House of Lords
House of Commons

Joint Committee on Human Rights

Work of the Committee in 2008–09: Government Response to the Committee's Second Report of Session 2009-10; Legislative Scrutiny (Finance Bills and Academies Bill)

First Report of Session 2010-11

HL Paper 32

HC 459

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First Report of Session 2010–11

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, draft remedial orders and remedial orders.

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

Current membership

HOUSE OF LORDS	HOUSE OF COMMONS
Lord Bowness	Dr Hywel Francis MP (Labour, *Aberavon*) (Chairman)
Baroness Campbell of Surbiton	Dr Julian Huppert MP (Liberal Democrat, *Cambridge*)
Lord Dubs	Mrs Eleanor Laing MP(Conservative, *Epping Forest*)
Lord Lester of Herne Hill	Mr Dominic Raab MP (Conservative, *Esher and Walton*)
Baroness Morris of Bolton	Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)
Lord Morris of Handsworth	Mr Andy Slaughter MP (Labour, *Hammersmith)*

Powers

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

Publications

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

Current Staff

The current staff of the Committee is: Matthew Hamlyn (Commons Clerk), Rob Whiteway (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick (Assistant Legal Adviser), James Clarke (Senior Committee Assistant), Greta Piacquadio (Committee Support Assistant), and Keith Pryke (Office Support Assistant).

Contacts

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1 Report

With this Report we are publishing the following papers received from Government departments since the Committee last met in March 2010:

- Response from the previous Government to our predecessor Committee's Second Report of 2009-10, *The Work of the Committee in 2008-09*, dated 27 March 2010

- Submission from the previous Government on retrospective measures in the March 2010 Finance Bill, dated 1 April 2010

- Submission from the Government on retrospective measures in the July 2010 Finance Bill, dated 1 July 2010

- Memorandum from the Department for Education on human rights aspects of the Academies Bill (now the Academies Act 2010), dated 20 July 2010

Formal Minutes

Wednesday 8 September 2010

Members present:

Dr Hywel Francis, in the Chair

Lord Bowness	Dr Julian Huppert
Baroness Campbell of Surbiton	Mrs Eleanor Laing
Lord Dubs	Mr Dominic Raab
Lord Lester of Herne Hill	Mr Richard Shepherd
Baroness Morris of Bolton	Mr Andy Slaughter

Draft Report, *Work of the Committee in 2008–9: Government Response to the Committee's Second Report of 2009–10; Legislative Scrutiny (Finance Bills and Academies Bill)*, proposed by the Chairman, brought up and read the first and second time, and agreed to.

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

Ordered, That the following papers be reported to each House for printing with the Report:

- Ministry of Justice: Response from the previous Government to the Committee's Second Report of 2009-10, The Work of the Committee in 2008-09
- HM Treasury: submission on retrospective measures in the March 2010 Finance Bill
- HM Treasury: submissions on retrospective measures in the July 2010 Finance Bill
- Department for Education: note on human rights aspects of the Academies Bill

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

[Adjourned till Tuesday 12 October at 2.00 pm

List of written evidence

Written evidence

Response from the previous Government to our predecessor Committee's Second Report of 2009–10, The Work of the Committee in 2008–09, dated 27 March 2010

The State of Human Rights in the UK

1. Serious, sustained allegations that the UK has received information from countries which routinely use torture, or has been more actively complicit in torture carried out by others, puts the UK's international reputation as an upholder of human rights and the rule of law on the line. (Paragraph 15)

The Government notes the Committee's conclusion. However, the Government considers its position is clear that the UK stands firmly against torture and cruel, inhuman and degrading treatment or punishment. There is no truth in the suggestion that it is our policy to collude in, solicit, or participate in abuses of prisoners.

We have taken a leading role in international efforts to eradicate torture. We support the work of international organisations, including the UN, against torture, and work around the world to promote effective criminal justice systems to both prevent torture and ensure perpetrators are brought to justice.

Wherever allegations of wrongdoing are made, the Government takes them seriously, and refers them, if necessary, to the appropriate authorities to consider whether there is a basis for inviting the police to investigate. This is not a theoretical possibility - it has happened, and there are ongoing police investigations as a result.

Intelligence from overseas is critical to our success in stopping terrorism. All the most serious plots and attacks in the UK itself in this decade have had significant links abroad. So our agencies must work with their equivalents overseas, some of whom may have different legal obligations and different standards to our own in the way they detain people and treat those they have detained. But that cannot stop us from working with them where it is necessary to do so to protect our country and our citizens.

Whether sharing information, which might lead to the detention of people who could pose a threat to our national security; passing questions to be put to detainees; or participating in interviews of detainees, we do all we can to minimise, and where possible avoid, the risk that the people in question are mistreated by those holding them.

Once published, our consolidated guidance to Agency staff and service personnel will make clear the careful and considered way we approach these situations.

There is no truth in the suggestion that the Government has "sidestepped parliamentary scrutiny" of these issues. These serious issues are subject to robust parliamentary

scrutiny both during debates in the House and by parliamentary committee. The Intelligence and Security Committee, in particular, is a key organ of parliamentary accountability for the work of our security and intelligence Agencies, as the courts have recognised. The Committee is a creation of Parliament, not of Government. It is an independent body made up of senior members of both Houses of Parliament, which does not stint in criticism where it is appropriate.

