2 of the First Protocol to have their child educated in accordance with their religious and philosophical convictions, without infringing the rights of more mature children under Article 2 of the First Protocol to access this curriculum, and to have access to important health-related information.⁴⁶

1.34 We welcome the Government’s acceptance, in principle, that as a child matures the child must be accorded greater rights to determine for themselves what is in their interests and to make decisions about their own private lives with the necessary information to do so. This is the basis on which we have recommended in the past that the right to withdraw from collective worship and religious education be exercisable not by parents but by children of sufficient maturity and understanding to be able to make that decision for themselves. The Government has not previously gone so far in accepting the principle that parental rights dwindle as a child matures, refusing, for example, to allow children to opt out of religious education or collective worship until they are in the sixth form.⁴⁷

1.35 We question, however, the justification for limiting the parental right of withdrawal by reference to age rather than by reference to the child’s maturity and understanding. In other closely related contexts, it is well established that parents’ rights to control their children are limited by the child acquiring sufficient maturity and understanding to be able to take their own decisions on certain matters (known as “*Gillick* competence”, or “*Fraser* competence” after the House of Lords decision which recognised the concept). For example, in 2006 the High Court concluded that once a young person was of sufficient maturity and understanding to reach their own decisions on matters such as abortion, then the parents’ right to be notified under Article 8 ECHR does not continue.⁴⁸ A girl under the age of 15 who is of sufficient maturity and understanding (“*Gillick* or *Fraser* competent”) to reach her own decisions about contraception, abortion and other matters concerning her sexual health is able to obtain advice and treatment from medical professionals on those matters without parental notification or consent. In its human rights memorandum, the Government “accepts that parental rights exist primarily for the protection of the child and that parental views, once a child is mature, cannot override the right of the child to

46 EN para. 208.

47 See s.342(5A)(b)(i) Education Act 1996, as inserted by s.143 Education and Skills Act 2008, explained in letter from Jim Knight MP, 5 June 2008, *Twenty-third Report of 2007-08, Legislative Scrutiny: Government Replies*, HL 126/HC 755, Appendix 3, replying to Nineteenth Report of 2007-08, *Legislative Scrutiny: Education and Skills Bill*, HL 107/HC 553 at paras 1.40-45. See also Twenty-sixth Report of 2008-09, *Legislative Scrutiny: Equality Bill*, HL 169/HC 736 at paras 229-233.

48 *R (Axon) v Secretary of State for Health* [2006] EWHC Admin 37.

information necessary to their health and development if such information is provided in a balanced and pluralistic way.”⁴⁹

1.36 We therefore asked the Government for its justification for allowing the parents of such a “*Gillick* competent” girl to veto her access to the important health-related information she needs to make informed decisions about her sexual health. The Government’s answer⁵⁰ is that limiting the parental right of withdrawal from sex and relationships education by reference to the *Gillick* criterion is “not ... in practice, particularly workable.” The justification appears to be that very different considerations arise when considering medical treatment for a young person (which may be urgent and essential for their continued health and well-being) and considering access to a statutory curriculum which provides some information and education about long-term health, but which may have no immediate relevance to the individual. A distinction is drawn between the personalised nature of medical consultation and treatment on the one hand, which may make it eminently practical and reasonable for a child to have early access to information and treatment if needed, and the less individualised roles of schools and teachers on the other. The Government does not consider that schools and teachers will want, or should be given, the responsibility of making such individualised assessments of capacity in respect of their pupils. In addition, if schools were given the responsibility of making such assessments in relation to their pupils, the Government is concerned that it would expose them to a significant risk of litigation from parents who do not accept the school’s assessment of a child’s competence, which would lead to unacceptable uncertainty. An amendment to the Bill to limit the parental right of withdrawal by reference to *Gillick* competence rather than age is therefore not something that the Government is prepared to consider “at this time.”

1.37 We have considered carefully but are not persuaded by the Government’s justification for the legal disparity between a child’s right of access to medical treatment concerning their sexual health and their right of access to education in order to obtain information and understanding about the same subject. We do not see any relevant distinction in principle, for these purposes, between the nature of medical treatment on the one hand and education on the other. In practice, teachers and schools frequently have to make individualised assessments about the children in their care, including about their capacity. The risk of litigation, always present in relation to matters on which views widely diverge, cannot be eliminated but is not in our view a significant risk given that litigation to the highest court has already established the legal concept of *Gillick* or Fraser competence which is now well established and widely understood. Nor should the task of having to make individualised assessments of capacity be unduly burdensome on schools. On current figures⁵¹ only 0.04% of children (about 4 in every 10,000) are withdrawn from sex and relationships education by their parents and while it is possible that these figures may rise when the subject becomes mandatory, schools will still only be required to make an individualised assessment of capacity in those cases where a parent seeks to exercise their right of parental withdrawal in relation to their child under 15 but the child disagrees and prefers not to be withdrawn. We are not persuaded that this will cause schools the “significant inconvenience” that the Government fears. In our view, any inconvenience to

49 DCSF, para. 16, Ev 47.

50 Ev 12.

51 Office for Standards in Education, *Sex and Relationships in Schools*, HMI 433, 2002.

schools can be minimised by drafting a law which would enable schools to work from a rebuttable presumption that all children are *Gillick* or Fraser competent for these purposes at the age of 15, but require them to consider on its merits those exceptional cases where there is a divergence of view between a child under the age of 15 and their parents.

1.38 We consider that, ranged against the arguments put forward by the Government, there are real human rights concerns about maintaining a disparity between the age at which a child can access medical treatment from their doctor without parental consent or notification in relation to such important matters such as contraception, sexually transmitted disease and abortion and the age at which they can access information about these subjects from their schools without parental veto. Moreover, we consider that this issue is of particular importance for girls, for whom the personal price of insufficient access to information about sex and relationships is likely to be higher than for boys.

1.39 In our view, the parental right of withdrawal should be limited by reference not to a child's age, but to the well-established and widely understood concept of "Gillick or Fraser competence", that is, whether he or she is of sufficient maturity and understanding to reach their own decisions on the matter. We recommend that clause 14 of the Bill be amended in a way which leaves 15 as the presumptive age of Gillick or Fraser competence for these purposes but which provides for an exception from the parental right to withdraw where a child under the age of 15 is of sufficient maturity and understanding to reach their own decisions on sex and relationships education. The following wording is intended to give effect to this recommendation.

Page 15, line 37, clause 14, in section 405 of EA 1996, after "15" insert:

“unless the school is satisfied that the pupil is of sufficient maturity and understanding to make his own decision on the matter.”

1.40 We also asked the Government whether it has conducted any analysis of what proportion of children withdrawn from sex and relationships education are girls and what proportion boys, and whether this is regarded by the Government as relevant to its equality impact assessment of the proposal. The Government replied that the OFSTED report which is the source of the figures for parental withdrawal does not contain any gender breakdown of the figures, nor do the local authority data on which OFSTED's own figure was based.⁵² It is therefore not possible to say which sex is more affected by the right of withdrawal. The Government has asked OFSTED to look again at any underlying statistics they may have and to provide any further useful information if it is available. We are grateful for this offer **but in our view the risk of a differential impact on girls is sufficiently high to warrant more proactive investigation of the issue by the Government as part of its equality impact assessment of the measure. In view of the more serious consequences for girls as a result of lack of proper information and education, the question of whether the right of parental withdrawal from sex and relationships education is more often exercised in relation to girls than boys is highly relevant to any proper assessment of the justification for the right of parental withdrawal. We recommend that the Government undertake the necessary research to ascertain the respective proportion of boys and girls who are withdrawn from sex and**

relationships education by their parents, and conduct a proper equality impact assessment of the measure in light of that information.

(c) Sex and relationships education in faith schools

1.41 Making sex and relationships education a part of the National Curriculum, and therefore mandatory in maintained schools, raises an important and familiar human rights issue: how to reconcile the competing rights, on the one hand, of faith schools to religious freedom⁵³ and, on the other hand, of pupils to be treated equally and with dignity and with proper respect for their private and family life. The issue arises because a number of faiths include views on the subject of sex and relationships which come into conflict with claims by others to be treated equally and with respect for their dignity and private and family life.

1.42 The Macdonald review of PSHE said that faith schools would be allowed to deliver PSHE lessons in line with the “context, values and ethos” of their religion, and this was accepted by the Government. Before the Bill was published the Secretary of State for Children, Schools and Families was quoted in the press to much the same effect: “You can teach the promotion of marriage, you can teach that you shouldn't have sex outside of marriage, what you can't do is deny young people information about contraception outside of marriage. ... The same arises in homosexuality. Some faiths have a view about what in religious terms is right and wrong – what they can't do though is not teach the importance of tolerance.”⁵⁴

1.43 The Bill provides that the teaching of PSHE (which includes sex and relationships education) must comply with three principles.⁵⁵

- (1) that information provided in the course of providing PSHE should be accurate and balanced;
- (2) that PSHE should be taught in a way that:
 - (a) is appropriate to the ages of the pupils concerned and to their religious and cultural backgrounds, and also
 - (b) reflects a reasonable range of religious, cultural and other perspectives.
- (3) that PSHE should be taught in a way that:
 - (a) endeavours to promote equality,
 - (b) encourages acceptance of diversity, and
 - (c) emphasises the importance of both rights and responsibilities.

1.44 In view of the express provision in the Bill that PSHE should be taught in a way that is “appropriate to the religious and cultural backgrounds of the pupils concerned”,⁵⁶ and the

53 See Family Education Trust, Ev 55.

54 *Daily Telegraph*, 5 November 2009.

55 New section 85B(4) of the Education Act 2002, inserted by clause 11(4) of the Bill, imposing a new duty on the head teacher and governing body to secure that certain principles are complied with. The three principles are set out in new s. 85B(5)-(7).

56 New section 85B(6)(a) of the Education Act 2002, as inserted by clause 11(4) of the Bill.

high profile reassurances that were being given by ministers in the media to faith schools, we asked whether it is the Government's intention that faith schools should be free to teach that homosexuality, contraception and sex outside marriage are wrong, sinful or immoral.

1.45 The Government's response is, in effect, that faith schools are to be permitted to teach sex and relationships education in accordance with their particular ethos, but "without compromising the other principles".⁵⁷

"... it is our intention that schools be permitted ... to teach in a manner that is 'appropriate to the ... religious and cultural backgrounds' of pupils, and in that way be permitted to teach the views of their own faiths on a variety of topics, including homosexuality, abortion and contraception. However, any such teaching will also continue to have to comply with the other principles too – and these include requirements that material presented is accurate and balanced, and that teaching reflects a variety of views (including other faith views) and promotes equality and diversity."⁵⁸

1.46 As the Government stated in the debates on the Equality Bill about the exemption of the curriculum from the prohibitions on discrimination, its intention is that faith schools will be able to teach the tenets of their faith including the views of that faith on sexual orientation and same-sex relationships. What they cannot do, however, the Government says, is present these views in a hectoring, harassing or bullying way that may be offensive to individual pupils or single out any individual pupils for criticism. Faith schools will not be able to suggest that their own views are the only valid ones, and they must make clear that there is a wide range of divergent views. It is said that the requirements of the other "principles" with which the school must comply will ensure this. In the Government's view, if their beliefs are explained in an appropriate way in an educational context that takes into account guidance on sex and relationships education and religious education, then schools should not be acting unlawfully.

1.47 We welcome the approach of making explicit on the face of the Bill the need to ensure that the teaching of PSHE, including sex and relationships education, must comply with certain basic principles, and that those principles include accuracy, balance, objectivity, pluralism, equality and diversity. These are all principles with a foundation in human rights law and we approve in principle of the creation of a detailed statutory scheme designed to give effect to those principles in a context in which different rights inevitably come into conflict and, as the Government rightly says, difficult balances have to be struck between sincerely held but widely divergent views. This is much to be preferred to the approach we often criticise, of conferring wide discretions on decision-makers and arguing that the provision is compatible with human rights because s.6 of the Human Rights Act requires the decision-maker to exercise the power compatibly with the ECHR.

1.48 However, while we approve in principle of the Bill's attempt to give effect to human rights principles by structuring the discretion of governing bodies and head teachers, we do not share the Government's confidence that "there is no reason to suppose that any pupil or gay parent of any pupil will have cause to be concerned about discrimination that would

57 Ev 13.

58 Ev 7.

affect or infringe their right to a private life and their right not to be denied education.” Our concern remains essentially that which we have consistently expressed in our earlier reports on the Sexual Orientation Regulations and the Equality Bill:⁵⁹ the risk that, so long as the content of the curriculum is exempted from the duty not to discriminate, and so long as harassment on grounds of sexual orientation is not prohibited in schools, children who are gay themselves, or are the children of a gay couple (whether biological or adopted), or are the child of a single parent, or divorced parents, or unmarried parents, will be subjected to teaching that their sexual orientation or that of their parents, or their family arrangements, are sinful or morally wrong. Exposure to such teaching, in a classroom setting, is in our view an interference with the child’s right to respect for their private and family life, discriminatory and an affront to their dignity.

1.49 We are not persuaded that the principles in the Bill will prevent such interferences with pupils’ human rights from arising. It seems to us that the Government’s response to our query invokes abstract principles which will clearly be in tension without explaining how they will be reconciled in practice. Experience shows that this is not a problem that can be wished away. It requires clarity in the legal framework and firm leadership about precisely what is and what is not permitted by the standards of human rights law. As we have pointed out in previous reports, it is the *content* of the curriculum (the teaching that certain orientations or lifestyles or family arrangements are objectively wrong or sinful), not just its presentation, that gives rise to the risk that children’s human rights will be infringed.

1.50 We welcome the Government’s explicit acceptance that the teaching of sex and relationships in faith schools must present material that is accurate and balanced, must reflect a variety of views, must not present that faith’s views as the only valid views, and must promote equality and diversity. This goes some way to addressing concerns that we have expressed in previous reports about the effect of the curriculum on the human rights of some pupils in faith schools. As currently drafted, however, we are concerned about the effect of the principle in the Bill that PSHE be taught in a way that is appropriate to the religious and cultural backgrounds of the pupils, which is intended to allow faith schools to teach sex and relationships education in accordance with their ethos. In our view, in the absence of provisions in the Equality Bill which subject the content of the curriculum to the prohibitions against discrimination, and protect pupils from harassment on grounds of sexual orientation, that provision in the Bill will lead in practice to teaching as part of PSHE which is incompatible with the rights of children who are gay themselves, or the children of a gay couple, or whose parents are not married, to respect for their private and family life (Article 8 ECHR) and not to be discriminated against in their enjoyment of that right and their right to education on grounds of sexual orientation, birth or other status (Article 14 ECHR in conjunction with Article 8 and Article 2 Protocol 1). In the same way that religious views on evolution are not appropriate in science lessons, we recommend that guidance to schools with a faith ethos make clear that when communicating value judgments about lawful sexual behaviour, these should be limited to saying that the school’s religion regards something as sinful or morally wrong and not teach that it is sinful or morally wrong.

59 Sixth Report of Session 2006–07, *Legislative Scrutiny: Sexual Orientation Regulations*, HL 58/HC 350, paras 60–67; Twenty-sixth Report of Session 2008–09, *Legislative Scrutiny: Equality Bill*, HL 169/HC 736, paras 213–220.

1.51 The Bill envisages that the Secretary of State shall issue guidance to local authorities, governing bodies or head teachers about the exercise of their functions.⁶⁰ Such guidance will in practice play an important part in ensuring that PSHE is taught in a way which does not give rise to breaches of children's right not to be discriminated against on grounds such as sexual orientation, birth or the marital status of their parents. **We welcome the Government's publication of updated guidance on Sex and Relationships Education on 25 January 2010 and we urge parliamentarians to give it careful attention to ascertain how the Government propose to guide schools about how to reconcile in practice the tension between the principle that PSHE should be taught in a way that endeavours to promote equality and encourages acceptance of diversity and the principle that it should be taught in a way that is appropriate to the religious and cultural backgrounds of the pupils concerned.**

(3) Licensing teachers

1.52 The Bill makes provision for the Secretary of State to introduce a licensing scheme for teachers.⁶¹ If they are refused a licence to practise, or a renewal of their licence, this would prevent them from teaching unsupervised in maintained schools and Academies. The Government's view is that the establishment of a licensing scheme for teachers does not engage any of the Convention rights.⁶²

(a) The right of qualified teachers to practise their profession

1.53 The Government does not consider that the right to peaceful enjoyment of possessions in Article 1 Protocol 1 is engaged because the refusal or withdrawal of a teacher's licence to practise does not lead to the loss of a teacher's professional status, or to the loss of any present legal entitlement or economic rights beyond an ability to hold a certain form of employment in future. It points out that the teacher could still continue to teach, albeit under supervision, or could teach at independent schools. The Government therefore does not consider that a licence will be a 'possession' within the meaning of Article 1 Protocol 1 ECHR.⁶³

1.54 We asked the Government for a more detailed explanation of its view that the introduction of a system of licences to teach does not engage teachers' right to earn a living practising their profession in Article 1 Protocol 1 ECHR. We also asked whether the Government agreed that, for a qualified teacher, not being able to teach unsupervised in a maintained school or Academy is a very significant restriction on their ability to practise the profession for which they have trained and qualified.

1.55 The Government agreed that this was a significant restriction, but maintained its view that a teacher's right to earn a living practising their profession does not constitute a "possession" for the purposes of Article 1 Protocol 1.⁶⁴ It argues that no present legal entitlement or ownership is conferred by virtue of being a qualified teacher: there is no absolute right to future income earned practising his or her profession. Being

60 New section 85B(8).

61 Clauses 23-25.

62 Ev 9.

63 EN para. 212; DCSF para. 19 Ev 48.

64 Letter from the Minister, 2 February 2010 Ev 9.

professionally qualified to teach does not give rise to any enforceable claim, it merely puts the teacher in a position to earn future income by obtaining suitable employment.⁶⁵

1.56 In our view the Government’s approach to what constitutes a “possession” for the purposes of Article 1 Protocol 1 is unnecessarily restrictive and does not reflect the case-law of the European Court of Human Rights. It is correct that Strasbourg jurisprudence makes clear that unearned future income, to which no enforceable claim exists, is not a possession for the purposes of Article 1 Protocol 1. However, it has also held that the right to practise a profession is akin to a private right of property and therefore falls within the scope of Article 1 Protocol 1. In *Van Marle v The Netherlands*, for example, the European Court of Human Rights considered a complaint by some Dutch accountants who had practised as such for some years before a new statute required them to seek registration if they wished to continue to practise.⁶⁶ The Dutch Government argued that Article 1 Protocol 1 did not apply because the accountants had nothing which could be classified as a possession within the meaning of that Article. The Court rejected that argument, holding that the accountants’ right to practise their profession could be likened to the right of property and was therefore a “possession” within the meaning of Article 1 Protocol 1.⁶⁷ The Court also held that there had been an interference with the accountants’ right to peaceful enjoyment of their possessions because the refusal to register them as certified accountants under the new statutory scheme “radically affected the conditions of their professional activities and the scope of those activities was reduced.”⁶⁸

1.57 We can see no distinction in principle between qualified teachers, who will be affected by this Part of the Bill, and the accountants in the *Van Marle* case. **Qualified Teacher Status, for which teachers must train and pass professional exams, gives teachers the right to practise their profession as a teacher. That is clearly a right which qualifies as a “possession” for the purposes of Article 1 Protocol 1. The proposed licensing scheme, which the Government accepts may impose significant restrictions on a qualified teacher’s right to practise their profession, clearly constitutes an interference with that possession. The licensing scheme therefore requires justification under the second paragraph of Article 1 Protocol 1.**

(b) Proportionality of the interference with teachers’ right to practise

1.58 The Government argues that, even if teachers’ right to practise their profession does amount to a “possession” for the purposes of Article 1 Protocol 1, the interference with that possession by the new licensing regime would be justifiable as a proportionate measure with the legitimate aim of improving the quality of teaching which children and young people receive.⁶⁹ Alongside the new regime for licensing teachers, the Government is also introducing measures to give teachers and head teachers an entitlement to Continuing Professional Development.

65 The Government relies on decisions which distinguish between goodwill on the one hand, which may be a possession for the purposes of Article 1 Protocol 1, and future income not yet earned, which is not: *Waltham Forest NHS Primary Care Trust v Zafra Iqbal Malik* [2007] EWCA Civ 265 and *R (Countryside Alliance) v Attorney General* [2007] UKHL 52..

66 (1986) 8 EHRR 483.

67 *Ibid.* at para. 41.

68 *Ibid.* at para. 42.

69 Ev 9.

1.59 The Bill itself provides little information on which to base a judgment about the proportionality of any likely interference: the provisions in this part of the Bill are skeletal. The circumstances in which a licence may be granted or refused, renewed or withdrawn, for example, are not set out on the face of the Bill but will be contained in Regulations, along with other significant details about the proposed regulatory scheme.⁷⁰ We note that during Public Bill Committee, the chief executive of the General Teaching Council for England, which will administer the licensing scheme, was reported to be concerned that the scheme might be “unduly burdensome” but said that there was “a lack of information from the Department ... about how the scheme will work”.⁷¹

1.60 The Government justifies the skeletal nature of the Bill’s provisions about licensing teachers on the basis that the framework and processes will develop and evolve over time, and the scheme therefore needs to be flexible enough to take account of changes in practice and be responsive to the needs of those affected.⁷² We are not persuaded that there is any greater need for flexibility and responsiveness in this particular regulatory context than any other: the lack of detail on the face of the Bill appears to be more a symptom of hurriedly prepared legislation than a considered attempt to ensure flexibility and responsiveness.

1.61 We accept that a licensing system is in principle capable of being a justifiable interference with the right of teachers to earn a living practising their profession, under Article 1 Protocol 1, and that the protection of the rights of children to a good quality education is a legitimate aim for these purposes. However, there is too little detail on the face of the Bill for us to be able to assess whether the proposed licensing scheme will operate in practice in a way which is compatible with the right of teachers to practise their profession. We recommend that the Bill be amended to include more detail of the proposed licensing scheme on the face of the legislation, including, for example, the grounds for refusing or withdrawing licences.

1.62 The proportionality of the interference with teachers’ Article 1 Protocol 1 rights depends in part on the adequacy of the procedural safeguards to ensure that decisions concerning a teacher’s right to practise are not arbitrary or otherwise disproportionate. This overlaps with the issue of whether the licensing regime is compatible with the right of teachers to a fair hearing under Article 6(1), including their right of access to court, to which we now turn.

(c) Teachers’ right to a fair hearing

1.63 The Bill gives the Secretary of State the power to make regulations concerning an appeals process,⁷³ which it is envisaged will be a committee of the General Teaching Council for England (“the GTCE”).⁷⁴ The Explanatory Notes to the Bill state that the Government considers that this is an ‘independent’ appeal which is sufficient to satisfy the requirements of Article 6 ECHR, and that in any event the decision of any General Teaching Council appeal panel would be open to judicial review.⁷⁵ The Minister in his

70 New section 4B(2) of the Teaching and Higher Education Act 1998, inserted by clause 23(1) of the Bill.

71 Public Bill Committee, 4 February 2010, Col. 471.

72 Ev 13; Ev 9.

73 New section 4C(1) of the Teaching and Higher Education Act 1998, inserted by clause 23(1).

74 New section 4C(2) of the Teaching and Higher Education Act 1998.

75 EN para. 211.

response to our queries asserts that appropriate safeguards will be put in place in the Regulations governing the appeals system to ensure that the system is Article 6 compliant.⁷⁶

1.64 The Government believes that it is right that the General Teaching Council, which is the professional body for teachers and regulates the profession, has the key role in delivering the licensing system including the need for hearing appeals. Since the nature of such appeals is likely to require that those hearing them possess a measure of professional expertise and experience, the Government believes that the GTCE are best placed to appoint such committees, which would comprise 3 members, only one of whom may be a member of the Council. In the Government's view, such appeal committees will be independent of the body which makes the original licensing decisions, and judicial review of the appeal committees will also be available.

1.65 We do not accept that a right of appeal to a committee of the very same body as makes the original licensing decision (GTCE) satisfies the requirement of Article 6 ECHR that there be access to an independent and impartial tribunal. Nor is the availability of judicial review of such a committee sufficient to satisfy Article 6. The Government argues that the proposals in relation to teachers are in line with those in place for both doctors and dentists. In fact, it is well established that in order to be compatible with Article 6 those appeal arrangements must be interpreted as providing a right of appeal to a court of full jurisdiction on fact and law (as opposed to the more limited right to apply for judicial review).⁷⁷ We recommend that the Bill be amended either to provide a right of appeal to a genuinely independent appellate body (not a committee of the GTCE) or to provide a full right of appeal to a court of full jurisdiction.

(4) Reporting of Family Court proceedings

1.66 The Bill contains measures designed to enable wider reporting of information relating to family proceedings.⁷⁸ This raises controversial issues of the correct balance between the right of the press to report court proceedings, and the public to receive such information, under Article 10 ECHR and children's right to respect for their privacy (Article 8 ECHR) as well as their best interests (under Article 3 of the UN Convention on the Rights of the Child).

1.67 Both the Explanatory Notes to the Bill and the Department's human rights memorandum describe the object of these provisions as being to "rebalance" the right to privacy in Article 8 ECHR and the right to freedom of expression in Article 10 ECHR, by giving greater weight to the latter. Neither, however, make any mention of the UN Convention on the Rights of the Child, Article 3(1) of which provides that in all actions concerning children the best interests of the child shall be a primary consideration. Restrictions on the attendance of the media at, and reporting of, family proceedings serve not only to protect the Article 8 rights⁷⁹ of parties and witnesses but may also be in the best

⁷⁶ Ev 9.

⁷⁷ *Preiss v General Dental Council*. (Privy Council) [2001] UKPC 36, [2001] 1 WLR 1926 at para 20 (dentist suspended from practice by professional tribunal entitled to a fair and public hearing by an independent and impartial tribunal).

⁷⁸ Clauses 32-41

⁷⁹ British Institute of Human Rights, Ev 27; Law Society, Ev 60.

interests of the child. We therefore asked the Government what consideration had been given to the best interests principle in the UNCRC in drawing up these provisions.

1.68 The Government replied that policy consideration has proceeded throughout on the basis that the identification of a child as being involved in family proceedings will generally not be in that child's best interests. The stringency of the restrictions on publishing identifying material is therefore key not only to the Article 8 rights involved but also to the question of the best interests of any children involved. The child's best interests are also said to be maintained as a primary consideration when the court is determining what information may be published in relation to family proceedings in which children are involved.

1.69 We received representations expressing concerns about whether these provisions in the Bill take sufficient account of the best interests of children.⁸⁰ The Children and Family Court Advisory and Support Service ("CAFCASS") is concerned that the provisions will lead to children and young people being less willing to share information with CAFCASS practitioners and therefore the courts, because of their concern that the information will be reported, and that this will operate against children's best interests because it will lead to less disclosure⁸¹.

1.70 When we suggested to the Government that the best interests principle could be given effect in the Bill by including an express restriction on publication which would not be in the best interests of the child, its response confirmed our concern. It responded that this would be to make the best interests of the child "the paramount consideration" rather than a "primary" consideration, and that would mean that "no balancing of interests would be possible."⁸² We do not consider that the best interest of the child is merely one consideration to be balanced against other rights and interests such as freedom of expression: rather, the best interests of the child should be paramount, and the Government's response renews our concern that the provisions in the Bill on the reporting of family proceedings do not achieve this.

1.71 We are concerned that the provisions on the reporting of family proceedings in the Bill may not be compatible with the best interests of the child principle in Article 3 UNCRC. Any relaxation of the restrictions on the attendance of the media at, and reporting of, family proceedings should not be at the expense of the best interests of the child principle. To ensure that the best interests principle in Article 3 UNCRC continues to be respected, we recommend that the Bill be amended so as to include an express restriction on the publication of information where such publication would not be in the best interests of the child.

(5) Home education

1.72 The Bill introduces a registration and monitoring scheme for home-educated children in England.⁸³ We decided not to scrutinise this aspect of the Bill in view of the higher

80 See e.g. Children's Rights Alliance for England, paras 10, Ev 41 and paras 17–19, Ev 44–45; British Institute of Human Rights, paras 17–22, Ev 27; Law Society, paras 3.1–3.4, Ev 60..

81 CAFCASS, Ev 35.

82 Ev 8.

83 Clauses 26-27 and Schedule 1.

significance threshold that we have applied in our legislative scrutiny work during this shorter than usual legislative session to enable us to report in time on the most significant issues.⁸⁴ However, in view of the limited information contained in the Explanatory Notes about the Government's consideration of the human rights issues at stake, our staff did ask for a more detailed explanation of the Government's thinking in relation to the human rights implications of this measure.

1.73 More detailed explanation was provided in the letter from the DCSF Legal Adviser dated 15 January, largely taken from the ECHR memorandum.⁸⁵ In view of the controversy which the Bill's home education provisions have generated, **we draw attention, without comment, to the Government's more detailed explanation of its assessment that the home education provisions in the Bill are compatible with the various human rights at stake. We emphasise that we have not scrutinised this part of the Bill for human rights compatibility. We may return to this issue in our next legislative scrutiny report.**

84 See Third Report of Session 2009–10, *Legislative Scrutiny: Financial Services Bill and the Pre-Budget Report*, HL 21/HC 184, para 2.1.

85 Ev 13–16.

2 Constitutional Reform and Governance Bill

2.1 We have received human rights memoranda from the Ministry of Justice in relation to Government amendments to the Constitutional Reform and Governance Bill concerning MPs' expenses and reform of the voting system.

2.2 We are grateful to have received these but unfortunately there is not time in the legislative timetable for us to correspond with the Government in relation to them and we therefore publish them without comment.

Conclusions and recommendations

Explanatory Notes

1. We welcome the Department's degree of engagement with our human rights scrutiny of this Bill. Although the comprehensiveness and quality of the human rights analysis in the Explanatory Notes is open to criticism, the Department's subsequent proactive provision of information, its preparedness to make officials available to answer questions and its full response to requests for further information have all been of considerable assistance to the Committee in its scrutiny of the Bill for human rights compatibility. We commend the Department's practices to other departments as examples of best practice (Paragraph 1.8)

Significant human rights issues

Giving legal effect to economic and social rights

2. We welcome the Government's embrace of legally enforceable guarantees to a minimum set of entitlements in education in this Bill. In our view this is capable of giving effect to the minimum core obligation which human rights law places on the UK to ensure a minimum essential level of provision for the right to education. This indicates a continued and welcome evolution in the Government's position since 2008 when, in its evidence to our Bill of Rights inquiry, it was distinctly unenthusiastic about any legally enforceable social or economic rights. For the reasons we have explained, an approach based on individual service entitlements is likely to improve the UK's compliance with its human rights obligations under the ICESCR (Paragraph 1.19)
3. To ensure that the human rights dimension of the pupil and parent guarantee's is not overlooked, we recommend that the Secretary of State ensures that the pupil and parent guarantees he issues fully reflect the relevant international human rights standards concerning the child's right to education (including Articles 28 and 29 of the UNCRC, as interpreted by the UN Committee on the Rights of the Child, and Article 13 ICESCR, as interpreted by the UN Committee on Economic, Social and Cultural Rights) and the rights of parents in relation to their children's education. We also recommend that when drawing up the pupil and parent guarantees the persons the Secretary of State consults under clause 2(2) of the Bill include children, in accordance with Article 12 UNCRC, the Children's Commissioners, and appropriate children's and parents' organisations with expertise in education (Paragraph 1.20)

The right to a fair hearing in determining whether a guarantee has been breached

4. In view of these more recent developments in the case-law concerning the scope of "civil rights" in Article 6 ECHR, we take the view that Article 6 ECHR may well apply to those entitlements in the pupil and parent guarantees which are underpinned by

mandatory requirement on local authorities, governing bodies or head teachers. If we are correct about that, we do not accept that the availability of a complaint to the Local Government Ombudsman followed by judicial review of the Ombudsman is sufficient to satisfy the requirement of Article 6 that there be access to an independent and impartial court or tribunal of full jurisdiction in the determination of one's civil rights. Provision would need to be made for an appeal to an appropriate court or tribunal such as the Health, Education and Social Care Chamber of the First Tier Tribunal (Paragraph 1.25)

Mandatory sex and relationships education

Children's right of access to health information

5. We regard the provision of mandatory sex and relationships education and the removal of the parental right to withdraw children aged 15 or above as significant human rights enhancing measures, for the reasons given in the explanatory material accompanying the Bill. The fact that all children will in future be guaranteed a minimum of one year's sex and relationships education before they reach the age of consent (16), significantly enhances the right of children and young people to be provided with important information necessary to their sexual health and personal development under Articles 8 and 10 ECHR and Article 2 of Protocol 1 ECHR, and their right under Article 12 of the UN Convention on the Rights of the Child to have their views taken into consideration. The measure gives effect to a longstanding recommendation of the UN Committee on the Rights of the Child that health education should form part of the school curriculum (Paragraph 1.28)

The right of parent withdrawal

6. We welcome the Government's acceptance, in principle, that as a child matures the child must be accorded greater rights to determine for themselves what is in their interests and to make decisions about their own private lives with the necessary information to do so. This is the basis on which we have recommended in the past that the right to withdraw from collective worship and religious education be exercisable not by parents but by children of sufficient maturity and understanding to be able to make that decision for themselves. The Government has not previously gone so far in accepting the principle that parental rights dwindle as a child matures, refusing, for example, to allow children to opt out of religious education or collective worship until they are in the sixth form (Paragraph 1.34)
7. In our view, the parental right of withdrawal should be limited by reference not to a child's age, but to the well-established and widely understood concept of "Gillick or Fraser competence", that is, whether he or she is of sufficient maturity and understanding to reach their own decisions on the matter. We recommend that clause 14 of the Bill be amended in a way which leaves 15 as the presumptive age of Gillick or Fraser competence for these purposes but which provides for an exception from the parental right to withdraw where a child under the age of 15 is of sufficient maturity and understanding to reach their own decisions on sex and relationships education. (Paragraph 1.39)

8. In our view the risk of a differential impact on girls is sufficiently high to warrant more proactive investigation of the issue by the Government as part of its equality impact assessment of the measure. In view of the more serious consequences for girls as a result of lack of proper information and education, the question of whether the right of parental withdrawal from sex and relationships education is more often exercised in relation to girls than boys is highly relevant to any proper assessment of the justification for the right of parental withdrawal. We recommend that the Government undertake the necessary research to ascertain the respective proportion of boys and girls who are withdrawn from sex and relationships education by their parents, and conduct a proper equality impact assessment of the measure in light of that information. (Paragraph 1.40)

Sex and relationships education in faith schools

9. We welcome the approach of making explicit on the face of the Bill the need to ensure that the teaching of PSHE, including sex and relationships education, must comply with certain basic principles, and that those principles include accuracy, balance, objectivity, pluralism, equality and diversity. These are all principles with a foundation in human rights law and we approve in principle of the creation of a detailed statutory scheme designed to give effect to those principles in a context in which different rights inevitably come into conflict and, as the Government rightly says, difficult balances have to be struck between sincerely held but widely divergent views. This is much to be preferred to the approach we often criticise, of conferring wide discretions on decision-makers and arguing that the provision is compatible with human rights because s.6 of the Human Rights Act requires the decision-maker to exercise the power compatibly with the ECHR. (Paragraph 1.47)
10. We welcome the Government's explicit acceptance that the teaching of sex and relationships in faith schools must present material that is accurate and balanced, must reflect a variety of views, must not present that faith's views as the only valid views, and must promote equality and diversity. This goes some way to addressing concerns that we have expressed in previous reports about the effect of the curriculum on the human rights of some pupils in faith schools. As currently drafted, however, we are concerned about the effect of the principle in the Bill that PSHE be taught in a way that is appropriate to the religious and cultural backgrounds of the pupils, which is intended to allow faith schools to teach sex and relationships education in accordance with their ethos. In our view, in the absence of provisions in the Equality Bill which subject the content of the curriculum to the prohibitions against discrimination, and protect pupils from harassment on grounds of sexual orientation, that provision in the Bill will lead in practice to teaching as part of PSHE which is incompatible with the rights of children who are gay themselves, or the children of a gay couple, or whose parents are not married, to respect for their private and family life (Article 8 ECHR) and not to be discriminated against in their enjoyment of that right and their right to education on grounds of sexual orientation, birth or other status (Article 14 ECHR in conjunction with Article 8 and Article 2 Protocol 1). In the same way that religious views on evolution are not appropriate in science lessons, we recommend that guidance to schools with a faith ethos make clear that when communicating value judgments about lawful sexual behaviour,

these should be limited to saying that the school's religion regards something as sinful or morally wrong and not teach that it is sinful or morally wrong (Paragraph 1.50)

11. We welcome the Government's publication of updated guidance on Sex and Relationships Education on 25 January 2010 and we urge parliamentarians to give it careful attention to ascertain how the Government propose to guide schools about how to reconcile in practice the tension between the principle that PSHE should be taught in a way that endeavours to promote equality and encourages acceptance of diversity and the principle that it should be taught in a way that is appropriate to the religious and cultural backgrounds of the pupils concerned. (Paragraph 1.51)

Licensing teachers

The right of qualified teachers to practice their profession

12. In our view the Government's approach to what constitutes a "possession" for the purposes of Article 1 Protocol 1 is unnecessarily restrictive and does not reflect the case-law of the European Court of Human Rights. (Paragraph 1.56)
13. Qualified Teacher Status, for which teachers must train and pass professional exams, gives teachers the right to practise their profession as a teacher. That is clearly a right which qualifies as a "possession" for the purposes of Article 1 Protocol 1. The proposed licensing scheme, which the Government accepts may impose significant restrictions on a qualified teacher's right to practise their profession, clearly constitutes an interference with that possession. The licensing scheme therefore requires justification under the second paragraph of Article 1 Protocol 1. (Paragraph 1.57)

Proportionality of the interference with teachers' right to practice

14. We accept that a licensing system is in principle capable of being a justifiable interference with the right of teachers to earn a living practising their profession, under Article 1 Protocol 1, and that the protection of the rights of children to a good quality education is a legitimate aim for these purposes. However, there is too little detail on the face of the Bill for us to be able to assess whether the proposed licensing scheme will operate in practice in a way which is compatible with the right of teachers to practise their profession. We recommend that the Bill be amended to include more detail of the proposed licensing scheme on the face of the legislation, including, for example, the grounds for refusing or withdrawing licences (Paragraph 1.61)

Teachers right to a fair hearing

15. We do not accept that a right of appeal to a committee of the very same body as makes the original licensing decision (GTCE) satisfies the requirement of Article 6 ECHR that there be access to an independent and impartial tribunal. Nor is the availability of judicial review of such a committee sufficient to satisfy Article 6. The Government argues that the proposals in relation to teachers are in line with those in

place for both doctors and dentists. In fact, it is well established that in order to be compatible with Article 6 those appeal arrangements must be interpreted as providing a right of appeal to a court of full jurisdiction on fact and law (as opposed to the more limited right to apply for judicial review). We recommend that the Bill be amended either to provide a right of appeal to a genuinely independent appellate body (not a committee of the GTCE) or to provide a full right of appeal to a court of full jurisdiction (Paragraph 1.65)

Reporting of Family Court proceedings

16. We are concerned that the provisions on the reporting of family proceedings in the Bill may not be compatible with the best interests of the child principle in Article 3 UNCRC. Any relaxation of the restrictions on the attendance of the media at, and reporting of, family proceedings should not be at the expense of the best interests of the child principle. To ensure that the best interests principle in Article 3 UNCRC continues to be respected, we recommend that the Bill be amended so as to include an express restriction on the publication of information where such publication would not be in the best interests of the child (Paragraph 1.71)

Home education

17. We draw attention, without comment, to the Government's more detailed explanation of its assessment that the home education provisions in the Bill are compatible with the various human rights at stake. We emphasise that we have not scrutinised this part of the Bill for human rights compatibility. We may return to this issue in our next legislative scrutiny report. (Paragraph 1.73)

Formal Minutes

Tuesday 9 February 2010

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness Lord Dubs Baroness Falkner of Margravine The Earl of Onslow	Dr Evan Harris MP Fiona Mactaggart MP Mr Virendra Sharma MP Mr Edward Timpson
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Draft Report (*Legislative Scrutiny: Children, Schools and Families Bill; Other Bills*), proposed by the Chairman, brought up and read.

