



House of Lords  
House of Commons  
Joint Committee on  
Human Rights

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# Legislative Scrutiny: Fifth Progress Report

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**Eleventh Report of Session 2005–06**

**Drawing special attention to:**

Electoral Administration Bill

Equality Bill

Health Bill

Immigration, Asylum and Nationality Bill





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House of Commons  
Joint Committee on  
Human Rights

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**Eleventh Report of Session 2005–06**

*Report, together with formal minutes and  
appendices*

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## Joint Committee on Human Rights

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

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

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Lord Bowness  
Lord Campbell of Alloway  
Lord Judd  
Lord Lester of Herne Hill  
Lord Plant of Highfield  
Baroness Stern

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Mary Creagh MP (Labour, *Wakefield*)  
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Dr Evan Harris MP (Liberal Democrat, *Oxford West & Abingdon*)  
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Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)

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

### Publications

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

### Current Staff

The current staff of the Committee are: Nick Walker (Commons Clerk), Ed Lock (Lords Clerk), Murray Hunt (Legal Adviser), Róisín Pillay (Committee Specialist), Jackie Recardo (Committee Assistant), Pam Morris (Committee Secretary) and Tes Stranger (Senior Office Clerk).

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## Summary

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The Joint Committee on Human Rights examines every Bill presented to Parliament. With Government Bills its starting point is the statement made by the Minister under section 19 of the Human Rights Act 1998 in respect of compliance with Convention rights as defined in that Act. However, it also has regard to the provisions of other international human rights instruments to which the UK is a signatory.

The Committee publishes regular progress reports on its scrutiny of Bills, setting out any initial concerns it has about Bills it has examined and, subsequently, the Government's responses to these concerns and any further observations it may have on these responses. From time to time the Committee also publishes separate reports on individual Bills.

In this Report the Committee substantively comments for the first time on the Electoral Administration Bill, and comments on further points arising on two Bills on which it has already reported, the Equality Bill and the Health Bill. The Committee publishes without further comment correspondence it has received on the Immigration, Asylum and Nationality Bill from the Government and the Public and Commercial Service Union. The Report also records the Committee's intention not to report on the human rights implications of the Terrorism (Northern Ireland) Bill, but to scrutinise the provisions of Part 7 of the Terrorism Act 2000 should the Home Secretary exercise his powers to extend their life beyond 31 July 2007.

### *Electoral Administration Bill*

The Committee welcomes a number of provisions of the Bill which support the right to free elections, protected by Article 3 of Protocol 1 ECHR (paragraph 1.8), but raises a number of concerns about other provisions of the Bill on human rights grounds.

The Report says that Co-ordinated Online Record of Electors (CORE) Schemes, which consolidate information currently held on electoral registers as well as other "related material" on an electronic database, are capable of administration in accordance with the right to respect for private and family life under Article 8 ECHR if the existing regulations on disclosure of information are applied, but that it should be made clear on the face of the Bill that the power to modify the regulations as they apply to CORE schemes (clause 2(3)(b)) does not extend to allow modification of the regulations on disclosure (paragraph 1.15).

Whilst welcoming the Government's assurances that personal identifying information of electors will not be widely disclosed, the Committee considers that Article 8 protection would best be ensured if it were made clear on the face of the Bill that disclosure of such information would only be made for electoral administration purposes or to prevent electoral fraud (paragraph 1.21). The Committee also expresses its concern that a requirement to provide a national insurance number or a date of birth when registering to vote may have a deterrent effect on voter registration and may therefore risk breach of rights under Article 3 of Protocol 1 ECHR, and Article 14 (prohibition of discrimination) ECHR (paragraph 1.25).

The Committee considers that clause 22 of the Bill, read in conjunction with provision for deprivation of citizenship and rights of abode in the Immigration, Asylum and Nationality Bill, would mean that the power of the executive to either prevent an individual from contesting an election, or to remove an elected member of the House of Commons, would be exercisable on very wide and ill-defined grounds in relation to Commonwealth citizens or certain individuals with dual British/Commonwealth nationality, and would therefore allow for significant, and possibly arbitrary, interference with the right to contest an election under Article 3 of Protocol 1 ECHR. It would also in the Committee's view risk disproportionate interference with the Article 10 rights of Commonwealth citizens who stand for election, or are elected Members of Parliament (paragraph 1.33).

The Committee says that the extent of possible disclosure of election documents under clause 42, for purposes not specified on the face of the Bill, including for example the prevention of crime, requires further scrutiny by Parliament in order to establish that it will in practice amount to necessary and proportionate interference with Article 8 rights (paragraph 1.39).

The Committee expresses its regret that measures to implement the judgment of the European Court of Human Rights in *Hirst v UK*, which held that blanket deprivation of voting rights for convicted prisoners breached Article 3 of Protocol 1, have not been included in this Bill, but welcomes the consultation on the issues arising which was announced by the Government on 2 February (paragraph 1.42).

### *Equality Bill*

The Committee reported on the human rights compatibility of this Bill, as well as on its provisions establishing the Commission for Equality and Human Rights, in its Fourth Report of this Session. Following the Government's Response to that Report, published here as an Appendix, the Committee in this Report welcomes the amendment which has been made to clause 50 of the Bill restricting the exception for faith schools to the duty of non-discrimination in clause 49, so that it does not permit faith schools to discriminate in exclusions, or allow them to discriminate in subjecting pupils to "any other detriment" (paragraph 2.5). It also welcomes the Government's undertakings to provide guidance on the non-discrimination obligations of schools under the Human Rights Act (paragraph 2.5), and to provide guidance to local education authorities on the equal provision of school transport to pupils wishing to attend faith and non-faith schools alike (paragraph 2.7).