One of the Committee's core functions is to review policies of the Agencies and report back findings to the Prime Minister and Parliament on an annual basis. In addition to its annual reports, the Committee has conducted detailed investigations on the "Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq" (2005) and "Rendition" (2007). Both these reports have been published.

The Committee also reported to the Prime Minister in March 2009 on "Alleged complicity of the UK intelligence and security agencies in torture or cruel, inhuman or degrading treatment" and has considered the Government's consolidated guidance to Agency staff and service personnel. We expect their findings on both these issues to be made public shortly.

2. We have consistently argued that the system of control orders, by which the activities of terrorism suspects who have not been prosecuted can be regulated and curtailed, is bound to lead to breaches of the ECHR, particularly because people subject to control orders are not given the details of the case against them. In a series of judgments during the session, the courts have reached broadly similar conclusions, culminating in decisions of the Grand Chamber of the European Court of Human Rights and the House of Lords, which have caused the whole system to unravel. (Paragraph 16)

The Government has consistently disagreed with the JCHR's assertions relating to control orders. The Government's position on the control order regime was set out in detail in its memorandum to the Home Affairs Committee on post-legislative scrutiny of the Prevention of Terrorism Act 2005 (Cm 7797), which was laid before Parliament on 1 February 2010.

The regime is not 'bound' to lead to breaches of the European Convention on Human Rights (ECHR). As a result of various House of Lords judgments, the 2005 Act is fully compliant with the ECHR.

Nor has the system unravelled. As set out in the 16 September 2009 quarterly report to Parliament on control orders, the Secretary of State for the Home Department considered that the control order regime remained viable following the June 2009 House of Lords judgment in Secretary of State for the Home Department v AF & Others [2009] UKHL 28 (AF & Others), but intended to keep that assessment under review as more cases were considered by the courts. The High Court has upheld four control orders since the House of Lords judgment, following proceedings that were compliant

with the Article 6 test laid down in AF & Others. The Government therefore remains of the view that the regime continues to be viable.

The independent reviewer of terrorism legislation, Lord Carlile has reached the same conclusion. In his fifth annual report on the operation of the 2005 Act, laid before Parliament on 1 February 2010, he states that 'abandoning the control orders system entirely would have a damaging effect on national security. There is no better means of dealing with the serious and continuing risk posed by some individuals.' He also emphasises that in reaching this conclusion he has 'considered the effects of the Court decisions on disclosure. I do not consider that their effect is to make control orders impossible.'

3. The Government is, of course, to be commended for introducing the Human Rights Act; but too often subsequently there has been a lack of leadership to use the Act to its full potential, ensure that public bodies promote human rights as well as do the minimum necessary to comply with the legislation, and respond to court judgments which have narrowed the scope of the Act from what Parliament originally intended. (Paragraph 20)

As the Committee notes, the Government introduced the 1998 Human Rights Act, which has been a significant development in ensuring the human rights of individuals within the UK. The Government does not accept the Committee's conclusions relating to a lack of leadership on human rights. As outlined in the Government's response to the Equality and Human Rights Commission's Human Rights Inquiry Report, since the 1998 Human Rights Act came into force, the Government has aimed to encourage a culture within public authorities in which human rights principles are seen as integral to the design and delivery of policy, legislation and public services.

The Government remains committed to the Human Rights Act and to demonstrating that the Act is a common sense way to realise our common values. Following the review of the implementation of the Human Rights Act, the findings of which were published in July 2006, the Ministry of Justice (MoJ) has taken forward a programme of work to implement the recommendations of the review.

As part of this programme of work, an ad-hoc Ministerial Group was established with a specific function to provide senior level oversight and leadership to the implementation programme. This group met three times in 2007 and was than concluded because it had delivered the outcomes it was set up to achieve. There continues to be a nominated Minster who has responsibility for human rights in each major Government Department. The Senior Human Rights Champions Network, which was established in 2007 to provide support to the Ministerial Group, continues to meet every three months to share good practice and information across Whitehall and is an important vehicle to maintain human rights momentum within Departments.

MoJ is leading Government Departments as they embed human rights within their policies and practices, and lead the implementation of a human rights framework in their agencies and sponsored bodies. The Department continues to provide support to other Government Departments in reviewing their own provision of guidance, training and access to legal advice on human rights in the sectors for which they are responsible. Government Departments are taking various steps to implement a human rights framework throughout their Department, their agencies and their sponsored bodies. Examples of this are the Department of Health's Human Rights in Healthcare Project, and the Human Rights in Schools Project being taken forward by MoJ in partnership with the British Institute of Human Rights and input from the Department for Children, Schools and Families and Amnesty International.

Following the review of the implementation of the Human Rights Act MoJ has also been working with the UK's inspectorates and regulatory bodies to provide leadership for the implementation of a human rights approach within these bodies. This has included publishing a guide, entitled 'The Human Rights Framework as a Tool for Regulators and Inspectorates', which aims to show how a human rights framework can be a valuable tool for these bodies, and to provide practical advice on how to integrate human rights within their practices. A regular forum, co-chaired by the EHRC, has also been established, for these bodies to share information and examples of good practice; and MoJ will be working with inspectorates and regulatory bodies to assist them to assess the training needs within their organisation.