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

Paragraphs 1.1 to 2.2 read and agreed to.

Summary read and agreed to.

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

Ordered, That the Chairman make the Report to the House of Commons and that Lord Dubs make the Report to the House of Lords.

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 10 February, 31 March and 13 October 2009 in the last session of Parliament and 24 November 2009, 26 January and 3 February

[Adjourned till Tuesday 23 February at 1.30pm.]

List of written evidence

1	Letter from the Chair of the Committee to Baroness Andrews, Parliamentary Under Secretary of State, Department for Communities and Local Government, dated 10 February 2009	Ev 1
2	Letter to the Chair from Baroness Andrews, dated 23 March 2009	Ev 2
3	Letter from the Chair of the Committee to the Rt Hon Ed Balls MP, Secretary of State for Children, Schools and Families, dated 14 January 2010	Ev 3
4	Letter to the Chair from Vernon Coaker MP, Minister of State for Schools and Learners, Department of Children, Schools and Families, dated 2 February 2010	Ev 6
5	Letter from Scott Trueman, Senior Lawyer, Legal Adviser's Office, Department for Children, Schools and Families to Murray Hunt, Legal Adviser, JCHR, dated 15 January 2010	Ev 10
6	Letters to the Chair of the Committee from the Rt Hon Jack Straw MP, Secretary of State for Justice, dated 26 January and 2 February 2010	Ev 16
7	Barnet 55+ Forum	Ev 24
8	British Institute of Human Rights	Ev 25
9	Brook	Ev 28
10	Campaign Against Criminalising Communities (CAMPACC)	Ev 29
11	Cafcass	Ev 31; 35
12	Children's Rights Alliance for England (CRAE)	Ev 40; 42
13	Country Land and Business Association	Ev 45
14	Department for Children Schools and Families	Ev 46
15	Equality and Human Rights Commission	Ev 49
16	Family Education Trust	Ev 55
17	Family Planning Association (FPA)	Ev 56
18	Mrs Frankie Heywood	Ev 58
19	Allan Jackson	Ev 59
20	Law Society of England and Wales	Ev 60
21	Patrick Mockridge	Ev 61
22	National Secular Society	Ev 63
23	Northern Ireland Human Rights Commission	Ev 64
24	NT Advisers	Ev 66
25	Marie Stopes International	Ev 67
26	Mr I Shortman	Ev 69
27	Stonewall	Ev 70

List of Reports from the Committee during the current Parliament

Session 2009-10

First Report	Any of our business? Human rights and the UK private sector	HL Paper 5/HC 64
Second Report	Work of the Committee in 2008-09	HL Paper 20/HC 185
Third Report	Legislative Scrutiny: Financial Services Bill and the Pre-Budget Report	HL Paper 184/HC 184
Fourth Report	Legislative Scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill	HL Paper 33/HC 249
Fifth Report	Legislative Scrutiny: Digital Economy Bill	HL Paper 44/HC 327
Sixth Report	Demonstrating Respect for Rights? Follow Up: Government Response to the Committee's Twenty-second Report of Session 2008-09	HL Paper 45/ HC 328
Seventh Report	Allegation of Contempt: Mr Trevor Phillips	HL Paper 56/HC 371
Eighth Report	Legislative Scrutiny: Children, Schools and Families Bill; Other Bills	HL Paper 57/HC 369

Session 2008-09

First Report	The UN Convention on the Rights of Persons with Disabilities	HL Paper 9/HC 93
Second Report	The Work of the Committee in 2007-08	HL Paper 10/HC 92
Third Report	A Bill of Rights for the UK? Government Response to the Committee's Twenty-ninth Report of Session 2007-08	HL Paper 15/ HC 145
Fourth Report	Legislative Scrutiny: Political Parties and Elections Bill	HL Paper 23/ HC 204
Fifth Report	Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation 2009	HL Paper 37/HC 282
Sixth Report	UN Convention on the Rights of Persons with Disabilities: Government Response to the Committee's First Report of Session 2008-09	HL Paper 46/HC 315
Seventh Report	Demonstrating respect for rights? A human rights approach to policing protest	HL Paper 47/HC 320
Eighth Report	Legislative Scrutiny: Coroners and Justice Bill	HL Paper 57/HC 362
Ninth Report	Legislative Scrutiny: Borders, Citizenship and Immigration	HL Paper 62/HC 375
Tenth Report	Legislative Scrutiny: Policing and Crime Bill	HL Paper 68/HC 395
Eleventh Report	Legislative Scrutiny: 1) Health Bill and 2) Marine and Coastal Access Bill	HL Paper 69/HC 396
Twelfth Report	Disability Rights Convention	HL Paper 70/HC 397
Thirteenth Report	Prisoner Transfer Treaty with Libya	HL Paper 71/HC 398

Fourteenth Report	Legislative Scrutiny: Welfare Reform Bill; Apprenticeships, Skills, Children and Learning Bill; Health Bill	HL Paper 78/HC 414
Fifteenth Report	Legislative Scrutiny: Policing and Crime Bill (gangs injunctions)	HL Paper 81/HC 441
Sixteenth Report	Legislative Scrutiny: Coroners and Justice Bill (certified inquests)	HL Paper 94/HC 524
Seventeenth Report	Government Replies to the 2 nd , 4 th , 8 th , 9 th and 12 th reports of Session 2008-09	HL Paper 104/HC 592
Eighteenth Report	Counter-Terrorism Policy and Human Rights (Fifteenth Report): Annual Renewal of 28 Days 2009	HL Paper 119/HC 726
Nineteenth Report	Legislative Scrutiny: Parliamentary Standards Bill	HL Paper 124/HC 844
Twentieth Report	Legislative Scrutiny: Finance Bill; Government Responses to the Committee's Sixteenth Report of Session 2008-09, Coroners and Justice Bill (certified inquests)	HL Paper 133/ HC 882
Twenty First Report	Legislative Scrutiny: Marine and Coastal Access Bill; Government response to the Committee's Thirteenth Report of Session 2008-09	HL Paper 142/ HC 918
Twenty-second Report	Demonstrating respect for rights? Follow-up	HL Paper 141/ HC 522
Twenty-third Report	Allegations of UK Complicity in Torture	HL Paper 152/HC 230
Twenty-fourth Report	Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims	HL Paper 153/HC 553
Twenty-fifth Report	Children's Rights	HL Paper 157/HC 338
Twenty-sixth Report	Legislative Scrutiny: Equality Bill	HL Paper 169/HC 736
Twenty-seventh Report	Retention, use and destruction of biometric data: correspondence with Government	HL Paper 182/HC 1113
Twenty-eighth Report	Legislative Scrutiny: Child Poverty Bill	HL Paper 183/HC 1114

Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty-First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults	HL Paper 40-I/HC 73-I

	with Learning Disabilities: Volume I Report and Formal Minutes	
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132
Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501
Eighteenth Report	Government Response to the Committee's Sixth Report of Session 2007-08: The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 103/HC 526
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554
Twenty-First Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies	HL Paper 116/HC 635
Twenty-Second Report	Government Response to the Committee's Fourteenth Report of Session 2007-08: Data Protection and Human Rights	HL Paper 125/HC 754
Twenty-Third Report	Legislative Scrutiny: Government Replies	HL Paper 126/HC 755
Twenty-Fourth Report	Counter-Terrorism Policy and Human Rights: Government Responses to the Committee's Twentieth and Twenty-first Reports of Session 2007-08 and other correspondence	HL Paper 127/HC 756
Twenty-fifth Report	Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008	HL Paper 132/HC 825
Twenty-sixth Report	Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill	HL Paper 153/HC 950
Twenty-seventh Report	The Use of Restraint in Secure Training Centres: Government Response to the Committee's Eleventh Report	HL Paper 154/HC 979
Twenty-eighth Report	UN Convention against Torture: Discrepancies in Evidence given to the Committee About the Use of	HL Paper 157/HC 527

	Prohibited Interrogation Techniques in Iraq	
Twenty-ninth Report	A Bill of Rights for the UK?: Volume I Report and Formal Minutes	HL Paper 165-I/HC 150-I
Twenty-ninth Report	A Bill of Rights for the UK?: Volume II Oral and Written Evidence	HL Paper 165-II/HC 150-II
Thirtieth Report	Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill	HL Paper 172/HC 1077
Thirty-first Report	Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008	HL Paper 173/HC 1078
Thirty-second Report	Scrutiny of Mental Health Legislation: Government Response to the Committee's Sixteenth Report of Session 2007-08	HL Paper/ HC 1079

Written evidence

Letter from the Chair of the Committee to Baroness Andrews, Parliamentary Under Secretary of State, Department for Communities and Local Government, dated 10 February 2009

LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION BILL

The Joint Committee on Human Rights is currently scrutinising this Bill for compatibility with the United Kingdom's human rights obligations.

We note that a significant part of the Bill relates to the governance of local authorities and their duties in respect of local participation in democracy and decision making.

We, and our predecessor Committee, have both recommended that all public authorities, including local authorities, should be subject to an express positive duty to protect and promote the Convention rights guaranteed by the Human Rights Act 1998. In our 2008 Report on Adults with Learning Disabilities we argued:

The creation of a positive duty to respect human rights would help kick-start a change of attitude to the role of the Human Rights Act and to rights more generally. We doubt that, at least in the short term, oversight by the Equality and Human Rights Commission will encourage individual authorities to take a more proactive approach. On the other hand, witnesses to [*our inquiry on human rights and adults with learning disabilities*], including the Minister for Care Services and the Minister for Disabled People, stressed their view that the potential impact of the Disability Equality Duty will be to change fundamentally the way that public authorities look at disability rights. We remain persuaded that the same is true of positive duties and the Human Rights Act. We reiterate our recommendation that the Government consider the introduction of an express positive duty on public authorities to promote respect for human rights, where the European Convention on Human Rights imposes a positive obligation on the State.¹

The ECHR, and the HRA 1998 already impose positive duties on local authorities to take action to protect the rights of individuals, in some circumstances. We consider that, like the positive duties under existing equality legislation, a clear, express positive duty on local authorities to protect and promote Convention rights could change the approach of councils to their obligations under the HRA 1998.

I would be grateful if you could provide some more information on the Government's approach to the equality and human rights duties associated with local authorities:

- (a) Does the Government agree that local authorities' positive equality duties have enhanced protection for individuals from discriminatory treatment in relation to local public services? If not, why not? If so, could you provide us with some practical examples.
- (b) Does the Government consider that the financial or administrative burdens placed on local authorities by existing equality duties have been proportionate to any benefits achieved for local residents? If not, why not?
- (c) Does the Government agree that local authorities are already under positive duties to take action to protect the Convention rights of their residents in certain circumstances?
- (d) Can you give us some explicit examples of steps taken by Government to make it clear to local authorities that their duties under the HRA 1998 include positive duties?
- (e) Can you give us any clear examples which show that local authorities have taken steps to meet those positive duties, where necessary, through changes to their policies and practices?
- (f) Are you aware of any local authorities which have conducted an audit of their existing policies and practices for compatibility with the Convention rights guaranteed by HRA 1998? If so, we would be grateful if you could provide us with the details of any such audits and their outcomes.

I have copied this letter to Trevor Phillips, Chair of the Equality and Human Rights Commission (EHRC), in the light of the Commission's ongoing investigation into the implementation of the Human Rights Act 1998. We would welcome any comments which the EHRC would like to make about implementation of the Human Rights Act 1998 by local authorities.

Trevor Phillips
Chair, Equality and Human Rights Commission

¹ Seventh Report of Session 2007–08, paragraph 117.

Letter to the Chair of the Committee from Baroness Andrews OBE, Parliamentary Under Secretary of State, Department for Communities and Local Government, dated 23 March 2009

LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION BILL

Thank you for your letter of 10 February 2009 in relation to the above Bill. I am extremely sorry for the delay in responding.

You asked about the equality and human rights duties placed upon local authorities. This is in the context of your Committee's suggestion that there should be "an express positive duty on public authorities to promote respect for human rights, where the European Convention on Human Rights imposes a positive obligation on the State".

A positive obligation under human rights law denotes an obligation on the State to take positive steps actively to protect human rights; these steps may include the creation of legal or institutional structures, for example, or the allocation of resources. By way of a specific example, the European Court of Human Rights has held that States are under a positive obligation under Article 2 (the right to life) to put in place and enforce criminal law to deter the commission of offences against the person. Similarly, the Court has found that States are under a duty under Article 6 (the right to a fair trial) to provide free legal assistance in criminal trials to impecunious people.

By virtue of section 6 of the Human Rights Act, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 6(6) clarifies that "an act" includes a failure to act. Therefore, where the Convention rights incorporate the imposition of a positive obligation upon the United Kingdom, that positive obligation is also placed upon public authorities that are subject to the Act. Any further provision making reference to specific positive obligations under the Convention would therefore be otiose.

Positive obligations should not however be confused with the idea of a general obligation upon public authorities to promote respect for the Convention rights, which your Committee has also previously advocated. However, as the Government has previously explained, it is of course only public authorities themselves that have an obligation under the Human Rights Act to respect the Convention rights. Such a general obligation could therefore only require public authorities to promote respect for the Convention rights to other public authorities. In any case, it would seem unlikely that such a general duty would be within the scope of the Local Democracy, Economic Development and Construction Bill.

This proposal for a general duty to promote respect for the Convention rights can of course be distinguished from the duties already contained in the Bill to promote democracy. These aim to make citizens more aware of the democratic process, enabling them to understand better who makes decisions about their local services, how to influence and take part in making those decisions, and how to stand for or seek appointment to civic roles such as councillor, school governor and magistrate. Although the duties are placed on local authorities, their policy aim is to increase awareness amongst citizens, not among public authorities themselves.

Since the passage of the Human Rights Act in 1998, the Government's aim has been to encourage a culture in public authorities in which fundamental human rights principles are seen as integral to the design and delivery of policy, legislation and public services. Following the Review of the Implementation of the Human Rights Act completed in July 2006 by the former Department for Constitutional Affairs (DCA), the Ministry of Justice—the successor to the DCA—has led a programme of work to implement the recommendations of the Review.

The Ministry of Justice produced generic guidance for public authorities, which they encouraged public authorities to adopt and adapt to suit their own requirements. As of March 2009, over 115,000 copies have been distributed of the suite of guidance, which comprises the handbook *Human Rights: Human Lives* and the summary booklet and DVD *Making Sense of Human Rights*; these have been distributed within central Government, to departments' sponsored bodies, and to other public sector organisations. This guidance discusses all the obligations, including positive obligations, that arise from the Convention rights.

One local authority that has taken particularly proactive steps in relation to its human rights obligations is the London Borough of Southwark. It has integrated human rights into its decision-making process as part of the Equality Impact Assessment. It has established an Equalities and Human Rights Scheme, and has identified a lead Member to champion equalities and human rights, currently Councillor Adele Morris, the executive member for communities, equalities and citizenship.

The Council's starting point was to audit two key service areas (housing and social services, as they were then called) to see if their policies and procedures were compliant with human rights.

The Council also identified training needs and commissioned the services of the British Institute of Human Rights (BIHR) as their training provider. The training was piloted in their social services and housing departments before developing a rolling programme of training. Over 600 staff and some councillors have received the training. The Council has now added an action planning section to the training, which assists staff to think about how they can embed human rights approaches into the way that they work and provide services. Feedback from the training is very positive and staff have continued their development through the application of a human rights framework to their day-to-day activities.

The Council has an ongoing partnership arrangement with the BIHR, building on the training they have provided, to promote best practice within Southwark and other organisations. For example, their local Primary Care Trust is taking part in the Department of Health project “Human rights in health care: a framework for local action”. Risk assessment processes have also been improved within the Council so that staff take into account human rights considerations when implementing new legislation, policies, practices and procedures.

I note in conclusion that you copied your letter to Trevor Phillips, Chair of the Equality and Human Rights Commission (EHRC). It is of course part of the duties of the EHRC, as set out in section 9(1) of the Equality Act 2006, that they should encourage public authorities to comply with section 6 of the Human Rights Act 1998. As noted above, this would include promoting compliance with the positive obligations that arise from the Convention rights.

I am copying this letter to Trevor Philips.

Letter from the Chair of the Committee to the Rt Hon Ed Balls MP, Secretary of State for Children, Schools and Families, dated 14 January 2010

CHILDREN, SCHOOLS AND FAMILIES BILL

The Joint Committee on Human Rights is considering the compatibility of the Children, Schools and Families Bill with the requirements of human rights law. I am grateful for the detailed memorandum your Department sent to the Committee on 3 November, setting out in detail the Government’s consideration of the human rights issues relating to the Bill. This is of considerable assistance to the Committee when it is scrutinising the Bill.

I am also grateful to your officials in the Bill team who have met with the Committee’s Legal Adviser in December to discuss some of those issues. At that meeting your officials kindly offered to provide some more information to assist the Committee in its scrutiny of the Bill and we look forward to receiving that. In the meantime I would be grateful if you could provide me with the answers to the following questions.

(1) ENFORCEABLE ENTITLEMENTS FOR PARENTS AND PUPILS

The Bill provides for pupil and parent “guarantees”, a set of specific entitlements which pupils and parents are entitled to expect from their school and which are intended to be enforceable through certain enforcement mechanisms. Pupils and parents will be entitled to complain about failure to meet the guarantees including to the Local Government Ombudsman. It is envisaged that judicial review may also be available if necessary.

This part of the Bill raises an important human rights issue considered in detail by the Committee in its Bill of Rights report: whether economic and social rights such as the right to education can be made the subject of individual entitlements with some means of redress without subverting democratic accountability for public expenditure. At that time, the Committee’s report was in favour, but the Secretary of State for Justice, the Rt Hon Mr Straw MP, and the Human Rights Minister, the Rt Hon Michael Wills MP, were against.

Q1. *Does the Bill’s embrace of legally enforceable guarantees to a minimum set of entitlements indicate an evolution in the Government’s position since 2008 when, in its evidence to our Bill of Rights inquiry, it stated its categoric opposition to any legally enforceable social rights? What accounts for the Government’s change of heart?*

Q2. *Has the Government’s recent more rights-oriented approach to the delivery of public services been influenced by the work of the Public Administration Select Committee on Public Service Guarantees and, if so, how?*²

Q3. *The Department’s human rights memorandum states that redress will be available “both through the Ombudsman and, if necessary, through judicial review.” Against whom is it envisaged judicial review will be available: (a) governing bodies; (b) local education authorities; (c) the Local Government Ombudsman; (d) the Secretary of State; or (e) all of the above?*

Q4. *How does the Government counter the criticisms that legally enforceable guarantees in public services such as education will lead to unacceptable judicial interference in the delivery of public services, distract service providers from their task of delivery, and only serve to benefit the articulate and educated?*

The human rights memorandum states that the entitlements provided by the guarantees are unlikely to amount to civil rights within the meaning of Article 6 ECHR, citing an old decision of the European Commission of Human Rights, *Simpson v UK*.

² See eg Twelfth Report of Session 2007–08, *From Citizen’s Charter to Public Service Guarantees: Entitlements to Public Services*, HC 411.

Q5. *Will the Government reconsider its view that Article 6 does not apply, in view of more recent developments in the case-law concerning the scope of “civil rights” in Article 6 ECHR, and the fact that the Local Government Ombudsman will be able to recommend financial compensation against local authorities where guarantees are not met?*

Q6. *Does the Government accept that there is no difference in content between the common law of procedural fairness and Article 6(1) ECHR?*

— *If so, why is the Government concerned to establish that the entitlements amount to civil rights?*

— *If not, what does the Government consider to be the difference in content between the two?*

(2) MANDATORY SEX AND RELATIONSHIPS EDUCATION

The Bill provides for mandatory sex and relationships education with a parental right to opt out their child out if they are under the age of 15. Given that the UK has one of the highest rates of teenage pregnancy in Europe, the provision of mandatory sex and relationships education and the limitation on the parental right of withdrawal to those under 15 are likely to be regarded by the Committee as significant human rights enhancing measures, for the reasons given in the explanatory material accompanying the Bill. They enhance the right of children and young people to be provided with important information necessary to their sexual health and personal development under Articles 8 and 10 ECHR and Article 2 of Protocol 1, and their right under Article 12 of the UN Convention on the Rights of the Child to have their views taken into consideration.

However, the continued provision of a parental right of withdrawal from sex and relationships education raises questions about the Bill’s compatibility with those rights, while the limitation of the parental right of withdrawal to those under 15 also raises issues concerning the right of parents to respect for their religious and philosophical convictions in the education of their children (Article 2 Protocol 1).

In other closely related contexts, it is well established that parents’ rights to control their children are limited by the child acquiring sufficient maturity and understanding to be able to take their own decisions on certain matters (known as “Gillick competence” after the House of Lords decision which recognised the concept). For example, in 2006 the High Court concluded that once a young person was of sufficient maturity and understanding to reach their own decisions on matters such as abortion, then the parents’ right to be notified under Article 8 ECHR does not continue.³

Q7. *A girl under the age of 15 who is of sufficient maturity and understanding to reach her own decisions about contraception, abortion and other matters concerning her sexual health (“Gillick competent”) is able to obtain advice and treatment from medical professionals on those matters without parental consent. What is the Government’s justification for allowing the parents of such a “Gillick competent” girl to veto her access to the important health-related information she needs to make informed decisions about her sexual health?*

Q8. *What is the Government’s objection to limiting the parental right of withdrawal by reference not to a child’s age, but to the well-established and widely understood concept of “Gillick competence”, that is, whether he or she is of sufficient maturity and understanding to reach their own decisions on the matter?*

Q9. *Would the Government consider amending clause 14 of the Bill in a way which leaves 15 as the presumptive age of Gillick competence for these purposes but which provides for an exception from the parental right to withdraw where a child under the age of 15 is of sufficient maturity and understanding to reach their own decisions on sex and relationships education?*

Q10. *OFSTED has reported that 0.04% of children are currently withdrawn from sex and relationships education by their parents. Does the Government have any more up to date information than this?*

Q11. *Has the Government conducted any analysis of what proportion of children withdrawn from sex and relationships education are girls and what proportion boys? Is this regarded by the Government as relevant to its equality impact assessment of the proposal?*

The Macdonald review of PHSE said that faith schools would be allowed to deliver PHSE lessons in line with the “context, values and ethos” of their religion, and this was accepted by the Government. Before the Bill was published you were quoted in the press to much the same effect: “You can teach the promotion of marriage, you can teach that you shouldn’t have sex outside of marriage, what you can’t do is deny young people information about contraception outside of marriage. ... The same arises in homosexuality. Some faiths have a view about what in religious terms is right and wrong—what they can’t do though is not teach the importance of tolerance.”⁴ The Bill provides that PSHE should be taught in a way that endeavours to promote equality and encourages acceptance of diversity, but is also appropriate to the religious and cultural backgrounds of the pupils concerned.⁵

³ *R (Axon) v Secretary of State for Health* [2006] EWHC Admin 37.

⁴ *Daily Telegraph*, 5 November 2009.

⁵ New section 85B(6)(a) of the Education Act 2002, as inserted by clause 11(4) of the Bill.

Q12. *Is it the Government's intention that faith schools should be free to teach that homosexuality, contraception and sex outside marriage are wrong, sinful or immoral? Is this the intended effect of the provision that PSHE should be taught in a way that is appropriate to the religious and cultural backgrounds of the pupils concerned?*

Q13. *If so, what are the Government's reasons for its view that such teaching as part of PHSE is compatible with the right of children who are gay themselves, or the children of a gay couple, or whose parents are not married, not to be discriminated against in their enjoyment of their right to respect for their private and family life, and their right to education, on grounds of sexual orientation, birth or other status (Article 14 ECHR in conjunction with Articles 8 and Article 2 Protocol 1)?*

The Bill envisages that the Secretary of State shall issue guidance to local authorities, governing bodies or head teachers about the exercise of their functions.⁶ Such guidance will in practice play an important part in ensuring that PSHE is taught in a way which does not give rise to breaches of children's right not to be discriminated against on grounds such as sexual orientation, birth or the marital status of their parents.

Q14. *Will a draft of the Secretary of State's guidance envisaged in new s. 85B(8) be made available during the passage of the Bill? If not, will you make public in outline how you propose to guide schools about how to reconcile in practice the tension between the principle that PHSE should be taught in a way that endeavours to promote equality and encourages acceptance of diversity and the principle that it should be taught in a way that is appropriate to the religious and cultural backgrounds of the pupils concerned.*

(3) REPORTING OF FAMILY COURT PROCEEDINGS

The Bill contains measures designed to enable wider reporting of information relating to family proceedings. This raises controversial issues of the correct balance between the right of the press to report court proceedings, and the public to receive such information, under Article 10 ECHR and children's right to respect for their privacy (Article 8 ECHR) as well as their best interests (under the UN Convention on the Rights of the Child).

Both the Explanatory Notes to the Bill and the Department's human rights memorandum describe the object of these provisions as being to "rebalance" the right to privacy in Article 8 ECHR and the right to freedom of expression in Article 10 ECHR, by giving greater weight to the latter. Neither, however, make any mention of the UN Convention on the Rights of the Child, Article 3(1) of which provides that in all actions concerning children the best interests of the child shall be a primary consideration. Restrictions on the attendance of the media at, and reporting of, family proceedings serve not only to protect the Article 8 rights of parties and witnesses but may also be in the best interests of the child.

Q15. *What consideration has been given to the best interests principle in the UNCRC in drawing up these provisions concerning the reporting of family proceedings?*

Q16. *What objection would the Government have to including in the Bill an express restriction on publication where such publication would not be in the best interests of the child?*

(4) LICENSING TEACHERS

The Bill introduces a licensing scheme for teachers. If they are refused a licence, or a renewal, this would prevent them from teaching unsupervised in maintained schools and Academies. The provisions in this part of the Bill are skeletal. The circumstances in which a licence may be granted or refused, renewed or withdrawn are not set out on the face of the Bill but will be contained in Regulations.⁷

The Government's view is that the establishment of a licensing scheme for teachers does not engage any of the Convention rights. It does not consider that the right to peaceful enjoyment of possessions in Article 1 Protocol 1 is engaged because the refusal or withdrawal of a licence to practise does not lead to the loss of a teacher's professional status, or to the loss of any present legal entitlement or economic rights beyond an ability to hold a certain form of employment in future. The teacher could still continue to teach, albeit under supervision, or could teach at independent schools.

Q17. *Please explain in more detail, including by reference to Strasbourg case-law, the basis for your view that the introduction of a system of licences to teach does not engage teachers' rights to earn a living practising their profession (Article 1 Protocol 1 ECHR) or their right to a fair hearing (including access to a court) in the determination of their civil rights (Article 6(1) ECHR).*

Q18. *Do you agree that for a qualified teacher, not being able to teach unsupervised in a maintained school or Academy is a very significant restriction on their ability to practise the profession for which they have trained and qualified?*

Q19. *Will the Government publish in draft, during the passage of the Bill, the regulations which will make provision for the grant, refusal, renewal or withdrawal of a licence to teach?*

The Bill gives you the power to make regulations concerning an appeals process, which it is envisaged will be a committee of the General Teaching Council. The Explanatory Notes to the Bill state that the Government considers that this independent appeal is sufficient to satisfy the requirements of Article 6 ECHR. The General Teaching Council is the body which will make the licensing decisions.

⁶ New section 85B(8).

⁷ New section 4B(2) of the Teaching and Higher Education Act 1998.

Q20. Please explain in more detail the basis for your view that a right of appeal to a committee of the same body as makes the original licensing decisions can satisfy the requirement of Article 6 ECHR that there be access to an independent and impartial tribunal.

Letter to the Chair from Vernon Loaker MP, Minister of State for Schools and Learners, Department for Children, Schools and Families, dated 2 February 2010

Thank you for your letter of 14 January 2010 about the human rights implications of the Children, Schools and Families Bill.

I understand that a letter from my principal legal adviser on the Bill, Scott Trueman, was sent to your legal adviser on 15 January 2010, and will therefore have crossed with your own correspondence. Many of the issues raised in your letter, and a number of the questions you have put, are dealt with in that letter, and I do not therefore intend to respond again to those points. Our response on the remaining issues and questions you have raised are set out below, in the same order in which you raised them.

(1) ENFORCEABLE ENTITLEMENTS FOR PARENTS AND PUPILS

My officials have already dealt in large part with questions one and two of your letter, save to say that this does not represent in any way a “change of heart”.

You ask if the Government’s more “rights-oriented” approach to the delivery of public services has been influenced by the work of the Public Administration Select Committee (PASC). You will, of course, be familiar with Liam Byrne’s letter of 29 September 2009 to Tony Wright setting out the Government’s further response to “From Citizen’s Charter to Public Service Guarantees: Entitlements to Public Services”. As Liam outlined there, “Building Britain’s Future”, published July 2009, announced a move away from a system based primarily on targets and central direction to one where individuals have entitlements over the service they receive. Included among those key entitlements were the proposed pupil and parent guarantees. As Liam said then:

“The aim is to ensure high quality standards for all and, by increasing the power of people to demand services reach these standards, help drive up service performance and efficiency. I think that it reflects the overall approach advocated by PASC.”

The pupil and parent guarantee documents are unusual in that they perform dual functions. In some instances and circumstances, they are able (by virtue of clause 1(2) of the Bill) to impose mandatory requirements onto local authorities, governing bodies and other proprietors of schools and head teachers. The documents can also, however, act as, in effect, statutory guidance to those same bodies and may, as the Bill states “set out aims, objectives and other matters” to which those bodies must have regard. It follows from this that in principle the guarantee documents will be capable of providing entitlements to parents and pupils that would, in theory at least, be enforceable through judicial review. In many cases, where the documents provide guidance or aims, or entitlements not suitable for direct enforcement, judicial review would not be appropriate.

The intention of the document, and the complaints system to be provided through the Local Government Ombudsman (LGO) (or, in Academies, through the Young Persons’ Learning Agency (YPLA)), is precisely to avoid litigation by offering parents and pupils an accessible, cost-effective and swift method of redress. The identity of parties against whom judicial review could be sought would depend, obviously, on the nature and extent of the obligation imposed upon them and, to the extent that the LGO is clearly a public body whose decisions are susceptible to review, his decisions might also be challenged through the courts. We consider this unlikely, however, given the likely cost-benefit to a claimant from commencing what would be expensive and lengthy proceedings.

We do not believe that the pupil and parent guarantees will lead to unacceptable judicial interference in the delivery of public services or distract service providers from their task of delivery. In the first place, we are confident that—as now—schools and local authorities will strive to resolve any concerns quickly and locally and in the second, we believe that the provision of an effective and simple redress mechanism through the LGO or YPLA will reduce the likelihood of complaints being pursued to Judicial Review.

The pupil and parent guarantees embody the most important aspects of what parents and pupils can rightly expect from schools. There is therefore no question that they would distract service providers from their task of delivery; rather, the guarantees reflect the most important aspects of the work of schools and the school-related functions of local authorities.

We share the Committee’s concern that the guarantees should not benefit only the articulate and educated. As part of consultation on the guarantees, we are working with the Department’s Parents Panel (which is a representative group of parents) as well as consulting bodies that represent the interests of parents and young people themselves. Our aim is to ensure that the guarantees are known and understood by as many parents and young people as possible. As the LGO and the YPLA develop the redress mechanisms, we know that they too will strive to ensure that their services are available and accessible to all those who may wish or need to use them.

Turning to your question five, the parent and pupil guarantees set out, as the Bill states, what parents and pupils “are entitled to expect with regard to the school”. The guarantees therefore set out facets of the state schooling system that parents are entitled to expect for their children, and pupils are entitled to expect from their schools. These are, self-evidently, benefits within the school system.

As you will know, the European Court has consistently held that the right to education, and elements of it, are not ‘civil rights’ within the meaning of Article 6 and the case of *Simpson* is still good law. Indeed, I note that this case was relied upon much more recently in the domestic context in several cases, including *R (B) – v – Alperton Community School*,⁸ when the English courts also found that there was no private law right to education of the sort that would engage article 6. To the extent rights are conferred, they are clearly public law rights only. The possibility of financial compensation is specifically excluded by the parental complaints system utilised by the Bill⁹ so far as governing bodies and head teachers is concerned. As you yourself note, the LGO can “recommend” financial compensation by a local authority under the Local Government Act 1974, and this would in theory apply also to a breach of a guarantee by a local authority if the Bill is enacted; but there would be no method of enforcing such a recommendation, and it remains the decision of the local authority whether to accept the recommendation.

Question 6 asks a much more general question about the Government’s perception of Article 6. I assume that the first bullet in this question is intended to read “...to establish that the entitlements do not amount to civil rights?” There is no doubt that the Courts have recognised that the principles contained in Article 6 are a part of English law. In general, Article 6 has simply re-enforced those common law rights, though article 6 applies a more “structured” approach when applying the overriding test of fairness to the facts of a case, and asks different questions at each stage, from the tests applied by the common law.¹⁰ I am not sure that I can usefully add much more to that in this context.

(2) PERSONAL, SOCIAL, HEALTH AND ECONOMIC EDUCATION (PSHE)

Questions 7–11 posed in this section were, in the main, answered by the letter from my officials. In relation to question number nine, the proposal you make would seem not to answer the points made in our previous letter about the risk of litigation to schools, and the possibility of uncertainty that was not in anyone interests. This is not something, therefore, that we would consider at this time.

Questions 12–14 raise some important issues and I am happy to take this opportunity to explain our thinking on them. As you will appreciate, these are matters on which there are many sincerely held but widely divergent views. It falls to the Government therefore to balance these views and to reflect that in legislation, where necessary. As the explanatory notes to the Bill explain, the teaching of PSHE will be subject to three main principles. These principles are ones with which head teachers and governing bodies must comply in providing the necessary teaching. As Mr Trueman set out in his letter of 15 January, it is our intention that schools be permitted, under the second of these principles (at new section 85B(6)(a) of the Education Act 2002) to teach in a manner than is “appropriate to the...religious and cultural backgrounds” of pupils, and in that way be permitted to teach the views of their own faiths on a variety of topics, including homosexuality, abortion and contraception. However, any such teaching will also continue to have to comply with the other principles too—and these include requirements that material presented is accurate and balanced, and that teaching reflects a variety of views (including other faith views) and promotes equality and diversity.

The questions you pose here are ones that the Committee has also raised in debate recently in the context of the Equality Bill. As the Government indicated there, in the context of the exemption of the curriculum from the requirements around discrimination, it is our intention that faith schools will be able to teach the tenets of their faith including the views of that faith on sexual orientation and same-sex relationships. What they cannot do is present these views in a hectoring, harassing or bullying way that may be offensive to individual pupils or single out any individual pupils for criticism. The requirements of the other principles will be key here. Faith schools will not be able to suggest that their own views are the only valid ones, and must make clear that there are a wide range of divergent views. But if their beliefs are explained in an appropriate way in an educational context that takes into account existing guidance on sex and relationships education (SRE) and religious education, then schools should not be acting unlawfully.

We consider in this way that there is no reason to suppose that any pupil or gay parent of any pupil will have cause to be concerned about discrimination that would affect or infringe their right to a private life and their right not to be denied education. I should add that many faith schools already successfully teach the non-statutory PSHE syllabus in this way.

It is also worth noting that until the current Equality Bill is passed and comes into force, the Equality Act (Sexual Orientation) Regulations 2007 apply in schools as much as they do in any other context and these too will prevent inappropriate treatment of gay pupils or gay parents by preventing discrimination (ie less favourable treatment) on the grounds of sexual orientation.

⁸ [2001] All ER (D) 312; see also *Phelps – v – Hillingdon LBC* [2000] 4 All ER 504 HL (existence of negligence claims, but relevant statute did not give rise to private civil right).

⁹ See section 211 (6) of the Apprenticeships, Skills, Children and Learning Act 2009.

¹⁰ See, for example, *R – v – A (no 2)* [2002] 1 AC 45; *Brown – v – Stott* [2003] 1 AC 681 (*per* Lord Hope).

As you say, guidance on the practical operation of the new PSHE curriculum will be essential for schools to fully understand their responsibilities—but many schools have been teaching PSHE on a non-statutory basis for many years, and many have found practical solutions to these sensitive issues. Although the guidance that will be issued pursuant to this Bill has not yet been prepared, updated guidance on SRE under the existing law was published on 25 January, and this does reflect, to some degree, the intention to introduce these new principles. I enclose a copy of that guidance for your information.

You may be interested to know that the Department has recently also published guidance on dealing with and preventing homophobic bullying.¹¹

(3) REPORTING OF FAMILY COURT PROCEEDINGS

In question 15 you asked what consideration had been given to the best interests principle in the United Nations Convention on the Rights of the Child (UNCRC) in drawing up the provisions concerning the reporting of family proceedings. As the Committee indicates, Article 3(1) of the UN Convention requires the best interests of the child to be a primary consideration in all actions concerning children, including actions by judicial authorities. Policy consideration has proceeded throughout on the basis that identification of a child as being involved in family proceedings will generally not be in that child's best interests, and that has been the principal basis on which the provisions concerning identification information were developed. The stringency of the restrictions on publishing identifying material is accordingly key not only to the Article 8 rights involved, but also to the question of the best interests of any children involved. Under the existing framework, it is not the prohibition in section 12(1)(a) of the Administration of Justice Act 1960 (on reporting information relating to certain family proceedings¹² held in private) that protects a child involved in proceedings from being named in reports, but the specific prohibition in section 97(2) of the Children Act 1989.¹³ Section 97(2) protects a child involved in proceedings from a publication to the public or a section of the public of information intended or likely to identify that child as being involved in certain proceedings [in which powers under that Act may be exercised]; but that protection ceases when the proceedings conclude, unless the court orders that it should continue. The Bill (as well as extending the protection to other persons involved in proceedings) provides that it will be a contempt of court to publish information likely to identify a child as being *or having been* involved in relevant proceedings regardless of whether and when the proceedings have concluded (see the definition of "identification information" in clause 40(1)).

The prohibition on publication of identification information may only be lifted to the extent that the court so orders, which it may only do if satisfied of at least one of four specific grounds for permitting publication, which are (a) that it is in the public interest; (b) that it is appropriate in order to avoid injustice to a person involved in the proceedings; (c) that it is necessary in the interests of a child or vulnerable adult involved in the proceedings; or (d) that permission has been applied for by a party to or on behalf of a child involved in the proceedings and it is appropriate in all the circumstances to grant it (clause 35(3)). It should be borne in mind that these are threshold conditions, and the court is not required to give permission if it is satisfied of any of them, but it may not give permission unless it is so satisfied.¹⁴ In addition, the court must have regard to any risk which publication would pose to the safety or welfare of any individual (which will include any child) involved in the proceedings. The child's interests in deciding whether or not to permit publication, are therefore a very strong—a primary—consideration in that decision.

Specific provision in relation to certain identifying information in relation to adoption is made by clause 36, reflecting risks specific to adopted persons (or those who may be adopted) and their adoptive families. Where the person who may be, or has been adopted, is a child the court may permit publication of such information only if satisfied that publication would not prejudice the safety or welfare of that child (clause 36(4)(a) of the Bill. The best interests of the child are accordingly again made a primary consideration.

Should the amending provisions of Schedule 2 to the Bill be commenced following review as provided for in clause 40, the prohibition on publication of sensitive personal information would be removed. The court would, however, have the explicit power to prohibit or restrict publication if there is a real risk that publication would prejudice the welfare of a child or vulnerable adult. Any such prohibition or restriction would of course be in addition to the prohibition on publication of identifying information. This maintains the child's best interests as a primary consideration in determining what information may be published in relation to family proceedings in which children are involved.

¹¹ See <http://www.teachernet.gov.uk/wholeschool/behaviour/tacklingbullying/safetolearn/>

¹² It is not a breach of s.12 to publish a fact about a child, even if that fact is contained in documents filed in the proceedings, if what is published makes no reference to the proceedings at all (*Doctor A & Others v. Ward and Another* [2010] EWHC 16 (Fam), paragraphs 112–113).

¹³ See in particular *Re B (A Child)* [2004] EWHC 411 at paragraphs 62 to 82 (Munby J).

¹⁴ As an indication of how the courts take children's rights and interests into account where what is in issue is a power, rather than a duty to allow publication of information, see *Murray (by his litigation friends) v Big Pictures (UK) Ltd and others* [2008] EWCA Civ 446, where the court, in considering a child's right to privacy under Art 8 ECHR against a publisher's right to freedom of expression under Art 10, held that the fact that a claimant (in relation to infringement of Article 8) was a child would bear weight in deciding whether a claimant's right to respect for a private and family life outweighed the Article 10 rights of the publisher, and that the child had a reasonable expectation of privacy.

At question 16, you asked what objection the Government would have to including in the Bill an express restriction on publication where such publication would not be in the best interests of the child. Such a provision would have the effect of making the best interests of the child the paramount consideration, rather than the primary consideration (which article 3 recognises). If it were to be made impossible to publish information relating to family proceedings involving a child unless that publication could be shown to be in the child's best interests (which appears to be the intention), publication would in practice require prior authorisation of the court. No balancing of interests would be possible. Effectively publication would become possible only in cases such as those involving missing children, where publication of the child's details is necessary in the child's interests to ensure that the child can be located and his or her safety assured. This would represent a considerable restriction compared to the existing position which recognises the need to balance competing interests].

(4) LICENSING TEACHERS (the "licence to practise")

In this section of your letter to me, you set out some preliminary remarks on the licensing scheme. Dealing first very briefly with the comment that the provisions in this part are "skeletal", I would say that the framework and processes around the licence to practise will develop and evolve as time passes, and establishing the new system in this way will provide us with the flexibility to take account of changes in practise and be responsive to the needs of those affected.

Turning to the Convention rights and to your question 17, it is our view that these are not engaged by the introduction of a system of licences to practise in itself.

In relation to Article 1 Protocol 1, we do not believe that a teacher's right to earn a living practising their profession constitutes a possession for these purposes. We have previously referred to the case of *Waltham Forest NHS Primary Care Trust v Zafra Iqbal Malik*,¹⁵ which followed the reasoning in *R (Countryside Alliance) v Attorney General*.¹⁶ In the latter case, Lord Bingham of Comhill stated that:

"Strasbourg jurisprudence has drawn a distinction between goodwill which may be a possession for the purposes of article 1 of the First Protocol and future income, not yet earned and to which no enforceable claim exists, which may not".

No present legal entitlement or ownership is conferred by virtue of being a qualified teacher. A teacher does not have an absolute right to future income earned practising his or her profession: this depends on obtaining suitable employment by which to do so. The right therefore is only to be in a position to apply for appropriate employment in the future and there is no enforceable claim that attaches.

In addition, as we outlined in our original memorandum, the loss of a licence to practise does not lead to the loss of professional status or the ability to apply for one again. If the teacher can bring their practice back up to standard they can obtain a new licence, although until then they will not be able to teach unsupervised. We are developing precise mechanisms for how and when a teacher who may have lost a licence can seek to recover it in the future.

Even if the right to practise their profession were found to be a possession, any deprivation would be justifiable as in the public interest and subject to conditions and a right of appeal that are compliant with Article 6.

In relation to Article 6, the right to a fair hearing will only be engaged on a refusal by the GTCE to grant or renew a licence since this is the point at which any right to practise will be at issue. I deal with the question of compliance with Article 6 in the reply to question 20.

In response to question 18, we agree that this is a significant restriction, but we believe this is a proportionate measure designed to improve standards, which balances the rights of a qualified teacher against those of the children whom they teach. The quality of services for children and young people depends on the people who work in those services. To achieve further improvements in outcomes for pupils in school we need to build on the excellent practice that already exists to ensure consistent high quality teaching in line with other world class school systems.

The licensing system will operate alongside the current performance management system, provided for by regulations in relation to maintained schools, and the obligation of teachers to participate in arrangements for appraisal made in accordance with such regulations will remain. Where there are particular concerns over practise and before a licence is removed, teachers will be subject to a period of enhanced support under local capability procedures.

The introduction of the licence to practise is accompanied by provisions—to be included in the School Teacher's Pay and Conditions Document—that will give all teachers and head teachers an entitlement to Continuing Professional Development (CPD). These provisions, coupled with the current performance management/appraisal arrangements, will help ensure that teachers have the opportunity to bring their performance up to the standards required by the licence and so avoid having their ability to practise restricted.

¹⁵ *Waltham Forest NHS Primary Care Trust v Zafra Iqbal Malik* [2007] EWCA Civ 265.

¹⁶ *R (Countryside Alliance) v Attorney General* [2007] UKHL 52.

You ask at question 19, about draft regulations. Clearly Parliamentary time is short but, as set out in our policy statement for clause 23, which was published on 19 January 2010, we are aiming to publish full, draft regulations for consultation in spring 2010; and the Regulations will be laid before Parliament and, therefore, be subject to Parliamentary scrutiny in the normal way.

Turning to question 20, and the possibility of appeals, appropriate safeguards will be put in place in the Regulations governing the appeals system to ensure that the system is Article 6 compliant.

New teachers attempting to secure a full licence at the end of their induction period (during which we envisage they will have held a temporary licence), will continue to have access to the General Teaching Council (GTC) Committee, which hears appeals when a decision has been made locally to fail someone at the end of induction or extend an induction period. Further information about these arrangements can be found at: www.gtce.org.uk/publications/induct_appeals/.

It is obviously crucial, however, that we also establish a fair appeals process for those teachers who already hold a full licence. We envisage a two tier process:

- Tier 1—locally by using grievance procedures required by regulations, and
- Tier 2—nationally through the GTC—established Committee.

Under tier 1, a teacher would be able to use (as at present) the appeals processes at regulation 19 or, depending on precisely who is their employer, regulation 33 of The Education (School Teacher Performance Management) (England) Regulations 2006¹⁷ to appeal against any of the entries in their planning and review statement (their performance management review). This statement will be critical in terms of licensing decisions

Under tier 2, once the local grievance process with regard to the planning and review statement is exhausted and a decision regarding the licence has been made, an appeal to the GTC could be made. Grounds for appeal will be set out in regulations and accompanying guidance.

It is proposed that appeals will be heard by a committee established by the GTCE. The GTCE is the professional body for teachers and one of its key functions is to regulate the profession. We believe that it is right that it has the key role in delivering the licensing system including the need for hearing appeals.

The nature of such appeals are likely to require that those hearing them possess a measure of professional expertise and experience to enable them to determine the issues in question. We believe that GTCE are best placed to appoint such committees. We would propose to mirror the make up of similar GTC committees, comprising three members—only one of whom may be a member of the Council. Of the three members, one would provide lay input and two would have professional expertise. This will enable expert bodies to be established, regionally where necessary, and independent of the body which makes the original licensing decisions.

Our proposals are in line with those in place in respect of both doctors and dentists. The licensing schemes established by, respectively, Part IIIA of the Medical Act 1983 and Part III of the Dentists Act 1984, both provide for the body that makes the original licensing decision and the appeals panel (in respect of dentists, regarding fitness to practice), to be part of, respectively, the General Medical Council and the General Dental Council.

Any decision of an appeals committee would potentially be susceptible to Judicial Review in the normal way, once all other appeals routes outlined above have been exhausted.

In general, to create a new body to hear appeals would add an additional layer of bureaucracy and add to the costs for all those involved. We believe that our plans for appeals will provide for appropriate separation between those making licence recommendations; those awarding licences; and those considering appeals.

It should also be noted that we are working extremely closely with social partners and GTCE on the development of the licence to practise and associated systems, and this provides challenge and a rigorous overview on a range of matters, including the appeals process.

I hope that this satisfies the questions you have raised.

Letter from Scott Trueman, Senior Lawyer, Legal Adviser's Office, Department for Children, Schools and Families to Murray Hunt, Legal Adviser, Joint Committee on Human Rights, dated 15 January 2010

CHILDREN, SCHOOLS AND FAMILIES BILL

Many thanks to you and Chloe for taking the time to come to the Department to see us just prior to Christmas and for setting out some of the issues on which you thought the Committee would be interested in having further detail. It was very helpful to have these thoughts and we are happy to try and set out our thinking more fully for you in response. I apologise for the short delay in getting this to you.

¹⁷ SI 2006/2661.

As you can appreciate, it has been somewhat difficult over the festive period to contact all of the officials with whom we needed to speak to finalise our response, and in one or two cases we do need further discussion with colleagues before we can respond fully.

However, in the interests of being able to provide what details we could in advance of any meeting of the Committee, so as to be as helpful as possible, I set out in this letter such responses as we are able to give at this point.

PUPIL AND PARENT GUARANTEES

You raised questions about the extent to which the new proposed guarantees might contribute to fulfilment of the UK's obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and relate to the Committee's own reports on Economic and Social Rights more generally. The Department is, of course, aware of the Committee's report on the ICESCR in October 2004¹⁸ and of its subsequent consideration of economic and social rights in the context of a proposed Bill of Rights in its 29th Report of the 2007–8 session.¹⁹ The Committee will be familiar already with the Government's response to this latter report, contained in the Memorandum from the Minister of State at the Ministry of Justice, Mr Michael Wills MP.

We have considered these questions in the light of the JCHR's 29th Report and the argument it makes that a Bill of Rights should include economic and social rights—in particular the two rights in relation to education that:

- everyone of compulsory school age has the right to receive free, full-time education suitable to their needs; and
- everyone has the right to have access to further education and to vocational and continuing training.

Subsequent to this report, our colleagues in the Ministry of Justice have published a Green Paper on precisely this issue. This Green Paper *Rights and Responsibilities: developing our constitutional framework*²⁰ suggested ways in which such entitlements might be given constitutional recognition in a Bill of Rights and Responsibilities, and we do not wish to pre-empt the results of the consultation process.

The creation of the Pupil and Parent Guarantees is an example of the way the Government promotes social and economic rights across a range of public services. As with entitlements to healthcare, for example, these are not generally referred to as rights, since they are not generally justiciable in the way in which rights under the ECHR can be enforced by litigation taken by or on behalf of individuals against public authorities (though some of these specific guarantees will be). The Guarantees don't on their own represent a constitutional right to education and, as with similar provisions in the Child Poverty Bill and areas of health policy, they pursue more specific policy goals rather than fulfilling an overarching, constitutional purpose.

HOME-SCHOOL AGREEMENTS

You asked too about the relationship between home-school agreements (HSAs) and school attendance, parenting orders and prosecutions for non-attendance. The short answer is that although parenting contracts and orders under the regime in the Anti-social Behaviour Act 2003 will make further references to the existence of HSAs, there is no direct legal link between these and the school attendance regime under the Education Act 1996. Broadly speaking, the HSA is intended to deal with a range of issues including, but not limited to, behaviour and parental support for learning and it concerns attendance (truancy) to only a limited extent. The school attendance regime (and prosecutions for breaches) is focused only on the attendance of pupils at school. We would expect a home-school agreement to support, but not be the main driver of, a school's attempts to improve the attendance of a child.

A parenting contract (but not an order), in the case of a pupil's truancy, will automatically include references to the HSA and in particular to the parent agreeing to discharge their responsibilities under the agreement. However, as the Department noted in its original submission to the Committee, parenting contracts are voluntary arrangements entered into by parents with schools and there is no element of compulsion involved which could engage Article 8. Likewise, parents are not obliged to sign an HSA, and will not suffer any direct adverse consequences as a result of failing to sign—so Article 8 is not engaged by the mere existence of HSAs either.

The school attendance regime is not intended to 'enforce' HSAs and overlaps in content with only one aspect of the HSA—ensuring that a child attends school. As noted, though, no relevant amendments to the provisions in s. 437 *et seq.* of the Education Act 1996 are made by the Bill and no formal interaction is intended. Clearly, in guidance that will be consulted on in February the Department will set out that it considers that the interrelationship of HSAs and school attendance orders is that the home-school agreement will be one mechanism through which schools draw attendance to the attention of all parents initially and which they can use to agree actions with particular parents if the need arises. More formal action on attendance will continue to be taken through the mechanism of contracts and orders for attendance.

¹⁸ 21st Report of the Joint Committee of Human Rights of the 2003–4 Session (HL 183; HC 1188).

¹⁹ HL Paper 165-I; HC paper 150-I.

²⁰ Cm 7577; Available at www.justice.gov.uk/publications/docs/rights-responsibilities.pdf

PERSONAL, SOCIAL, HEALTH AND ECONOMIC (PSHE) EDUCATION

In relation to this aspect of the Bill, you asked three particular questions:

- (1) Why set the right of withdrawal at 15 and not by reference to *Gillick*²¹ competence? Does this not create a disparity between this provision and children (girls in particular) seeking medical advice?
- (2) Why is requiring schools to assess pupil competence too administratively burdensome if the numbers withdrawing are so small? Can we identify what proportion of pupils withdrawn are girls? Are they disproportionately affected?
- (3) How will these new requirements work for faith schools? Will a version of the guidance be available for the committee to see as the Bill passes?

As we indicated in the original submission to the Committee, the present law, contained in s. 405 Education Act 1996, which potentially leaves a right of withdrawal from sex education to parents in respect of their children until their child's 19th birthday is unsustainable and the Department was clear that this age had to be reduced. The Department also accepts, of course, that in considering this issue the rights of both parents and children are in play, and that it is necessary to achieve an acceptable balance. The Department is also mindful as well, that there are a wide range of sincerely held beliefs in the country as to where the balance between the respective rights of each should be struck.

The Department accepts that the rights of parents and pupils under Article 8 and Article 2 of the First Protocol are potentially engaged. Although there is unlikely to be any conflict between the Article 8 rights of parents and pupils when the child is still young, the Department accepts in principle that there comes a point at which the rights of children of sufficient maturity and understanding would be potentially infringed by the continued existence of a parental right to withdraw them from lessons and that the parental right should cease, so far as possible, before that point.

The Department is of course, conscious that the rights of children themselves must be of paramount concern. Although you raised the issue of *Gillick* capacity and suggested that the point should be drawn by reference to this criterion, the Department does not accept that such a point is, in practice, particularly workable. Whereas it is no doubt convenient and straight-forward for a GP or other medical practitioner to assess the competence of a young patient, and take appropriate action on that assessment, the Department does not consider that schools and teachers will want, or should be given, the responsibility of making such decisions in respect of their pupils. Such a responsibility would also open the school up to what the Department considers to be a significant litigation risk from parents who did not accept the school's assessment of a child's competence, and the Department cannot see that it would be in anyone's interests for there to be such uncertainty, or such risk.

We are mindful that the European court has held on a number of occasions that the State can adopt practical solutions to cases of difficulty. On that basis, we consider that the Bill need not require individualised assessments of capacity, and may adopt instead a broader view of an age at which a child's views should prevail over that of their parents.²² That being the case, the Department considers that setting the statutory age for parental withdrawal to terminate at a child's 15th birthday is a significant and progressive step towards according mature pupils more rights, and for the, to date, small numbers who have been withdrawn by their parents, ensures even the youngest in the an academic year a minimum of one year's sex and relationships (SRE) education before they reach the age of consent.

We consider that such a provision accords primacy to the rights of more mature children in a way which satisfies the Article 8 rights of all parties.

We also consider that it ensures that all pupils have access to some SRE as part of their PSHE studies, whilst ensuring that the views and wishes of parents of younger children are also accorded respect. The Department considers that it therefore satisfies the requirements of Article 2 of the First Protocol for both pupils and parents and does so by reference to a straight-forward and practical criterion (age) for the small numbers concerned.

With reference to the issue of medical treatment and any possible disparity that may arise, the Department takes the view that very different considerations may arise when considering medical treatment for a young person (which may be urgent and essential for their continued health and well-being) and considering access to a statutory curriculum which provides some information and education about long-term health, but which may have no immediate relevance to the individual. The personalised nature of medical consultation and treatment may make it eminently practical, and reasonable, for a child to have early access to information and treatment if needed for that individual. In any event, all competent children will, under these proposals, receive essential SRE education, information, advice and guidance before their sixteenth birthday, whatever the views of their parents may be. Some limited disparity appears inevitable between the two when one is decided by reference to *Gillick* competence, and the other by reference to age. However, the Department has indicated above why it has taken that decision, and that it considers it justifiable. On that basis, any limited disparity would also be justifiable on the same grounds.

²¹ *Gillick –v– West Norfolk and Wisbech AHA* [1985] 3 All ER 402 HL considered in detail more recently in *R (Axon) –v– Secretary of State for Health* [2006] EWHC 37 (Admin).

²² See, for example, *Kjeldsen –v– Denmark (1979–80) 1 EHRR 711*

In our meeting you mentioned the figure for parental withdrawal, quote by OFSTED,²³ of 0.04% (about four in every 10,000 pupils) and we agreed that this was also our best estimate for the numbers of pupils who are currently withdrawn from SRE. OFSTED identified 40 LEAs to represent a national sample. All these LEAs were asked to take part in a survey. As an incentive to take part they were promised a full analysis of their data with national data so they could make comparisons. Each LEA was sent 50 forms for them to distribute to their schools. They collected the forms and forwarded them to OFSTED for analysis. Return rates were very good: never less than 50%. The survey asked a range of questions including details of how and when SRE was taught, who taught it, the number of pupils withdrawn, etc. The data showed a consistent picture across the country with small numbers of parents withdrawing their children from SRE.

The OFSTED report does not contain any gender breakdown, and we understand from OFSTED that the local authority figures upon which they based this estimate also did not contain any gender divisions. At present, therefore we cannot say which sex is more affected by the right of withdrawal or what those percentages might be. We have asked OFSTED to look again at any underlying statistics they may have, and if we receive any further useful information on this we will communicate it to you.

Although we agree that the figure of 0.04% is a very low number, the fact is that it would not be valid to extrapolate from this and assume this to be the same as the numbers that would withdraw from the proposed statutory SRE curriculum in PSHE. The figures are, in any event, merely a best estimate. Even if accurate, parents may not presently feel so inclined to withdraw their children from an SRE programme which is non-statutory and the content of which is determined solely by the school in consultation with parents. If these proposals are implemented it is *possible* though by no means clear, that these figures could rise. Even just a few cases each year could cause a school significant inconvenience, concern and risk.

In relation to faith schools, as I mentioned in the meeting, clause 11 inserts a new section 85B into the Education Act 2002, to provide for PSHE and the principles which apply to the way it is taught. The 'second principle' contained in section 85B(6)(a) would permit PSHE to be taught in a way that is '*appropriate to the ages of the pupils concerned and to their religious and cultural backgrounds...*'. The Department intends that this is wide enough to cover the 'ethos' of a school, without compromising the other principles. There is no direct cross-over with the Equality Bill currently before Parliament, and indeed clause 89(2) of that Bill (largely replicating provisions of the Equality Act 2006) specifically excluded the content of the curriculum from the ambit of the provisions on schools in that Bill.

LICENCE TO PRACTICE

You indicated that you thought the Committee were likely to want further details in relation to the proposed licensing scheme for teachers. Although we accept that there is less detail here than there is in relation to the home-education provisions, the home education registration and monitoring scheme is only intended to be a basic, light-touch scheme in a previously unregulated field. On the other hand, we expect that the licensing scheme will mature and evolve as time passes, in what is already a complex area with a large number of variables. We therefore need to retain the flexibility to deal with this through regulations and to set out the details otherwise than in primary legislation. It is the Department's intention to set out in policy statements at the time of the Bill reaching Committee what our intentions are for the regulatory system, and these will include the grounds for refusing or withdrawing licences.

We will also revert to you at that stage on the remaining queries you raised at our meeting.

HOME EDUCATION

What follows here is largely taken from the ECHR memorandum, with some additional explanation when required. As noted briefly in the Department's original submission, home education is lawful²⁴ and largely unregulated at present. Parents may decide to home-educate from an early age. Where a child has never attended school, parents are not required to inform the local authority or seek approval from it. This is also the case when a child is moving from a nursery to a primary, or primary to secondary school. If a home-educated child is known to one local authority but moves to another area, there is no obligation on the parent to inform either local authority. Local authorities consequently have no clear idea of exactly how many children in their area are being home-educated. The best current estimate by the Department is that there are 20,000 to 80,000 home-educated children in England.

The proposals for a registration and monitoring scheme for home-educated children, will enable local authorities for the first time to identify all home-educated children, ensure that they are receiving a suitable education and are safe and well. The scheme will thereby enhance protection of children's rights not to be denied an education in accordance with Article 2 of the First Protocol (right not to be denied education and for respect for parental religious and philosophical convictions). Monitoring and registration will also enable local authorities to provide better access for these children to facilities that enrich their experience of education, including school libraries, sports facilities and music lessons. Home educators also tell the Department that they want more tailored support for children with special educational needs and we will be looking at how this can be achieved as we take forward our work on the recommendations from Brian Lamb's review of SEN provision.

²³ In their report *Sex and Relationships* (2002) (HMI 433).

²⁴ Section 7 Education Act 1996.

The Department therefore accepts that a registration and monitoring scheme will engage Article 2 of the First Protocol and Article 8 ECHR (private and family life) but contends that it will be compatible with them provided that the scheme is operated in a way that is subject to clear and accessible rules; such that any controls or restrictions are operated in a proportionate manner for the purposes of ensuring the education or welfare of the child; and contains sufficient procedural safeguards.

You raised two particular issues in this context: the extent to which this system enhances the rights of the child who is being home-educated and the grounds on which the power to revoke or refuse registration would be exercised. You also asked about the composition of any independent appeals panel.

The paramount consideration under Article 2 of the First Protocol is the child's fundamental right not to be denied education. The ECHR does not provide an absolute right for parents to home-educate their children in accordance with their own wishes. The cases of *Family H v UK*²⁵ and *Leuffen v Germany*²⁶ make it clear that a State may prevent a parent from home-educating where it reasonably considers that home education would be contrary to the child's wider educational interests. In *Konrad v Germany*²⁷ compulsory attendance at primary school (thereby denying any possibility of home education at all) was held justifiable where the state had carefully reasoned its decision and had good reasons for requiring school attendance. It was accepted by the Court that not only the acquisition of knowledge but also integration into and first experiences of society were important goals in primary education. Other registration schemes similar to that proposed in schedule 1 of the present Bill have been found compatible with Article 2 of the First Protocol.²⁸

The Department considers therefore that requiring registration and monitoring of home education enhances children's rights under Article 2 of the First Protocol, by providing for a consistent method of ensuring all children have access to a suitable education. Secondly, the light-touch regulation scheme presently proposed reflects due respect for the philosophical convictions of parents who wish to educate their children themselves at home, where those convictions do not interfere with a child receiving a suitable education. It should be noted that there is already an existing duty on parents to ensure that their child receives a suitable education²⁹—so there is nothing new, or additional, in this last requirement. The Department will be publishing, before or at Committee, a policy statement about its intentions with respect to the regulations. It will take the opportunity to also set out the Department's current understanding of what constitutes a 'suitable' education, and I say more about that below.

In setting out the requirements of registration and monitoring, a child's own wishes and feelings will, as you have identified, often be relevant. At new section 19E of the 1996 Act (to be inserted by Schedule 1 of the Bill), the purposes of monitoring are set out—and local authorities will be under a duty to ascertain as part of this process, so far as is reasonably practicable, the wishes and feelings of home-educated children about their education and to ascertain whether it would be harmful to the child's welfare for home education to continue. This will ensure that, for the first time, a child's own views will be taken into account. Authorities will be obliged to hold at least one meeting with the child each year (new section 19E(3)(a)), and, where appropriate, local authorities can also seek to interview a child alone (new section 19E(4)), if they deem it necessary (though there is no power to compel this if a parent or the child refuses).

Also of note is the requirement in new section 19F(4) for a local authority to give due consideration to a child's wishes and feelings when deciding whether to revoke registration on the grounds of possible harm to their welfare, or lack of suitability of the education. The Department anticipates that children's wishes and feelings will permeate the entire registration and monitoring scheme because of their clear relevance to the issues of welfare and suitability. For example, where a local authority has doubts about the suitability of education received but the child is very clear that they want to be educated at home, a local authority is likely initially to focus on offering support to the family with a view to improving the quality of learning.

The Department therefore maintains that the proposed system not only enhances children's rights under Article 2 of the First Protocol, but in doing so, also makes consultation with the child an important part of the process.

The Department accepts too that requiring parents to register home education clearly engages Article 8, but the Department considers that any interference with this right is necessary in the interests of the protection of health, and the protection of the rights of others, as the local authority will need to have accurate information to monitor the suitability of a child's home education and the child's welfare. The information required of parents at registration will be quite basic and include a statement of prescribed information about the prospective education. It will therefore be proportionate to the aim of monitoring such children.

Where a local authority refuses to register a child on their home education register or revokes registration, Article 8 is engaged. The new provisions will give an authority discretion to refuse to register a child only in specific circumstances. The Department intends to specify in regulations what matters should or should

²⁵ Application no 10233/83.

²⁶ Application no 19844/92.

²⁷ Application No 35504/03.

²⁸ *BN and SN –v– Sweden* Application No. 17678/91.

²⁹ Also contained in section 7 Education Act 1996.

not be taken into account by local authorities in exercising the discretion to refuse registration, and any regulations will, themselves, have to be Article 8—compliant. As noted above, we will deal with this in outline in our policy statement.

There will also be various grounds for revocation of registration all of which will be on the face of the legislation. The Department also intends to use regulations to specify what matters should or should not be taken into account by local authorities in exercising the power to revoke.

The Department will set out a clear regulatory framework for relevant procedural steps for revocation or refusal of registration—such as notifying parents of specified matters, prescribed periods for responses, what evidence might be needed etc. In relation to grounds of refusal of registration/revocation there will be a proportionality balance that will need to be carried out by the local authority. It is, though entirely necessary and justifiable, to satisfy both Article 8 (and as stated, article 2 of the First Protocol) that there will be some circumstances when a local authority may wish to say that a child should not be home-educated.

As the Bill also provides for the monitoring of the scheme to include an annual meeting not only with the child, but also with the parent(s) and with any educator (if different), these provisions will also engage Article 8. Again, however, the Department regards these as an essential adjunct to the requirement to monitor suitability, and determining whether it would be harmful for the child's welfare for the home education to continue. Again, these are proportionate to the aim of protecting health and the rights of others.

The Department intends to commission work in the early part of this year aimed at defining more clearly what 'suitable' education is, and to include this into any statutory guidance. In commissioning the review, we have assured home educators that they will not be required to follow the National Curriculum or the Early years Foundation State nor take any tests or require their children to be entered for any public examinations. They will also not have to observe school hours, days or holidays. The review will build on existing case law which refers to preparing children for life primarily in their own community while not preventing them from pursuing a different form of life if that is what they choose, as adults. This means that home educators will continue to have a wide discretion to decide their own educational approach. The review will be asked to take into account the wide diversity of approaches that home educators currently take. It will also be asked to take into account the view of the Children, Schools and Families Select Committee which said that the definition of 'suitable' must enable local authority officers to tackle situations where it appears to the authority that a child has no prospect of gaining basic literacy and numeracy skills or where there is no breadth of education. Parents and local authorities are both required to make a judgement about the suitability of a child's education and the Department believes it is in the interests of both parties to have a shared understanding of what this is.

In relation to appeals against refusal or revocation of registration, you asked for some further thoughts on the constitution of the independent panel who will consider appeals against local authority decisions. As we indicated at the meeting, the appeal process will be set out in regulations and we intend at present that appeals be considered by a panel independent of the original decision maker. We intend to provide for an oral hearing, where appropriate, and for provision about representation for parents or children before the panel. We anticipate that local authority's exercising good practice will want to have a review process in place which parents can use initially before having to appeal and we will set out this expectation in guidance. Clearly, parents would also have the right to seek judicial review of any panel decision and, if they considered that there was maladministration, could complain to the local government ombudsman.

As we indicated to you in the meeting, and in the original memorandum, the Department does not consider that refusal or revocation of registration engages Article 6, as we do not accept that such a decision is determinative of a parent or child's civil rights. The decision only determines whether a child must attend school or whether they can be educated outside school. We also do not accept that such a decision would affect the reputation of the family either, even if welfare grounds were invoked, sufficient to engage Article 6. In *R (B) – v – Alperton Community School*³⁰ a similar argument that exclusion proceedings engaged the reputation of the family so as to amount to an infringement of Article 8 was rejected by the High Court because the proceedings before the Independent Appeal panel were not directly determinative of the pupil's reputation and the procedure followed recognised the risk of reputational damage in any event.

The Department accepts that the decision to refuse or revoke registration will engage Article 8 and will therefore require justification under Article 8(2); but the Department asserts that this is proportionate to the aim of ensuring both the health and safety of the child and that he or she is not being denied education.

³⁰ [2001] EWHC 229.

Monitoring and the light-touch regulatory provisions which accompany it (including ascertaining the wishes and feelings of the child themselves) is also justified and proportionate to make the registration scheme effective.

FAMILY COURTS PROVISIONS

We will also revert to you in relation to these at a later date.

CONCLUSION

I very much hope that these comments and further thoughts are helpful. We look forward to hearing from the committee and assisting with any further queries they may have.

Letter to the Chair of the Committee from the Rt Hon Jack Straw MP, Secretary of State for Justice, dated 26 January 2010

CONSTITUTIONAL REFORM AND GOVERNANCE BILL: AMENDMENTS FOR COMMITTEE STAGE TO IMPLEMENT CERTAIN RECOMMENDATIONS OF THE COMMITTEE ON STANDARDS IN PUBLIC LIFE'S REPORT ON MP'S EXPENSES AND ALLOWANCES

Following the written statement by the Leader of the House on 10 December, I have today tabled Government amendments to the Constitutional Reform and Governance Bill to implement ten of the recommendations of the Kelly report on MP's expenses and allowances. I am satisfied that the provisions are compatible with the Convention rights. The attached memorandum details our assessment of the human rights issues arising from the amendments.

Annex

ECHR MEMORANDUM: AMENDMENTS TO THE CONSTITUTIONAL REFORM AND GOVERNANCE BILL WHICH IMPLEMENT THE REPORT OF THE COMMITTEE ON STANDARDS IN PUBLIC LIFE

1. This Memorandum addresses human rights issues arising in relation to provisions which implement the report of the Committee on Standards in Public Life ("CSPL") on MPs' expenses, the committee chaired by Sir Christopher Kelly ("the Kelly report").³¹ The provisions are to be inserted into the Constitutional Reform and Governance Bill by amendment ("CRAG").

INTRODUCTION AND BACKGROUND

2. Last year, in response to the MPs' expenses scandal, Parliament passed the Parliamentary Standards Act 2009 ("the 2009 Act") to an accelerated timetable. That Act:

- (a) establishes the Independent Parliamentary Standards Authority ("the IPSA") to:
 - (i) administer MPs' pay;
 - (ii) prepare and administer an MPs' allowances scheme;
 - (iii) prepare and administer an MPs' code of conduct relating to financial interests ("the financial code");
- (b) establishes an independent office holder, the Commissioner for Parliamentary Investigations ("the Commissioner"), to investigate breaches of the MPs' allowances scheme and the financial code and refer findings to the House of Commons Committee on Standards and Privileges for the House to decide whether to take disciplinary action;
- (c) establishes the Speaker's Committee for the IPSA, made up of MPs, which agrees selections of members of the IPSA and the Commissioner and has a role in the financial accountability of the IPSA;
- (d) creates an offence for an MP who provides information which that MP knows to be false or misleading for an allowances claim;
- (e) makes provision about the transfer of further functions to the IPSA or Commissioner;
- (f) provides a sunset clause which would result in provisions of the 2009 Act which relate to the Commissioner and financial code expiring (subject to a power to extend) two years after the commencement of the financial code provisions.

³¹ Committee on Standards in Public Life, *MPs' expenses and allowances: Supporting Parliament, safeguarding the taxpayer* (12th report 2009) Cm 7724.

3. The Kelly report was published on 4 November 2009. It contains 60 recommendations. Many of these recommendations relate to the type of allowances scheme that should be established by the IPSA and which are within the existing powers of the IPSA. However, there are other recommendations which could not be implemented without primary legislation which the provisions, described below, address.

THE PROVISIONS

4. The amendments make provision concerning the following:

- (a) Amendments 01 and 16: The independent Commissioner would be replaced by a Compliance Officer appointed by the IPSA through a process of fair and open competition. The powers of the Compliance Officer to investigate complaints would be similar to those presently vested in the Commissioner.
- (b) Amendment 2: The Speaker's Committee on the IPSA would include three lay, voting members drawn from outside Parliament.
- (c) Amendment 3: The general duties of the IPSA are enhanced in several ways, in particular to enhance transparency of the new system. Specifically:
 - (i) The IPSA would be given a duty to support MPs to carry out their parliamentary duties in an efficient, cost effective and transparent way.
 - (ii) The IPSA would be required to give reasons for adopting an allowances scheme.
 - (iii) The IPSA would be required to publish claims for allowances made and allowances paid, with such details as it considers appropriate.
- (d) Amendment 4: The IPSA is given the power to set, as well as to administer, the MPs' pay system, after consulting the Review Body on Senior Salaries and others.
- (e) Amendment 5: A power is provided so that the IPSA is able to give effect to exercises of the disciplinary power of the House of Commons in relation to allowances (including resettlement grant). Under the 2009 Act, this power exists only in relation to salaries (see section 4 of the 2009 Act). This would enable the IPSA, for example, to reduce or remove an allowance payable for future breaches of the House of Commons conduct rules.
- (f) Amendment 7: The provisions of the 2009 Act in relation to the financial code will be repealed.
- (g) Amendment 6, 8 and 17: The Compliance Officer would be given the power to impose sanctions, namely a civil penalty, as well as requiring the restitution of wrongly paid allowances. Repayments, monetary penalties and costs would also be made recoverable through the county court. The Government would provide a route of appeal from decisions of the Compliance Officer to the First-tier Tribunal. The MP or Compliance Officer can appeal from a decision of the First-tier Tribunal to the Upper Tribunal on any point of law with permission, pursuant to section 11 of Tribunals, Courts and Enforcement Act 2007 ("TCEA"). There is then a right of appeal to the Court of Appeal with permission on a point of law pursuant to section 13 of the TCEA. There is also the possibility of an appeal to the Supreme Court.
- (h) Amendment 12: The sunset clause would be repealed.
 - (i) Amendment 19: The IPSA is given the power to make a scheme about the administration of the Parliamentary Contributory Pension Fund and to make provision about MPs' pensions in a MPs' pensions scheme. The Minister for the Civil Service is given the power to make a scheme making provision about Ministers' etc pensions in a Ministers' etc pension scheme.

5. The amendments would also provide for the possibility of a protocol between the IPSA and the new Compliance Officer and other enforcement bodies, including the non-statutory Parliamentary Commissioner for Standards and prosecuting authorities (see amendment 10). There are also minor and consequential amendments—see amendment 11 (repeal of section 11 of the 2009 Act) and amendments 13 and 18 (consequential amendments).

ECHR ISSUES

6. In outline, the key human rights issues in respect of the above amendments are as follows:

- (a) whether the enforcement powers of the Compliance Officer (contained in amendments 6, 8 and 17) give rise to issues under Article 6 ECHR and Article 1 of the First Protocol;
- (b) whether the IPSA's powers to give effect to the exercises of the disciplinary powers of the House in relation to the MPs' allowances scheme and pay (contained in amendment 4 and 5) are compatible with Article 6 and Article 1 of the First Protocol;
- (c) whether the provision (contained in amendment 4) that no payment of salary is to be made before an MP has taken the oath required by the Parliamentary Oaths Act 1866 (or the corresponding affirmation) is compatible with Article 1 of the First Protocol;

- (d) whether the duty on the IPSA to publish such information as it considers appropriate in respect of each claim for an allowance and each payment (contained in draft amendment 3) are compatible with Article 8 ECHR; and
- (e) whether the provisions in relation to the making of pensions schemes (contained in amendment 19) are compatible with Article 1 of the First Protocol.

7. We address each of these issues below.

ECHR COMPATIBILITY

(a) *Compliance Officer and enforcement*

8. Article 6 provides that where there is a determination of a civil right/obligation, or a criminal charge, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Importantly, that right: (a) contains certain procedural guarantees concerning the determination of civil rights or obligations; and (b) guarantees a right of access to court for such determinations.

9. Article 1 of the First Protocol provides that no one is to be deprived of his or her possessions except in the public interest and subject to conditions provided by law.

10. As stated above, the Compliance Officer would be given the power to impose sanctions, namely a civil penalty, as well as requiring the restitution of wrongly paid allowances. Repayments, monetary penalties and costs would also be made recoverable through the county court. These functions may give rise to issues under Article 6 and Article 1 of the First Protocol, which we detail below. The Compliance Officer's investigation powers may give rise to issues under Article 8 which are also discussed below.

Repayment Direction and Enforcement

11. The enforcement powers of the Compliance Officer give rise to issues under Article 6 ECHR. This is because the making of a direction to repay overpayments ("a repayment direction") under new Schedule 4 may amount to the determination of a civil right or obligation. Such a repayment direction would require an MP to repay overpayments, interest on those overpayments and costs incurred by the IPSA or Compliance Officer in relation to the overpayment. A repayment direction would require the repayments by a certain time. The main way of enforcing a direction would be to recover the amount against future payments of allowances and salaries. However, they would also be recoverable through the county court.

12. Arguably, a repayment direction under the new Schedule 4 does not amount to a determination of a civil right or obligation for Article 6 purposes. This is because there is clear authority to the effect that disciplinary functions in relation to members of Parliament do not engage Article 6 because of the public law nature inherent in being a member of Parliament. For example, the Strasbourg court has held that Article 6 is not engaged in cases where members of Parliament were automatically disqualified after being found bankrupt and removed for exceeding the level of elections expenses (albeit in the latter case after a court finding to that effect).³² An earlier case decided that there is authority that the right to participate in a legislative chamber (in that particular case the House of Lords) "falls into the sphere of 'public law' rights outside the scope of Article 6."³³

13. The question is how far these authorities apply in the case of what is essentially a repayment, rather than disciplinary scheme. In the context of other obligations to make payments to the state (for example, obligations under tax legislation), the Strasbourg court has held that the fact that a dispute is pecuniary is not sufficient to show that there is a determination of a civil right or obligation. The question is whether the private law features predominate over the public law features.³⁴

14. In this case, there are arguments that the pecuniary interest involved in making a repayment here is so closely related to each MP's responsibilities as an MP that the interests affected here are public in nature. On the other hand, there are weaknesses with this argument because the features of the allowances scheme are likely to have the features of other expenses schemes in private employment. It may be thought that the pecuniary interest affected is analogous to pecuniary interests affected in a private law context. Nevertheless, there are arguments that the public nature of these matters means that Article 6 is not engaged.

³² See also *Tapie v France* Application No. 32258/96 (a Commission decision that an application by a former Member of Parliament who was automatically disqualified from elected office for five years after becoming insolvent was inadmissible) and *Estrosi v France* Application No. 24359/94; *Pierre-Bloch v France* (1997) p 16 (two cases in which the candidate declared elected was removed by the Conseil Constitutionnel for exceeding the maximum level of elections expenses).

³³ *X v United Kingdom* (1978) Application No. 8208/78.

³⁴ See *Schouten v Netherlands* (1994) 19 EHRR 432; and see *Pierre-Bloch v France* (1997) p 17.