To address the number of damaging myths that have grown up about the Human Rights Act, MoJ Press Office works with officials and counterparts in other Government Departments to provide the media with correct information about the Act. This includes identifying misleading articles and articles which incorrectly cite the Act and clarifying the situation with the media. The principal Government Departments each have a nominated press officer who can liaise with the MoJ Press Office when necessary to ensure this is done as rapidly as possible.

In addition to providing leadership on embedding human rights within public authorities, the Government has also established the EHRC which, under Section 9 of the Equality Act, has a statutory duty to:

- "promote understanding of the importance of human rights",
- to "encourage good practice in relation to human rights", and
- to "promote awareness, understanding and protection of human rights", and
- to "encourage public authorities to comply with section 6 of the Human Rights Act 1998"

Following the publication of its human rights strategy in November 2009, the EHRC is planning to hold a meeting with key stakeholders in February 2010 where the Commission intends to discuss how it plans to implement its strategy, including the recommendations of its Human Rights Inquiry. The Government is looking to the

Commission to take a strategic approach to human rights and to translate the actions recommended by the Inquiry into specific initiatives.

4. **We are concerned that human rights will again become a political football, with serious debate on the choices facing the UK kept on the touchline in favour of noisy recitals of the myths and distortions with which we are so familiar. Politicians on all sides must be clear about what they intend to do and the practical impact of their proposals. We would oppose any suggestion that rights encompassed in the Human Rights Act should no longer be protected or should not be enforced in UK courts, or that the UK need not fully comply with judgments of the European Court of Human Rights. (Paragraph 21)**

5. **Whatever decisions are taken on the shape of the human rights framework in the UK, we are of the view that Parliament, Government and the people we serve will continue to benefit from a dedicated human rights committee with an unflinching focus on whether human rights are being protected and promoted sufficiently in the UK (Paragraph 22)**

The Government notes the Committee's comments.

Pre- and Post-Legislative Scrutiny

6. **We draw to the attention of both Houses the Government's undertaking, in 2006, that a coroner may refuse to suspend an inquest in favour of an inquiry under the Inquiries Act 2005 if he reasonably believes that the inquiry will not comply with Article 2 of the ECHR (Paragraph 29)**

We believe that the Government's 2006 view, which stopped short of an undertaking, still applies in most circumstances when an inquiry into a death, or a series of deaths, is established under the Inquiries Act 2005.

However, as has been made clear in extensive debate, in both Houses, during the course of what became the Counter Terrorism Act 2008 and the Coroners and Justice Act 2009, there are some extremely rare circumstances when an Article 2 compliant inquest cannot be held. This is because there is centrally relevant material which cannot be disclosed to the coroner, a jury (where summoned) or to the family of the person who has died, and an inquest cannot therefore fulfil its purposes.

During the course of debate, Ministers acknowledged that these circumstances are so rare that they apply to only one current case, and that this case was not drawn to their attention until August 2007. At that time, a coroner ruled that he was unable to proceed with an Article 2 compliant inquest because particular material was unable to be disclosed to him.

Subsequently, and in both Bills referred to above, the Government has put forward several different models for how Article 2 can be complied with.

The solution reached is that if the Lord Chief Justice believes an inquiry should be established, then he will nominate a judge to chair the inquiry and the Lord Chancellor will advise the coroner with responsibility for investigating the death that he or she should suspend his or her investigation.

The subsequent inquiry will have access to the material which was unable to be disclosed to the coroner, and the bereaved family will have a Counsel to the Inquiry to review and ask questions about material that cannot be disclosed to them. In the Government's view, these proposals comply with Article 2 requirements.

There would be no purpose in either the coroner proceeding to hold a parallel inquest, or resuming the inquest at the conclusion of the inquiry, given that he or she would not be able to see the sensitive material. There would therefore be no prospect of such an inquest being Article 2 compliant.

7. We welcome requests from members of the public to investigate Government policy or practice which may not comply with the UK's human rights obligations (although bearing in mind that we cannot investigate individual cases). Where time allows, we will endeavour to take up matters within our remit with the Government and to provide a response to those who raise matters with us explaining the action we intend to take or the reasons why we have decided not to act. (Paragraph 31)

The Government notes the Committee's position.

8. We look forward to receiving the fruits of this work: scrutiny of the Finance Bill is central to the work of Parliament and we require additional information than that which is normally provided in order to perform our scrutiny role properly (Paragraph 33)

Following publication of the Finance Bill, the Government will provide the JCHR with a memorandum identifying the fully retrospective provisions within the Bill, (i.e. not including those about which a budget or an in-year announcement has been made), in order to aid the Committee's scrutiny of the legislation.

Timeliness

9. During the session we reported on nine bills before Report stage in the first House and one before Second Reading in the second House. (Paragraph 34)

The Government notes this information.

Recurring Themes

10. We welcome the Government's willingness to amend the Marine and Coastal Access Bill to meet our concerns about compliance with Article 6 of the ECHR in the light of the Tsfayo judgment. We look to the Government to build on its approach to dealing with Tsfayo in this context in future legislation. (Paragraph 37)

The Government would like to make clear that its reasons for amending the Marine and Coastal Access Bill in this respect should not be taken to imply any acceptance by the Government of the view that the Bill, as introduced into the House of Lords, or at any intermediate stage of its proceedings to date, was not compatible with Article 6(1) ECHR. The reasons for the Government's view on compatibility with Article 6 (1) were set out in a letter from Lord Hunt of Kings Heath to the Chairman of the Joint Committee dated 27th February 2009, published as an Annex to the Committee's Eleventh Report of Session 2008-9 (at Ev.25). The Government stands by the views expressed there.