15. Even if a court were to find that a repayment direction did determine civil rights or obligations, there are a range of safeguards to ensure that the process behind the repayment direction is compatible with Article 6. In particular:

- (a) The Compliance Officer will be independent and impartial. In particular, the Compliance Officer is appointed by the IPSA on the basis of fair and open competition and is independent of the executive. A person appointed to this position is appointed for a fixed term of five years, after which a person appointed to this role may not be re-appointed. Furthermore, the person appointed can only be removed during the fixed term on very limited grounds, for example because they are declared bankrupt or unfit to carry out the functions of their office. These safeguards ensure that the role of Compliance Officer is independent and impartial for Article 6 purposes.
- (b) A repayment direction will only be made after the investigation process by the Compliance Officer set out in amendment 8. As part of that process, the MP would be given an opportunity to make representations as part of the investigation. The MP would also be given an opportunity to make further representations about the Compliance Officer's provisional findings.
- (c) A decision by the Compliance Officer to impose a repayment direction would be subject to appeal to the First-tier Tribunal. The MP would also be able to appeal against the imposition of interest or costs. That appeal would be by way of a full rehearing. Repayments, interest and costs would not be recoverable until the appeal proceedings were completed. These appeal rights are sufficient to ensure that the provisions are compatible with Article 6 by providing a right of appeal which stands free of any additional right to seek judicial review. This ensures that matters which may involve the determination of a civil right or obligation are decided by an independent and impartial tribunal which has "full jurisdiction" to rehear all issues of law and fact.
- (d) An MP may also apply to the Compliance Officer to extend the period in which a repayment should be made. An MP may also appeal to the First-tier Tribunal in respect of the Compliance Officer's decision not to extend the repayment period.
- (e) The IPSA would be required to set out other procedures in relation to investigations by the Compliance Officer and complaints to the Compliance Officer and set guidance about the imposition of costs as part of a repayment direction. In doing so, the IPSA, a public authority for the purpose of section 6 of the Human Rights Act 1998, would be required to act compatibly with the Convention rights.
- (f) The Compliance Officer will also be a public authority and required to act compatibly with the Convention rights.

16. Accordingly, we consider that the provisions relating to repayment directions and their enforcement are compatible with Article 6.

Imposition of a Monetary Penalty

17. Part 2 of new Schedule 4 would provide the Compliance Officer with powers to impose a monetary penalty. The Compliance Officer would be able to impose a penalty: (a) where the Compliance Officer has made a finding that an MP has without reasonable excuse failed to comply with a request for information; and (b) where the MP has without reasonable excuse failed to comply with a repayment direction. The penalty is limited to £1,000. As with the repayment direction, the penalty would be recoverable against future payments of pay or allowances, but would also be recoverable through the county court.

18. We consider that it is likely that the powers to impose a penalty will engage the civil limb of Article 6 ECHR as being the determination of a civil right or obligation. However, we consider that there are tenable arguments that the monetary penalty regime would not engage the criminal limb of Article 6. The test for whether there is a determination of a criminal charge is whether an act is classified as criminal for the purpose of domestic law; the nature of the offence; and the seriousness of the penalty, *Engel v Netherlands* (1976) 1 EHRR 647. Here, the penalty is of a civil nature in domestic law and it is imposed for failure to comply with the requirements of the Compliance Officer which are in the nature of sanctions for administrative wrongdoing rather than having the characteristics of criminal misconduct. The penalty is also designed to ensure compliance with the scheme rather than being of a punitive nature. In addition, the penalty is capped at £1,000. There is no direct connection between the circumstances in which a penalty is imposed and the criminal offence provision in section 10 of the 2009 Act (offence of providing false or misleading information for allowances claims).

19. The following safeguards are available concerning the imposition of a penalty:

- (a) A penalty will only be imposed after a finding that the MP has failed to provide information to the Compliance Officer or after a failure to comply with a repayment direction. Both circumstances will only arise after there has been an investigation by the Compliance Officer in relation to whether an MP has been overpaid, as set out in substituted section 9. The MP will have the opportunity to make representations during that process.
- (b) The Compliance Officer would be required to provide a penalty notice setting out information about the penalty imposed.

- (c) As with the making of a repayment direction, the MP would have a right of appeal to the First-tier Tribunal against the imposition of a penalty. That appeal would be by way of a full rehearing; the First-tier Tribunal would therefore have “full jurisdiction” to rehear all issues of law and fact. The penalty would not be recoverable while an appeal against the penalty is on foot.
- (d) The IPSA would be required to prepare guidance about the imposition of penalties. In doing so, the IPSA would be required to act compatibly with the Convention rights.
- (e) As noted above, the Compliance Officer will be required to act compatibly with the Convention rights.
- (f) The Compliance Officer would be able to review a decision to impose a penalty and would be able to cancel or reduce the amount of the penalty.

20. Even were the criminal limb of Article 6 engaged, we consider that this would be at the less serious spectrum of what constitutes a “criminal charge”. Strasbourg authority suggests where an “offence” is a lesser criminal charge, fewer safeguards may be needed to secure Article 6 compliance.³⁵ We are therefore confident that the safeguards outlined above, and in particular the right of access to the First-tier Tribunal, would be adequate.

21. Accordingly, we consider that the monetary penalty provisions are compatible with Article 6.

22. Article 1 of the First Protocol may also be engaged by the repayment direction and the imposition of a monetary penalty, given that these will involve the interference with an MP’s pecuniary interests. However, we consider that any interference is clearly justified given the public interest in MPs not being overpaid allowances, there being appropriate sanctions to enforce such a principle and given the safeguards that surround any interference with the pecuniary interest.

23. Accordingly, we consider that the monetary penalty provisions are compatible with Article 1 of the First Protocol.

Investigation powers and Article 8

24. As noted above, the investigation powers of the Compliance Officer are very similar to the investigation powers of the Commissioner under the 2009 Act. In particular, the amendments replicate the power of the Compliance Officer/Commissioner reasonably to require information of MPs—see section 9(3) of the 2009 Act and the substituted section 9(3) contained in amendment 8. This is likely to engage Article 8.

25. Article 8 is intended to protect individuals from arbitrary interference in their private and family life, home and correspondence. To be permissible, any interference with this right must pursue one of the legitimate aims laid down in Article 8(2), such as the prevention of disorder and crime, and must be “necessary in a democratic society”, that is proportionate to the aim pursued.

26. We are confident that the power of the Compliance Officer reasonably to require MPs to provide information in respect of his or her allowances is compatible with Article 8. This is because a request for such information is justified as being necessary in the public interests of the prevention of disorder or crime. It would be impossible for the Compliance Officer to conduct investigations and enforce the new system without such powers. Moreover, the requirement that the request for information must be reasonable means that the power can be exercised compatibly. The Joint Committee on Human Rights made no objection to the equivalent power reasonably to require information during the passage of the Parliamentary Standards Bill.

27. Accordingly, we consider that this provision is compatible with Article 8.

(b) *Provisions to enable the IPSA to give effect to exercises of the disciplinary powers of the House in relation to the MPs’ allowances scheme and pay*

28. Because the present system of MPs’ allowances is based on resolutions of the House of Commons, it is possible for the Commons to withhold those allowances by resolution. This provision would enable the IPSA to respond to any such disciplinary measures imposed by the House of Commons.

29. Although it may be argued that this proposal gives rise to Convention rights issues in relation to Article 6, we consider that there are arguments to suggest that Article 6 may not be engaged at all by this provision. As outlined above, there is clear authority that the exercise of certain disciplinary functions in relation to members of Parliament does not engage Article 6 because of the public law nature inherent in being a member of Parliament. Case law supports an argument that conduct and discipline concerning a member of a legislature is a matter of public law rather than private law rights. The Strasbourg court has shown reluctance to consider internal disciplinary functions as engaging Article 6, unless the outcome of the disciplinary proceedings is decisive of the individual’s right to practice his or her profession.³⁶

³⁵ See for example *Duhs v Sweden* (No. 12995/87), where a parking offence was imposed before a hearing. Even though this was a criminal charge for Article 6 purposes, the imposition of a penalty before a hearing was not a breach of Article 6 because the offence was minor and the fine was repayable if the applicant’s objection succeeded.

³⁶ *Demicoli v Malta* (1992) 14 EHRR 47, §33. See also *Tapie v France* Application No. 32258/96; *Estrosi v France* Application No. 24359/94 and *Pierre-Bloch v France* (1997) p 16.

30. Even assuming that there is a determination of a civil right and thus Article 6 is engaged, we consider this provision is compatible with that Article. This is because this amendment merely provides a mechanism through which the disciplinary sanctions of the House may be operated. Accordingly, the compatibility of this amendment would be determined by the existing conduct and discipline mechanisms in place for the House of Commons. In this respect, there are safeguards concerning the way in which the House operates. Furthermore, the current conduct procedures in the House of Commons were designed with an understanding of the potential Article 6 issues involved in conduct and discipline matters for members.³⁷ This suggests that those functions and any implementation by IPSA of sanctions would be exercisable in a compatible way. We also note that the Joint Committee on Human Rights has recently observed that the procedures adopted by the House of Lords in its code of conduct satisfy the common law requirements of fairness.³⁸ We consider that the Commons procedures are comparable to those in the Lords, and in some respects superior, for example, in having the Parliamentary Commissioner of Standards as an independent investigator of standards issues.

31. Accordingly, assuming that Article 6 is engaged by this amendment, we consider that the provision is compatible with Article 6 ECHR.

32. This amendment may also give rise to issues concerning Article 1 of the First Protocol. This is because the functions of the IPSA may affect certain propriety interests of MPs. For example, withholding an allowance payment may affect the way in which an MP enjoys pecuniary interests under the allowances scheme or in relation to their salaries.

33. However, we consider that any interference with rights contained in Article 1 of the First Protocol would be justified as being in accordance with the law and in the public interest. This is because it is manifestly in the public interest for the House of Commons to continue to have meaningful sanctions powers in relation to MPs. In any event, the sanction functions of the House of Commons are discretionary and are capable of being exercised compatibly.

(c) *Payment of an MP's salary dependent on taking the oath*

34. Amendment 4 contains provision that an MP's salary is to be withheld until they have made and subscribed the oath required by the Parliamentary Oaths Act 1866 (or the corresponding affirmation). This is the oath of allegiance. This provision may give rise to issues concerning Article 1 of the First Protocol as the withholding of salary may affect the way in which an MP enjoys pecuniary interests in relation to their salaries.

35. By long custom, going back to a Speaker's ruling in 1924, any MP who has not made and subscribed the oath (or corresponding affirmation) is not entitled to receive a salary. The requirement to take the oath is found in section 1 of the Parliamentary Oaths Act 1866 and not amendment 4 itself. The requirement to take the oath, along with the Speaker's Statement in 1997 that MPs who had not taken the oath would not be entitled to the other services available to all other MPs from the House, has previously been subject to challenge on the basis that Articles 9, 10 and 13 of the Convention were infringed. The arguments were rejected by the European Court of Human Rights.³⁹

36. We consider that any interference with rights contained in Article 1 of the First Protocol would be justified as being in accordance with the law and in the public interest. As the European Court of Human Rights has previously held; "the requirement that elected representatives to the House of Commons take an oath of allegiance to the reigning monarch can be reasonably viewed as an affirmation of loyalty to the constitutional principles which support the workings of representative democracy. In the Court's view it must be open to a member State to attach such a condition, which is an integral part of its constitutional order, to membership of Parliament and to make access to the institution's facilities dependent on compliance with the condition".⁴⁰ We thus consider that provision that no payment of salary is to be made to an MP before they have made and subscribed the oath (or corresponding affirmation) would be in the public interest.

(d) *The duty on the IPSA to publish such information as it considers appropriate in respect of each claim for an allowance and each payment*

37. As stated above, Article 8 is intended to protect individuals from arbitrary interference in their private and family life, home and correspondence. To be permissible, any interference with this right must pursue one of the legitimate aims laid down in Article 8(2), such as the prevention of disorder and crime, and must be "necessary in a democratic society", that is proportionate to the aim pursued. It is well established that personal information is protected as part of an individual's private life and that the release of such information without the individual's consent will engage Article 8.

³⁷ See the report of the Joint Committee on Parliamentary Privilege (1998-99) §284.

³⁸ See the Joint Committee on Human Rights, *Legislative Scrutiny: Constitutional Reform and Governance Bill* (4th Report of 2009-10) HL Paper 33; HC 249 §1.72.

³⁹ See *McGuinness v United Kingdom* (1999) ECHR No 39511/98

⁴⁰ *Ibid*

38. The duty on the IPSA to publish such information as it considers appropriate in respect of each claim for an allowance and each payment may engage Article 8 ECHR. This is because those duties are likely to require the IPSA to publish personal information concerning MPs.

39. However, we are satisfied that the requirement to publish information in respect of claims for an allowance and each payment is compatible with Article 8. This is because the publication of such information is justified as being necessary in the interests of the prevention of disorder or crime. In turn, this is because we consider that having a transparent system is a crucial part of ensuring that MPs and the IPSA comply with the rules for the new system.

40. Furthermore, the requirement to disclose information is also proportionate to the aim of preventing disorder and crime. This is because the duty on the IPSA to publish only extends to publishing some information about each claim and each payment. This gives the IPSA areas of discretion about what to publish and the way in which the information is published. The IPSA can therefore decide not to publish highly sensitive information in respect of a claim. This therefore means that the power can be exercised compatibly.

(e) Powers to make MPs' and Ministers' etc pension schemes

41. It is likely that Article 1 of the First Protocol is engaged in relation to the provisions dealing with pension schemes for MPs and Ministers etc (amendment 19). However, we do not consider that there is any interference with these rights. The new provisions are based on the existing provisions of the Parliamentary and other Pensions Act 1987 which currently deal with pension schemes for MPs and Ministers etc. In particular, section 2(6) of the 1987 Act currently provides the circumstances in which accrued rights, as defined in section 2(10) of the 1987 Act, may be adversely affected. These provisions, and the definition of accrued rights in section 2(10) of the 1987 Act, is replicated in amendment 19.

42. The other powers given to IPSA and the Minister for the Civil Service to make pension schemes in relation to MPs, Ministers and other office holders largely replicate those powers found in the 1987 Act and we consider that these are capable of being exercised compatibly.

25 January 2010

Letter from the Rt Hon Michael Wills MP, Minister of State, Ministry of Justice, dated 2 February 2010

**CONSTITUTIONAL REFORM AND GOVERNANCE BILL: AMENDMENTS FOR
COMMITTEE STAGE TO MAKE PROVISION FOR A REFERENDUM ON THE VOTING
SYSTEM FOR PARLIAMENTARY ELECTIONS**

Following the statement by the Prime Minister earlier today, I have today tabled Government amendments to the Constitutional Reform and Governance Bill to provide for a referendum to be held on the alternative vote system for Parliamentary elections. I am satisfied that the provisions are compatible with the Convention rights. The attached memorandum details our assessment of the human rights issues arising from the amendments.

Annex

**AMENDMENTS TO THE CONSTITUTIONAL REFORM AND GOVERNANCE BILL TO MAKE
PROVISION FOR A REFERENDUM ON THE VOTING SYSTEM FOR PARLIAMENTARY
ELECTIONS**

1. This Memorandum addresses human rights issues arising in relation to amendments to the Constitutional Reform and Governance Bill ("CRAG") which make provision for a referendum on the voting system for parliamentary elections to take place no later than 31 October 2011.

INTRODUCTION AND BACKGROUND

2. Part 7 of the Political Parties, Elections and Referendums Act 2000 ("the 2000 Act") provides a general framework regulating the conduct and operation of major aspects of any referendum held throughout the United Kingdom. The matters covered by the 2000 Act include scrutiny by the Electoral Commission of the referendum question, setting spending and donations controls for those participating in the campaign, and providing for the designation of official "yes" and "no" campaigns. However, as the 2000 Act does not provide a means of creating new obligations to hold referendums or for setting referendum dates or questions, any proposal to hold a referendum on any given matter requires separate primary legislation.

3. Against that backdrop, the amendments to CRAG provide that a referendum must be held by 31 October 2011 on the voting system for elections to the House of Commons (amendment 3). The amendments require the Secretary of State to bring forward secondary legislation to set the actual date of the poll and the question to be posed in the referendum, although firm parameters are established for the question. In particular, the amendments provide that the question must ask voters whether they would prefer a specific form of “alternative-vote system” (as defined in the amendments) instead of the existing first past the post system.

4. The amendments contain other primary legislative provision necessary to hold the referendum. They:

- set the franchise for the poll as the franchise for Parliamentary elections, with the addition of members of the House of Lords (amendment 4);
- provide that the “referendum period”—the period during which spending before a referendum is regulated and during which the Electoral Commission appoint the official “yes” and “no” campaigns—will begin on the date on which the order setting the date for the poll is made. However, where the order is made more than six months before the date of the poll the “referendum period” will only commence six months from the polling date (amendment 5);
- provide that the Electoral Commission must provide public information about the referendum and how to vote in it, and that the Commission may also provide information about the two voting systems to voters if it believes additional information is required (amendment 6);
- provide for the costs of the poll to be paid for from the Consolidated Fund, and make provision specifying how payments will be made to the “counting officers” who will be responsible for the local administration of the poll (amendments 7 and 8);
- provide that any legal challenge to the referendum result must be brought by judicial review, and that any such challenge must be lodged within 6 weeks of the outcome of the poll (amendment 9); and
- make minor amendments to the 2000 Act in order to strengthen the regulation of those individuals or organisations that incur significant expenditure during the referendum campaign (amendments 10 and 11).

ECHR ISSUES

5. In outline, the two human rights issues that could be said to arise in respect of the above amendments are:

- (a) whether the franchise for the referendum, which is based on the franchise for parliamentary elections, gives rise to an issue under Article 3 of Protocol 1 ECHR; and
- (b) whether the time limit on legal challenges to the referendum result gives rise to an issue under Article 6 ECHR.

6. In our view, neither of these matters creates a concern about the compatibility of the amendments with Convention Rights. Our reasoning is given below.

ECHR COMPATIBILITY

(a) *Franchise for the referendum (amendment 4)*

7. As mentioned above, amendment 4 provides that the franchise for the referendum includes all those entitled to vote in parliamentary elections, as well as peers who are currently disqualified from voting in parliamentary elections but who are eligible to vote in local government and European parliamentary elections.

8. The amendment has been drafted so that the franchise for the referendum is defined by reference to the franchise for parliamentary elections. One effect of this is that those prisoners who are currently disqualified from voting in parliamentary elections by virtue of section 3 of the Representation of the People Act 1983 will also be unable to vote in the referendum. In light of the decision in *Hirst v UK (No 2)* (application 74025/01), we have considered whether this raises an issue in terms of Article 3 of Protocol 1 ECHR, which includes the right to vote in elections for the legislature. Case law establishes, however, that referendums do not fall within the scope of Article 3 of Protocol 1 because they are not “elections concerning the choice of the legislature” and, accordingly, that no right to participate in a referendum is derived from that Article (*X v UK* (application 7096/75), *Castelli v Italy* (applications 35790/97 and 38438/97), *Bader v Austria* (application 26633/95) and *Nurminen v Finland* (application 27881/95)).

9. It follows that we consider that the provision made in respect of the franchise for the referendum in amendment 4 does not engage Article 3 of Protocol 1 and that no issue of incompatibility with the ECHR arises in respect of either section 3 of the Representation of the People Act 1983 or any other ground of disqualification or exclusion from the franchise.

(b) *Time limit on legal challenges (amendment 9)*

10. Amendment 9 provides that any proceedings questioning the number of ballot papers counted or votes cast in the referendum must be brought by way of judicial review and that the proceedings must be commenced within six weeks of the certification of the result. We have considered whether the time limit on bringing legal challenges imposed in amendment 9 is compatible with Article 6(1) ECHR, which includes the right of access to a court.

11. To the extent that the limitation period imposed in amendment 9 constitutes a restriction on access to a court so as to engage Article 6(1), we consider that it is compatible with Convention Rights. Where an apparent restriction engages Article 6(1), it will be compatible with the right protected by that Article if it is justified and proportionate in the pursuit of a legitimate aim (*Ashingdane v UK* (application 8225/78)). We consider that the limitation period imposed in amendment 9 pursues a legitimate aim, namely to ensure that challenges to the referendum result can be brought but to avoid prolonged uncertainty about the outcome. In our view the six week time limit is proportionate to this aim; while it is a shorter time limit that would otherwise apply in respect of judicial review applications, it is considered that the circumstances likely to give rise to a challenge are likely to be known (or capable of being known) shortly after the certification of the result and the six week period therefore allows a reasonable time for any person to bring a challenge. In this regard, we note that a shorter period of three weeks is generally applicable in respect of challenges to election results (brought by way of an election petition and heard by a specially constituted election court rather than by judicial review).

12. Further, legal challenges other than those specifically mentioned in amendment 9 will not be subject to any particular restriction and will therefore be subject to the standard rules which govern the time for bringing judicial review challenges. The types of challenges that would not be covered by the time limit in the amendment would include, for example, those brought on the basis of procedural irregularities that do not call into question the accuracy of the result (such as allegations that polling stations in some areas did not open) or challenges to the way the referendum campaign was carried out (such as allegations that financial limits in Schedule 14 to the 2000 Act were exceeded).

13. It follows that we consider that the provision made in respect of restricting certain types of legal challenges in amendment 9 is justified and proportionate by reference to a legitimate aim and that no issue of incompatibility with the ECHR arises.

**Letter to the Chair of the Committee from Stan Davidson, Chairperson,
Barnet 55+ Forum, dated 21 August 2009**

FINAL STAGES OF THE EQUALITY BILL CURRENTLY IN THE HOUSE OF COMMONS

Our August Executive Committee meeting considered a report from Age Concern and Help the Aged, concerning the above Bill. It is quite clear that it expresses a wider consensus than just these two organisations, and it is one we support. We believe they have outlined good reasons for making a better Bill, and not lose an opportunity to make a truly historic step forward in human rights. We therefore support those reasons, which are:

That it lacks bite and will require further legislation to make it effective in practice. It may be that the consultations taking place on health and social care regulations, and also on the implementation of regulations on financial and insurance issues, will result in a real strengthening of the Bill. We hope this is the case.

We note that as it presently stands the forced retirement at 65 will still be possible by employers. This should not be the case.

Opponents of the Bill in Parliament may see delaying tactics to ensure it does not get through Parliament before the next General Election as a means to prevent it being adopted at all. We hope that this is not the position of Barnet's MPs. We urge that the process is speeded up.

In sum total we see this opportunity as one capable of making a major contribution to removing ageism from our culture.

We urge that our Barnet MPs do whatever is possible to clarify and strengthen the Bill, to speed up its progress through Parliament, to ban NDRA (National Default Retirement Age), and enable the earliest commencement of new regulations.

Memorandum submitted by the British Institute of Human Rights (BIHR)

1. The British Institute of Human Rights (BIHR) is an independent national human rights charity. We focus on the value of human rights ideas, laws and practice to tackle inequality and promote social justice. We have three main aims: (i) to lead the development of a fresh and ambitious vision of human rights that encompasses the full range of internationally recognised rights and is relevant to everyone in the UK, especially the most marginalised people; (ii) to build the capacity of other organisations to develop their own human rights practice that helps them deliver more effective services and campaigns; and (iii) to influence people with power to make this broader vision of human rights an integral part of their policies and plans. We do a range of policy, research and influencing activities and we develop and deliver practical human rights supports (including information, consultancy and training) for voluntary, community and public sector organisations.

DOMESTIC VIOLENCE: CRIME AND SECURITY BILL—“go orders”

2. BIHR welcomes the JCHR’s scrutiny of the proposed Domestic Violence Prevention Notices and Orders (DVPN and DVPO, respectively, also referred to as “go orders”).

3. The Government states that the purpose of a “go order” is “to secure the protection and safety of a victim of domestic violence in the immediate aftermath of an incident where no other protection is available.”⁴¹ As such a DVPN will prevent a person (“P”)⁴² from returning to the property straight away. It seeks to protect the victim from further immediate violence and provide breathing space for the victim within their own home rather than having to seek temporary accommodation, such as a refuge. The proposals then require the police to make an application for a DVPO to the courts within 48 hours. The court can issue a DVPO if it is satisfied that 1) on the balance of probabilities P has been violent towards or has threatened violence towards the victims; and 2) that making the DVPO is necessary to protect the victim from violence or a threat of violence. With both the DVPN and DVPO the police and the court, respectively, must take into account the views of the victim, but both can be issued without the victim’s agreement.

4. BIHR has evidence of advocates using the Human Rights Act to ensure that the state meets its obligations in promoting and protecting the rights of victims⁴³ of domestic violence, including to prevent or challenge the removal of children from victims escaping domestic violence and to secure safe accommodation.⁴⁴

5. However, what is less clear, is the translation of a “human rights approach” in the development of law and policy to address domestic violence. This may be for many reasons, including the lack of general awareness and understanding of human rights in general and the Human Rights Act in particular and how it works. The proposals therefore raise a number of potential human rights issues, including:

- the rights of victims of domestic violence not to be subject to inhuman and degrading treatment (Article 3 ECHR) and to respect for their private and family life and home (Article 8 ECHR);
- the rights of perpetrators to respect for their private and family life and home, and their right to a fair trial (Article 6 ECHR); and
- the obligation on the state to take positive steps to protect victims from domestic violence

6. Under the Human Rights Act public authorities have positive obligations to respect and protect human rights. This includes ensuring there are systems of law enforcement and strategies to prevent harm, such as domestic violence. Positive obligations also require public bodies to protect individuals from harm, in circumstances where the public body knew or ought to have known at person was at risk of harm, even where this harm is caused by another private individual. The human rights framework, rather than inhibiting legal intervention, can actually require action to address domestic violence.

7. It is important to remember that Article 3 is an absolute right; so that where treatment meets this threshold the state has an obligation to intervene. Whereas Article 8 is a qualified right, which means that it can be interfered with, provided the interference is lawful, necessary and proportionate. We also note that the proposals need to be scrutinised in relation to Article 6 and the right to a fair trial, to ensure a proportionate and appropriate system of protecting the human rights. For example, we note concerns about the lack of a perpetrator’s right of appeal and possibility of court adjournments extending the time for which the DVPN/DVPO is in force, which may ultimately impact on the proportionality of these measures.

8. With some adjustments, therefore a measure which temporarily excludes the perpetrator from a property may be a necessary and proportionate response to address domestic violence. However, we would also urge the JCHR to note that the implementation of any future DVPN/DVPO should be within the

⁴¹ Home Office, Domestic Violence Protection Orders—Policing, Crime and Security Bill: Equality Impact Assessment.

⁴² Please note we use the term as used in the proposed legislation.

⁴³ Please note we use the legal term “victim” throughout, although we recognise that many advocates and those that experience domestic violence may use the term survivor.

⁴⁴ BIHR *The Human Rights Act: Changing Lives* (2nd edition) case studies 11, 23 and 24, see www.bihhr.org.uk

context of a human rights approach. This is particularly important because the proposals will allow DVPN and DVPO to be issued irrespective of the victims wishes, which has an impact on their right to autonomy under Article 8. It is therefore important that in implementing measures to protect those at risk of harm, the police and the courts are equipped to use human rights standards and principles to inform their decision-making processes in determining whether to issue a DVPN/DVPO. Further, DVPN/DVPO should not be seen as stand alone measures, but in the wider context of seeking to address domestic violence within a human rights framework, including having in place appropriate and necessary support and advocacy systems.

ENTITLEMENT TO PERSONAL CARE AT HOME: PERSONAL CARE AT HOME BILL

9. The Personal Care at Home Bill proposes the removal of current meanstesting for care at home for those who need the highest levels of care, which will benefit a number of people who are currently excluded from home care assistance because of their income and/or assets. The government estimates that 280,000 people—170,000 older people and 110,000 younger adults—will be eligible for free personal care under the Bill proposals (although we note that these estimates are based on assumptions and modelling as the information available in this area is limited).⁴⁵

10. The Human Rights Act not only provides a safety net ensuring that the provision of care must not fall below minimum standards, but also has the potential to act as a springboard, pushing up standards, policy and practice to ensure that people are enabled to live their lives with dignity and to flourish. BIHR certainly has evidence of evidence of advocates and service providers using the Human Rights Act in the allocation of resources to meet these positive obligations, including securing funds for a woman placed in residential care after a stay in hospital to be supported to move back to her home.⁴⁶ We are also beginning to see greater recognition, in law and policy, of the important role provision of social care has in respecting and promoting people's human rights. The Personal Care at Home Bill has the potential, for those with the highest care needs, to further enhance their right to respect for the family life and home under Article 8 of the European Convention on Human Rights, bought into UK law by the Human Rights Act.

11. Article 8 is engaged in a number of ways, for example where a person wants to remain in their own home but the local authority decides to place them in residential care this can be very distressing and may affect their mental well-being. Placement in residential care can also affect a person's ability to participate in community life or to access essential economic, social, cultural and recreational activities which they have developed in their own home. Local authorities are bound to act compatibly with Article 8 and should ensure that a person's needs and wishes are central to decisions about their private and family life including care. However, because Article 8 is a qualified right necessary and proportionate limitations are permissible in order to take account of the rights of others, the wider community, and this includes considering resource allocation when making decisions about the care to be provided to a person wishing to remain at home. However, as noted above, public authorities also have positive obligations to ensure the right to respect for private and family life is fulfilled. This could include, for example, providing extra resources, such as providing adequate support to enable people to remain living at home, as proposed under the Bill. However, we would also like to highlight a number of potential human rights concerns.

12. Firstly, the proposals do not cover those living in residential accommodation who, under these proposals would have to continue to pay for their personal care. This potentially engages their right to protection against discrimination under Article 14⁴⁷ ECHR both in relation to their right to enjoyment of their possessions (Article 1 Protocol 1) and the right to respect for private and family life and home. By paying for their personal care, people in residential accommodation are prevented from enjoying the possession of their money as compared to those who do not have to pay and can therefore continue to enjoy the possession of their money. Additionally, this situation is likely to engage Article 8 because for many people, including those who the government has suggested are the beneficiaries of the underlying policy of the Bill—older people and younger disabled adults—home is within a residential setting. Provided the stay within the residential accommodation has been for a reasonable length of time, it may be deemed the person's "home" for the purposes of Article 8.

13. We are concerned that the exclusion of people living in residential accommodation will result in those in this group who meet the criteria for highest levels of care, not being assessed under the proposals. Therefore, no consideration will be made of whether provision of free personal care could assist them in returning home or moving to a different type of residential accommodation. This is particularly concerning given that evidence from the reports of the JCHR⁴⁸ and BIHR's own evidence suggests that people in

⁴⁵ Department of Health, Impact Assessment of Personal Care at Home Bill.

⁴⁶ BIHR *The Human Rights Act: Changing Lives* (2nd edition) case studies 14 and 17, see www.bihar.org.uk

⁴⁷ The House of Lords in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 confirmed that persons living in a certain type of home who are treated differently from those living in another type can be a status for experiencing discrimination under Article 14.

⁴⁸ For example JCHR reports *A Life Like Any Other? Human Rights of Adults with Learning Disabilities* (March 2008) and *The Human Rights of Older People in Healthcare* (August 2007). See also BIHR's submissions to the JCHR for both reports, available from www.bihar.org.uk

residential accommodation can be particularly vulnerable to human rights abuses. We are particularly concerned that the JCHR consider whether it is proportionate for there to be a blanket exclusion of a whole group of people who may meet the criteria for receiving the benefit of a policy.

14. Secondly, we note that children will not be covered by this policy, as children's social care is governed by a different legal framework. We therefore urge the JCHR to be mindful of the need to ensure that children's Article 8 right to respect for private and family life is not undermined by lack of similar protections as outlined in the Personal Care at Home Bill. Such disparity has the potential to raise issues of unjustifiable discrimination based on the grounds of age under Article 14 of the ECHR.

15. Thirdly, we share the concerns of other organisations regarding the funding of this policy, the potential to create perverse incentives, and the disjuncting of this proposal from the wider policy context of reforming social care.⁴⁹ The government has stated that local authorities will be responsible for contributing funding of £250 million annually, to be found from efficiency savings. We are concerned that in finding these savings local authorities do not cut, pare down or ration services to other people with social care needs. Notwithstanding the Personal Care at Home Bill, local authorities are still bound by the Human Rights Act to ensure that they are respecting the rights of the people in their area, including those who will not fall within the Bill's ambit. Adequate funding for local authorities is also essential to avoid creating perverse incentives within the social care system, such as incentivising the inappropriate placing of people in residential homes or circumventing the provision of free care at home using definitions or criteria around highest need.

16. Finally, whilst we welcome the underlying aim of the Personal Care at Home Bill, we are concerned that this should not be divorced from the current social care policy context, particularly reforms which seek to provide a National Care Service and the introduction of a more person-centred system through the personalisation agenda. It is important that the proposals under the Bill are part not separate from wider reform of the social care system, which should be based on respecting and fulfilling the human rights of all individuals who require access to care services.

REPORTING OF FAMILY COURT PROCEEDINGS: CHILDREN, SCHOOLS AND FAMILIES BILL

17. BIHR welcomes the opportunity to comment on the proposals aimed at making the family justice system more accountable. In bringing forward the new proposals the government's aim is "to create a [family justice] system that is transparent, accountable, and inspires public confidence in its good work, whilst still protecting the privacy of children and families involved."⁵⁰

18. The Bill proposes two stages of reforms. Stage one would be immediate and would continue the current rules on media attendance but would expand the range of cases which they could attend. Reporting rules would be changed so that the substance of the cases could be reported provides a number of conditions are met and the parties and any children involved were not identified. The Bill also provides lifelong anonymity for children and families unless the court orders otherwise. There would also be a list of information that is automatically not permitted to be reported (such as identification information and personal sensitive information), unless the court specifically provides permission. Many of the provisions protecting the privacy of parties and children available in Stage one will be removed in Stage two as sensitive personal information would become publishable (unless the court specifically restricts this).

19. This issue has human rights implications for both the parties involved in proceeding and their right to respect for a private and family life (Article 8 ECHR), and concerns about the impact of such proceedings on freedom of expression under Article 10 of the ECHR. Human rights laws and principles make it clear that systems of justice should be transparent and fair. Family court proceedings deal with complex and difficult personal issues, such as relationship breakdown, disputes between separated parents about their children, child protection and adoption. As such cases involve the disclosure and discussion of personal information and engage the Article 8 right to respect for privacy for those involved in proceedings. Neither Articles 10 nor 8 are absolute rights; this means they can be limited provided the limitation is necessary and proportionate.

20. We urge the JCHR to consider whether, by allowing increased media access to the courts, the proposals under the Bill strike a proportionate balance between considering the right to freedom of expression and the rights of those involved in family proceedings. Considering the nature of such proceedings, this includes the rights of children and other individuals who are vulnerable to human rights abuses, such as people with learning disabilities. The Bill appears to conflate privacy with anonymity, with measures (at least in Stage one) aimed at not revealing the identity of a child or family. This is not the same as privacy which is far wider than a person's name and is about the protection of personal information about a person's private life. Revealing this information, even in the absence of personal identification, still engages a person's right to privacy. As noted above, the publication of this personal information is being proposed in the context of dealing with complex and difficult issues, often involving vulnerable children and adults.

⁴⁹ See for example briefings and media statements by Age Concern/Help the Aged, the Learning Disability Coalition, and the Kings Fund.

⁵⁰ "Openness and accountability in family courts: new legislation proposed" Ministry of Justice Press Release 19 November 2009 <http://www.justice.gov.uk/news/newsrelease191109a.htm>

21. The proposals in the Bill have been put forward despite a 12 month project, launched on 2 November 2009, to pilot the publication of anonymised family court judgments. Thus there is a lack of analysis as to whether the measures in the pilot strike a proportionate balance between respecting the privacy of those involved family cases and enabling the public to access information about the decision making processes used in family court cases. Additionally, we are also concerned that there has been a lack of public consultation about the Bill's specific proposals and a lack of evaluation of changes to the system which were made in April 2009.

22. Furthermore, BIHR urges the JCHR to consider human rights implications of the proposed (at Stage 2) provision of an explicit power on the courts to impose restrictions if it is necessary to avoid "an unreasonable infringement on the privacy of any person". The Human Rights Act specifically identifies the courts as being under an obligation to act in a manner which is compatible with ECHR rights, including the Article 8 right to privacy. We are concerned that the Bill's proposals, should they become law, should not allow a potential difference in standards between "unreasonable infringement" under the Bill and the standards of necessity and proportionality under the Human Rights Act.

Katie Ghose
Director

January 2010

Memorandum submitted by Brook

1. EXECUTIVE SUMMARY

1.1 Brook believes that all children and young people have the right to sex and relationships education which equips them with the information and skills they need to form healthy and positive sexual relationships. Their right to this education is enshrined in the UN Convention on the Rights of the Child.

1.2 Brook is supportive of the Children, Schools and Families Bill. Good quality sex and relationships education guaranteed through a statutory curriculum is long overdue and will make a huge difference to children and young people. This is something that Brook has long campaigned for.

1.3 The reduction of the age at which parents can opt out their children from education about sex and relationships to 15 guarantees that all young people will receive at least one year of sex and relationships education before they reach 16.

2. INTRODUCTION

2.1 Brook is the UK's leading provider of sexual health services and advice for young people under 25. The charity has 45 years of experience working with young people and currently has a network of services in England, Scotland, Northern Ireland and Jersey.

2.2 Through education, clinical services and campaigning Brook helps children and young people to make informed, active choices about their personal and sexual relationships so they can enjoy their sexuality without harm.

3. THE RIGHTS OF CHILDREN AND YOUNG PEOPLE

3.1 Every day at Brook we see young people whose education about relationships and sex has not been good enough. For too long young people have been saying that the sex education they receive is too little, too late and too biological because schools are only required to teach what is in the science curriculum.

3.2 Young people report too little discussion of social and emotional issues, including real life dilemmas, and that what little information they are given about sexually transmitted infections is not relevant to their lives. A survey of almost 22,000 young people⁵¹ found that 40% of respondents thought their SRE was either poor or very poor and a further 33% thought it was average. 43% said they had not been taught about personal relationships at school.

3.3 It is fantastic progress that Personal, Social, Health and Economic (PSHE) Education,⁵² the subject within which sex and relationships education is delivered, will become a statutory part of the national curriculum.

3.4 Making PSHE Education statutory will provide a clear framework and ensure that it will be inclusive of every child and young person combining legal/civil rights, health, and cultural and religious perspectives. It will mean that all children and young people will receive the education and information they are entitled to.

⁵¹ In Primary Schools this part of the curriculum is known as Understanding Physical Development, Health and Well-being.

⁵² UK Youth Parliament. SRE—Are you getting it?, June 2007.

4. THE RIGHTS OF PARENTS

4.1 Brook does not believe that making sex and relationships education a statutory part of the national curriculum is incompatible with the right of parents to respect for their religious and philosophical convictions in the education of their children.

4.2 In fact, the Children, Schools and Families Bill sets out principles for PSHE Education. In clause 11, point 6, the second principle of which is that: “*PSHE should be taught in a way that—*

- (a) *is appropriate to the ages of the pupils concerned and to their religious and cultural backgrounds, and also*
- (b) *reflects a reasonable range of religious, cultural and other perspectives.*”

4.3 Children, young people, parents, carers and teachers all support PSHE Education. The vast majority of parents are in favour of sex education in schools as this supports what many of them are already doing at home. A 2009 survey for the DCSF showed that 81% of parents agreed that every child should attend sex and relationships (SRE) lessons if they were part of the national curriculum.⁵³

4.4 Less than 1% of parents and carers withdraw their children from SRE.⁵⁴ However the proposal to limit the right of withdrawal to under 15 is welcome because it will guarantee that every young person will receive at least one year of education about sex and relationships before they reach 16, the legal age of consent and the age at which the majority of young people first have sexual intercourse.⁵⁵

14 January 2010

Memorandum submitted by the Campaign Against Criminalising Communities (CAMPACC)

CALL FOR EVIDENCE ON THE GOVERNMENTS DRAFT LEGISLATIVE PROGRAMME 2009–10

We welcome your call for evidence and seek to outline our concerns with regard to proposals to reform restrictions on the right to protest in Parliament Square, as contained in the Constitutional Reform and Governance Bill.

The Campaign Against Criminalising Communities (CAMPACC) was set up in early 2001 to oppose the Terrorism Act 2000. We are a non-party organisation supported by a number of lawyers, advocates for refugee and migrant communities, and civil liberties campaigners. We have campaigned against the Government’s successive terrorism laws and supported the communities affected by them. We have worked with other organisations to highlight the clampdown on civil liberties and the right to protest.

THE CONSTITUTIONAL REFORM AND GOVERNANCE BILL

We welcome the Government proposal, in part four of the Bill at clause 32, to repeal sections 132–135 of the Serious and Organised Crime and Police Act 2005 (SOCPA) and make amendments to the Public Order Act (POA) 1986. We consider that this brings to an end the draconian situation in which protesters can be prosecuted for exercising their legitimate right to protest at the seat of British democracy. We recognise the acknowledgement that there must be a willingness to accept some disruption during large scale protests and that restrictions should be in place only in order to facilitate access to the Houses of Parliament by members and the public. We consider that these proposals enhance the protection of the right to freedom of expression and the right to assembly.

Nonetheless, we have some concerns about the clarity of the proposals to introduce amendments to the POA, in schedule 4 of the bill, and suggest an additional amendment be made to the POA is made to ensure that Chiefs of Police consider whether his/her restrictions on protest around Parliament and beyond impede peaceful protest, no matter its lawful nature.

⁵³ Populus/Blue Rubicon Sex Education Poll, 2009

⁵⁴ Nicole Stone and Roger Ingham, Exploration of the factors that affect the delivery of sex and sexuality education and support in schools, Centre for Sexual Health Research, Faculty of Social Sciences, University of Southampton, July 1998

⁵⁵ K Wellings et al, Sexual behaviour in Britain: early heterosexual experience, The Lancet, Vol 358, 1 December 2001

Under the CRG Bill's proposed new section 14ZA of the POA,⁵⁶ processions or assemblies that take place within an area around Parliament may be subject to restriction by the senior police officer if, in his/her reasonable opinion, they are necessary for ensuring that the specified requirements (in subsection (3)) are met. It is of concern that these specified requirements have not been fully articulated in the Bill and that they may be amended by statutory instrument. We do acknowledge that subsection 4 highlights that accessibility to Parliament is the concern of these potential requirements however we consider that the lack of clarity in this section could be abused and run contrary to the stated aim of facilitating protest around Parliament.

We also note that, while the area in which these extra restrictions will apply has been reduced to 250 metres (section 14ZB⁵⁷) from the one kilometre now in force under section 138(3) of SOCPA 2005,⁵⁸ this area still extends well beyond Parliament Square. We suggest that Parliament Square is specifically excluded from the area where these proposed additional restrictions will apply. We note, moreover, that any event in Parliament Square cannot inhibit access to Parliament, as it is cut off by busy roads from the Palace of Westminster and indeed Portcullis House. Further, we contend that the zone where restrictions could apply is focused only on the paths of entry to Parliament, and therefore a more nuanced and carefully drawn map is considered.

We are also concerned at the intentions behind the proposals for section 14ZC⁵⁹ in which the Secretary of State may designate a building which is to be "used by a House of Parliament for the purpose of holding meetings of the House or of any of its committees (including joint committees)." Apart from Committee

⁵⁶ "14ZA Access to and from the Palace of Westminster POA 1986

- (1) This section applies in relation to—
 - (a) a public procession which is being held (or is intended to be held) where the route (or the proposed route) is wholly or partly within the area around Parliament (see section 14ZB), or
 - (b) a public assembly which is being held, or is intended to be held, wholly or partly within that area.
- (2) The senior police officer may give directions imposing on the persons organising or taking part in the procession or assembly such conditions as, in the officer's reasonable opinion, are necessary for ensuring that the specified requirements (see subsection (3)) are met.
- (3) For the purposes of subsection (2) the Secretary of State may by order made by statutory instrument specify requirements that must be met in relation to the maintaining of access to and from the Palace of Westminster.
- (4) They may include (for example) requirements as to the number or location of entrances to the Palace of Westminster—
 - (a) which must be kept open, and
 - (b) to and from which there must be access routes for pedestrians and vehicles through the area around Parliament.
- (5) An order under this section may confer discretions on the senior police officer.
- ...
- (7) In relation to a public procession, the conditions that may be imposed under this section include conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions.
- (8) In relation to a public assembly, the conditions that may be imposed under this section are limited to conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration and the maximum number of persons who may constitute it.

...

⁵⁷ 14ZB The area around Parliament POA 1986

- (1) For the purposes of section 14ZA "the area around Parliament" means the area specified as such by the Secretary of State by order made by statutory instrument.
- (2) The area may be specified by description, by reference to a map or in any other way.
- (3) No point in the area specified may be more than 250 metres in a straight line from the point nearest to it in Parliament Square.

...

⁵⁸ 138 The designated area SOCPA 2005

- (1) The Secretary of State may by order specify an area as the designated area for the purposes of sections 132 to 137.
- (2) The area may be specified by description, by reference to a map or in any other way.
- (3) No point in the area so specified may be more than one kilometre in a straight line from the point nearest to it in Parliament Square.

⁵⁹ 14ZC Special provision if a House meeting outside Palace of Westminster

- (1) The Secretary of State may by order made by statutory instrument specify, for the purposes of this section—
 - (a) a building situated outside the Palace of Westminster, and
 - (b) an area, no point in which is more than 250 metres in a straight line from the point nearest to it on the specified building.
- ...
- (3) The following subsections apply in relation to—
 - (a) a public procession which is being held (or is intended to be held) where the route (or the proposed route) is wholly or partly within the specified area, or
 - (b) a public assembly which is being held, or is intended to be held, wholly or partly within the specified area.
- (4) The senior police officer may give directions imposing on the persons organising or taking part in the procession or assembly such conditions as, in the officer's reasonable opinion, are necessary for ensuring that the specified requirements (see subsection (5)) are met.
- (5) For the purposes of subsection (4) the Secretary of State may by order made by statutory instrument specify requirements that must be met in relation to the maintaining of access to and from the specified building during any week in which the specified building is, or is planned to be, used by a House of Parliament for the purpose of holding meetings of the House or of any of its committees (including joint committees).
- (6) "Week" means any period of 7 days starting with a Sunday.
- (7) The requirements may include (for example) requirements as to the number or location of entrances to the specified building—
 - (a) which must be kept open, and
 - (b) to and from which there must be access routes for pedestrians and vehicles through the specified area.
- ...
- ...
- ...

meetings that take place in Portcullis House (which is already covered by the 250m zone), we are unclear when this power would be necessary and are concerned at its possible abuse. The circumstances that would have to arise for normal parliamentary meetings not to take place in the House would most likely be one of a national emergency and are exactly the type where the Civil Contingencies Act 2004 would likely take effect. We therefore ask the Committee to scrutinise the intention behind this section and clarify its purpose and meaning.

Lastly, we suggest that the Bill should amend the Public Order Act 1986 to make it incumbent on the Chief Police Officer authorising restrictions to have in mind a duty to facilitate peaceful protest. This would be a change from the current consideration to facilitate lawful protest. One of the main concerns to date about policing practice in general and the enforcement of SOCPA in particular has been the use of police powers to break up or restrict protest that has been entirely peaceful, although possibly unlawful. Operations like that which brought a violent end to the peaceful climate camp occupation of a section of road in the city of London during the G20 summit or the arrest and prosecution of anti war activists near the cenotaph,⁶⁰ create a sense of distrust and hostility between protesters and the police, which is not helpful to either. It should be incumbent on senior police officers present on the scene to consider ways to ensure that any disruption to community life is managed rather than eliminated.

We are grateful to the committee for considering these submissions.

Lochlinn Parker

On behalf of CAMPACC

30 October 2009

**Memorandum submitted by Cafcass (JCHR Legislative Scrutiny Priorities for 2010,
Priority 3: Domestic Violence)**

1. Cafcass is tasked with safeguarding children whose families are involved in public and private law applications before the Court.⁶¹ Domestic violence is raised as an issue in a substantive number of the cases we work with, either as the main issue or in conjunction with other difficulties.

2. We recognise that the Bill brings a tension between Articles 2, 3, 6 and 8 Human Rights Act. In placing the child's needs as paramount, we prioritise action that aims to create a safe place for the child in the first instance, and so place Articles 2 and 3 higher than Articles 6 and 8. Instant decisions regarding fault will sometimes be difficult to make. However, the consequences of leaving an abusive parent in the home can be catastrophic. From a safeguarding perspective we welcome action that removes one party so that the immediate priority can be the safety of the victim and/or children, whilst still allowing for neutral action to be taken in the ensuing Police investigation. We expect that the police would continue to carry out a thorough investigation and that collecting of evidence will take place as a matter of course to facilitate longer-term enquiries.

3. Research informs us that some of the most risky cases considered at Serious Case Reviews have a combination of domestic violence, mental health issues and alcohol and substance abuse and that many cases concern families where children are under five years of age, presumably pre-school children who would be at home all the time [see Appendix 1]. We should take steps to minimise the exposure these children have to domestic violence as a priority. We refer you to the Cafcass Domestic Violence Toolkit and in particular Chapter 3 which considers the child's experience. An extract from Chapter 3 can be found at Appendix 2.

4. In considering the child's experience of domestic violence, Cafcass recognises that domestic violence is more often and most seriously inflicted by men on women although it can be women on men, people in a same gender-relationship, and inter-generational. Our assessment model emphasises the importance of being open to all possibilities. Police have to make a judgement at the time of a callout about who has been abusive and who is the victim. We appreciate that this is sometimes difficult where there is no hard evidence, however we welcome the "Go Order" measures that enable an instant decision to be made that can provide safety to a child who is suffering as a result of being directly or indirectly affected by domestic abuse in the family.

The remainder of this submission considers articles 2, 3, 6 and 8, focussing on the risks to the child. The appendices contain research and resources which may be of interest to the Committee.

Consideration of the child in cases where this legislation may be used against Article 2: Right to Life

Children die as a result of domestic abuse by

- Direct and intentional physical abuse as a foetus
- Direct and intentional physical abuse as a child

⁶⁰ Maya Evans and Milan Rai were arrested on 25 October 2005 for reading a list of British and Iraqi casualties of the war in Iraq in contravention the restrictions under SOCPA 2005. They were later prosecuted, found guilty and ordered to pay a fine. Milan Rai refused to pay the fine and was jailed for 14 days.

⁶¹ See our website http://www.cafcass.gov.uk/about_cafcass.aspx for more information on our role and remit.

- Unintentional physical abuse by becoming directly involved in the incident
- Unintentional physical abuse by virtue of being in the vicinity of abuse taking place
- Self-harm as a result of witnessing domestic abuse in the family.

Consideration of the child in cases where this legislation may be used against Article 3: Prohibition of Torture

- Direct and intentional physical abuse as a foetus.
- Direct and intentional physical abuse as a child-child abuse is present in a significant number of known cases in which domestic abuse has been raised as an issue.
- Unintentional physical abuse by becoming involved in the incident
 - Some children take direct action such as standing between parents
 - Some victim parents pick up small children for protection in the hope that the abuse will stop
 - Some children behave badly to draw attention to themselves so that they can distract their parents from the domestic incident.
- Unintentional physical abuse by virtue of being in the vicinity of abuse taking place.
- Self-harm as a result of witnessing domestic abuse in the family.
- Witnessing the murdering of a parent.
- Degrading treatment includes seeing ill-treatment of the victim parent by the abusive parent.
- Ill-treatment that could be considered to amount to torture is caused to a powerless and vulnerable child from witnessing:
 - the distress caused to the victim parent
 - the victim parent in a position of powerlessness
 - the victim parent self-harm as a result of the situation.

The child would not necessarily need to be in the room for this to have effect.

- Children who witness from another room often imagine the worst is happening, ie that someone is going to be killed
- Children who have not been at home when the abuse took place will see signs,
 - in their parents' physical demeanour,
 - such as bruises or cuts in the parents'
 - the house in disarray
 - in the atmosphere.

Degrading treatment includes the child hearing derogatory and abusive comment about him/herself. Children are sometimes punished or are forced to commit certain acts as a punishment in this situation. Bearing in mind that these are often both the child's parents or caregivers and the child may have some sense of loyalty to both, through:

- hearing derogatory and abusive comment about the victim parent
- hearing derogatory and abusive comment about the abusive parent.

Children are sometimes punished for taking the side of the victim parent. Children become involved in the power and control battle by the abusive parent to the extent sometimes of being encouraged to side with the abusive parent and engage in the abuse of the victim parent. The degrading emotional impact of this extends into adulthood.

- Children witness abusive parents threatening self-harm, or actually killing or harming themselves as a way of manipulating the situation.
- Children can suffer degrading treatment in the hands of a victim parent whose parenting and coping strategies have been disabled or destroyed by the abuse suffered.

Consideration of the child in cases where this legislation may be used against Article 6 (1): Right to a Fair Trial

- Whichever parent is given the "Go Order" there will be a concern that this establishes the status quo in terms of who has been the unreasonable parent. Domestic violence is difficult to prove as hard evidence is not readily available where, for example, threats to kill have been made. This is compounded by a reluctance (for various reasons) to report earlier incidents.
- A victim parent may be mistaken for an abusive parent, and be given the "Go Order". Our concern is firstly on the safeguarding issues of a child left with an abusive parent. Such action could also hamper the right to a fair trial, as the effect of the previous abuse, compounded with being mistaken for the abusive parent, may "tip" the victim parent to believing that a thorough and neutral investigation will not happen, and seeing future efforts as futile.

- The Family Court system allows for later determinations to be made by the Judiciary through a Findings of Fact hearing.

Consideration of the Child in cases where this legislation may be used against Article 8: Right to Respect for Private and Family Life

If the abusive parent were given the “Go Order”, contact would become an issue for the child with the absent parent. Witnessing domestic violence causes children to feel afraid and confused. The child can benefit from having no contact during a recovery time while decisions are made about next steps.

If the non-abusive parent were given the “Go Order” the abusive parent may further the abuse by persuading the child that the victim parent does not care, is actually the abusive parent etc. This could mean that future contact and the relationship with the absent parent becomes problematic.

If there had been exaggeration/false allegation prompting the making of the “Go Order”, and there was no risk, the child would be confused, and could be at risk of losing contact with their parent.

It is our view that a safeguarding approach is essential where domestic violence is raised as an issue. In the circumstance of the police making a “Go Order” we would suggest the child remains in the care of the victim rather than the abuser, provided that the victim parent can meet the needs of the child.

Final comment from a child:

...they should be taken away because a mum or child wouldn't call 999 just to get a dad taken away for no reason.

(Louis, young people's focus group)⁶²

Annex 1

BIENNIAL SERIOUS CASE REVIEW REPORT: 2003–05 BRANDON, M ET AL, DCSF (JAN 2008)

SUMMARY OF FINDINGS

Analysing child deaths and serious injury through abuse and neglect: What can we learn? A biennial analysis of serious case reviews 2003–05

Marion Brandon, Pippa Belderson, Catherine Warren, David Howe, Ruth Gardner, Jane Dodsworth, Jane Black

161 serious case review included in the study.

Of which:

- 12% were on the child protection register
- 55% were known to social services
- 16% related to head injuries to babies
- 21% featured neglect (strict definition of neglect used for the study)
- 30% were living in poor living conditions

In relation to age breakdown for the 161:

- 47% were under 1
- 20% were age 1–5
- 7% were age 6–10 (significantly under represented, given this is one of the highest groups presented to hospital A&E departments)
- 15% were age 11–15
- 9% were 16 plus (mainly suicides)

Out of the 161, 47 were looked at in more detail. In these cases:

- Domestic violence was present in 66%
- Mental health was present in 55%
- Substance misuse was present in 57%

In addition the report found that in 1 in 3 cases of the 47 detailed cases, all three of these factors were present.

The full report (DCSF-RB023) can be accessed at www.dcsf.gov.uk/research/

⁶² *Children and families experiencing domestic violence: Police and children's social services' responses* Nicky Stanley, Pam Miller, Helen Richardson Foster and Gill Thomson January 2010 www.nspcc.org.uk/inform

EXTRACT FROM CHAPTER 3 OF CAF/CASS' DOMESTIC VIOLENCE TOOLKIT

1. UNDERSTANDING THE CHILDREN'S EXPERIENCE OF DOMESTIC VIOLENCE

INTRODUCTION

1.1 This section is a tool to assist staff to enhance their understanding of a child's experience of living with domestic violence and the behaviour this may cause them to demonstrate. The guidance explores the child's experience of:

- The extent and level of abuse they have experienced or witnessed;
- Her/his understanding of the behaviour, and;
- Her/his communication about abuse/violence;
- Her/his diversity.

UNDERSTANDING A CHILD'S EXPERIENCE OF PROBLEMS AT HOME

Context

1.2 A child living with domestic violence is in an impossible situation in which her/his needs cannot be met. There may be an atmosphere of unpredictability and fear. The child may be hyper-vigilant for any signs of tension, raised voices and where it is a factor, signs for alcohol or drug abuse. What happens in the family may be kept secret and a child may feel at risk should they choose to disclose it or fear the wider consequences of family instability.

1.3 A child living with domestic violence is likely to be affected by fear, distress, and disruption in their family lives even if they are not directly abused. This is recognised in the extended definition of harm in the Adoption and Children Act (2002).

1.4 A child who has been living in violent or abusive circumstances for some time is likely to have learnt about the "trigger" points in her/his parent's relationship and the tension and violence which can result.

Implications

1.5 A child will react in different ways to the violence they have witnessed or experienced depending on their personal resilience and support. Some children may appear to be "matter of fact" about the abuse. Research indicates⁶³ that some older children who may have more experience of abuse can display more knowledge and personal resources to help them make sense of what is happening.

1.6 The complex mix of emotions which the child may experience includes:

- A sense of guilt about the abuse between their parents;
- Difficulties with their sense of identity;
- Blaming parents and modelling inappropriate behaviour;
- Difficulty understanding parenting and a sense of divided loyalty between their parents.
- (See section 4 of this toolkit for further information on the impacts on children)

THE OVERLAP BETWEEN DOMESTIC VIOLENCE AND CHILD ABUSE⁶⁴

1.7 Over recent years there has been a growing body of research on domestic violence, which has looked into the overlap between adult violence and child abuse.⁶⁵ The research indicates that the links are substantial and could be between 30 and 60%.⁶⁶ The child can be at risk of injury if they get in the way of an attack or try to intervene. According to research undertaken in the London Borough of Hackney⁶⁷ at least a third of children on the Child Protection Register were found to have mothers who are being abused in the home. Research by Cleaver and Freeman⁶⁸ supports this figure. They found that when a visit was made as a result of a child protection referral to social services the rate of domestic violence was at 40%. Similarly, research by Hunt *et al*⁶⁹ found that for children subject to care proceedings, domestic violence was a factor in 51% of cases coming to court.⁷⁰

⁶³ A. Mullender *et al* (2003) Children's Perspectives on Domestic Violence.

⁶⁴ Humphreys, C & Stanley, N (eds) Domestic Violence and Child protection: directions for good practice Jessica Kingsley (2006)

⁶⁵ Hester, M., Pearson, M. & Harwin, N. with Abrahams, H. (2006) "Making an Impact"

⁶⁶ (Edleson, J. (1999) Children's witnessing of adult domestic violence, *Journal of Interpersonal Violence* 14 839-870).

⁶⁷ Hackney Council Press & Publicity Team (1993), *The links between domestic violence and child abuse: developing services*, London.

⁶⁸ H. Cleaver *et al* (1999) Children's Needs—Parenting Capacity The impact of parental mental illness, problem alcohol and drug use, and domestic violence on children's development.

⁶⁹ Hunt, J *et al* (2000) *The last resort: Child protection, the courts and the 1989 Act*, London: HMSO

⁷⁰ H. Cleaver *et al* 1999 *op. cit.* at 7

1.8 Evidence from research involving court files indicates that nearly 25% of private law contact cases involve allegations of domestic violence/abuse.⁷¹ When monitoring private law applications, Cafcass Service Managers and the Court Service have found higher rates of allegations.

1.9 The trade union and professional association for family court and probation staff (NAP0) undertook a survey of the work of Cafcass in contested residence and contact cases. The study found:

- Out of the 300 cases involved, 77% (230 cases) featured allegations of domestic violence.
- In 61% of cases allegations were made against the male partner and against the female partner in 16% of cases.
- In 24% of the 300 cases (73 cases) the allegations were admitted or established as fact. (Although NAP0 suggest that it is likely that the true figures will be higher).

UNDERSTANDING HOW A CHILD MAY COMMUNICATE ABOUT PROBLEMS AT HOME

1.10 Lack of effective communication can be a major barrier to a child getting the help s/he needs. There may be a shared desire to protect one another or secrecy and shame surrounding problems, parents may also find it hard to know how to talk to a child, and feel too upset themselves to talk about problems. Children who participated in studies on domestic violence^{72,73} stressed in particular, that they wanted their parents to talk to them more. A failure to talk to the child may actually perpetuate her/his confusion and isolation and lead to misunderstandings.

1.11 It is likely that a child will use informal sources of support. A child is likely to turn to parents (usually mothers) and friends, then siblings, grandparents or pets. Support may come in the form of talking or spending time with someone and feeling safe. Children say that they want to talk to someone who they trust, who will listen to them and provide reassurance and confidentiality. Boys may find it harder to talk about problems and are more likely to leave talking to someone until nearer crisis point than girls.⁷⁴

Cafcass memorandum in response to JCHR Legislative Scrutiny Priorities for 2010, Priority 7: Reporting of Family Court Proceedings

1. Cafcass (Children and Family Court Advisory and Support Service) is a non-departmental public body accountable to the Secretary of State for Children, Schools and Families. We work within the strategic objectives agreed by our sponsor department and contribute to wider government objectives relating to children. Cafcass is independent of the courts, local authority children's services and health authorities.

2. We operate within the law set by Parliament and under the rules and directions of the family courts. Our role is to:

- Safeguard and promote the welfare of children;
- Give advice to the family courts;
- Make provision for children to be represented; and
- Provide information, advice and support to children and their families.

3. The main types of cases in which the courts ask Cafcass to help are when:

- Parents or carers are separating or divorcing and have not yet reached agreement about arrangements for their children;
- Local Authority Children's Services have become involved and children may be removed from their parents' care for their safety; and
- Children could be adopted.

4. Cafcass has a core responsibility to represent the best interests of children and young people by ensuring that their voices are heard and their feelings expressed in all family proceedings. We therefore play a role in upholding Article 12 of the UN Convention on the Rights of the Child: "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body". We are aware that in some circumstances the facts of the cases we work with may involve the balancing of competing rights. We are also aware that the proposed legislation involves consideration both of the right of the media to report in the public interest, and the right of children and families to privacy.

5. The Children, Schools and Families Bill, which aims to establish a more open reporting system for family proceedings, is likely to impact on the way in which young people engage with Cafcass practitioners, in terms of the information that young people will in future be willing to share, through Cafcass

⁷¹ Smart C, May V, Wade A and Furniss C (2003) "Residence and Contact Disputes in Court", Centre for Research on Family, Kinship & Childhood, University of Leeds

⁷² A. Mullender *et al* (2003) Children's Perspectives on Domestic Violence.

⁷³ Joseph Rowntree Foundation (JSF) (2004)—Ref 51,4: "Understanding what children say about living with domestic violence, parental substance misuse or parental health problems." <http://www.jrf.org.uk/knowledge/findings/socialpolicy/514.asp>

⁷⁴ JSF Report op. cit. at 11

practitioners, with the courts. Cafcass, as part of the policy development process, has been acting as a conduit for young people who are involved with us, in order that their experience of both Cafcass and the wider family court process can inform the design of proposed changes in legislation and court practices.

6. It is vital that Cafcass practitioners are able to engage effectively with young people in order to ascertain their wishes and feelings and to communicate these to the court, along with Cafcass analysis and recommendations about how the court might best promote their welfare. When undertaking case work, especially involving older children and young people, it is important to establish an open dialogue. This essential work requires care and skill, and may take some time to complete, as many young people are understandably cautious about disclosing sensitive personal information to an adult who has only recently become known to them.

7. Consultation with the Cafcass Young People's Board⁷⁵ has identified a number of concerns about the presence of the media in court. This seems, at least in part, to arise from young people's perception of the media's approach to reporting on the private lives of celebrities. The Board has indicated that it hoped the media would not sensationalise family proceedings in the manner prevalent in the popular press. Another concern is that, despite the planned anonymisation of media reports, the identity of families involved in proceedings could still be apparent should the reporter publish specific incidents or case details—this would be a significant concern in close-knit communities. The Board have also identified that the internet, in particular the “comment” sections common on newspaper websites, is likely to be used for the addition of speculation, comment, and opinions about case details that have been reported.

8. It is important to make clear that, even at present, Cafcass practitioners do not “keep secrets” because they are bound to report all relevant information to the court, nearly all of which will be available for consideration by the various parties (parents, local authorities and others) who are involved in the case. Many young people already voice the concern that they do not want some wishes and feelings to be communicated to the court as they fear it may upset their parents, or make them angry. On occasion, this already limits the extent to which information is disclosed to Cafcass.

9. This constraint is likely to be compounded by young people's anxiety that media representatives will be present to listen to, and able to report some details of, such information on a wider basis than is currently permitted. It is important to bear in mind that children and young people only very rarely attend hearings in family court proceedings of which they are the subjects and as a result, practitioners will need very carefully to prepare young people for what may appear in the media, based on what has taken place in court.

10. There is a general consensus within the Board that an increased knowledge of the proposed limitations to be placed on the media in family proceedings will go some way towards alleviating their anxieties. The Board does accept that communicating young people's feelings to the court is in their best interests, even if it makes them uncomfortable. It has been suggested by the Board that the proposed legislation could help others who find themselves in a similar situation to have an understanding of what might happen, provided there is sensitive reporting of family proceedings.

11. Identifying, and then mitigating, these concerns is essential if Cafcass practitioners are to maintain effective relationships with the children and young people whom they serve. It is to be welcomed that a commitment has already been made for the provision of additional resources to Cafcass, in recognition of the additional time that will need to be spent in working with children and young people, and reassuring them, if the legislative proposals are implemented.

12. At present, Cafcass practitioners have a duty to ensure that all service users are aware that anything they share with a Cafcass worker can be used in the reporting to court process, and could be read by those involved. This is explained to young service users through discussions and leaflets,⁷⁶ and practitioners are skilled in explaining this process in a sensitive and age-appropriate manner. This already existing discussion could be developed to include references to media attendance at and reporting of family proceedings.

13. The Young People's Board continues to stand ready to assist Ministers, and their policy advisers, having already had direct contact with them about this vital issue during the lengthy period during which the current proposals have been formed. Its members could play a significant role in the development of practice guidance should the Children, Schools and Families Bill be passed, as they are all young people who have experienced family court proceedings. A particular area of expertise is how any changed arrangements might be explained to children and young people who are the subjects of future family proceedings, where the media's presence and capacity to report on their cases may well be an additional anxiety, beyond that which already arises from being involved in family court proceedings.

⁷⁵ http://www.cafcass.gov.uk/about_cafcass/how_we_are_organised/young_peoples_board.aspx The Cafcass Young People's Board was set up in 2006 and is made up of young people aged 11–18 years who have direct experience of both Cafcass and the family courts. In this instance, eleven members of the YPB responded to questions on how practitioners could engage with service users to communicate changes from the proposed legislation (see Appendix).

⁷⁶ Cafcass produce separate leaflets detailing involvement in public and private law. The leaflets are tailored to suit three age ranges: under eight; 8–12 years; and teenagers—but can be used with any child depending on their understanding and development.

APPENDIX

CAFCASS YOUNG PEOPLE'S BOARD RESPONSES TO MEDIA QUESTIONNAIRE

There is a Children, Schools and Families Bill currently passing through Parliament. One section of this Bill will let the media come in to Family Court Proceedings, and write articles about the cases they watch. This will help people to understand what happens in the Family Court, and how the judges reach the decisions they do, which is often misunderstood by those who haven't gone through the Court themselves.

Newspapers will not be able to use the names of children or their families, but they will be able to report on what the case is about.

Cafcass have been given the opportunity to respond to the Joint Committee on Human Rights, to say how our practitioners will work with young service users to try and make sure these changes, if the Bill is passed, do not affect the relationship between young people and Cafcass practitioners. We still want young people to feel comfortable in sharing their thoughts and feelings with their FCA.

We have seen your "Tips for Newspaper Editors" and would like to build on this by seeking your views on the following questions:

1. *How did your FCA explain the court process to you? Did you feel comfortable telling them things which you knew might be shared in court?*

1. They explained that Cafcass will talk to everyone concerned and then present a report to the courts on what they think the best decision is for everyone. Some young people are reluctant to say everything they want to as they may be undecided about how they feel or they may want to see both parents and don't want to have to decide. A lot of young people find themselves in conflicting and confusing situations where there is a lot of uncertainty. The media will add an extra burden to this pressure if the young person knows that what they say will not only be heard, but recorded for the wider public to see and hear. Especially for young adolescents who may want their private lives to remain that way for fear of reflecting on them personally or their future prospects.⁷⁷

2. I didn't feel that my FCA explained the process well, as when I had to attend a meeting with the judge I thought I had said something wrong. Although it was difficult for me to talk to them I knew that if I didn't share my views with the FCA a judgement would have been made without hearing my thoughts, which I wanted to give.

3. The first explanation of the court process I received was unclear; it was only as the case progressed I became more aware from my own questioning. As time went on I verbally received more guidance regarding the court process from different FCAs. Despite it being emotionally challenging, I did give my views regarding the situation to my FCA, I saw this as important to ensure that those involved with the family case understood my perception to matters relevant to me.

4. I felt comfortable at the time as they were really nice and friendly, what they didn't tell me was that they would quote me to my dad, which later resulted in nastiness from my Nan. This left me rather upset, I felt betrayed by the people I had trusted with details of something that hurts me deeply.

5. I wasn't explained much about the court process or at least I didn't understand the things I was being told. On most occasions I wasn't happy about talking to anyone other than my parents directly.

6. I don't remember going through Cafcass as I was very young at the time so do not remember having an FCA.

7. Unfortunately I only saw my FCA on one or two occasions. We never got as far as discussing the specifics about what I needed to be said to the court but she did give me a vague outline of what her role was. I would only feel comfortable talking to my FCA if I knew she would do something.

8. Although I don't have any direct experience of meeting an FCA, I think personally, if the FCA explained the process and made me feel comfortable that the media won't be mentioning my name or personal information then I would feel more secure. Some children might back down and feel less comfortable sharing certain information knowing that the information will be shared and might not want everyone to know. I would be worried about the media mentioning what town I am from as my friends or neighbours might have a clue that it is me and they will know the full story of my case in more detail. Unless the media publish a case of a child in a different county, so therefore all counties will get a grasp of a case from someone from a different area. I feel it's important for the FCA to explain the court process and mention the media but state that no names will be mentioned in the press. If I know I can trust the system then I would be comfortable knowing that my information is kept anonymous. Perhaps if the information a child feels uncomfortable about sharing with the media, and only wants the judge to know, then there should be exceptions as such.

9. I didn't have an FCA but I'm sure they would have explained the court process to me. If not, I would have asked about it as I'd be desperate to know every little detail. I would feel comfortable telling someone from Cafcass things that might be shared in court.

⁷⁷ The responses from the YP have been anonymised, with each child/YP being assigned a number 1-12.

2. *What concerns did you have about sharing things with your FCA? How did your FCA help you not to worry so much?*

1. I think it is difficult for young people to tell Cafcass workers things that may be said in court or said to another parent as they may feel a divided loyalty and may be afraid to speak out. I think some young people can be reluctant to tell the truth about how they feel and may just repeat what they have heard another adult say because they feel it is the right thing to do, so as not to upset or hurt anyone. Cafcass workers often reassure young people by saying that what they say will be kept in confidence unless their safety is at risk and I think this reassures the young person and enables them to speak more freely and openly about their experience.

2. I was concerned that what I was saying wasn't being listened to, and that some of the questions I was asked were not appropriate. They didn't provide much reassurance at the time, which made me worry more.

3. I was concerned regarding privacy when talking to my FCA due to one meeting being held at school, using a room directly off the main corridor. I felt that this was an inappropriate venue to discuss sensitive issues. The FCA provided little reassurance at the time, although future meetings were held in more appropriate settings.

4. I felt able to tell the FCA details of my relationship with my dad and my wishes because they made it clear they only wanted to help me and the situation was quite relaxed, although I felt awkward being in a chair in the middle of the room with two people, one on each side, staring at me. When I started crying I felt even more uncomfortable because there were no tissues near me and I had to wait for the lady to get me some.

5. I wasn't sure who was trying to help me and I was scared that I would say something that could put someone in my family in trouble.

6. I don't remember going through Cafcass as I was very young at the time. However, if I saw an FCA now I would be concerned about what I am telling them, how can I trust them?

7. I was concerned she was going to share vulnerable information about me and not ACT upon it. She went on maternity leave and I never saw her again so I cannot really say she did anything to make me worry less. What she could do to help me would have been to keep me informed. It would drive me crazy when they said you are a young person so you are too vulnerable to know what is going on as I had sleepless nights from the anxiety anyway.

8. If the FCA understands enough to support me and makes me feel that I will have no regrets in sharing info, I would feel as if I can trust the FCA and share whatever I feel I like without concerns or worries. However, there could be times when FCAs might go home after work and talk about their jobs or cases to their family. I would be concerned if the FCA is breaking confidentiality outside of work. If the FCA made me aware that the information she/he knows about me will be kept between the FCA, court and the media only, then that's fair enough and understandable.

9. FCAs should reassure you that your views will be taken into account and that the judge will make the best decision for you. They should make sure that your interests were prioritised and that you were put first, and if something couldn't be done, they'd tell you why not.

3. *How do you think young people will feel about sharing things with their FCA if they know there is a possibility a newspaper could write about the case?*

1. I think that young people will be more reluctant to voice their opinions and will be scared to tell the truth and how they feel for fear of worrying about another family member. It may also lead to those children who come from families which are suffering from domestic violence or other forms of abuse to feel more vulnerable and less inclined to speak out about what is happening.

2. I believe young people would feel newspaper reports were intruding in personal matters, at a difficult time for that young person. Some young people might worry about the possibility of people outside their family knowing what's going on, because the reporter may include the area, and details of parts of the case that neighbours might recognise.

3. The majority of young people are going to see, I feel, the media involvement as a negative impact regarding how comfortable they feel throughout the process. I am concerned that some may not speak as freely as they would have done without the prospect of reporters, due to fear of being identified by neighbours/peers etc. Even though the proposal places assurance that names will not be used, it does not provide the same guarantee regarding the bias slant the reporters are likely to place upon any coverage of cases in family court proceedings. Members of the public will make immediate judgements, which without being fully informed (which is not appropriate) are most probably misguided, inaccurate and inappropriate to share on internet news forums, comments pages etc.

4. It depends what details will be shared like real names and/or details of things that are personal to them, as they might not want such details debated in the media. However, if it was to help other people in the same situation it might help them to know they would be helping others and to understand they are not alone.

5. Depending on the age and personality of the young person, some may be intrigued in the idea of minor fame and others would be scared of revealing things that shouldn't be told to the public.

6. I myself would tell the FCA less as I wouldn't want my life on the front page of a newspaper, especially not if friends and people in the local community would know it was me.

7. There will definitely be a sense of reservation on the part of a young person in my opinion. This is because family issues are a private area and the odds of that remaining so are low if readers can guess who the case is talking about.

8. I think there will be people who won't feel comfortable with sharing certain things with their FCA knowing people out there will get to read their case, in case people can identify them. However, if certain measures are taken to keep names/town anonymous, this will make them feel more at ease. In some ways, I think there should be exceptions, if a child feels they have things to say but are worried because they do not want the media to know, there should be a way to let the FCA know and therefore the FCA should be responsible for making sure the media do not grasp that certain information and only the judge has access to it. At the end of the case, if the decision of the case does not sound right to people then the judge should make the media aware that there were certain bits of information that had to be kept private in case people don't think why the court decision is not right. Otherwise this could prevent children from mentioning important information to their FCA only because of the media. I feel children should not have to worry about the media too much as the case is about THEM not the media. If a story was published about me in the same town as I lived, there would be no doubt as to who it is. Therefore, for the child's security, protection and of course confidentiality, the case of a child MUST not be published in the same town to prevent identification.

9. If it were me, I'd be much more hesitant about it. I don't want my case to be publicised at all. Private law should stay private. I wouldn't want people to know that my father was abusive, as it isn't something I'm proud of at all.

10. This could be very scary to a young person. If I was told that something I was going to say was going to be published in a newspaper then I would be very wary about what I said. The process is scary enough without the worry of friends finding out things you don't want them to.

11. I think the young person would be very reluctant because they wouldn't want "the whole world" to know what they thought and what they said and things about themselves.

4. How do you think FCAs could explain these changes to young people, to stop them worrying too much, and encourage them to still share their feelings?

1. I don't think they can. I think the best option is to keep people's family life private and to not add another invasion of privacy from an already overbearing "big brother" state (see "1984" for proof of this). I think that the family courts deal with very private and personal situations and it should remain this way due to the sensitive nature of some of the situations and the knock on effects it may have to the children they are reporting about. It is more often the case that the public can deduce those involved anyway, even if names are not used.

2. Cafcass could create a booklet for young people explaining what the reporters would write and why they were there. FCAs would have to stress to the children that they should work with the situation as it was still important to share their opinions, so that their voice would be heard.

3. FCAs would need to be clear and consistent with what they told young people regarding possible media involvement within their cases. I feel it would benefit some young people to be shown the type of document that the media would be likely to write if they chose to report. This would reassure the young person who would most likely be questioning of why the media could become involved and what they would be permitted to report.

4. Tell them it will help others, they are not alone, and try to be as natural as possible, not staring from all angles as it felt they were in mine.

5. By calmly explaining that what is written could help other young people and families directly or indirectly through the experience that they have in courts.

6. I think to explain the changes would be very difficult, as each child reacts differently to every question. The best way forward in my eyes is to ask the child and family if they mind a journalist being in the court. Like this it is their choice. Also, if a news reporter must sit in, the child and family should have the option for the paper not to be published in their local community but elsewhere. I also believe the child and family should see the article first before it is published.

7. Definitely break things down if a young person is appearing distressed, and telling the youngsters, who could do without the anxiety, as much information as possible. Don't make false promises eg see you next week and then not show up. The chances of a young person opening up will be low.

8. This can get more difficult for them and harder to get information from a certain young person but I feel the FCA should explain that these procedures are taken for every case so equal every case is equal. The young person in the case should also be made aware that although media can use their case to publish in a newspaper, their names won't be mentioned. This should put them at ease. I feel that if a child does not want their town or county to be mentioned then this should be allowed, however, the media could mention what

court a young person attended so people are at least aware of where the court hearing took place but not the information relating to the young person. The FCA needs to do their best in order to encourage young people to share feelings and important information.

9. That's a really difficult question. I am not in favour of the media being able to report on Family Court Cases. All FCAs will be able to do is reassure the young person and tell them that names won't be mentioned. They'd have to be realistic, tell the young person what will and won't be reported on. I'd absolutely hate my case being reported on, as people in my local community might know it's me and my family. There must be different ways for people to explain how Family Courts work rather than writing about cases.

10. It has to be in a way which the young people would understand. Not just saying it once and thinking that they have done their job. It's important to make sure the young person understands. If the young person is going to share their feelings with an FCA (or anyone really) then they need to feel comfortable and have developed a relationship with the person. It's a lot about trust.

11. By explaining that it could encourage other families to use Cafcass and it would therefore help other children.

January 2010

Memorandum submitted by Children's Rights Alliance for England (CRAE)

ABOUT CRAE

1. The Children's Rights Alliance for England (CRAE) seeks the full implementation of the United Nations Convention on the Rights of the Child (UNCRC) in England. Our vision is of a society where the human rights of all children are recognised and realised.

INTRODUCTION

2. This submission focuses on the bills identified by the Joint Committee on Human Rights (JCHR) for legislative scrutiny in the 2009–10 parliamentary session. We highlight significant children's rights issues raised in each of the bills and consider opportunities to strengthen children's human rights protection.