The Government remains of the opinion that the decision in Tsfayo relates only to the specific facts of that case.

Quality of Explanatory Notes

11. Following the example set by the Department of the Environment, Food and Rural Affairs with the Marine and Coastal Access Bill and the Government Equalities Office with the Equality Bill, Ministers should provide us with a redacted version of the human rights memorandum circulated within Government when a bill is introduced. We recommend that Government guidance on the introduction of legislation should be amended to give effect to this proposal in time for the first session of the new Parliament. (Paragraph 42)

The Government has continued to work hard throughout this Parliament to improve the quality of the human rights analysis contained in the Explanatory Notes and we welcome the Committee's acknowledgement of this improvement. In addition, as the report notes, Bill teams are increasingly providing detailed memoranda or letters to assist the Committee in its legislative scrutiny.

Whilst Bill teams are encouraged to draw on the analysis in the ECHR memorandum when preparing explanatory notes, the Government remains of the opinion that it is not appropriate for redacted versions of all ECHR Memoranda automatically to be sent to the Committee. The principal purpose of the Memorandum is to provide legal advice to Legislation Committee when Bills and Draft Bills are considered for introduction, and it

may contain advice from Law Officers which, as the Committee is aware, is privileged legal information.

In light of the Government's continuing commitment to improving the quality of information received by the Committee, and the need to ensure that the ECHR Memorandum fulfils its intended purposes effectively, the Government will not change the Cabinet Office guidance at this time. The Committee may be interested to note however that we have recently updated the Cabinet Office guidance on Making Legislation to include a link to the Explanatory Notes to the Criminal Justice and Immigration Bill, which received Royal Assent in 2008. These were praised by the Committee in their Sixth Report of Session 2007-08 for providing a detailed analysis of the human rights issues arising.

Committee Amendments to Government Bills

12. We look forward to the House of Commons being given the opportunity to agree that amendments to bills (and motions) can be tabled in the name of a select committee, as long as the amendments have been agreed formally without division at a quorate meeting (or, in the case of a joint committee, by a quorum of Commons Members). We also welcome the Procedure Committee's recommendation that committee amendments should have priority in selection for decision under programming. (Paragraph 44)

The Government notes the Committee's view. This is a matter for the House of Commons itself.

13. We particularly welcome and endorse that Committee's view that "there should be a presumption that no major group [of amendments] should go undebated". (Paragraph 45)

The Government notes the Committee's view.

Civil Society input into Legislative Scrutiny Work

14. The House of Commons should be given an early opportunity to debate changes to procedure arising from the report of the Wright Committee, including a new approach to the allocation of time for Report stage debates which will enable the Commons to debate legislation more thoroughly than is often possible at present. (Paragraph 45)

The House debated the recommendations of the Select Committee on Reform of the House on 22 February and 4 March.

15. We welcome engagement with members of the public, NGOs and others about the human rights issues raised in bills. (Paragraph 46)

The Government notes the Committee's position.

16. The publication in draft of the Government's legislative programme has helped us plan our work and attract more civil society input and should now be regarded as a routine part of the legislative cycle. (Paragraph 47)

The Government welcomes the Committee's comments on the draft legislative programme.

UN Convention Against Torture

17. This formulation of the Government's view, which we had not previously encountered, does not assuage our concern that the UK may be in systematic and regular receipt of information obtained by torture overseas and may, as a result, be "complicit" in torture as that term is defined in the relevant international standards. An overseas security agency may well use torture without being encouraged to do so by the fact that the information thereby obtained ends up in London. In any event, it is unlikely that the UK Government would come to know or believe that its receipt of such information was acting as an encouragement to torture. (Paragraph 63)

With regard to the passive receipt of intelligence obtained by torture, the Government's position on State complicity is explained in our response to the Committee's report 'Allegations of UK Complicity in Torture'.

The reality is that that the precise provenance of intelligence received from overseas is often unclear. Where there is intelligence that could save British – or other – lives, however, we believe that we cannot reject it out of hand. This is the same conclusion reached by Lord Justice Brown in his judgment in the 2005 House of Lords Appeal[1] on cases related to the Anti-Terrorism, Crime and Security Act 2001:

> "Generally speaking it is accepted that the executive may make use of all information it acquires: both coerced statements and whatever fruits they are found to bear. Not merely, indeed, is the executive entitled to make use of this information; to my mind it is bound to do so. It has a prime responsibility to safeguard the security of the state and would be failing in its duty if it ignores whatever it may learn or fails to follow it up."

Furthermore, it is only by working with international partners and making our position on torture clear that we can seek to eradicate this abhorrent practice worldwide.

Rt Hon Michael Wills MP
Minister of State, Ministry of Justice

[1] (2005) UKHL 71

Submission from the previous Government on retrospective measures in the March 2010 Finance Bill, dated 1 April 2010

Introduction

1. In the Summary of the Twentieth Report of 2008-09, the JCHR commented that:

> "Finance Bills are long and complex and it is difficult for us to identify clauses with retrospective effect which may engage the ECHR. Consequently, we recommend that the Government should in future provide us with a Memorandum accompanying the Finance Bill, identifying any provisions in the Bill which have retrospective effect, together with an assessment of the retrospective provision and a detailed justification for retrospectivity."