CHILD POVERTY BILL

Ending child poverty by 2020

3. CRAE is a member of the End Child Poverty campaign. We recognise that the Government's commitment to eradicating child poverty by 2020 should move the UK further towards compliance with its obligations under Article 27 of the UNCRC. However, we are concerned that the Child Poverty Bill defines successful eradication as a relative poverty rate of below 10%. We urge the Government to consider the recommendations of the UN Committee on the Rights of the Child (UN Committee) to provide disaggregated budgetary analysis to identify the amount of expenditure allocated to children and to consider whether this serves to effectively implement policies and legislation affecting them.

CONSTITUTIONAL REFORM AND GOVERNANCE BILL

Parliamentary scrutiny of treaties before ratification

4. CRAE welcomes increased parliamentary scrutiny of the UK's commitments to international human rights legislation as a measure to strengthen both the democratic process and parliamentary oversight of the implementation of ratified treaties. Care must be taken to ensure that this process serves to strengthen human rights protection in the UK, and does not, through a lack of knowledge and understanding of human rights, serve to undermine it. It is important that parliamentarians (and the executive) receive clear, concise and accurate information about human rights and the provisions of international law. The Government must make clear how, if at all, this process may affect the reservations or declarations that may be made to any one treaty.

EQUALITY BILL

5. Please see written evidence from CRAE and Young Equals submitted in June 2009 for legislative scrutiny of the Equality Bill.

IMMIGRATION SIMPLIFICATION BILL (DRAFT)

Protecting children in the immigration system

6. The draft Immigration Simplification Bill will bring together a broad range of legislation which has affected every stage of the immigration process. CRAE welcomes this attempt to streamline and simplify immigration legislation, but urges the Government to ensure that this does not have the unintended consequence of weakening existing protection for children in the immigration process. Despite the Government lifting its wide-ranging reservation to the UNCRC concerning immigration, we have a number

of serious concerns regarding the current system, which we do not want to see exacerbated. These concerns include but are not limited to: the detention of asylum-seeking children; the lack of data on the number of children seeking asylum; the lack of independent oversight of reception conditions for unaccompanied children who have to be returned; and the prosecution of children over the age of 10 if they do not possess valid documentation upon entry to the UK.⁷⁸

IMPROVING SCHOOLS AND SAFEGUARDING CHILDREN BILL

Educational guarantees for children and parents

7. CRAE welcomes the introduction of educational guarantees for children and their parents and hopes that the Government will ensure that sufficient funds are in place to make these guarantees a reality. In particular we welcome the guarantee that all children will go to a school where they are taught in a way that meets their needs and have the opportunity to express their views. We remain concerned, however, that the Government is delaying implementation of the new duty on school governing bodies to “invite and consider” the views of students.⁷⁹ In October 2008 Ministers gave assurances that these matters should include delivery of the curriculum, behaviour, school uniform, school food, health and safety, equality and sustainability.⁸⁰ In light of the proposed stronger powers for schools to enforce Home School Agreements, it is crucial that school discipline shows respect for children’s human rights in both policy and practice.

Information sharing for Local Safeguarding Children Boards

8. In the drive to protect children through information sharing, it is crucial that children’s rights to privacy and confidentiality are maintained. There are existing concerns regarding the security, privacy, transparency, accuracy and proportionality of databases such as ContactPoint, and children themselves have voiced concerns about what information is held about them, and where it goes. Explicit guidance and good training is needed to ensure that practitioners working with children and their parents are equipped to deal with the issue of informed consent for information sharing. Such guidance should make clear the importance of privacy rights as laid out in international and domestic law. CRAE urges the Government to establish a clear independent lead for the protection of children’s privacy rights, particularly but not exclusively in relation to computerised databases and the collection and retention of biometric data on children.

Monitoring arrangements for children educated at home

9. While CRAE welcomes some form of registration and monitoring of home education, this must be proportionate and focus on the quality of the education being provided, in line with Article 29 of the UNCRC. These proposals should make sure that children and young people, whose parents opt to educate them at home, do not miss out on the educational opportunities and support available to their peers. The Government should also use the opportunity to ensure that the forthcoming bill provides for children and young people of sufficient understanding to initially and periodically be given their own say in whether, and how, they are home-educated.

Media reporting of family proceedings

10. The recent move to open family court hearings to the media has been heavily criticised by NGOs and lawyers, and there has already been a significant amount of confusion about the rules permitting media coverage of such cases. Although the courts have been given discretion to restrict media attendance in certain circumstances, and the Government has committed to protecting the privacy of children involved in family proceedings,⁸¹ children’s rights activists remain concerned that the rights of children involved in these hearings (including their right to privacy) are not being given sufficient priority in the Government’s drive for further transparency and accountability.

POLICING, CRIME AND PRIVATE SECURITY BILL

Reducing reporting requirements on stop and search forms

11. CRAE is concerned that the reduction of reporting requirements for police on stop and search forms may weaken safeguards for children who are subject to stop and search. In 2008, 2,331 stop and searches were carried out by the Metropolitan Police on under-15s under section 44 of the Terrorism Act 2000. Fifty-eight of these involved children under the age of nine.⁸² The Independent Police Complaints Commission is currently investigating complaints concerning the stop and search of two young girls aged six and 11 and a boy aged nine.⁸³ CRAE has called for clear guidelines on the stopping and searching of young children, taking account of children’s views and framed by human rights requirements.

⁷⁸ Permitted via section 2 of the Asylum and Immigration Act 2004

⁷⁹ Education and Skills Act 2008

⁸⁰ House of Lords debate, 11 November 2008: Hansard Column 573

⁸¹ Ministry of Justice (2008). *Family Justice in View*

⁸² Metropolitan Police Authority (2009). *Yearly statistics*

⁸³ Independent Police Complaints Commission press release (10 September 2009). *Managed investigation into stop and search complaint*

Additions to the DNA database

12. The proposed new police power for post-conviction DNA sampling and taking of fingerprints should not include children. The Government should establish a general presumption that DNA samples will not be taken from children following arrest, charge or conviction unless this is required for the purposes of investigating the offence for which the child was arrested. The retention of the DNA profiles of children and young people should never be indefinite and must always be subject to regular review, including automatic review when any child whose DNA profile has been retained reaches the age of 18.⁸⁴ CRAE urges the Government to significantly revise its proposals for the DNA database in order to achieve both proportionality and a sufficient differentiation between adults and children in the collection and retention of DNA.

Protecting women and girls from violence

13. CRAE welcomes the opportunity in the bill to consider recommendations from the Home Office consultation on violence against women and girls.⁸⁵ The Government must take care to ensure that all forms of violence against children and young people, including in domestic settings, are included in its legal definitions. We welcome its adoption of the UN definition of violence against women and girls. The Government has yet to implement a coherent response to the recommendations made in the UN Study on Violence Against Children. There is still no co-ordinated, comprehensive system for recording and analysing all instances of violence against children and young people. A cabinet-level minister should be given responsibility for co-ordinating the implementation of the recommendations of the UN Study, and for overseeing the development of a national strategy focusing explicitly on ending all forms of violence against children and young people.

Support for parents with children involved in anti-social behaviour

14. CRAE welcomes the provision of support for parents struggling with their child's behaviour. It is crucial that parenting assessments and Parenting Orders provide effective support for families, and do not simply become a paper trail leading to the criminal justice system. We do not believe that it is appropriate or helpful to criminalise people for non-criminal activity. The disproportionate application of Anti-Social Behaviour Orders (ASBOs) to children (as compared to adults) has raised particular concern with regard to the appropriateness and effectiveness of their use with children. In October 2008 the UN Committee on the Rights of the Child called for a review of their application to under-18s. Positive moves by the Government to provide support to families do not dispel concerns about the Government's promotion of the anti-social behaviour agenda as a solution to the "problem" of children and young people.

30 October 2009

Supplementary memorandum submitted by the Children's Rights Alliance for England (CRAE)

ABOUT CRAE

1. The Children's Rights Alliance for England (CRAE) seeks the full implementation of the United Nations Convention on the Rights of the Child (UNCRC) in England. Our vision is of a society where the human rights of all children are recognised and realised.

INTRODUCTION

2. This submission from CRAE⁸⁶ focuses on seven of the nine priority areas for legislative scrutiny identified by the Joint Committee on Human Rights (JCHR) for 2010. We highlight significant children's rights issues raised and consider opportunities to strengthen children's human rights protection.

DNA AND FINGERPRINTS

3. CRAE is a member of the Standing Committee for Youth Justice (SCYJ) and supports its detailed briefing for the Second Reading of the Crime and Security Bill.

4. We welcome the judgment of the European Court of Human Rights in the case of *S & Marper* [2008] which found that current practice in England and Wales regarding the retention of DNA data on the National DNA Database violates Article 8 (right to family and private life) of the European Convention on Human Rights (ECHR).⁸⁷ The Court severely criticised the "blanket" and "indiscriminate" holding of data

⁸⁴ Standing Committee for Youth Justice (2009). *Keeping the right people on the DNA database: response on behalf of the SCYJ*

⁸⁵ Home Office (2009). *Together we can end violence against women and girls*

⁸⁶ The Children's Rights Alliance for England (CRAE) is an alliance of 270 organisations. Not all our members necessarily support the contents of this submission.

⁸⁷ The Grand Chamber's judgment of 4 December 2008 in the case of *S and Marper v The United Kingdom* (Applications nos. 30562/04 and 30566/04).

and singled out the damaging impact of such data retention on children and young people. We do not believe that the proposals in the Bill provide an adequate response to the European Court's judgment or the UK's obligations under the UNCRC.

5. The proposed new police power for post-conviction DNA sampling and taking of fingerprints should not include children. The Government should establish a general presumption that DNA samples will not be taken from children following arrest, charge or conviction unless this is required for the purposes of investigating the offence for which the child was arrested. Children's DNA profiles should be retained for no longer than is required for the purposes of investigating the offence for which the child was arrested. The retention of the DNA profiles of children and young people should never be indefinite and must always be subject to regular review, including automatic review when any child whose DNA profile has been retained reaches the age of 18.⁸⁸ CRAE urges the Government to significantly revise its proposals for the DNA database in order to achieve both proportionality and a sufficient differentiation between adults and children in the collection and retention of DNA.

DOMESTIC VIOLENCE

6. CRAE welcomes the opportunity in the Crime and Security Bill to consider recommendations from the Home Office consultation on violence against women and girls.⁸⁹ The Government must take care to ensure that all forms of violence against children and young people, including in domestic settings, are included in its legal definitions. We welcome its adoption of the UN definition of violence against women and girls. The Government has yet to publish or implement a coherent response to the recommendations made in the UN Study on Violence Against Children. There is still no co-ordinated, comprehensive system for recording and analysing all instances of violence against children and young people. A cabinet-level minister should be given responsibility for co-ordinating the implementation of the recommendations of the UN Study, and for overseeing the development of a national strategy focusing explicitly on ending all forms of violence against children and young people.

STOP AND SEARCH

7. CRAE is a member of the Standing Committee for Youth Justice and supports its detailed briefing for the Second Reading of the Crime and Security Bill. CRAE is concerned that the reduction of reporting requirements for police on stop and search forms may weaken safeguards for children who are subject to stop and search.

8. Whilst we welcome the retention of ethnicity monitoring as a safeguard against discrimination, we believe that monitoring should not be limited to ethnicity and should include age. In 2008, 2,331 stop and searches were carried out by the Metropolitan Police on under-15s under section 44 of the Terrorism Act 2000. Fifty-eight of these involved children under the age of nine.⁹⁰ The Independent Police Complaints Commission is currently investigating complaints concerning the stop and search of two young girls aged six and 11 and a boy aged nine.⁹¹

9. A record should be made of the power under which the search is made. Searches can currently be made under various pieces of legislation and not all of these require a police officer to have "reasonable suspicion" before stopping a member of the public, for example section 60 Criminal Justice and Public Order Act 1994 and section 44 of the Terrorism Act 2000. There is some evidence that the police are using these very broad powers on a regular basis despite the fact that they are intended for exceptional use and hence it is important that their use is monitored.⁹² We call on the Government to implement the recent judgment by the European Court of Human Rights in the case of *Gillan and Quinton v United Kingdom* [2010]. The court ruled that stop and search without "reasonable suspicion" was a violation of Article 8 of the ECHR (the right to family and private life).

10. We are concerned at the Government's proposals to replace written records of stop and searches with a "a receipt provided that the person exercising the power is using mobile technology with direct input into a force computer system."⁹³ We are seeking clarification that this system will be able to produce a hard copy of the electronic audit trail for verification and validation purposes and which may be requested by the person stopped (or, in the case of a child, their parent in appropriate circumstances). This information should not be used to gather identification material which can be used in speculative searches, nor be retained indefinitely, if there are no other reasons for retention.

11. We are concerned that the proposed reforms do not address, and possibly exacerbate, a number of longstanding problems with the way stop and search works in practice in relation to children and young people. In all normal circumstances (where there is not an immediate urgency on the street), searches of

⁸⁸ Standing Committee for Youth Justice (2009). *Keeping the right people on the DNA database: response on behalf of the SCYJ*

⁸⁹ Home Office (2009). *Together we can end violence against women and girls*

⁹⁰ Metropolitan Police Authority (2009). *Yearly statistics*

⁹¹ Independent Police Complaints Commission press release (10 September 2009). *Managed investigation into stop and search complaint*

⁹² Lord Carlile of Berriew Q.C. (2009) *Independent Report on the Operation in 2009 of the Terrorism Act 2000*

⁹³ Home Office (2008) *PACE review: government proposals in response to the review of the police and criminal evidence act 1984*

children should be conducted at a police station in the presence of an appropriate adult. The senior officer should notify the child or young person's parent/guardian before the search takes place, unless the child has sufficient understanding and objects to their parent/guardian being present. If an urgent search on the street is necessary, there should be a requirement to report the search to a senior officer within 24 hours. The search should also be reported to the child's parent/guardian within 24 hours unless it would manifestly not be in the child's best interests to do so. We believe that such safeguards are necessary to ensure that stop and searches of children are used correctly and appropriately by the police.

12. Notwithstanding questions concerning the lawfulness of children under the age of criminal responsibility being stopped and searched, CRAE has called for clear guidelines on the stopping and searching of young children, taking account of children's views and framed by human rights requirements.

ENFORCEABLE ENTITLEMENTS FOR PARENTS AND PUPILS

13. CRAE welcomes the introduction of educational guarantees for children and their parents in the Children, Schools and Families Bill and hopes that the Government will ensure that sufficient funds are in place to make these guarantees a reality. In particular we welcome the "pupil ambition" that all children will go to a school where they are taught in a way that meets their needs and have the opportunity to express their views. We will be seeking clarification from the Government that the duty on the Secretary of State to consult before issuing or revising a pupil or parent guarantee (clause 2(2)) includes a duty to consult children. Every child's right to education is reflected in Articles 28 and 29 of the UNCRC, and in General Comment No. 1 of the Committee on the Rights of the Child.⁹⁴ We hope that these and other key human rights provisions will be reflected in the pupil and parent guarantees.

MANDATORY SEX AND RELATIONSHIPS EDUCATION

14. CRAE has been a long-standing advocate for statutory and comprehensive sex and relationships education (SRE) and supports the introduction of a reformed statutory basis for SRE in the Children Schools and Families Bill (clause 13). Article 24 of the UNCRC gives every child the right to have access to health education whilst Article 17 guarantees to every child access to information, particularly that aimed at promoting well-being and physical and mental health. In 2002 the Committee on the Rights of the Child recommended that health education should form part of the school curriculum and specifically stated this should include sex education.⁹⁵

15. Clause 14 amends exemptions from SRE. Currently a parent may withdraw any child up to the age of 19 from sex and relationships education. There is little accurate information on the number of children affected by this withdrawal. A small study in 2002 by Ofsted estimated this to be four in every 10,000 school pupils; or approx 3,000 children in England.⁹⁶ The Government is proposing to lower the age at which parents have the right to withdraw children from SRE to 15. CRAE sees this as a small step forward. However, we believe that to meet its human rights obligations the Government should be much more ambitious. The Committee on the Rights of the Child is unequivocal that all children and young people should be provided with, and not be denied, accurate and appropriate information on how to protect their health and on the development and practice healthy behaviours. This should include information on safe and respectful social and sexual behaviours.⁹⁷ In the England submission to the Committee in 2008, over 100 non-governmental organisations called upon the Government to remove parents' right to withdraw children from sex education in school.⁹⁸

16. The European Court of Human Rights ruled on the issue of compulsory sex education in primary and secondary schools in the case of *Kjeldsen, Busk Madsen and Pedersen v Denmark* [1976].⁹⁹ The case was brought by six parents who claimed that this education was in breach of Article 2, Protocol 1 of the ECHR concerning the right of parents to respect for their religious and philosophical convictions in the education of their children. The parents also claimed breaches of Articles 14 (discrimination on grounds of religion), Article 8 (family and private life) and Article 9 (freedom of religion). The court ruled against them on all counts.

REPORTING OF FAMILY COURT PROCEEDINGS

17. CRAE is a member of the Interdisciplinary Alliance for Children and supports its detailed briefing on media access to the family courts for the Second Reading of the Children, Schools and Families Bill.

⁹⁴ UN Committee on the Rights of the Child (2001) *General Comment No. 1: The aims of education, Article 29(1) CRC/GC/2001/1* [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2001.1.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2001.1.En?OpenDocument)

⁹⁵ UN Committee on the Rights of the Child (2002) *Concluding observations: United Kingdom of Great Britain and Northern Ireland CRC/C/GBR/CO/4*.

⁹⁶ Ofsted (2002) *Sex and relationships. A report from the Office of Her Majesty's Chief Inspector of Schools*.

⁹⁷ UN Committee on the Rights of the Child (2003) *General comment No. 4. Adolescent Health and Development in the Context of the Convention on the Rights of the Child. CRC/GC/2003/4*. [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.4.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.4.En?OpenDocument)

⁹⁸ Children's Rights Alliance for England (2008) *State of Children's Rights in England 2008—Review of UK Government's implementation of the Convention on the Rights of the Child—2008*

⁹⁹ Application No 5095/71, 5920/72, 5926/72

18. CRAE supports the principle of reforming the family courts to achieve a more transparent and accountable process. However, we are concerned that the provisions laid out in Part 2 of the Bill do not take sufficient account of the best interests or privacy rights of children or their families. Enabling powers in clause 40 will permit the Lord Chancellor to relax the rules on reporting “sensitive personal information”.¹⁰⁰ The effect of this will be that sensitive personal information initially protected by the Bill may be published following the commencement of this clause (unless a court specifically imposes restrictions) thus significantly increasing the likelihood of children and families being identified in press reporting.

19. CRAE, along with the Interdisciplinary Alliance for Children, feels that these provisions have been adopted without adequate consultation or an assessment of the potential impact on children in terms of their safety, well-being and privacy. Children themselves have expressed concern about media attendance in family courts and have indicated this may limit the information they choose to share. It is unclear whether the Government has considered alternative methods of improving transparency which would not subject already highly vulnerable children to a range of further risks. We urge MPs to make no further changes to legislation in the absence of an independent evaluation of the impact of media access to the courts following the rule change in April 2009.

ASYLUM SUPPORT AND DESTITUTION

20. The Draft Immigration Bill will bring together a broad range of legislation affecting every stage of the immigration process. CRAE welcomes this attempt to streamline and simplify immigration legislation, but urges the Government to ensure that this does not have the unintended consequence of weakening existing protection for children in the immigration process. Despite the Government lifting its wide-ranging reservation to the UNCRC concerning immigration, we have a number of serious concerns regarding the current system, which we do not want to see exacerbated. These concerns include but are not limited to: the detention of asylum-seeking children; the lack of data on the number of children seeking asylum; the lack of independent oversight of reception conditions for unaccompanied children who have to be returned; and the prosecution of children over the age of ten if they do not possess valid documentation upon entry to the UK.¹⁰¹ Both the Council of Europe Commissioner for Human Rights and the UN Committee on the Rights of the Child have raised serious concerns regarding the detention of children in the immigration system.¹⁰² We call on the Government to include a commitment to ending the detention of children and their families in Immigration Removal Centres in the draft Bill before Parliament.

January 2010

Letter to the Chair of the Committee from the Country Land and Business Association, dated October 2009

We are writing with regard to the Human Rights Committee’s Report on the provisions of the Marine and Coastal Access Bill.

In the report it was stated that the appeal mechanism proposed by the government “would remove the incompatibility with Article 6”.

However, this mechanism does not extend so far as to give the holder of a profit *a prendre* the right of appeal.

The government accepts that this is what it intended by its amendment.

The most commonly held profits in this context of coastal access will be grazing rights, mineral rights and shooting rights. As you will appreciate, it will often be the case that the value of the profit will be considerably greater than the value of the bare land. As such the profit holder potentially has more at stake than does the landowner.

Moreover, profits are, of course, legal interests and for most other purposes are treated in the same way as other property. As such I would have assumed that the right to their use is a civil right for the purposes of Art 6.

In the circumstances, could we ask, was it the Committee’s intention that the range of persons entitled to appeal should be limited in the way the government wants?

¹⁰⁰ The Bill defines “sensitive personal information” in Schedule 3 under four categories: information given by a relevant child; information relating to a medical, psychological or psychiatric condition; information relating to a medical, psychological or psychiatric examination; and information relating to health care, treatment or therapy.

¹⁰¹ Permitted via section 2 of the Asylum and Immigration Act 2004

¹⁰² Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe (2008) *Following his visits to the United Kingdom on 5–8 February and 31 March–2 April 2008, Issues reviewed: Asylum and immigration* UN Committee on the Rights of the Child (2008) *Concluding observations: United Kingdom Of Great Britain And Northern Ireland CRC/C/GBR/CO/4*.

Commons report stage of the Bill has not yet been set but is likely to be late October.

Apologies if all this is a little presumptuous. If it would be of use, we would be happy to come over to your offices to discuss matters in more detail.

Richella Logan
Head of Public Affairs

Memorandum submitted by the Department for Children Schools and Families

On 28 July 2009, the Parliamentary Joint Committee on Human Rights indicated that it wished to have written evidence from the Department on the human rights implications of the Bill. The Department is pleased to submit the following response to that request.

INTRODUCTION

1. This Memorandum sets out the principal human rights implications of the Children, Schools and Families Bill (previously titled the Improving Schools and Safeguarding Children Bill). The Bill includes a wide range of policy areas, but can be divided into 6 principal themes:

- (a) A new set of “guarantees” or entitlements for pupils and parents;
- (b) Reforms from the Schools White Paper: *Your child, your school, our future: building a 21st century schools system*;
- (c) Curriculum reforms;
- (d) Introducing a license to practise for teachers;
- (e) Safeguarding vulnerable children; and
- (f) Increasing confidence in the family courts.

2. Although the Department accepts that there are human rights implications flowing from the Bill, it does not believe that any of these present a major concern, and it is confident that the Bill will be fully compliant with the Articles of the European Convention on Human Rights (ECHR).

3. To assist the committee in considering this Bill, we have set out below those main elements of the Bill where we consider there may be some potential for interference with the Articles of the ECHR; and have set out the nature of the proposal, the potential for any interference and why the Government does not consider that the proposals either infringe those rights, or, if they do, why any interference is proportionate and justified. For reasons of space, we have not dealt with every aspect of the Bill.

PUPIL AND PARENT “GUARANTEES”

4. The Bill will require the Secretary of State to issue a document or documents, known as the pupil and parent guarantees, which will set out a series of key rights or “entitlements” which pupils and parents are entitled to expect from their school or their child’s school. The documents may impose requirements on local authorities, school governing bodies and head teachers. Pupils and parents will be able to complain about any infringements of their entitlements to the Local Government Ombudsman. The Ombudsman will be able to investigate, report and make findings and will be able to make recommendations about pupil and parent entitlements. In the case of local authorities, the Ombudsman will be able to recommend financial compensation.

5. Even though the documents can impose requirements on local authorities, school governing bodies and head teachers, the Department does not consider that a parent or pupil’s Article 6 rights (to a fair trial) will be engaged by these provisions since the entitlements provided by the guarantees are unlikely to amount to “civil rights” within the meaning of Article 6.¹⁰³ In any event, even if Article 6 were engaged, the clauses provide additional rights for pupils and parents, and an effective form of redress, both through the Ombudsman and, if necessary, through judicial review sufficient to satisfy the requirements of the Article.

HOME-SCHOOL AGREEMENTS

6. Parents of pupils at maintained schools and Academies¹⁰⁴ already have home-school agreements pursuant to sections 110–111 of the School Standards and Framework Act 1998. The Bill will amend the current provision to require personalised agreements to be drawn up annually between the school and parents, and require the head teacher to take reasonable steps to secure that the agreement is signed by parents.

¹⁰³ *Simpson -v- UK* (1989) 64 DR 188, EComm HR

¹⁰⁴ For these purposes “Academies” includes City Technology Colleges (CTCs) and City Colleges for the Technology of the Arts (CCTAs).

7. The Bill will also insert provisions into the Anti-social Behaviour Act 2003 to require that parenting contracts offered in the event of truancy or misbehaviour must include a statement that a parent agrees to discharge their responsibilities under the home-school agreement. The Bill will also require magistrates' courts considering whether to make a parenting order under the same Act to take into account any failure by the parent to discharge their responsibilities under the terms of any agreement. Parenting orders can require parents to attend residential courses (but only if a court is satisfied that the interference that would result to a parent's family life, under Article 8, was proportionate in all the circumstances).

8. The Department does not consider that Article 8 is engaged by home-school agreements themselves since there are no direct adverse consequences for parents or pupils if parents fail to sign it. This is explicit in s. 111(5) of the School Standards and Framework Act 1998.

9. A parenting contract is entirely voluntary, and a parent need not agree to sign. However, as a refusal to sign such a contract may be taken into account in an application for a parenting order, Article 8 might arguably be engaged. In those circumstances, the same considerations as outlined below would apply.

10. In relation to an application for a parenting order, the Department accepts that Article 8 is engaged but considers that any interference with a parent's right to family life which results is necessary in a democratic society, proportionate and pursues a legitimate aim of ensuring acceptable attendance and behaviour by pupils in the classroom. In *R (M) -v- Inner London Crown Court*,¹⁰⁵ the Divisional Court held parenting orders compatible with Article 8 as balancing the competing interests of the community's right to protection of life, limb and property against parents' rights to respect for private and family life. The Bill does not make any substantial amendments to the parenting order legislation which would change this analysis in any way.

REFORM OF THE CURRICULUM

11. The Bill will introduce two distinct reforms to the school curriculum. First, it will introduce a new curriculum for primary pupils designed to allow study and teaching in "areas of learning" rather than by rigid subject. This follows recommendations of an independent report by Sir Jim Rose. Secondly, it will introduce Personal, Social, Health and Economic (PSHE) education in key stages 3 and 4 as a new foundation subject within the National Curriculum.¹⁰⁶ This new subject will include teaching on what is presently sex education, on careers, alcohol and other drugs, emotional health and well-being, work-related learning, nutrition and physical exercise.

12. In relation to the introduction of "areas of learning" at primary level in maintained schools, one of the areas of learning will be "understanding physical development, health and well-being" and this subject will contain age-appropriate elements of "sex and relationships education" (SRE).

13. The Department considers that this engages the rights under Article 2 of the first protocol¹⁰⁷ of both parents and pupils alike. The Department also considers that it may engage the Article 8 rights of pupils.

14. Parents will be able to withdraw their children from any element of SRE delivered in this area of learning. The Department considers that this will avoid any infringement of parental rights, but also that children's own best interests are best protected by their parents at this age. In relation to primary school pupils, it is highly unlikely that a parental decision as to what is in the best interests of a child would infringe the child's own Article 8 rights.

15. In relation to the introduction of statutory PSHE, the Department again considers that this will engage Article 2 of the first protocol and Article 8 in relation to parents and children because of its incorporation of sex and relationships education (SRE) and because it represents the introduction of a compulsory subject within the National Curriculum intended to convey (in part) information on sexual health and personal development.

16. The Department intends to maintain a partial right of withdrawal for parents in relation to the teaching of SRE to their children (but no other part of PSHE), but will be reducing the age from the present limit of 19 which is unsustainable in the light of ECHR case law and the principles of the UN Convention on the Rights of the Child (UNCRC). A continued, but limited, right of parental withdrawal strikes an acceptable balance between the rights of parent and child. A limited right recognises that parents have a role to play in deciding what is in the best interests of young children and the fact that there is unlikely to be any conflict between the Article 8 rights of parents and a young child, and reflects the requisite respect for the religious and philosophical convictions of parents inherent in Article 2 of the first protocol. As a child matures, however, the Government accepts that children must be accorded greater rights to determine for themselves what is in their interests, and to make decisions about their own private lives, with the necessary information to do so-so that the parental right of withdrawal must cease. The Government also accepts that

¹⁰⁵ [2003] EWHC 301 DC

¹⁰⁶ Key stages 3 and 4 equate, roughly, to the period between the ages of 11-16: ie secondary education.

¹⁰⁷ "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

parental rights exist primarily for the protection of the child and that parental views, once a child is mature, cannot override the right of the child to information necessary to their health and development if such information is provided in a balanced and pluralistic way.

17. On that basis, the Government is satisfied that these provisions will not infringe Article 2 of protocol 1 or Article 8 ECHR.

LICENCE TO PRACTISE FOR TEACHERS

18. The Bill will introduce a licensing scheme for teachers registered with the General Teaching Council for England. Teachers will receive a licence, renewable periodically on demonstration of maintenance of professional standards. Only licensed teachers will be able to teach in maintained schools and academies. The Department does not consider that the establishment of the licensing scheme itself engages any Convention rights. Article 6 rights of teachers could be engaged, however, if they are refused a licence, or a renewal, since this would prevent them teaching unsupervised in relevant schools. However, the Bill will also require the Secretary of State to establish an appeal process for teachers to an independent GTC committee, and to set out the appeal process—which will have to comply with Article 6. Any GTC decision would also be susceptible to judicial review. There is consequently no infringement of Article 6.

19. Additionally, the loss of a licence does not lead to loss of professional status: a teacher may reapply and be licensed as soon as they meet the required standards. This can be contrasted with de-registration by the GTC (for serious misconduct) where there is a right of appeal to the High Court. The Department does not consider that a licence will be a possession within the meaning of Article 1 of the first protocol.¹⁰⁸

REGISTRATION OF HOME EDUCATION

20. The Bill will introduce a scheme for the registration and monitoring of home education of children in England. Local authorities are to be required to maintain a register of all children of statutory school age being home educated in their area. The register will identify home educated children and it will be part of the registration scheme to comply with limited monitoring so that a local authority can ensure that education provided is suitable and that children are safe and well. There is presently no obligation on parents to register or notify their local authority of home education. It will not be an offence to fail to register, but ultimately parents who do not register and continue to home educate will face the school attendance regime, for which there are criminal penalties.

21. The Department considers that registration and monitoring will engage Article 2 of the first protocol and Article 8 but will be compatible with them provided that the scheme is operated in a way that is subject to clear and accessible rules, operated proportionately for the purposes of safeguarding the welfare and education of the child. Refusals of registration or revocation will be managed within a clear regulatory framework and the permitted grounds for refusing home education will be set out. A right of appeal from the local authority decision will be included. The ECHR provides no absolute right for parents to home educate children¹⁰⁹ where the State reasonably considers that it is contrary to the child's wider educational interests. Other registration schemes similar to that proposed here have been found compatible with Article 2, protocol 1.¹¹⁰

22. Requiring parents to register home education and comply with monitoring engages Article 8, but the Department considers that any interference is justified as necessary in the interests of the protection of health and the protection of the rights of others. The local authority will need accurate information to monitor the suitability of a child's education. The information and monitoring required will be relatively basic, and therefore proportionate to the aim.

23. Some limited information sharing between local authorities will also occur which will engage Article 8, but again the Department is satisfied that any interference will be proportionate and necessary to monitor children who move between authorities so that a full picture in relation to the child is maintained.

SUPPLY OF INFORMATION REQUESTED BY LOCAL SAFEGUARDING CHILDREN BOARDS IN ENGLAND AND WALES (LSCBs)

24. The Bill will contain a clause requiring the provision of information to an LSCB in England at its request, for the purpose of assisting the LSCB to perform its functions. Although the Department accepts that Article 8 may be engaged by such information requests, any interference is justified: the functions most likely to require personal information relate to reviews of serious cases and child deaths where learning lessons and identifying concerns are intended to protect the rights and freedoms of others. The Secretary of State will issue guidance intended to ensure compliance with Article 8. Similar powers will be taken by LSCBs in Wales.

¹⁰⁸ This is consistent with the decision in *Waltham Forest NHS Primary Care trust -v- Malik* [2007] EWCA Civ 265 in which the Court of Appeal held that membership of the medical practitioner's list was not a "possession" protected by Article 1 of the First Protocol.

¹⁰⁹ See *Family H -v- UK* (application no 10233/83) and *Leuffen -v- Germany* (application no 19844/92)

¹¹⁰ See for example, *BN and SN -v- Sweden* (application no 17678/91)

 FAMILY PROCEEDINGS: ATTENDANCE AND REPORTING

25. Reporting of court proceedings in family cases is presently heavily restricted, with protection weighed more towards Article 8 rights to privacy. The Bill intends to increase public confidence in the operation of the family courts by allowing greater scrutiny of their operation through media reporting. The Bill will rebalance competing rights, to give greater weight to Article 10 freedom of expression rights, whilst maintaining significant controls to satisfy Article 8 protection. It will allow media reporting of information about proceedings acquired by the attendance of accredited media representatives, subject to certain automatic restrictions for some types of information, and some discretionary ones for all other material. For information relating to adoption and parental orders specific restrictions will apply to give additional protection to the privacy of the adopted child and the adoptive family.

26. The Article 8 rights of litigants, children and (sometimes) witnesses are engaged. The Ministry of Justice (who promote this part of the Bill) consider that allowing reporting of the substance of a case (subject to the restrictions indicated in paragraph 27 below), but preventing the identification (for life, in the absence of a specific court decision to relax the restriction) of a child and others involved in the proceedings, suitably reflects the Article 8 rights of key persons.

27. Automatic protection (by way of automatic restriction of publication) of Article 8 rights will continue to apply to the publication of any information which would be likely to lead to identification (including, for example, identifying features of the case: so-called “jigsaw” identification). The court will retain a discretion to relax this control. For other categories of information, Article 8 issues will be addressed on a case-by-case basis by a further system of discretionary controls, allowing the court to impose additional restrictions when necessary for specific purposes, which will allow protection for Article 8 rights. This is in addition to the Senior Courts’ inherent jurisdiction to impose additional restraints to ensure protection of Article 8 rights. Courts will be able to fine-tune the balance between Article 8 and Article 10 rights by reference to the powers to permit, or restrict, the different categories of information according to the criteria laid down in the provisions.

28. Whilst the main focus of these provisions relates to the balance held between Articles 8 and 10, they also represent a move towards greater scrutiny of court proceedings in line with Article 6.

3 November 2009

Memorandum submitted by the Equality and Human Rights Commission

Legislative scrutiny priorities for 2010

1. The Equality and Human Rights Commission (the Commission), established on the 1 October 2007 is working to eliminate discrimination, reduce inequality, protect human rights and to build good relations, ensuring that everyone has a fair chance to participate in society.

2. Our approach to equality, opportunity and human rights builds on the achievements of our predecessors, the Equal Opportunities Commission (EOC), the Commission for Racial Equality (CRE) and the Disability Rights Commission (DRC). We are here for the 60 million people of Britain and Parliament has set us the task of:

- Protecting and promoting equality
- Protecting and promoting human rights
- Ensuring good relations

3. The Commission welcomes the opportunity to provide evidence to the Joint Committee on Human Rights as part of its legislative scrutiny of Bills for compatibility with human rights. As a statutory body, the Commission has duties to promote equality and protect human rights, and encourage compliance with the Human Rights Act 1998 and other human rights obligations under international treaties.¹¹¹

1. CRIME AND SECURITY BILL

DNA and fingerprints

4. The Bill establishes various time limits for the retention of DNA samples, profiles and fingerprints taken under the Police and Crime Evidence Act 1984 (PACE) and anti-terror legislation. These provisions seek to address the European Court of Human Rights’ (ECtHR) judgment in *S and Marper v United Kingdom*.

5. The Bill also introduces new powers to take samples and fingerprints from people convicted of crimes domestically and abroad, and powers to compel individuals to attend a police station to be sampled.

¹¹¹ Section 9 of the Equality Act 2006.

6. The Commission recognises the DNA database as an important crime-solving tool and acknowledges that the Government's proposals are more proportionate than the current system in that they:

- aim to treat DNA samples differently from profiles and fingerprints;
- take some account of the need to treat profiles and fingerprints of those convicted of offences differently from those who are acquitted (or not charged);
- take some account of the seriousness of the offence;
- take some account of the unique situation of children; and
- take account of the unique situation of those who have given their DNA voluntarily.

7. However, the Commission still thinks that the Government has interpreted the judgment too narrowly and that the proposals do not go far enough to give full effect to the judgment. The Commission thinks that some aspects of the proposals lack the necessary level of proportion to be lawfully justified.

8. The ECtHR's ruling emphasised that the United Kingdom has a narrow margin of appreciation when it comes to determining permissible limits on the interference with private life in this sphere. In particular, it considered that any state claiming a pioneer role in the development of new technologies (as the UK does) bears special responsibility for striking the right balance.

9. The Commission believes that if some of the proposals become law the Government is likely to be in breach of Article 8 of the Convention and be acting unlawfully.

10. In particular, the proposal to retain DNA profiles taken from adults for 6 years when they are not convicted of a crime is likely to be unlawful according to advice obtained by the Commission from a leading counsel.

11. The Council of Europe's Committee of Ministers, which oversees implementation of the Court's judgments, has also questioned how this and other proposals take into account factors that the Court found to be relevant in determining the proportionality of the interference with private life. Key factors are the gravity of the offence that the individual was originally suspected of committing, and the interests deriving from the presumption of innocence.

12. The Commission is also concerned about the lack of a mechanism for independent review of the justification for retaining samples in individual cases. The Committee of Ministers shares this concern.¹¹²

13. In relation to retention periods for DNA profiles, the Commission's view is that the starting point ought to be that profiles are destroyed when a final decision has been made in a particular case, subject to limited exceptions. This aligns with the Council of Europe's guidance on the use of DNA within the framework of the criminal justice system¹¹³ that the ECtHR relied on heavily. The limited circumstances can be summarised as follows:

- there has been a conviction;
- the conviction concerns a serious criminal offence against the life, integrity and security of a person;
- the storage period is strictly limited;
- the storage is defined and regulated by law; and
- the storage is subject to control by parliament or an independent supervisory body.

14. Decisions taken about retaining DNA profiles should also be subject to independent review.

15. The Commission recognises that this presumption may be displaced in certain limited circumstances, but wishes to emphasise that the current proposals are too distant from these basic principles to be proportionate.

Domestic violence

16. The Commission broadly supports the Government's proposal to introduce Domestic Violence Protection Notices/Orders or "GO" notices/orders.

Domestic violence as a human rights issue

17. The Government has made progress in tackling domestic violence over the last 10 years, with a range of initiatives such as Specialist Domestic Violence Courts and Independent Domestic Violence Advisors. Although there is some evidence that the levels of domestic violence may have fallen,¹¹⁴ it remains widespread and continues to have a significant impact on the lives of many victims.

¹¹² http://www.coe.int/t/DGHL/MONITORING/EXECUTION/Reports/Current/United_Kingdom_en.pdf

¹¹³ Committee of Ministers Recommendation No. R (92) 1, paragraph 8, and the related Explanatory Memorandum: referred to in paragraphs 43 and 44 of the Court's judgment in *S and Marper v United Kingdom*.

¹¹⁴ The Government's response to the Home Affairs Committee's report on Domestic Violence, Forced Marriage and "Honour"-Based Violence refers to a 65% decrease in the number of incidents of domestic violence reported in the British Crime Survey between 1995 and 2007–08

18. It is a major cause of death and disability for women¹¹⁵ and can lead to physical and mental health problems¹¹⁶ and reduced economic potential.¹¹⁷ Domestic violence also has an impact on children living in households where it is occurring including reduced educational attainment; increased involvement in anti-social behaviour and street and playground violence.¹¹⁸ Domestic violence is a common feature in the households of children who die as a result of maltreatment.¹¹⁹

19. The Commission recognises domestic violence as a form of violence against women within the United Nations definition which is “gender-based violence directed against a woman because she is a woman or that affects women disproportionately”. Although men are also victims of domestic violence, women are disproportionately affected in terms of overall numbers and in terms of the frequency, severity and consequences of violence.

20. Domestic violence is increasingly recognised as both an issue of gender inequality and a human rights abuse. The State’s positive obligation to protect women and children from violence within the home was highlighted by a European Court of Human Rights ruling in June 2009. It ruled against Turkey in a domestic homicide case, finding that the State had failed to prosecute adequately a man who repeatedly attacked his wife, and eventually shot and killed his mother-in-law.¹²⁰

“GO” orders

21. In June 2008, the House of Commons Home Affairs Committee published the report of its inquiry into Domestic Violence, Forced Marriage and “Honour”—Based Violence. It recommended the introduction of GO orders, which have been used in a number of European countries to give victims of domestic violence time and space to consider their options without pressure from the alleged perpetrator.

22. In its response to the report, the Government said it would keep GO orders under review as part of learning from good practice in other countries. The orders have now been brought forward as part of the Crime and Security Bill.

23. GO orders have already been introduced in Austria, Switzerland, Germany and Poland, all of which are signatories to the Convention for the Protection of Human Rights and Fundamental Freedoms. In all of these countries, the legislation enables the police to exclude the alleged perpetrator of domestic violence from the home although the length of the exclusion and the degree to which the victim can influence the decision varies.

24. There is a potential problem with perpetrators breaching the order although breach rates in Austria, which is considered by the Council of Europe as a model of best practice, are low at only 3%. The problem of breaching also applies to existing protective injunctions within Britain and requires a robust response from the police and courts.

25. An evaluation of GO orders in Austria found that they were generally supported by victims and were effective if linked to support and help for the victim. Most victims said that their situation had improved in follow up interviews a year later.

26. The introduction of GO orders in Britain would help the police to protect victims of domestic violence more effectively. They would ensure the immediate safety of victims and provide an opportunity for them to access specialist support to help them to plan their futures. This would address situations where the police believe that domestic violence has taken place and is at risk of being repeated but where the quality of evidence may not be sufficient to secure a conviction.

27. In these cases the onus is currently on victims to apply for an injunction but they may not have the emotional or financial resources to do so. In cases where the perpetrator is charged, a GO order would remove the reliance on bail conditions to prevent the perpetrator returning to the home. GO orders should reduce the number of victims forced to flee their homes because of domestic violence. This is often an extremely disruptive and expensive “solution” which can damage children’s schooling, result in victims losing their homes, friends and communities and place unnecessary burdens on the voluntary sector and homelessness services.

Concerns about GO orders/notices

28. These potential benefits need to be set against the potential negative impact of GO orders on alleged perpetrators who would be deprived of access to their home, initially for 48 hours through a Domestic Violence Protection Notice (DVPN). This period could be extended from 2–4 weeks if a magistrate’s court issues a Domestic Violence Protection Order (DVPO).

¹¹⁵ WHO, 2005, Multi-country Study on Women’s Health and Domestic Violence against women

¹¹⁶ Walby, S, 2004, The Cost of Domestic Violence, published by DTI

¹¹⁷ Ending Violence against women: from words to action, Study of the Secretary-General, 9 October 2006 [http://www.un.org/womenwatch/daw/Violence against women/launch/english/v.a.w-exeEuse.pdf](http://www.un.org/womenwatch/daw/Violence%20against%20women/launch/english/v.a.w-exeEuse.pdf)

¹¹⁸ London Safeguarding Children Board, 2008, Safeguarding Children Abused through Domestic Violence

¹¹⁹ Humphreys and Stanley, 2006, Domestic Violence and Child Protection: Directions for Good Practice

¹²⁰ <http://www.hrlrc.org.au/year/2009/opuz-v-turkey-2009-echr-3340102-9-june-2009/>

29. There are also concerns that GO orders would undermine the right to a fair hearing and leave alleged perpetrators exposed to false allegations. Concerns that false allegations are common are not supported by evidence. For example a US study of more than 2000 divorce cases found that less than 2% involved false allegations of abuse.¹²¹ In reality, victims are more likely to under report domestic violence than they are to exaggerate.

30. The Commission is unclear as to the relationship between Domestic Violence Notices and Orders and other non molestation orders, in particular orders under Part 4 of the Family Law Act 1996 and the Domestic Violence, Crime and Victims Act 2004. In particular the Commission notes that under the current provisions there appear to be no penalties or provision for determination of breach of the DVPO or DVPN. The Commission would suggest it would be helpful to clarify these issues on the face of this legislation or in the explanatory notes.

Safeguards

31. The proposals in the Crime and Security Bill would enable the police to issue a DVPN where they have reasonable grounds for believing that domestic violence has taken place or been threatened and that a DVPN is needed to protect the victim. A DVPN could only be issued by an officer ranked superintendent or above.

32. A DVPN must be followed by a police application for a Domestic Violence Protection Order (DVPO). The application must be heard within 48 hours of the DVPN. The alleged perpetrator would be notified of the hearing and would have the opportunity to oppose the order.

33. In making a DVPO, the court would need to be satisfied that on the balance of probabilities domestic violence has been committed or threatened by the alleged perpetrator and that a DVPO would be needed to protect the victim.

34. The Commission believes that the relatively short length of the DVPN (48 hours), the requirement for the police to obtain a DVPO at court within 48 hours and the opportunity for the alleged perpetrator to make their case in court against a DVPO provide safeguards that limit the negative impact on alleged perpetrators.

35. The Commission considers that provision should be made to enable the police to accompany the person subject to a domestic violence notice or order to return to the premises for a short period for the purposes of collecting essential personal items. In addition in the pilot scheme the Commission would welcome consideration of support available to both the person subject to such a notice or order, and the person such a notice or order seeks to protect.

36. In addition, the Commission is reassured that the Government intends to pilot the new orders in two police force areas which will enable their impact on both victims and alleged perpetrators to be evaluated.

Stop and search

37. The Commission has a longstanding interest in stop and search. There are approximately a million stop and searches every year in England and Wales, mostly under the Policing and Crime Evidence Act 1984 (PACE) which requires “reasonable grounds for suspicion”. This specifically must not be based on generalisations, for example, on grounds of race or appearance, or people’s past record, but only on suspicious behaviour or matching a specific witness description.

38. In 2007–08, Asian people were 21/2 times more likely than White people to be stopped and searched, per head of population, and Black people 71/2 times, above the norm for the past 15 years.

39. The Bill contains provisions to reduce the reporting requirements on the police when they stop and search individuals.

40. The Commission broadly welcomes the proposals to remove the name, address and vehicle details from the stop and search record form. We understand this is being done to reduce bureaucracy following the Flanagan report, but we support this on the grounds of equality and human rights principles.

41. The original proposal in Lord Macpherson’s report published in 1999 was that a record form should be completed as a means of accountability and a way of monitoring ethnicity against other factors in stop and search. Personal details of the individual stopped were not necessary to this purpose. These details have been added, with police officers routinely checking names against the Police National Computer, none of which is within the statutory purpose of stop and search.

42. Many in the police service have more recently cited the length of the form as a reason to reconsider record keeping. However, the Commission has pointed out that the extent of information gathered has been driven by the police and the Government. Statutory authority is only to ask for, but not require, provision of these personal details.

43. The Bill therefore appears to return information recording back to its originally recommended role and extent.

¹²¹ Thoennes and Tjaden 1991, from *Mothering Through Domestic Violence*, L Radford and M Hester, 2006

44. The Commission understands that the requirement to record ethnicity under Code A of the PACE Act 1984 has statutory authority equal to being enshrined in the Act itself. We do however welcome the new provision to strengthen this reporting requirement by including it on the face of the Bill.

45. Furthermore, we would welcome a commitment from the Government to give its continued support to the National Policing Improvement Agency's (NPIA) programme to roll out a "best practice" package progressively to forces through 2010. We are confident this will foster good relations between communities and the police and reduce race inequalities in the use of the power.

2. PERSONAL CARE AT HOME BILL

Entitlement to personal care at home

46. The Commission broadly welcomes the Personal Care at Home Bill, which would require local authorities with responsibility for adult social services to provide free personal care in certain circumstances to adults with the highest needs. The Bill will have the effect of amending existing legislation to remove the six week restriction that currently applies to free social care at home, under the Community Care (Delayed Discharges) Act 2003.

47. The Commission agrees with the principle of helping more people with care needs to remain in their own homes. In our view, this social policy approach is supported by several human rights instruments.

- Article 8 of the European Convention on Human Rights protects the right to respect for one's home and private life. Being able to remain in one's own home is very likely to support an individual's dignity and autonomy—both of which are principles underpinning rights under Article 8, according to the jurisprudence of the European Court of Human Rights.
- Article 19 of the UN Convention on the Rights of Persons with Disabilities requires states parties to recognise the right of disabled persons to live in the community, ensuring that they have the opportunity to choose their place of residence with a range of support services including personal assistance.
- The UN Principles for Older Persons, which have been adopted to guide national policies for older people, include the principle of independence. This principle specifies that "older persons should be able to reside at home for as long as possible".

48. The Commission understands that questions have been raised as to whether people living in residential care might allege that the Bill creates discrimination in the protection of rights; that is, under Article 14 of the Convention (freedom from discrimination in the enjoyment of Convention Rights) read with either Article 8 (the right to respect for one's home) or Article 1 Protocol 1 (right to peaceful enjoyment of one's possessions—given that those in care homes have to use their financial resources to pay for personal care).

49. The decision in the case of *R (RJM) v Secretary of State for Work of Pensions* [2008] UKHL 63 lends support to the contention that people living in residential care have a particular "other status" within the meaning of Article 14.

50. However, while the Commission accepts that it is appropriate to raise this question, we do not believe that the Bill is discriminatory in effect. The policy of providing free personal care at home appears to be reasonably and objectively justified as a proportionate means of achieving a legitimate aim, and thus complaint with Convention obligations.

51. The direction of travel in community care policy over the past two decades has been towards a greater recognition of the value of autonomy and independent living. This approach has been supported by a strong evidence base including the responses to the consultation on the government's Green Paper, "Independence, well-being and choice" (2005). These responses strongly underlined the wishes of people with social care needs to remain in their own homes as long as possible.

52. The Commission's own work on this issue also supports the principle that disabled and older people with social care needs should have the right to remain in their own homes for as long as they can. Our report, "From safety net to springboard" (2009) drew on a literature review and consultation with stakeholders, as well as examining evidence concerning the current performance of care and support in protecting and promoting human rights and equality. The report recommended that the reform of social care be based on the capability theory advanced by Amartya Sen and recommended by the Equalities Review. A person's standard of living, including being able to live with independence and security, is an element of the capabilities approach which is highly relevant here.

53. The Commission also notes that the Government's End of life care strategy (2008) presented evidence that most people's preference is to die in their own homes, whereas in practice only 18% are able to do so. The Commission believes that the Bill would have the effect of supporting more people in their choice to die at home, and thus enhance rights under Article 8 of the Convention relating to personal autonomy about decisions affecting one's own death. This dimension to Article 8 was recognised by the European Court of Human Rights in the case of *Pretty v United Kingdom* (2002).

54. The Joint Committee has raised the question of whether economic rights such as the right to personal care at home can be made the subject of individual entitlements with some means of redress falling short of full legal enforceability. The provisions of this Bill would be enforceable to the extent that they would be subject to the complaints procedure applying to all decisions on social care. If a complainant remains dissatisfied with the outcome of the complaints process, he or she can take up the matter with the Local Government Ombudsman. As an alternative—perhaps where the decision-making processes of the local authority fall a long way short of administrative law or human rights standards—it would be open to the complainant to make an application for judicial review.

55. Taking into account these systems of redress that would be available, the Commission believes that the measures introduced by the Bill would be sufficiently judicious to make them entitlements as opposed to discretionary social provisions.

56. The Commission has some concerns about the practical issues that might arise in relation to implementation of the bill. These concerns include the definition of personal care; the inherent inequalities in the Fair Access to Care Services system; and the prospect of these measures further reducing the funding available for people whose needs are below the “critical” threshold. We also recognise the importance of ensuring that the Bill does not undermine the options set out in the recent Green Paper on social care. However, we intend to raise these concerns in our response to the Department of Health consultation on the regulations under the Bill.

3. DRAFT IMMIGRATION BILL

Asylum support and destitution

57. The Commission welcomes the JCHR’s examination of the Draft Immigration Bill, particularly that aspect which is broadly equivalent to section 55 (s55) of the Nationality Immigration and Asylum Act 2002. The relevant clauses prohibit the Secretary of State from providing support to destitute asylum seekers where it considers that an asylum application was not made as soon as reasonably practicable on arrival in the UK. However, if a failure to provide such support would result in a breach of an asylum seeker’s Convention rights, the Secretary of State would be obliged to provide it.

58. The approach set out in s55 and replicated in the Draft Immigration Bill has proved complex and controversial and has not delivered the results the Government says it intended.

59. Government representatives have argued that previous support arrangements for asylum seekers acted as “pull” factors in attracting economic migrants into the UK under the cover of asylum claims. However new research questions both the claim that such provision might pull asylum seekers into the UK and that the newer arrangements might discourage them.¹²² In general, the evidence is that the arrangements set up under s55 encourage asylum seekers whose claims have been rejected to abscond.

60. Further, the Commission considers that the decision in the *Limbuela* case¹²³ renders the provisions of section 55 (to be replicated in the Draft Immigration Bill) of very little practical effect. Following the decision, the Secretary of State will rarely be prohibited from granting support to asylum seekers on the basis that their applications for asylum were not submitted as soon as reasonably practical. The House of Lords was clear in stating that not every case of destitution will constitute a breach of a person’s Convention rights, but, in practice, it is hard to envisage circumstances in which destitute asylum seekers, who are excluded from making a living for themselves, would not face a breach of their right to be free from inhuman and degrading treatment. The case confirms that, in practice, once asylum seekers satisfy the definition of destitution under the Bill, in very many cases their Convention rights will be at risk, and the Secretary of State will be obliged to act to avoid a breach of those rights.

61. Immigration officials would be required to make a fine and implausible distinction under clause 211 of the Draft Immigration Bill to distinguish between destitute asylum seekers whose state is so severe that their Convention rights are threatened, and those destitute asylum seekers whose state is not so severe. The words of the House of Lords are pertinent:

“The combination of s 55(1) and s 55(5) places the Secretary of State in a difficult and unenviable position. Subsection (1) makes it positively unlawful for him to provide support to any asylum seeker who has not made his asylum claim “as soon as reasonably practicable”. But sub-s (5), in conjunction with s 6 of the 1998 Act, requires him to provide that support “to the extent necessary for the purpose of *avoiding...*” (our emphasis) a breach of the asylum seeker’s art 3 right not to be subjected to inhuman or degrading treatment... A literal approach to sub-ss (1) and (5) would create for the Secretary of State an impossible tightrope to tread. He would be bound to fall off one side or the other in almost every case”.

¹²² Crawley H, *Chance or choice? Understanding why asylum seekers come to the UK*, Swansea University/Refugee Council, January 2010, available at http://www.refugeecouncil.org.uk/policy/briefings/2010/13012010_x

¹²³ *Adam, Tesema and Limbuela v Secretary of State for the Home Department*, [2004]

62. In practice, the provisions would *either* create a real risk of incorrect assessments being made in individual cases and a subsequent breach of individuals' Convention rights, *or* render the provision meaningless and without practical effect, since support would be granted in all cases. For these reasons, these provisions do not, in the Commission's view, provide a satisfactory mechanism for the protection of asylum seekers' Convention rights. This Bill should be seen as an important opportunity to remedy the problems created by section 55 of the 2002 Act, not to re-enact them.

22 January 2010

Memorandum submitted by Family Education Trust (Family & Youth Concern)

INTRODUCTION

For almost 40 years, Family Education Trust has conducted research on a range of issues with a view to promoting stable family life and the welfare of children. The Trust has always taken a particular interest in sex and relationships education and has actively participated in the process leading up to the present Children, Schools and Families Bill.

In addition to making written submissions to the DCSF review of sex education delivery in schools, to Sir Alasdair Macdonald's independent review of Personal Social, Health and Economic education (PSHEe), and to the QCDA Curriculum Reform Consultation in relation to PSHEe, representatives of the Trust met with Sir Alasdair Macdonald in February 2009.

1. *The proposal to make sex and relationships education a statutory part of the national curriculum from primary school entry*

1.1 We are concerned that this proposal involves a potential conflict with Articles 8, 9 and Article 2 Protocol 1 of the European Convention on Human Rights (ECHR).

1.2 In spite of a concerted campaign from the sex education lobby, acknowledged in the QCDA report, over two-thirds (68%) of respondents to the government's own public consultation exercise disagreed with making Personal, Social, Health and Economic education (PSHEe) a statutory part of the National Curriculum, with 64% "disagreeing strongly".¹²⁴

1.3 The government's proposal would inevitably reduce the influence of parents over what is taught in their children's schools. Schools are currently required to consult with parents with regard to their sex education policies and to be responsive to their wishes.¹²⁵ However, making sex and relationships education part of the national curriculum would make schools less accountable to parents in what is a particularly sensitive and controversial subject area which, for many, engages strong religious convictions.

1.4 Making sex and relationships education statutory would limit the discretion of individual schools, including faith schools. At the moment, schools are free to develop their own policies on sex education in line with their own ethos. However, one of the government's key objectives in making sex education statutory is to ensure consistency. The Secretary of State has already confirmed that all maintained schools, including faith schools, would be required to teach pupils under the age of consent about contraception and the acceptability of homosexual relationships.¹²⁶ Allowing schools flexibility to teach sex education in line with their ethical and moral values is incompatible with the goal of consistency.

1.5 Primary schools would be deprived of any choice as to whether or not they provide sex and relationships education. While primary schools are currently required to have a policy on sex education, they are under no obligation to teach anything beyond the requirements of national curriculum science. However, making sex and relationships education statutory from primary school entry would remove discretion from the governing bodies and headteachers of primary schools.

1.6 The government argues that statutory sex and relationships education is "vital for the healthy development of every child and young person" and will reduce teenage pregnancy rates. However, it should be noted that very little research has been conducted to evaluate the success of sex education programmes. As the government's own review group noted in its report:

"[T]here is a dearth of good quality international evidence on SRE [sex and relationships education]. A literature review of the international evidence that does exist confirms that it is difficult to be precise about the impact of SRE, for a number of reasons. Firstly, there is not always clarity about what the objectives of SRE are... Second, there is such significant variation in the delivery of SRE that it makes comparisons between programmes difficult."¹²⁷

¹²⁴ QCDA, Personal, social, health and economic education: Curriculum reform consultation report to the DCSF, September 2009.

¹²⁵ DfEE, Sex and Relationship Education Guidance, DfEE 0116/2000, July 2000.

¹²⁶ Paton G, "Parents lose right over sex education", *Daily Telegraph*, 5 November 2009.

¹²⁷ Review of Sex and Relationship Education (SRE) in Schools: A report by the External Steering Group, October 2008, para 22.

1.7 Clause 13(4)(c) of the Children, Schools and Families Bill proposes to delete from the present law a clause aimed at protecting children from “teaching and materials which are inappropriate having regard to the age and the religious and cultural background of the pupils concerned”. This does not sit comfortably with Article 9 or with Article 2 Protocol 1 of the ECHR.

2. *The proposal to remove from parents the right to withdraw their children from sex and relationship lessons once the child reaches the age of 15.*

2.1 We are concerned that this proposal also involves a potential conflict with Articles 8, 9 and Article 2 Protocol 1 of the European Convention on Human Rights (ECHR).

2.2 The explanatory notes to the Bill state that giving all pupils a guarantee of sex education lessons “at the very least in the last year of compulsory education” will ensure that their “right to a private life” under Article 8 of the European Convention on Human Rights is not infringed. However, Article 8 does not provide any basis for regarding 15- and 16-year-olds as autonomous individuals, to be treated independently of their parents. Rather, the Convention refers to “the right to respect for... private and family life”. The government’s proposal does not take account of the whole family dimension.

2.3 The principle enshrined in Article 2 Protocol 1 that “the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions” applies throughout the years of compulsory schooling and does not cease at some arbitrary point determined by the government. We would therefore question the government’s contention that “it is acceptable and consistent with human rights principles to limit the parental right of withdrawal by reference to a child’s age”.¹²⁸

2.4 The logical extension of the government’s argument would be to transfer the statutory duty to ensure that children of compulsory school age receive a suitable and efficient education from parents to the children themselves once they reach the age of 15. However, we do not see any support for such a fundamental change in education law. We further note that 79% of respondents to the government’s public consultation agreed that parents, carers and guardians should retain their current right to withdraw their children from the SRE element of PSHEe.¹²⁹

2.5 We are not at all persuaded by the government’s appeal to Article 12 of the United Nations Convention on the Rights of the Child as a justification for its proposal. The fact that there is no provision in the Bill for granting pupils the right to withdraw themselves from sex education classes from their 15th birthday demonstrates that this proposal has nothing to do with the rights of the child. The effect of the proposed measure would be to limit the influence of parents over what their children are taught, while allowing the state to determine what 15- and 16-year-olds will learn about sex and relationships, irrespective of the views of parents or the young people themselves.

2.6 The government has admitted that there is no evidence that 15- and 16-year-old pupils whose parents have hitherto withdrawn them from sex education classes are at any greater risk of teenage pregnancy or sexually transmitted infections than other pupils. The interference with the right to a private and family life cannot therefore be justified on the basis that it would protect health and morals.

15 January 2010

Memorandum submitted by the Family Planning Association (FPA)

**FPA SUBMISSION TO THE JOINT COMMITTEE ON HUMAN RIGHTS’ LEGISLATIVE
SCRUTINY PRIORITIES FOR 2010**

6. *Mandatory sex and relationships education*

1. INTRODUCTION

1. FPA is one of the UK’s leading sexual health charities. Our mission is to help establish a society in which everyone has positive, informed and non-judgmental attitudes to sex and relationships; where everyone can make informed choices about sex and reproduction so that they can enjoy sexual health free from prejudice and harm. We have restricted our submission to our areas of knowledge and expertise.

1.2 FPA supports the provisions in the Children, Schools and Families Bill to introduce statutory sex and relationships education as we believe all young people have a right to information about sex and relationships to enable them to make informed decisions as they grow up.

1.3 FPA does not believe that introducing statutory sex and relationships education is incompatible with the rights of parents to respect for their religious and philosophical convictions in the education of their children as receiving factual information and participating in discussions about relationships is not incongruent with religious faith or belief.

¹²⁸ Children, Schools and Families Bill, Explanatory Notes, para 209.

¹²⁹ QCDA, *op. cit.*

2. THE RIGHTS OF CHILDREN AND YOUNG PEOPLE

2.1 FPA believes it is vitally important to educate people about sex and relationships, to ensure that they have all the information and advice they need to explore, develop and express their own sexuality safely. We have long campaigned for SRE to be made a compulsory part of the National Curriculum at all key stages.

2.2 FPA supports the provisions of the Children, Schools and Families Bill to introduce statutory sex and relationships education. Children and young people pick up messages about sexuality and relationships from a young age and from a variety of sources, including their parents, their friends, television and the internet. Not all of this information is accurate and FPA believes that school based SRE at all key stages plays a significant role in providing children and young people with accurate and objective information which can enable them to make informed choices about their health and wellbeing as they grow up. We welcome the fact that all young people will have an entitlement to receive at least one year of sex and relationships education in schools after the Bill is passed.

2.3 The current non-statutory nature of sex and relationships education is not meeting children and young people's needs. Because the only compulsory elements of SRE are currently delivered through the science curriculum, many young people say that the information they receive from school is too little, too late and too biological. Making SRE statutory would provide an opportunity for children and young people to learn about and discuss values, attitudes and emotions which are currently missing.

2.4 A survey of over 20,000 young people conducted by the UK Youth Parliament in 2006–07 found that nationally, 40% of young people aged 11–18 rated the sex and relationships education they had received at school as either poor or very poor and a further 33% rated it as average. The survey also found that 61% of boys and 70% of girls over the age of 17 reported not having received any information about personal relationships at school and overall 43% of all young people surveyed stated that they had not been taught about personal relationships at school.¹³⁰

2.5 In addition, there are currently variations across the country in the quality of SRE that young people receive. This is not acceptable as all young people have a right to high quality SRE, regardless of where they live.

2.6 High quality SRE can help to protect children and young people from abuse or exploitation by equipping them with the skills and knowledge they need to identify appropriate and inappropriate behaviour, be able to resist pressure and know who to go to for help if and when they need it. For younger children this will mean they are able to identify and report inappropriate touch or abuse while for older young people it will help them to resist pressure and make safe choices about sex.

2.7 High quality SRE does not make young people more likely to have sex. It can actually lead them to have sex later, especially when linked to confidential advice services,¹³¹ FPA believes all children and young people have a right to receive high quality sex and relationships education to enable them to develop the skills, knowledge and confidence to make safe and healthy decisions as they grow up.

3. THE RIGHTS OF PARENTS

3.1 FPA believes that parents have a key role to play in providing sex and relationships education for their children. We believe the provision of SRE should be a partnership between parents and schools. We are aware that many parents are unsure how to speak to their children about issues associated with sex and relationships and we deliver a community based education programme for parents and carers called Speakeasy, which is aimed at enabling them to develop the skills, knowledge and confidence to talk to their children about growing up, sex and relationships.

3.2 However, it is important to recognise that some parents are unwilling or unable to talk to their children about these issues and it is vital that these young people still receive high quality information about sex and relationships. In 2007, Ofsted produced a report on Personal, Social and Health Education,¹³² which stated that: "Parents' greatest challenge is to set clear expectations, and to be aware of and to accept responsibility for their children's behaviour. Some parents do not rise to this challenge. Pupils look to schools for help, hence the importance of high quality PSHE".

3.3 FPA does not believe that SRE becoming a statutory subject will contradict parents' rights to respect for their religious and philosophical convictions in the education of their children. High quality SRE should achieve a balance between acquisition of:

- Attitudes—appreciation of difference, tolerance, openness about sex;
- Skills—negotiation, communication, assertiveness, care for self and others, personal skills, managing emotions and relationships, problem-solving skills, decision-making skills;
- Knowledge—puberty, the mechanics of sex including biological aspects, fertility and reproduction, contraception and STIs, information about sexual orientation and sexuality.

¹³⁰ UK Youth Parliament, *SRE: Are you getting it?* (London: UK Youth Parliament, 2007)

¹³¹ Swann C *et al*, *Teenage Pregnancy and Parenthood: a Review of Reviews, Evidence Briefing* (London: Health Development Agency, 2003)

¹³² Ofsted, *Time for change? Personal, Social and Health Education* (London: Ofsted, 2007)

Providing young people with factual information and providing an opportunity for them to discuss issues such as emotions and relationships is not incompatible with religious belief.

3.4 SRE should not be values-free and most schools deliver SRE within a moral framework. Ofsted's report into the delivery of SRE, which was published in 2002, stated: "Schools almost always set their SRE programmes within an explicit moral framework governing relationships and behaviour. They are often successful in giving pupils opportunities in SRE lessons to explore their values and attitudes and to consider how they and others are affected by them. Where lessons are less effective, this is most often because the teacher talks about what is considered to be the right attitude without giving the pupils the opportunity to debate it, to make their own views known and to explore contradictions and disagreements."¹³³

3.5 Parents are supportive of statutory SRE. In a survey conducted by the Department for Children, Schools and Families in October 2009, 81% of parents agreed that all children and young people should attend mandatory sex and relationships education lessons. Our experience of delivering our Speakeasy programme is that many parents are unaware of how little information is currently a statutory part of the SRE curriculum.

January 2010

Memorandum submitted by Mrs Frankie Heywood

ITEM (3) DOMESTIC VIOLENCE:

If there is reasonable suspicion to arrest an alleged perpetrator, then the person should be arrested under the usual judicial processes. Otherwise, the 'suspected' perpetrator should be left alone. The gender bias towards women and against men should be acknowledged: women are not necessarily always "the victim".

ITEM (5) "ENFORCEABLE ENTITLEMENTS" FOR PARENTS AND PUPILS:

This seems to be a similar project to that of introducing a charter of patients' rights in the NHS. Such an endeavour is superficially attractive but ultimately worthless. In the NHS, people neither want nor need a bill of rights, but they do need decent services across the board eg clean hospitals. Experience has shown that grandiose statements of entitlements do not automatically improve services "on the ground". Ditto with education: parents and children are indeed entitled to a decent standard of education—current data on GCSEs suggests this is far from being provided in many parts of England. The remedy is not to impose enforceable entitlements, which would no doubt result in more costly inspections, a raft of new performance criteria, further grade inflation, etc. Improving current standards through such measures as weeding out poor teachers, and de-politicising the curriculum, would be of greater real benefit to children and parents

ITEM (8) ENTITLEMENT TO PERSONAL CARE AT HOME:

Having worked at senior level in social service departments in England, in teams for older persons' services, I can say that this is not practical. It is also too costly. The "anti-institutional" ideology which has informed legislation, policy, and practice over the last 20 years, has resulted in service users, families, and the NHS, having unrealistic expectations of the level of care people can receive at home.

In practice, it is frequently not possible to give seriously disabled people, who are unable to wash and cook for themselves, and who are often incontinent of urine and faeces, adequate care in their own homes, unless there are highly committed neighbours and relatives on hand to share the care. A hospital ward environment cannot be replicated in someone's own home. If a service user needs a very high level of care, then they can best be looked after in a residential or nursing home, which should not be seen as a "failure" or "last resort", but as a setting which best meets that person's needs.

Local Authorities have squeezed home care providers to the extent that care packages are now timed in 5-minute chunks. Home carers—who are usually paid a minimum wage and are often drawn from the ethnic minorities—are expected to carry out their work at breakneck speed. There are frequent "boundary" disputes between health and social services, over issues such as whose responsibility it is to monitor and administer medication, and who should put on pressure stockings. Home Care agencies already have difficulty recruiting carers because people simply do not want to do this dirty, badly paid and low status work. The old "home help" jobs, which attracted kind and committed unskilled working class women, have long gone. Such women would now rather stack shelves in Tesco.

Entitlement to personal care at home is another superficially attractive and vote catching idea which ignores the economic and practical reality.

January 2010

¹³³ Ofsted, *Sex and Relationships Education in Schools* (London: Ofsted, 2002)

Memorandum submitted by Allan Jackson

1) Illegal File sharing, while I understand the concerns of the music industry we must not get to a point where Government determine who is/is not allowed access to the internet. It is very easy to access people's internet connection and pretends they are that person; therefore you could be punishing a completely innocent person.

2) DNA and Fingerprints, these should only be retained where someone has committed a criminal offence; any one not charged should have these deleted as soon as the person is released.

3) Domestic Violence, if someone is guilty of domestic violence then arrest them, until then they are innocent, it is over the top to bar someone from their own property just based on allegations, the victim should of course be protected and there are many shelters that do this, if the abuser is then charged then the victim would be able to return to the property while that person is in prison. It should always be the case that the victim needs to prove the abuse.

4) Stop and Search, this is a huge misuse of police time, police should only be allowed to stop and search people if there is evidence that person has committed a crime, there should be no provision to make them ethnically balanced, it is a fact that while not all Muslims are terrorists currently all terrorists are Muslims, therefore at the moment I would expect more young Asian men being stopped.

5) Enforceable Entitlements for Parents and Pupils, what a load of codswallop, people do not need legal entitlements, who judges what the entitlement is and whether it has been met. Not necessary at all.

6) Mandatory Sex and Relationship lessons, while I understand the need for this, the parents should always be able to see the curriculum and withdraw their children if they feel it is appropriate, the state should never assume the role of a parent by deciding what is best for children, that is up to the parent.

7) Reporting of Family Court Proceedings, all court proceedings should be open and transparent, if there is a need for anonymity then pseudonyms can be used.

8) Entitlement to Personal Care at Home, I am not sure this is necessary or desirable, if people need help then surely that should be provided, if someone is treated negligently then there is already the opportunity for people to take action.

9) Asylum Support and Destitution, all applications for asylum should be made in the persons home country and they should have authorisation to travel if they arrive in the country without that authorisation then they should be put back on a plane and sent back to wherever that flight came from.

15 January 2010

Memorandum submitted by the Law Society of England and Wales

1. SUMMARY

1.1 The Law Society ("The Society") is the professional body for over 140,000 solicitors in England and Wales. The Society represents the interests of the profession to decision makers within Parliament, Government and the wider stakeholder community, and has an established public interest role in law reform.

1.2 The Society has focussed its evidence to the Joint Committee on the provisions in the Children, Schools and Families Bill and the Crime and Security Bill.

2. CHILDREN, SCHOOLS AND FAMILIES BILL: ENFORCEABLE ENTITLEMENTS FOR PARENTS AND PUPILS

2.1 The Law Society's view that there is currently no clear model of how to make economic, social and cultural rights subject to individual entitlements while at the same time avoiding the pitfalls of making them fully enforceable. individual and fully enforceable entitlements for such rights are said to be objectionable for three reasons:¹³⁴

2.1.1 economic, social and cultural rights are formulated in general terms and due to their imprecise nature were not suitable for consideration in courts

2.1.2 creating enforceable rights usurp the proper functions of the democratically elected Government and Parliament.

2.1.3 it would lead to judicial involvement in setting social priorities and resource allocation which would be constitutionally inappropriate.

¹³⁴ Joint Committee on Human Rights (2008) *A Bill of Rights for the UK?* HL Paper 165-I/HC 150-I, Paragraphs 182 to 191

2.2 The Society believes that it would be difficult to provide individual entitlements without making them fully enforceable. Otherwise, the entitlements are effectively aspirations. Without the machinery to ensure compliance, they would risk being meaningless if they could be ignored.

2.3 The South African model is the one most regularly cited as a “successful” model for the justiciability of economic, social and cultural rights. Inspired by this model, the Joint Committee has itself suggested its own version of “qualified justiciability”.¹³⁵ The role of the courts would be limited to (a) using economic, social and cultural rights as a guide to interpreting other legislation; and (b) assessing the reasonableness of Government measures taken to achieve the Governments duty, within available resources, of progressive realisation of such rights.

2.4 However, both the South African and the models suggested by the Joint Committee are not enforceable by individuals against government or public authorities. The courts’ role is limited to carrying out a “reasonableness review” to ensure that the commitments are not being ignored, rather than providing individual justice.

3. CHILDREN, SCHOOLS AND FAMILIES BILL: REPORTING OF FAMILY COURT PROCEEDINGS

3.1 The Law Society’s particular concern is regarding Clause 40 of the Bill which provides the power to alter the treatment of sensitive personal information. This Clause enables the Lord Chancellor to make an order to bring into force amending provisions relating to the treatment of sensitive personal information.

3.2 Sensitive personal information is defined in Schedule 3, and includes information which a child has provided to a witness in proceedings or any other person; the medical, psychological or psychiatric condition or evaluation of any person or any health care, treatment or therapy. This could cover a significant number of issues including; the private views, feelings and wishes put forward by children about themselves and/or family members including any difficulties or concerns with making friends and being socially accepted, or private details about how they interact and describe their relationship with each of their parents; information provided by the child regarding maltreatment; details of medical and psychiatric information about the child or other family members; alcohol and drug abuse; or domestic disputes between family members. These are all essentially private matters which any adult, let alone a child, may well not wish to be made public.

3.3 A child, who through no fault of their own is subject to the justice system, may well have intimate details about their life or medical condition publicly available to friends and others. Moreover, as it becomes clear that this can be published, this may deter children from confiding in adults who may be witnesses and so they may feel that the justice system is actually acting against their interest. The Society does not believe that the dangers and risks to privacy in publishing sensitive personal information would be outweighed by any gain in increasing public understanding of the Family Courts. The Society does not believe that even a power to publish such information should be included in the Bill without a full assessment of the potential harm that could be caused to parties to proceedings, especially children by the publication of sensitive personal information and a full consultation.

3.4 The Society believes that the publishing by the media of personal sensitive information raises serious issues under Article 8 of the ECHR.

4. CRIME AND SECURITY BILL: DNA AND FINGERPRINTS

4.1 The Law Society does not believe that the proposed DNA retention framework contained in the Crime and Security Bill remedies the incompatibility with the right to respect for private life in Article 8 of the Human Convention on Human Rights, as identified by the European Court of Human Rights Judgment in the case of *Marper v the UK*.

4.2 The Law Society is particularly concerned about the retention of DNA profiles and fingerprints from persons who have not been convicted of any offence. The Society is further concerned about the proposals for the retention of DNA profiles and fingerprints from convicted persons under the age of 18.

4.3 *Retention of non-convicted persons’ DNA profiles and fingerprints*

4.4 The Law Society is of the view that the DNA profiles and fingerprints of innocent people should not be retained by the State. People who have not been convicted of an offence should not be subject to any measure in the nature of a sanction, be it the loss of their freedom by imprisonment, the forfeiture of their property by way of a fine, or the forceful taking and involuntary retention of their DNA profile and fingerprints.

4.5 To use the fact that a person has been arrested by the police on mere suspicion only of having committed an offence to forcibly take samples and prints, and then retain this information, is an arbitrary means by which to build up a database of DNA profiles and fingerprint information. Whilst it may be said that the person who has been convicted of an offence has, by committing that offence, forfeited their right not to have their information retained, the mere fact that a person has been arrested is not sufficient to justify this interference with the individual’s right to keep this information from the State. It is a consequence of

¹³⁵ Ibid, Paragraph 171

being convicted of a criminal offence that this aspect of private life is forfeited. The proposals in relation to retention of innocent persons' DNA profiles and fingerprints has the potential to create grades of innocence and, in our view, is not acceptable.

4.6 The Society notes that the Government does not accept this approach. A less satisfactory approach to the non-retention of any non-convicted person's DNA profile and fingerprints, but one that is preferable and more proportionate to the proposed blanket six year retention period, is the system that applies in Scotland. The Society would suggest a similar approach be implemented in England and Wales, so that the retention of DNA profiles and fingerprints from those arrested but not convicted would only be permitted where there is an objective assessment that the arrested person presents a future risk, based on the violent and/or sexual nature of the offence for which they were arrested. A more limited but nevertheless significant retention period of three years could apply, with an option for the police to apply to an independent court for an extension of this period for a further specified period where there are factors that justify further retention.

4.7 *Convicted persons under 18 year of age*

4.8 The Bill will permit the indefinite retention of DNA profiles and fingerprints of under-18 year olds convicted of a serious offence, and 5 year retention where it is a first conviction for minor offence, or indefinite retention following a second minor conviction. The Society does not accept that these periods of time are appropriate or proportionate.

4.9 The Law Society suggests that in relation to children and young people, retention of DNA profiles and fingerprints should only be permitted in relation to those convicted of a serious sexual or violent offence. The appropriate indicator of seriousness should be the fact that an actual Detention Order was imposed on the child or youth. In relation to convictions for minor crimes, the DNA profile and fingerprints should only be able to be retained following the child or youth's third conviction for a minor offence. On attaining their 18th birthday the person's records should be deleted.

4.10 As with adults, persons under 18 years who have merely been arrested but not convicted of an offence should not be subject to retention at all.

19 January 2010

Memorandum submitted by Patrick Mockridge

My submission to the Joint Committee on Human Rights Committee in response to Press Notice No. 6, which called for input from civil society, is below. The issues are listed in the order that they are listed in the press release. I would have liked to have commented on all legislation but would have run over the word limit had I done so.

ILLEGAL FILE-SHARING

It appears, although forgive me if I am wrong, that copyright holders will have the power to disconnect *suspects* from the internet without meeting the usual legal burden of proof. If the ISP or the individual resist then the state will instigate force against the suspect. This socialises the costs of enforcing what are, essentially, private contractual arrangements between media producers and consumers. Are the media paying more tax for this legal privilege to be awarded by the state? Does the state have the right to punish suspects? Will the enforcement of this law be driven by due legal process or the media industry?