2. This Memorandum seeks to meet that request in respect of the Finance Bill 2010. The Government considers that the Bill is compliant with the rights protected under the ECHR and the Chancellor has certified the Bill to this effect. As this is the first such Memorandum, some background is set out on the different categories of retrospection typically found in a Finance Act.

Retrospection in the Finance Act

3. As the Committee will be aware, Article 1 Protocol 1 (A1P1) protects the right to peaceful enjoyment of possessions. Taxation is, in principle, an interference with the right guaranteed by the first paragraph of A1P1, since it deprives the person concerned of a possession, namely the amount of money which must be paid. However, this basic right is not absolute. The second paragraph of this Article expressly provides that a State may enforce such laws as it deems necessary to secure the payment of taxes or other contributions. The key legal principles on A1P1 in relation to tax, and to retrospection in taxation legislation, are summarised by the European Court of Human Rights on page 11 of MA v Finland (emphasis added):

> "According to the Court's well-established case-law, an interference, including one resulting from a measure to secure payment of taxes, must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must be a reasonable relationship of proportionality between the means employed and the aims pursued.

> Furthermore, in determining whether this requirement has been met, it is recognised that a Contracting State, not least when framing and implementing policies in the

> area of taxation, enjoys a wide margin of appreciation and the Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation...
>
> Nor does the fact that the legislation applied retroactively in the applicants' case constitute per se a violation of Article 1 of Protocol No. 1, as retrospective tax legislation is not as such prohibited by that provision. The question to be answered is whether, in the applicants' specific circumstances, the retrospective application of the law imposed an unreasonable burden on them and thereby failed to strike a fair balance between the various interests involved."

4. Finance Acts invariably contain measures which have retrospective effect. The overall analysis of fairness turns to a significant extent on the degree to which P is being deprived of legal certainty by not being able to predict the legal consequences of P's actions.

5. It follows that a distinction may sensibly be drawn between legislation which imposes a set of legal consequences of which P cannot be aware because P's action pre-dated any possible awareness of the legislation (unannounced retrospective effect), and legislation which imposes a set of legal consequences of which P is aware because the proposal to legislate has been announced, and the legislation is not to be made to apply before the making of the announcement (announced retrospective effect).

'Unannounced' retrospective measures

6. The Finance Bill 2010 contains one measure with unannounced retrospective effect, that is clause 46 (Relationships treated as loan relationships etc: repos). The amendments made by this clause are to be treated as always having had effect (so that as a consequence the clause has effect from 1 October 2007, the date on which the legislation which is being amended was introduced). This measure was announced on 9 February 2010 together with the draft clause.

7. Sale and repurchase (or repo) transactions are commonly entered into by financial institutions and provide a safe form of financing. The relevant legislation, section 550 of the Corporation Tax Act 2009 (and the predecessor legislation, paragraph 4 of Schedule 13 to the Finance Act 2007), was designed to ensure that the tax treatment of repos follows accounting practice. It has been asserted that it is possible to interpret the legislation as meaning that certain payments (known as manufactured payments) received by companies do not have to be taken into account for tax purposes if the securities to which they relate are not recognised on the companies' balance sheets. If that were the correct interpretation, companies could seek to deduct for tax purposes manufactured payments that have contributed to their accounting profits. By excluding these payments, companies' taxable profits could be significantly lower than their actual profits.

8. The repo legislation was introduced following full consultation with the stated aim that such transactions are to be taxed in accordance with their accounting treatment and economic substance. The interpretation which is being advanced leads to an outcome inconsistent with that aim. It is an interpretation which was not advanced during the consultation period even though the types of repo transaction to which the legislation relates are routinely carried out by large banking groups. If this interpretation is correct, it would inevitably lead to a number of challenges in respect of past transactions (that is those preceding the date of the announcement) even though on entering into them the groups had expected to be taxed in accordance with the accounting treatment. This would result in a significant and unexpected tax windfall.

9. This clause will restore certainty and make it clear that manufactured payments must be taken into account in calculating the profits chargeable to corporation tax if those payments are taken into account in computing accounting profits. The clause cannot result in any company being charged to tax on more than its actual profits but prevents the possibility of relief for artificial losses.

10. The legislation will have effect from 1 October 2007, which is the date that the legislation that is now being amended came into effect. In order to protect the general body of taxpayers from the possibility that some taxpayers could obtain an unintended and unexpected windfall and, to give certainty, it is considered appropriate for the legislation to be made with such retrospective effect. It is therefore considered that the legislation is within the wide margin of appreciation afforded to the State in tax matters, and does not breach any Convention rights.

'Announced' retrospective measures

11. Finance Acts normally contain certain measures which have been announced at some point during the previous year and which take effect from the date of their announcement. These are known as 'Rees Rules' announcements, named after Peter Rees QC who first articulated the principles during the Finance Bill Standing Committee debate of 6 June 1978.

12. A 'Rees Rules' announcement is made where it is necessary, in order to mitigate tax avoidance or for exchequer protection, that a measure have immediate effect. In each case the announcement comprises a precise Ministerial warning of the intention to legislate with retrospective effect, accompanied by draft clauses (or in some cases a very detailed technical note) and the clauses giving effect to the statement are included in the next available Finance Bill.

13. The clauses in the Finance Bill 2010 which are subject to a 'Rees Rules' announcement are as follows:

- 25 & Schedule 4 Sideways relief etc
- 27 & Schedule 5 Capital allowance buying
- 28 & Schedule 6 Leased assets
- 30 Sale of lessors: consortium relationships
- 32 & Schedule 8 Gifts of shares etc to charity
- 35 &Schedule 10 Foreign currency bank accounts
- 37 &Schedule 12 Reliefs and reductions for foreign tax
- 38 Asset transfer to non-resident company: recovery of postponed charge
- 41 & Schedule 14 Unauthorised unit trusts
- 42 & Schedule 15 Index-linked gilt-edged securities
- 45 Connected companies: release of debts
- 48 Apportionment of asset value increases
- 49 Extension of special annual allowance charge
- 53 Reversionary interests of purchaser or settlor etc in relevant property
- 55 SDRT: depositary receipt systems and clearance services systems

14. ln each case it is considered that the retrospection is fair and proportionate and therefore the legislation is within the wide margin of appreciation afforded to the State in tax matters, and does not breach any Convention rights. The Government is able to show for each measure that it is aimed at anti-avoidance or exchequer protection, and that it gave clear warning in an established manner that retrospective legislation would be passed, so that the taxpayer could arrange their affairs accordingly.

Bank payroll tax

15. Clause 22 and Schedule 1 introduce Bank Payroll Tax (BPT). The measure has effect from the time of the announcement on 9 December 2009 (12:30pm) and as with the 'Rees Rules' measures mentioned above, a precise ministerial warning was published alongside draft clauses. The retrospection is only from the time of the announcement. Unlike the 'Rees Rules' measures, the aim of the measure is neither anti-avoidance nor exchequer protection.

16. BPT will be payable by taxable companies - broadly speaking banks or building societies or certain financial and holding companies within bank or building society groups. BPT will be chargeable on the aggregate of the amounts of chargeable relevant remuneration awarded during the chargeable period to or in respect of relevant banking employees of the taxable company. BPT will be charged at the rate of 50%. The chargeable period will be from 12:30pm on 9 December 2009 to 5 April 2010. Draft clauses were published on 9 December 2009 and the tax will not apply to contractual arrangements entered into before that date.

17. There have been some amendments to the draft clauses as published in December 2009 but these are either relieving or clarificatory in nature. The measure includes anti-avoidance provisions and collection and machinery provisions, including penalty

provisions for failure to make a return or to pay the tax when due. The penalty provisions will not be retrospective as they will only apply to future conduct.

18. It is considered that the measure falls within the State's margin of appreciation under A1P1, and therefore does not breach any Convention rights. BPT serves a legitimate aim in the public interest, namely to encourage change in the remuneration practices that contributed to excessive risk-taking by the banking industry. The Government wishes to encourage the development of sustainable long-term remuneration policies that take greater account of risk and facilitate the build up of loss-absorbing capital. Given the unprecedented economic situation created by the financial stability crisis it is important that this measure, to encourage sustainable long-term remuneration policies, applied to discretionary bonuses awarded during the 2009/10 bank bonus season.

Other retrospective measures

19. In the ordinary course of events the Budget takes place in a given year before the start of the financial year. So a fiscal measure is announced at the Budget, subsequently enacted in the Finance Act, and is in certain cases given legal effect from the start of the financial year. Such clauses amount to legislation with announced retrospective effect, and so we do not mention them here. Also, we do not mention any retrospective relieving measures, i.e. changes which are wholly to the advantage of the taxpayer.

Rt Hon Stephen Timms MP
Financial Secretary to the Treasury

Submission from the Government on retrospective measures in the July 2010 Finance Bill, dated 1 July 2010

Introduction

1. In the Summary of the Twentieth Report of 2008-09, the JCHR commented that:

> "Finance Bills are long and complex and it is difficult for us to identify clauses with retrospective effect which may engage the ECHR. Consequently, we recommend that the Government should in future provide us with a Memorandum accompanying the Finance Bill, identifying any provisions in the Bill which have retrospective effect, together with an assessment of the retrospective provision and a detailed justification for retrospectivity."

2. This Memorandum seeks to meet that request in respect of the emergency Finance Bill 2010 (to become the Finance (No.2) Act 2010). The Government considers that the Bill is compliant with the rights protected under the ECHR and the Chancellor has certified the Bill to this effect. A similar Memorandum was provided to the Committee in respect of the Finance Bill 2010 (which became the

Finance Act 2010, c. 13). That Memorandum provided background information on the different categories of retrospection typically found in a Finance Act. It is not proposed to repeat that background information here.

'Unannounced' retrospective measures

3. The emergency Finance Bill 2010 does not contain any charging measures with unannounced retrospective effect.

'Announced' retrospective measures

4. Finance Acts normally contain certain measures which have been announced at some point during the previous year and which take effect from the date of their announcement. These are known as 'Rees Rules' announcements.

5. A 'Rees Rules' announcement is made where it is necessary, in order to mitigate tax avoidance or for exchequer protection, that a measure have immediate effect. In each case the announcement comprises a precise Ministerial warning of the intention to legislate with retrospective effect, accompanied by draft clauses (or in some cases a very detailed technical note) and the clauses giving effect to the statement are included in the next available Finance Bill.