As well as giving the media industry more power, the state will be giving itself more power. Disconnection from the internet merely for being *suspected* of sharing files in contravention of a private purchase agreement is mere arbitrary violence by the state on behalf of the media industry.

What separates just laws from violence is due process. If due legal process is not followed then state action descends into arbitrary acts on behalf of special interest groups—such as the media industry, which also has a vested interest not only in socialising the costs of enforcing private purchase agreements but in stifling the fierce competition that comes from a free and open internet.

These proposed new powers are not only an example of crony capitalism—whereby the state socialises corporate costs—it is an unjust law that puts undue power in the hands of corporations and the state, leaving the future of the internet and free speech at their mercy.

Our rights are not given to us by either but are, rather, innate and inalienable. Under these proposed new laws we may soon be asking the media and the state for permission to interact with others. Does a free society operate in such a way where one underprivileged group must ask permission to speak from the privileged group to whom they must also pay tribute? Is this what the committee call "human rights"?

DNA AND FINGERPRINTS

While the proposed legislation looks to give more power to the media industry to enforce their copyright, the legislation also looks to strip the individual of its power to enforce its copyright over its own DNA. Is our DNA fundamentally owned by us or by the state?

If the committee believe in copyright for a corporation's finished products then why not copyright for an individual's own body. If we have no fundamental rights of ownership over our own DNA then does the state have the right use other parts of the individual's body as they see fit too?

Does the state have the right to, like Pol Pot, put our limbs to work on an agrarian commune? Or, like the Japanese did to Chinese women in World War Two, turn our genitals prostitution? Forgive the deduction ad absurdum but these are examples of what happens when the state believes that it has rights of the bodies of its citizens—they become slaves.

Again, are rights given to us by Parliament or by directives from the unelected European Commission or are they innate and inalienable? Do individuals own their bodies or does the state? Do we wish to model Britain after every totalitarian state in history or does it wish to be a free nation?

In looking to put released offenders on the DNA register those proposing this law obviously see it as an infringement of rights which is more acceptable when enacted on a minority who probably don't vote anyway. These offenders have already served their and should not be seen as legal guinea pigs for the rest of their lives. Does the state feel it has the right to enact retroactive punishment on any man who has previously committed a crime?

DOMESTIC VIOLENCE

The legislation seeks to punish suspects and potentially infringe upon their property rights—but this time in the name of preventing domestic violence. I understand that this may be proposed with the best intentions and that domestic violence is a serious problem affecting many people, of all ages and genders, across the country, but I do not understand how bypassing due legal process will help anyone in the long term.

Those less scrupulous would have greater incentive to “cry wolf” against the property owner and tie up the relevant authorities in nuisance cases. Those nuisance cases would interfere with the authorities' ability to deal with more serious cases of domestic abuse, it will deter couples from moving in together and will therefore lead to less, not more, social cohesiveness.

It will also erode confidence in the law—which is supposed to apply to all persons equally. This legislation will essentially punish the suspect with a restraining order. What will the suspect do if he or she is not allowing to sleep in their won property? Will the law give provision for the suspect to stay somewhere and maintain the lifestyle to which they have become accustomed at the taxpayers' expense? Or will the suspect also be punished financially by having to arrange separate accommodation?

The committee should not only be assessing this legislation from the viewpoint of mutually coherent human rights but also practicality.

STOP AND SEARCH

The case of police stop and search powers is not so much one about the rights of individuals not to be searched but the rights of the state to search anyone it wants with minimal due process. As was mentioned early in this correspondence what separates violence and infringement from law is due process. The individual would not accept a random search from any individual in the street but they, by and large, do so from a police officer. Why? The first reason is that the police officer will use violence and detention if the citizen does not comply—but no civilized nation relies merely upon the use of force for its citizens to comply with the law. The second reason is, therefore, that the citizen must believe that the policeman is acting according to the public good—and therefore according to just law—and not arbitrarily—or unjust law. What prevents arbitrary police action? Due process does. The erosion of due process, therefore, erodes the citizen's faith in the law.

Does the committee wish the country to be run by laws or by force? This is the choice that this legislation presents. Are the police to be held to account under due process or do they have the right to act as they see fit? What would Charles de Menezes say?

And this is why search warrants were invented. I suggest that the committee may wish to revisit British history before passing judgement.

MANDATORY SEX AND RELATIONSHIPS EDUCATION

As I am limited to 1500 I will finish with the proposed legislation on mandatory sex education. Firstly there is no evidence that more state sex education leads to lower teenage pregnancy—which seems to be the fashionable thing to look to reduce these days. Regardless of whether anyone can objectively say whether it's better to have less teenage pregnancy, it's unclear whether state education has any effect anyway.

Can the state, then, ensure that its sex education will remain impartial and sensitive to the different expectations of different cultures? The simple answer is no. Sex education is a morally and culturally loaded subject. I remember my sex education being particularly lax in its moral judgement of promiscuity and abortion and, while I largely agree, there are many people who do not and their rights to their personal preferences must also be respected.

So the state will essentially be infringing upon the rights of parents to raise their children as they see fit, infringing upon individual moral judgements and infringing upon the cultural sensibilities for no discernable objective benefit. How can this be acceptable?

In conclusion I would like to thank you and the committee in advance for their due consideration of the views of the public and for supporting free speech while it still exists.

18 January 2010

Memorandum submitted by the National Secular Society

EC REASONED OPINION 226 AND RELATED DISCRIMINATION MATTERS

On behalf of the National Secular Society I attach the Commission's Reasoned Opinion to the Government dated 20 November 2009 and set out some related areas of concern. Action which we would be grateful if the Committee could take is shown in bold.

A. The National Secular Society would like formally to register our concerns to the JCHR about Sections 58 and 60 of the School Standards and Framework Act 1998 (SSFA) which we believe in substantial part are in breach of the Employment Directive 2000/78/EC. Our serious concerns include, but are not limited to:

1. Education and Inspections Act 2006, Section 37 as this represented an impermissible regression of equality law. This includes the repeal of s 58(4) of the SSFA (which read: "The head teacher of such a school shall not, while holding the post of head teacher of the school, be a reserved teacher."). The CofE's "National Society advises that VC schools should as a matter of course make all future Headteachers also Reserved Teachers"¹³⁶ except where the current incumbent objects, and the redesignation would occur on their departure. The other provisions of Section 37 relate to VA schools non-teaching staff which may also be impermissible regressions.
2. That discrimination permitted by Section 60(5) of the SSFA on grounds of religious belief is probably incompatible with the Framework Directive, in that it does not restrict such discrimination to circumstances where there is a genuine, legitimate and justified occupational requirement. (This is also the formal conclusion of our Silk, available on request.)

We have endeavoured to persuade the Government to modify the SSFA through the Equality Bill, but it is clear this not now going to happen.

We seek the Committee's opinions on our two allegations above and to the extent they consider that the legislation is likely to be incompatible with the Directive.

B. *Reasoned Opinion 226*. The National Secular Society complained in 2004 about the UK Government's mistransposition of the EC Framework Directive 2000/78/EC into the 2003 Employment Regulations. We can provide details of exchanges of correspondence between the Society and the Commission regarding our complaint.

As you will know, the Commission was not satisfied with the Government's response and sent a Reasoned Opinion setting out its continuing concerns. I attach a copy of the original (and a recognised version which is much easier to work with).

The Society hopes the JCHR will find the attached Commission's Reasoned Opinion of interest and the possible basis for further study.

I draw particular attention to the Reasoned Opinion's closing sentence in para 18: "Furthermore, the wording of the national legislation contradicts the provision under Article 4(2) of the Directive which provides that permitted differences of treatment based on religion 'should not justify discrimination on another ground'". It would seem to us that this sentence has application beyond the 2003 SORs Reg 7(3) and could also apply to the SSFA, which the Government is leaving intact.

We invite the Committee to consider whether it considers that the "discrimination on another ground" concern in the above paragraph might have wider application in UK discrimination law, for example the SSFA S 60(5)(a)(i) provisions concerning tenets of the religion, especially given this appears to go materially beyond the ethos of the school.

¹³⁶ www.natsoc.org.uk/downloads/equalopportunitiesdec08.doc end page 2

The principal question dealt with by the Reasoned Opinion related to the 2003 SORs Regulation 7(3) concerning exemptions for organised religion. The Government originally dealt with this in Sch 9 Para 2(8) of the Equality Bill:

- (8) Employment is for the purposes of an organised religion only if the employment wholly or mainly involves—
 - (a) leading or assisting in the observance of liturgical or ritualistic practices of the religion, or
 - (b) promoting or explaining the doctrine of the religion (whether to followers of the religion or to others).

Following an outcry from the Archbishop of York, Baroness O’Cathain, Baroness Cumberlege and others the religious exemption is now likely to be materially widened under the latest Government amendment to

Employment is for the purposes of an organised religion only if—

- (a) the employment is as a minister of religion, or
- (b) the employment is in another post that exists (or, where the post has not previously been filled, that would exist) to promote or represent the religion or to explain the doctrines of the religion (whether to followers of the religion or to others).”

We fear that without a “wholly or mainly” before “to promote” this is open to an impermissible extension to administrative and service staff, simply through the addition of a spurious sentence to their contracts.

The complaint in Para 5 of the Reasoned Opinion over instruction seems to have been picked up in the Bill’s clause 110. We leave it to the Committee to decide how adequately this has been achieved.

We draw this matter of concern to the Committee’s attention.

Other matter in the Equality Bill. An amendment (no. 21A) we suggested to Bs Turner of Camden which she raised at Committee to show perception and association on the face of the Bill was rejected, and I think something similar has been suggested by the Committee. I assume you have followed the rejection of Baroness Varsi’s Amendment 21 and Lord Ouseley’s Amendment 23 about replacing “because of” with “on the grounds of” (with their precedents on association and perception) and whether you accept the Government’s rationale for not doing so.

We invite the Committee to consider whether the above concerns merit being drawn to the attention of the Government.

If further information is required we will be happy to provide it.

K Porteous Wood
Executive Director

18 January 2010

Memorandum submitted by the Northern Ireland Human Rights Commission

Evidence to the Joint Committee on Human Rights: The Draft Legislative Programme 2009–10

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,¹³⁷ advising on legislative and other measures which ought to be taken to protect human rights,¹³⁸ advising on whether a Bill is compatible with human rights¹³⁹ and promoting understanding and awareness of the importance of human rights in Northern Ireland.¹⁴⁰ In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding “soft law” standards developed by the human rights bodies.

2. The Commission welcomes this opportunity to provide evidence to the Joint Committee on Human Rights on Government’s Draft Legislative Programme. The Committee will have already received the Commission’s evidence in relation to the planned Immigration Simplification Bill, with which the Commission has very serious concerns. This submission now concentrates on those matters that have particular human rights significance in Northern Ireland.

¹³⁷ Northern Ireland Act 1998, s.69(1).

¹³⁸ *Ibid.*, s.69(3).

¹³⁹ *Ibid.*, s.69(4).

¹⁴⁰ *Ibid.*, s.69(6).

A BILL OF RIGHTS FOR NORTHERN IRELAND

3. The Commission would take this opportunity to comment on what is not in the draft Programme as well as what is. The Northern Ireland Human Rights Commission was mandated by the Belfast (Good Friday) Agreement 1998 and the Northern Ireland Act 1998 to provide advice on the scope for a Bill of Rights for Northern Ireland. After extensive consultation throughout Northern Ireland and beyond, the Commission delivered that advice to the Secretary of State on 10 December 2008. The Commission urged the Secretary of State to begin consultation on the proposals as a matter of urgency in order to bring us closer to the enactment of a Bill of Rights for Northern Ireland.

4. The Committee might also be aware that a number of Parliamentarians have tabled questions in order to ascertain when government will begin the consultation process. The timetable would appear to be ever changing with Government initially indicating spring, then late summer and then October. At the time of writing the consultation document has still not been published.

5. The Commission is of course aware of the complexity of its advice and the need for Government to consider the proposals carefully and responsibly. To that end, this Commission offered the services of its own staff to the Northern Ireland Office to help Government gain a better understanding of the rationale and implications of the proposals. Unfortunately that offer has not been taken up to the extent that would have facilitated a much more timely consultation document. The delay in considering the Commission's advice, drafting and publishing a consultation document has led to a situation where it is highly unlikely that legislation can be drafted and introduced in the current Parliament. The Commission is disappointed at this situation and invites the Committee to press government to bring forward the consultation so that, having considered the responses, Government will at least be able to make its intentions on a Bill of Rights for Northern Ireland clear within the present Parliament.

THE CONSTITUTIONAL RENEWAL BILL

6. Following the decision in the *YL* case,¹⁴¹ Government moved relatively quickly to clarify the definition of a public authority for the purposes of the Human Rights Act 1998, in the health and social care setting. This Commission worked closely with a number of organisations to ensure that the Health and Social Care Act 2008 clarified that voluntary and private sector care homes providing accommodation and care under statutory provisions were bound by the Human Rights Act 1998.

7. The Commission is also aware that plans have been mooted to ensure that the Human Rights Act 1998 applies to other similar arrangements between the state and private contractors, not least through recent Private Member's Bills. The Constitutional Renewal Bill would, in the Commission's view, be an appropriate legislative vehicle for doing so. The draft Bill as published in March 2008 did not address the issue, and the Bill itself has yet to be published. The matter of defining a public authority, given the human rights protections and obligations that flow from that, appears to the Commission to be sufficiently important to merit treatment in the context of constitutional reform.

8. The Commission has included in its Bill of Rights advice a definition that it believes would be appropriate for both the Human Rights Act 1998 and a potential Bill of Rights Northern Ireland Act. It hopes that Government will take this opportunity to include the following clarified definition:

“The term ‘public authority’ includes: a) a court or tribunal; and b) any person or body performing a public function. In determining whether a function is a ‘public function’, the factors to be taken into account include:

- (a) the extent to which the executive, legislature or judiciary, whether local, regional or UK-wide, has assumed responsibility for the function in question;
- (b) the role and responsibility of the executive, legislature, or judiciary, whether local, regional or UK-wide, in relation to the subject matter in question;
- (c) the nature and extent of the public interest in the function question;
- (d) the nature and extent of any statutory power or duty in relation to the function in question;
- (e) the extent to which the executive, legislature or judiciary, whether local, regional or UK-wide, directly or indirectly, regulates, supervises and inspects the performance of the function in question;
- (f) the extent to which the executive, legislature or judiciary, whether local, regional or UK-wide, makes payment for the function in question;
- (g) whether the function involves or may involve the use of statutory coercive powers; and
- (h) the extent of the risk that improper performance of the function might violate a right or freedom in a Bill of Rights for Northern Ireland.

For the avoidance of doubt, the existence of a contract as the basis for performance of the public function shall not preclude the person performing the public function from being considered to be a ‘public authority’.

¹⁴¹ *YL v Birmingham City Council and others* House of Lords [2007] UKHL 27.

Where a person or body is a ‘public authority’ due to the performance of a public function, the person or body shall only be treated as a public authority in respect of those acts performed pursuant to the public function.

A public authority shall not be bound to comply with Recommendation 1 where the public authority could not have acted otherwise due to Westminster primary legislation and could not have interpreted or given effect to the Westminster primary legislation such as to ensure compatibility with a Bill of Rights for Northern Ireland.”

9. The Commission invites the Committee to press Government to ensure a timely response to its advice on A Bill of Rights for Northern Ireland, and to clarify the definition of a public authority for the purposes of the Human Rights Act 1998 in the proposed Constitutional Renewal Bill.

October 2009

Letter to the Chair of the Committee from Anthony Mehigan, NT Advisers LLP, dated July 2009

Legislative scrutiny: Finance Bill

I am writing to you on behalf of NT Advisers, following the recent publication of the Joint Committee on Human Rights twentieth report *Legislative Scrutiny: Finance Bill; Government Response to the Committee’s Sixteenth Report of Session 2008–09*.

We very much welcome the Committee’s recognition that retrospective legislation needs to be applied very carefully to ensure that it is compliant with human rights legislation. We particularly welcome the recommendation that the Government should in the future provide the Committee with a memorandum identifying any provisions in the Finance Bill which have retrospective effect, together with an assessment of the impact of the retrospective provision and a detailed explanation of the justification for the retrospectivity. We very much hope of course that the Government will accept this recommendation.

We are also grateful to the Committee for specifically looking into Clause 67 of the Finance Bill. However, we note that the Committee fully accepted the Government’s position on Clause 67, which stated that the 1 April schemes were in fact very similar to the 12 January schemes. The Committee held the view that in those circumstances the retrospective nature of Clause 67 was justified.

In its assessment of compatibility the Committee concluded that the substantial loss to the Exchequer along with the lack of any evidence of personal hardship to those individuals involved in the scheme justified the retrospective measure. This argument reiterates the comments of the Rt Hon Stephen Timms MP, Financial Secretary to the Treasury, made in Public Bill Committee.

NT Advisers is particularly concerned about the Government’s reason for introducing Clause 67 retrospectively. None of those concerns were effectively dealt with by the Minister when the Clause was debated in Public Bill Committee.

The 1 April statement applied to those schemes operating under S11 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA). The 12 January statement referred to schemes operating under sections 346, 348 or 555 of the ITEPA 2003. Therefore the schemes closed down by the 1 April statement are in fact substantially different in nature to the schemes closed down by the 12 January statement.

The 12 January statement referred to schemes which “prevent deductions being allowed where liabilities relating to an employment are incurred by employees and former employees with a main purpose of avoiding tax”. The 1 April statement extended this to include all employment loss. If the intention was to close down schemes that operated under s11 of the ITEPA, the Government would have done so in its January statement. Also, the Government has not provided an adequate explanation as to why S11 schemes were left out of the original statement.

It would appear that the only reason for introducing the measure retrospectively is that an error was made by HM Treasury in making the scope of the 12 January statement too narrow. It was in fact the actions of NT Advisers who brought the Government’s attention to the scheme, by acting in accordance with the rules laid down in the Disclosure of Tax Avoidance Schemes (DOTAS).

The great majority of the 600 individuals who will be affected by the retrospectivity of Clause 67, are full-time UK residents (even where they may have a non-UK domicile) and therefore invest and spend their incomes in the UK. A large majority are active entrepreneurs who will be looking to re-invest at least a large part of these additional funds into their own or other business ventures.

Given the wider effects of retrospective legislation on tax planning and certainty, as well as the image of the UK as a good country to do business, it would be oversimplifying to say that the interests of the general public and the loss to the Treasury of £200 million outweighs the interests of the 600 individuals.

We feel that an important area which the Committee's report did not pick up on is the fact that, to date, it has been accepted practice only to apply retrospective tax legislation in an area where HMRC has notified it will do so in future. The only example of this is remuneration planning, where in December 2004, the then Paymaster General, Dawn Primarolo MP, announced that it would in future make amendments retrospectively when amending remuneration planning. A number of such retrospective amendments have been brought in since 2004 and each time such a change was made, it was confirmed that it would only be in the very narrow area of remuneration planning. These amendments have been widely accepted by the industry. However, Clause 67 is widening the scope of this "Primarolo Principle" which sets a dangerous precedent.

It is very worrying indeed that Lord Myners, the Financial Services Secretary, during the Second Reading debate of the Finance Bill in the House of Lords on 20 July, stated that retrospective measures would continue to be applied to what HMRC considered to be "the most heinous forms of tax avoidance". In doing so, he has extended the scope for HMRC introducing retrospective legislation across the whole spectrum of tax planning. I would therefore be grateful to hear what the Committee's views are on this.

We would therefore be keen to discuss the outcome of the report with you as we strongly feel that some of the arguments which were used by the Financial Secretary to the Treasury were factually wrong.

If you were willing to meet, than perhaps you could let me know and we can schedule a mutually convenient time and date.

Memorandum submitted by Marie Stopes International

LEGISLATIVE SCRUTINY PRIORITIES ITEM 6: MANDATORY SEX AND RELATIONSHIPS EDUCATION

MARIE STOPES INTERNATIONAL

1.1 Marie Stopes International (MSI) is a not-for-profit sexual and reproductive health organisation,¹⁴² and one of the UK's leading providers of sexual and reproductive healthcare services. Over 100,000 men and women visit our nationwide network of sexual health clinics annually for sexual health services including: contraception counselling and provision; unplanned pregnancy counselling; abortion information, advice and services; health checks and screening; and other gynaecological services.

1.2 Via such service provision, MSI aims to prevent unintended pregnancies in the UK. To achieve this goal, MSI recognises the need to educate young people about sex, sexuality, sexual health, emotions and relationships in order to develop a culture of sexual responsibility. MSI engages in numerous sex and relationship education (SRE) campaigns. For example, MSI is the organisation behind www.likeitis.org, a sex education website aimed at 11–15 year olds, and producer of the "Zoom In!" SRE resource. MSI healthcare professionals deliver sex education lessons within schools and youth settings when possible, for which there is a high demand.

1.3 *MSI therefore supports the provisions in the Children, Schools and Families Bill providing for mandatory sex and relationships education (SRE).*

MANDATORY SRE: SUPPORTING CHILDREN'S RIGHTS

2.1 MSI strongly agrees that SRE should become a statutory part of the National Curriculum. This would ensure all young people have equal access to accurate information about safe sex and are empowered to make educated choices about their lives and futures, and would bring the UK in line with most of its European counterparts.

2.2 The Office for National Statistics conception figures reveal that the conception rate among women aged under-18 in England and Wales has risen for the first time since 2002¹⁴³ Dawn Primarolo's written answer to Liberal Democrat Norman Lamb revealed that the number of sexually transmitted infections (STIs) diagnosed in those under the age of 16 is also on the increase, rising from 2,474 cases in 2003 to 3,913 cases in 2007.¹⁴⁴ These statistics are of grave concern, and suggest that young people's educational needs in relation to sexual activity are not currently being met. Mandatory SRE is necessary to ensure all young people receive good quality, age-appropriate SRE delivered by trained professionals to meet their right to receive information important to their health.

¹⁴² Marie Stopes International, Registered Charity Number: 265543, Company Number: 1102208

¹⁴³ Office for National Statistics, *News Release: Conception rate increases among under 18s*, available at <http://www.statistics.gov.uk/pdfdir/hsq0209.pdf>

¹⁴⁴ Dawn Primarolo, *Sexually Transmitted Diseases: Young People*, available at: <http://www.theyworkforyou.com/wrans/?id=2009-05-15a.272349.h>

2.3 Young people already receive information about sex via the internet, television, billboards and their friends. However, this information is often unregulated and may be sensationalist, misleading, or incorrect, and as a result young people may be approaching puberty with a lack of accurate information about what constitutes a healthy and desirable relationship, and ill-prepared to make an informed decision about whether or not to have a sexual relationship and how to protect themselves against unintended pregnancy and STIs. The provision of comprehensive SRE delivered in safe learning environments is needed to balance exposure to sensationalist sexual imagery with reliable and factual information. This would equip young people with:

- the knowledge, skills and resources they need to be able to make decisions about their own sexual health, to develop positive and healthy emotional relationships, to engage in sexual relationships responsibly and positively, and to build self-confidence to resist being pressured into sex, thereby assisting in the drive to decrease unintended teenage conceptions and STIs;
- the information they need to enable them to respect sexuality choices among their peers, which could contribute to reducing incidences of bullying on the grounds of sexuality;
- knowledge about the links between risky sexual behaviour and drug/alcohol abuse

2.4 The UN Convention on the Rights of the Child (which has been ratified by the UK government) states that children and young people have the right to access information which will allow them to make decisions about their health (Article 17) and that those professionals working with young people shall take appropriate measures to develop family planning education and services (Article 24).¹⁴⁵ Children and young people also have the right to education which will help them learn, develop and reach their full potential and prepare them to be understanding and tolerant to others (Article 29). Making SRE statutory therefore supports the realisation of children's rights by ensuring that every child is able to access healthcare information and family planning education, and is given information and skills to be able to understand and respect themselves and others.

2.5 High quality SRE may also ensure children's rights are safeguarding, by equipping young people with the information, skills and knowledge they need to identify inappropriate sexual behaviour, and to be able to resist pressure or coercion. *In 2007 an international review of comprehensive SRE found nearly all programmes had a beneficial impact on young people's confidence to say "no" to unwanted sex.*¹⁴⁶

THE RIGHTS OF THE PARENT

3.1 MSI believes that introducing statutory SRE is compatible with the rights of parents to respect for their religious and philosophical convictions in the education of their children, since receiving factual and medically correct information about sex and relationships does not contrast to religious faith or belief.

3.2 MSI is aware through its conversations with healthcare professionals and young people that there are currently variations across the country in the quality of SRE that young people receive. Making SRE statutory is key to improving its provision and ensuring it is provided comprehensively across the country to all young people regardless of the area in which one lives, the religious beliefs of their friends and family, and the culture in which the child is brought up. A statutory programme of education with clear teaching guidance will also support teachers and professionals in delivering SRE.

3.3 MSI is also aware, through dialogue with schools and teachers that SRE is often taught within lessons on religious studies, placing SRE within a moral framework. Ofsted's report into SRE stated: "Schools almost always set their SRE programmes within an explicit moral framework governing relationships and behaviour... Where lessons are less effective, this is most often because the teacher talks about what is considered to be the right attitude without giving the pupils the opportunity to debate it, to make their own views known and to explore contradictions and disagreements".¹⁴⁷ Making SRE mandatory will mainstream SRE discussions, allowing delivery of factual, balanced and non-judgemental information in a variety of settings and contexts, to equip young people with the knowledge needed to be autonomous and to reach their own values on sex and relationships, whilst respecting the views of others. This is in support of the child's right to their own freedom of thought, conscience and religion.

3.4 In countries where comprehensive and consistent SRE starts from an early age, unintended teenage pregnancy and STI rates tend to be lower. However, abstinence driven education policies, often delivered in line with religious and philosophical convictions, have been shown to fail, as highlighted by the Centres for Disease Control for example. The CDC says that southern states of the United States of America, where there is often emphasis on abstinence and religion, tend to have the highest rates of teenage pregnancy and STIs¹⁴⁸.

¹⁴⁵ The Sex Education Forum, *Sex and Relationships Education Framework*, available at http://partner.ncb.org.uk/dotpdf/open%20access%20-%20phase%201%20only/ff30_sef_2004.pdf

¹⁴⁶ http://www.dcsf.gov.uk/pns/DisplayPN.cgi?pn_id=2009_0208

¹⁴⁷ Ofsted, *Sex and Relationships* (London: Office for Standards in Education, 2002)

¹⁴⁸ The Guardian, *Teen pregnancy and disease rates rose sharply during Bush years, agency finds*, available at <http://www.guardian.co.uk/world/2009/jul/20/bush-teen-pregnancy-cdc-report>

3.5 As discussed above, the provision of SRE supports the realisation of children's rights. SRE should therefore be provided to *every* child and young person. Allowing parents the right to opt out their child if they are under the age of 15 opposes this principle, and therefore is not in the best interests of children. We welcome the fact that the Children, Schools and Families Bill provides an entitlement for young people to receive at least one year of SRE.

3.6 MSI believes that in order for SRE to be effective, parents and educators need to work together, and SRE needs to be taught in all settings including the home, community and educational settings. Creating school-parent partnerships to encourage parental involvement in the development of SRE policy and curriculum may enable parents to include their religious and philosophical convictions within classroom discussions.

3.7 Parents are supportive of statutory SRE. The MSI "Sexplanations" resource to assist parents in having sex-related conversations with young people was highly requested. In a survey conducted by the Department for Children, Schools and Families in October 2009, 82% of parents agreed that all children and young people should attend mandatory SRE lessons.¹⁴⁹

3.8 Mandatory SRE encourages parent-child dialogue on sexual health issues. In 2007 an international review of comprehensive SRE found nearly all programmes improved young people's communication with parents.¹⁵⁰

January 2010

Memorandum submitted by Mr I Shortman

1. ILLEGAL FILE-SHARING

I feel the Digital Economy Bill unduly infringes on users' rights to respect for private life (Article 8 ECHR). Our society is founded upon the presumption of innocence, and the routine monitoring and maintenance of a list of people whom have been found guilty of no offence goes against this. Additionally, technical restrictions may withdraw part of one's right to correspondence. Additionally I feel it also infringes upon right to a fair trial (Article 6 ECHR) if monitoring and technical restrictions are placed against accused persons without trail.

I feel that file-sharing does not infringe on the author's right to property (Protocol 1, Article 1 ECHR) as the original copy is not degraded or destroyed (hence the historical distinction between the criminal offence of theft and the civil one of copyright infringement).

2. DNA AND FINGERPRINTS

S & Marper v United Kingdom (2008, ECHR) established the retention of DNA samples and fingerprints of innocent persons to be unlawful. However, I feel the Crime and Security Bill still infringes on right to respect for private life (Article 8 ECHR).

The Rehabilitation of Offenders Act 1974 was introduced to allow persons with convictions to integrate fully with society, and is analogous with Article 8 in its belief that persons who are unlikely to pose any danger deserve privacy over those convictions.

I believe once a conviction is legally spent, there are no longer sufficient grounds to warrant retention of their DNA samples and fingerprints. As with persons convicted of no offences, it is an infringement of their right to respect for private life.

3. DOMESTIC VIOLENCE

In cases where there is insufficient evidence to charge the accused (as proposed in the Crime and Security Bill), I feel there are no justifiable grounds for barring that person from their own homes.

4. STOP AND SEARCH

I feel the reporting requirements on stop and search forms should be retained (contrary to the proposals in the Crime and Security Bill). The reporting requirements provide a method of recourse by the individual, providing clear proof of reasoning and findings. Additionally, it provides an important safeguard against discrimination and stopping for arbitrary reasoning, helping conserve the right to respect for private life (Article 8 ECHR).

Additionally, in light of the recent ruling of the ECHR regarding the illegality of the Terrorism Act 2000 (s.44) I feel this section should be repealed immediately. The lack of requirement of some suspicion or reasoning makes the risk of misuse unjustifiable, especially when near-permanent regions (such as Central London) are established contrary to the law's purpose.

¹⁴⁹ Populus/Blue Rubicon Sex Education Poll, 2009, available on request from the Department for children, schools and families

¹⁵⁰ http://www.dcsf.gov.uk/pns/DisplayPN.cgi?pn_id=2009_0208

5. ENFORCEABLE ENTITLEMENTS FOR PARENTS AND PUPILS

No comments.

6. MANDATORY SEX AND RELATIONSHIPS EDUCATION

Given the importance of comprehensive education (regardless of any additional teachings by parents) with regards the right of education and reception of information important to their health, I feel mandatory education is necessary to ensure the rights of children are insured.

7. REPORTING OF FAMILY COURT PROCEEDINGS

Given the lack of privacy for defendants in most court cases (as a matter of public record), I see no convincing reason for this to be different for Family Court proceedings. Therefore, the right of the press to report court proceedings (Article 10 ECHR) should be enforced (restrictions of identities in identified cases as per Children Act provides legal protection for children where necessary).

8. ENTITLEMENT TO PERSONAL CARE AT HOME

Article 8 ECHR has not been shown to be intended to guarantee any right to health care, and therefore I do not feel the location of any provisions is a human rights matter.

9. ASYLUM SUPPORT AND DESTITUTION

No comments.

15 January 2010

Memorandum submitted by Stonewall

(6) Mandatory sex and relationships education

INTRODUCTION

1. This paper contains Stonewall's submission to the Joint Committee on Human Rights on priority area (6) Mandatory sex and relationships education.

2. Stonewall is a national organisation that has campaigned for equality for the 3.6 million lesbian, gay and bisexual people across Britain since 1989.

3. Stonewall welcomes the Committee's decision to investigate into different aspects of the Children, Schools and Families Bill and is grateful for the opportunity to contribute to this inquiry.

4. Stonewall recognises the importance of inclusive high quality sex and relationship education for young people. As a member of the Sex Education Forum (SEF) we fully support the government's proposals to make PSHE statutory and the proposed changes to the curriculum as spelled out in the Children, Schools and Families Bill.

5. Three research reports by Stonewall provide statistical evidence for this response. *The School Report* (Stonewall 2007) is based on the accounts of over 1,000 lesbian, gay and bisexual young people and their experiences at school. *The Teachers' Report* (Stonewall 2009) captures the perspective on homophobic bullying of over 2,000 primary and secondary teachers and other school staff. *Prescription for Change* (Stonewall 2008) is based on over 6,000 responses of lesbian and bisexual women on questions around their health needs and experiences.

THE ISSUE

- The Children, Schools and Families Bill provides for mandatory sex and relationships education (SRE) with a parental right to opt out their child if they are under the age of 15.
- There are no current figures available on the number of children who are being withdrawn from SRE in the UK. The numbers are likely to differ considerably between schools depending on the communities they serve.
- The Children, School and Families Bill includes a duty for the governing body and head teacher, in any school where Personal, Social, Health and Economic education (PSHE) is provided, to comply with the three principles set forth in 11 (5) to (7) in the Bill, including the requirement that PSHE be taught in a way that "endeavours to promote equality, encourages acceptance of diversity and emphasises the importance of rights and responsibilities" 11(7).
- The implementation of this requirement in schools might lead more parents to make use of their right to withdraw their child from any SRE part of PSHE, especially if they do not agree with their child receiving information taught in that way and especially in ways with regard to the third principle 11(7).

- This development would impact negatively on the rights of young people in two ways:
 - (1) The greater the number of young people who are being withdrawn from SRE in any one school or class and the greater therefore the number of pupils who do not receive SRE taught in a way that reflects all three principles, the higher the likelihood that there will be increased levels of homophobic bullying compared to schools/classes where few or no students are withdrawn.
 - 65% of lesbian, gay and bisexual (LGB) young people say they have experienced homophobic bullying in school. (Stonewall, *The School Report*, 2007)
 - Not only LGB pupils experience homophobic bullying but anyone perceived as different. Secondary teachers identified homophobic bullying as the most common form of homophobic bullying after bullying because of weight. (Stonewall, *The Teachers' Report*, 2009)
 - Seven in ten lesbian, gay and bisexual pupils report never having been taught about lesbian and gay people or seen lesbian and gay issues addressed in class. (Stonewall, *The School Report*, 2007)
 - Those lesbian, gay and bisexual young people who have been taught about gay issues are 13% less likely to experience homophobic bullying. They are also more than twice as likely to enjoy going to school and more than two and a half times more happy. (Stonewall, *The School Report*, 2007)
 - (2) Lesbian, gay or bisexual pupils whose parents make use of their right of withdrawal would be denied information on sexual health issues and on healthy relationships including same-sex relationships, information necessary in order for them to be able to make safe choices and to stay physically and mentally healthy. The experiences of adult lesbian and bisexual women today may be regarded as indicators for inadequate provision of inclusive SRE in recent years.
 - Less than half of lesbian and bisexual women have ever been screened for sexually transmitted infections. (Stonewall, *Prescription for Change*, 2008)
 - One in four lesbian and bisexual women has experienced domestic violence, the same as women in general. (Stonewall, *Prescription for Change*, 2008)
 - 15% of lesbian and bisexual women over the age of 25 have never had a cervical smear test, compared to 7% of women in general. (Stonewall, *Prescription for Change*, 2008)
 - One in five lesbian and bisexual women who have not had a test have been told they are not at risk. (Stonewall, *Prescription for Change*, 2008)
 - Over half of lesbian and bisexual women have ever been for a sexual health check up. Three quarters of those who have not been tested “don't think I'm at risk”. (Stonewall, *Prescription for Change*, 2008)
 - Half of all lesbian and bisexual women under the age of 20 have self harmed and 16% have attempted to take their life. (Stonewall, *Prescription for Change*, 2008)

Selection of Relevant Law

We feel that the following list of international law may be helpful to the Joint Committee on Human Rights.

CONVENTION ON THE RIGHTS OF THE CHILD (ENTERED INTO FORCE 2 SEPTEMBER 1990)

- As a signatory to the UNCRC the UK recognises the right of children to
 - the “enjoyment of the highest attainable standard of health” (Art. 24).
- The CRC furthermore requires
 - “State Parties to undertake to protect the child from all forms of sexual exploitation and sexual abuse” (Art. 34).
- The UK agreed to
 - “take measures to ensure regular attendance at schools and the reduction of drop-out rates” (Art.28e).
- The UK shall
 - “respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child” (Art. 14.2)
- Furthermore education shall be directed to
 - “The development of the child's personality, talents and mental and physical abilities to the fullest potential” (Art. 29.1(a))

- “The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living in, the country from which he or she may originate, and for civilizations different from his or her own” (Art. 29.1(c)).
- “The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance [...] (Art. 29.1(d))
- The UK is to assure
 - “to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child” (Art. 12.1).

UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD CRC/GC/2003/4, 1 JULY 2003. GENERAL COMMENT 4

- “Adolescents have the right to adequate information essential for their health and development [...] It is the obligation of States parties to ensure that all adolescent girls in boys [...] are provided with, and not denied, accurate and appropriate information on how to protect their health and development and practice healthy behaviours. This should include information on [...] safe and respectful social and sexual behaviours [...]”. (CRC/GC/2003/4, para 26)

EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR), ROME 4 NOVEMBER 1950

- Art. 8 Right to respect for private and family life
- Art. 9 Freedom of thought, conscience and religion
- Art. 10 Freedom of expression

EUROPEAN COMMITTEE OF SOCIAL RIGHTS 30 MARCH 2009 INTERNATIONAL CENTRE FOR THE LEGAL PROTECTION OF HUMAN RIGHTS (INTERIGHTS) v. CROATIA.

- The Committee states that “sexual and reproductive health education as a process aimed at developing the capacity of children and young people to understand their sexuality in its biological, psychological, socio-cultural and reproductive dimensions which will enable them to make responsible decisions with regard to sexual and reproductive health behaviour” (46.).
- It furthermore considers that States must ensure “that the form and substance of the education, including curricula and teaching methods, are relevant, culturally appropriate and of sufficient quality, in particular that it is objective, based on contemporary scientific evidence and does not involve censoring, withholding or intentionally misrepresenting information, for example as regards contraception and different means of maintaining sexual and reproductive health” (47.)
- And the Committee emphasizes “that the obligation under Article 11§2 as defined above does not in its view affect the rights of parents to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents own religious or philosophical convictions (see European Court of Human Rights, Case of Kjeldsen, Busk Madsen and Pedersen v. Denmark, Judgment of 7 December 1976).” (50.)

YOUNG PEOPLE’S VOICES

Commissioned by the DCSF and in cooperation with the UK Youth Parliament, the Sex Education Forum carried out a Young People’s Survey. Based on the responses of 1,709 young people it found that

- Of those young people who identified as lesbian and gay, 56 and 55% respectively reported SRE was bad or very bad compared to 34% of all respondents.
- 52% thought that the ‘different types of relationships and families’ should be taught between the ages of 5 and 10.

PARENTS’ VIEWS

In October 2009 quantitative and qualitative research on SRE was commissioned by the DCSF. This research found a wide spectrum of opinion amongst parents on SRE. (press release DCSF 5 November 2009)

- 82% of parents said they supported the principle that all children should receive SRE;
- 20% of parents said there should be no right of withdrawal, 33% of parents said the right should end at age 11, 9% said it should end at age 14 and 7% at the age of 16.

CONCLUSION

- Taking into consideration the findings of the Stonewall reports cited above as well as the UK's legal obligations under international Human Rights law in particular those related to health, education, due weight to children's own views and parents' rights, Stonewall
 - welcomes the three principles set out in the Bill;
 - believes that the principles in themselves contribute to the balancing of rights;
 - believes the right of parents to respect their religious and philosophical convictions in the education of their children (Article 2 Protocol 1) are balanced adequately against the rights of the child to education, to receive information important to their health and to their own freedom of thought, conscience and religion and to have their views given due weight;
 - is convinced that the parental right to opt out their child if they are under the age of 15 should under no circumstances be increased to extend to children over the age of 15 as this would seriously infringe on the child's rights, and particularly on the rights of lesbian, gay and bisexual young people.

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