6. This Bill contains one measure, clause 9 (insurance companies: businesses transfer involving excess assets), which was the subject of such an announcement.

Other retrospective measures

7. In the ordinary course of events measures announced at the Budget take effect from that date. Such clauses amount to legislation with announced retrospective effect, and we do not mention them here. Also, we do not mention any retrospective relieving measures i.e. changes which are wholly to the advantage of the taxpayer.

David Gauke MP
Exchequer Secretary to the Treasury

Memorandum from the Department for Education on human rights aspects of the Academies Bill (now the Academies Act 2010), dated 20 July 2010

Letter from the Bill Manager to the Legal Adviser, JCHR

Academies Bill

I am writing to you as Bill Manager for the Academies Bill. I am grateful to you for coming to the Department on 9 July to meet officials and to set out some initial thoughts on those matters on which the Joint Committee on Human Rights might appreciate a departmental view.

The Academies Bill had Third Reading in the House of Lords on Tuesday 13 July, was introduced to the House of Commons on the same day, and had Second Reading in the House of Commons on Monday 19 July. The Government hope to receive Royal Assent prior to summer recess, in order to allow the first schools which have been graded 'outstanding' by Ofsted and who have applied to do so, to convert to Academy status at the beginning of the Academic year in September. We appreciate that to assist the Committee as much as possible given the timescales involved, that we should respond as fully now as we are able.

Academies as 'public authorities'

Firstly you asked whether Academies are public authorities for the purposes of the Human Rights Act, the Equality Act and the Freedom of Information Act. As we discussed the Government does consider Academies to be public authorities for the purposes of the Human Rights Act and the Equality Act. That was the position taken also by the previous Government, as it stated in its dealings with the Committee which lead to the 18th and 21st Reports of the 2005/6 Session. This discussion, of course, predates the House of Lords decision in *YL –v- Birmingham City Council*[2] and it seems to us that in the light of the principles set out in that judgement, that Academies would clearly fall to be considered as public authorities (and Lord Mance noted that the provision of education may be viewed as a non-delegable state function). Lord Wallace of Saltaire set out the Government's position at Committee on 28th June 2010[3]. His Lordship said:

> "My Lords, I am happy to confirm that this Government, like the previous Government, accept that academy schools are public authorities for the purposes of the Human Rights Act and that, consequently, they are under a duty to act compatibly with the convention rights in their dealings with parents, pupils and others…academies will be required to comply with all the duties in the Equality Act that apply to schools more generally, with respect to disability, non-discrimination,

[2] [2007] UKHL 27. The reasoning of this Judgement must hold good, notwithstanding that the actual decision in that case has been reversed by section 145 of the Health and Social Care Act 2008.

[3] *Hansard*, Vol 719, No 20,, col 1609

> reasonable adjustments and the like. It is quite correct that academies are not currently listed in Schedule 19. However, Schedule 19 will be updated before the duties come into force in 2011, and academies will be included in time for that. That will also deal with the suggestion…that an academy should be a public authority for the purpose of the Equality Act."

As Lord Wallace promised in that debate, The Parliamentary Under-Secretary of State for Schools, Lord Hill, subsequently wrote to Baroness Williams of Crosby about that issue, and a copy of that letter is attached.

In relation to the Freedom of Information Act 2000, the Government introduced amendments to the Bill, contained now in paragraph 10 of Schedule 2 to insert Academy proprietors to the list of public bodies in Schedule 1 of that Act who are required to comply with its provisions.

'Equivalent protections'

The second issue you raised was about whether the legal protections for children and parents of children at Academies are equivalent to the legal protections available at maintained schools, in particular in relation to Special Educational Needs (SEN), Admissions, Exclusions, and Religious Education (RE) and collective worship. This is an issue which the Committee has raised before, as the extracts from its previous reports of the 2005/6 Session which you kindly sent, demonstrate.

As the Department indicated at the meeting, the model funding agreement includes provisions to apply the Admissions Code; statutory guidance on exclusions (including the right of appeal against permanent exclusions); and the same rules around RE and collective worship – including the parental right to withdraw a child - to Academies. The model funding agreement also includes SEN provisions, and you will be aware that a Government amendment to the Bill was tabled for and agreed at Report Stage, which introduces a statutory requirement that Academy arrangements (Funding Agreements or grants) must contain provisions imposing obligations equivalent to those imposed on maintained schools in Part 4 of the Education Act 1996 and any Regulations made under part 4. This offers additional reassurance to pupils and parents in Academies that pupils with SEN will be treated the same at Academies as they are in maintained schools.

You referred at the meeting to the need for 'equivalence' between maintained schools and Academies; and this is also a theme of previous reports of the Joint Committee. As noted above, there will be equivalent provision for pupils in Academies and maintained schools in some fundamental respects. However, Academy schools and maintained schools are intentionally different types of schools, set up in different ways and controlled and funded through different mechanisms. In that sense, therefore, there are always going to be differences between these types of school. As you will be aware from the case of *P –v- Schools Adjudicator*[4], the Courts have rejected the notion that a maintained school represents a 'gold standard' from which departures must be justified; and the Department would suggest therefore that it is wrong to approach this issue from that starting point- or from the viewpoint that different is necessarily worse.

[4] [2006] UKHC 1934 (Admin) per Wilkie J, at paragraph 50. The decision was approved in *R (Elphinstone) –v- City of Westminster* [2008] EWCA Civ 1069 though it did not touch on that specific point.

'Model Funding Agreement'

The third area that was discussed at the meeting was about the Model Funding Agreement. We confirmed that the draft Model Funding Agreement has been published and is available on our website: www.education.gov.uk/academies. We discussed how the requirements contained in the Funding Agreement are enforceable by parents, and officials explained that where parents or pupils have complaints in relation to Academies, they can complain to the Young People's Learning Agency (YPLA) who are responsible, on behalf of the Secretary of State, for ensuring that Academies comply with their Funding Agreement. Parents can ultimately take their complaint to the Secretary of State, who can ensure that an Academy complies with their contractual obligations. Parents also have the option of Judicially Reviewing an Academy, in the same way that a parent could do if their child was at a maintained school[5].

We had a discussion about the policy on departing from the Model Funding Agreement, and officials could not foresee a scenario where the Department would agree to a departure in relation to SEN, exclusions or Religious Education. In relation to admissions, the Bill explicitly allows schools that already have selective admission arrangements on the basis of academic performance to convert to Academy status without changing their admission arrangements and permits schools with a faith designation to retain this too. Ministers have been very clear though that no new selection will be allowed as a result of conversion to Academy status, and all new Academies being opened up will have to act in accordance with the Admissions code.

'Existing Academies'

The fourth area of discussion was around the 203 existing Academies, which are operating under a previous version of the Funding Agreement (FA). Officials explained that all existing FAs do include the requirement to comply with the Admissions Code, exclusions guidance, and provide for the requirement to teach RE and provide collective worship, and require Academies to have regard to the SEN Code of Practice (2001) and statutory guidance on inclusion. The new FA does go further on SEN, but in practice, there is no evidence that existing Academies are providing inferior support to maintained schools. In addition, existing Academies may switch to the new version of the Funding Agreement because it provides additional freedoms in other areas and they will certainly be given that option. As a result of a Government amendment on SEN made in the House of Lords, and assuming the Bill is passed, there will now be an obligation that future Academy arrangements will impose on academy schools the same obligations as those that apply to maintained schools under Part 4 of the Education Act 1996.

'Complaints'

The fifth issue we discussed was the complaints system in relation to Academies. The internal school complaints process for Academies is a requirement contained in the Independent School Standards Regulations, which also require Academies to publish their complaints process for parents. After the in-school process is exhausted, the complaints

[5] The principle that CTCs (and therefore Academies) are judicially reviewable is long-standing: see *R –v- Governors of Haberdashers' Aske's Hatcham College ex p. T* [1995] ELR 350.

process for neither maintained schools nor Academies is set out in statute[6] – rather it is an administrative process in both cases[7]. As explained earlier, parents can complain about the Academy's failure to comply with legal or contractual obligations to the YPLA (unless the complaint relates to a child's SEN statement, in which case the parent could complain to the local authority), and ultimately to the Secretary of State. The YPLA will publish its complaints procedure on its website shortly. Where the Secretary of State finds in favour of the parent or child – agreeing that the terms of the FA have been breached – he ultimately has recourse to the courts to ensure that the terms of the contract are met. In practice however, this has never been necessary, because Academies have always complied before this stage if the Secretary of State concluded there might be a breach. We intend to improve the information to parents about how to complain about Academies through various publications such as our information booklet for parents with children with special educational needs.

'Information'

The final area of discussion centred around the information made available to children and parents about the proposed arrangements prior to a school converting to Academy status. An amendment to the Bill at Report stage in the House of Lords introduced a statutory requirement for schools to consult with such persons as it thinks appropriate before the FA is signed. We recognise that we will need to consider carefully the extent to which in future standard information provided to parents about the statutory responsibilities of schools in relation to admissions, exclusions and SEN, will need to be explicit about the responsibilities of Academies too.

I hope this has provided the necessary reassurances to you, and to the Committee when it is convened. Please don't hesitate to get in touch if you require any further information.

[6] Though there is a statutory obligation on maintained schools to have a complaint process under S. 29 Education Act 2002.

[7] The Apprenticeships, Skills, Children and Learning Act 2009 Chapter 2 of Part 10 introduces a statutory complaints system but this has not been fully commenced and is in pilot only.

List of Reports from the Committee during the last Session of 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
Ninth Report	Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010	HL Paper 64/HC 395
Tenth Report	Children's Rights: Government Response to the Committee's Twenty-fifth Report of Session 2008–09	HL Paper 65/HC 400
Eleventh Report	Any of our business? Government Response to the Committee's First Report of Session 2009–10	HL Paper 66/HC 401
Twelfth Report	Legislative Scrutiny: Crime and Security Bill; Personal Care at Home Bill; Children, Schools and Families Bill	HL Paper 67/HC 402
Thirteenth Report	Equality and Human Rights Commission	HL Paper 72/HC 183
Fourteenth Report	Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill	HL Paper 73/HC 425
Fifteenth Report	Enhancing Parliament's Role in Relation to Human Rights Judgments	HL Paper 85/HC 455
Sixteenth Report	Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In	HL Paper 86/HC 111