### *Health Bill*

The Committee reported on the Health Bill in its Sixth Report of this Session, subsequently writing to the Government to ask for its justification for the discriminatory effects of the exemptions from the proposed smoking ban of licensed premises not serving food and of membership clubs. The Committee notes that the Government's response to this question, contained in a letter from the Secretary of State for Health appended to this Report, is that the need for justification does not arise because the non-discrimination provision contained in Article 14 ECHR is not engaged, and that the issue is a policy matter for Parliament to decide. The Committee sets out the reasons why it does not accept these arguments. The

Committee concludes that, in order to enable Parliament to reach its own view on the compatibility of the exemptions with human rights standards, it should be provided with the justifications relied on, and advises both Houses that, in the absence of any such justification, it is not clear that the exemptions are compatible with human rights standards.



# Bills drawn to the special attention of both Houses

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## *Government Bill*

### 1 Electoral Administration Bill

Date introduced to first House	11 October 2005
Date introduced to second House	12 January 2006
Current Bill Number	HL 58
Previous Reports	None

### Introduction

1.1 This is a Government Bill, introduced in the House of Commons on 11 October 2005,<sup>1</sup> and currently awaiting its second reading in the House of Lords. A statement of compatibility under section 19(1)(a) of the Human Rights Act has been made in respect of the Bill by Baroness Ashton of Upholland. Explanatory notes to the Bill have been published,<sup>2</sup> and assess the human rights compatibility of the Bill at paragraphs 353–358.

1.2 The Bill would make numerous amendments to electoral law, including some likely to have a positive impact in supporting participation in elections, and thereby enhancing protection for rights to vote and stand for election, protected under the Human Rights Act (Article 3 Protocol 1 ECHR) and under international human rights law. Certain of the Bill's provisions, considered in this report, also raise issues of human rights compatibility. The right to respect for private life under Article 8 ECHR is engaged by a number of provisions in the Bill. In addition, the restriction on Commonwealth citizens standing for election in clause 21 of the Bill raises issues under Article 3 Protocol 1 ECHR and Article 10, and is also considered further below.

1.3 In December 2005, we wrote to the Secretary of State for Constitutional Affairs, requesting clarification and further information on several questions of human rights compatibility raised by the Bill. By reply of 23 January 2006, the Secretary of State responded to our questions. This Report contains our final assessment of the human rights compatibility of the Bill, taking into account the letter of the Secretary of State for Constitutional Affairs. Copies of the relevant correspondence are appended to the Report.

### The Human Rights Engaged

1.4 The right to free elections, and the right to vote and to stand for election, are protected both in international human rights law and under the Human Rights Act 1998. The foundation of this protection is Article 21 of the Universal Declaration of Human Rights which provides that “everyone has the right to take part in the government of his country, directly or through freely chosen representatives”, and that the will of the people “shall be

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1 HL Bill 58

2 HL Bill 58-EN

expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

1.5 Article 3 of Protocol 1 ECHR, given effect in UK law under the Human Rights Act, provides that:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

1.6 Unusually for the ECHR, Article 3 is expressed not in terms of the rights of individuals, but as an undertaking of the State. The European Court of Human Rights has nevertheless held that Article 3 of Protocol 1 confers individual rights to vote, and to stand for election.<sup>3</sup>

1.7 The International Covenant on Civil and Political Rights (ICCPR) provides both for rights to vote and stand for election, and for wider rights (not guaranteed by the ECHR) to participate in public affairs. Article 25 states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

## Positive Aspects

1.8 The explanatory notes to the Bill state its aim as to “improve the effectiveness of electoral administration for the benefit of the public and the electoral community”.<sup>4</sup> To the extent that it succeeds in this aim, the Bill is likely to have a positive impact on human rights protection. **We welcome those provisions of the Bill which support the right to vote and to stand for election as protected under the Human Rights Act and international human rights law.** In particular, we welcome:

- Clause 10, by which a person may apply to be entered on the Electoral Register anonymously, where the registration officer is satisfied that their safety would be at risk if their name or address appeared on the Register;
- Clause 11, which extends the period for voter registration to allow voter registration up to five days before polling day;
- Clause 12, which allows for the removal of voters from the electoral register where it becomes apparent that they were not entitled to be registered or are no longer entitled to be registered;

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3 *Mathieu-Mohin and Clarefayt v Belgium* 10 EHRR 1

4 EN page 2

- Part 4, which provides for local authorities to review polling districts on a regular basis in order to ensure reasonable provision of and access to polling facilities;
- Clause 20, which allows persons of 18 or over (rather than 21 as at present) to stand for election;
- Clauses 36 and 37, which make provision for assistance, including translation of electoral documents, to voters where necessary.

## CORE Schemes

1.9 Part 1 of the Bill provides for the establishment, by order of the Secretary of State, of one or more Co-ordinated Online Record of Electors (CORE) Schemes to be administered by a designated “CORE keeper”, either the Electoral Commission, or another public authority nominated by the Secretary of State. Such schemes would consolidate information currently held on electoral registers as well as other “related material” on an electronic database. Information to be held under the CORE scheme includes:

- The register of electors for any election;
- Lists or records relating to an electoral register which have a statutory basis;
- Any other information relating to a person who has an entry on an electoral register which is required for electoral purposes or in connection with jury service;
- Other information specified by the Secretary of State as necessary for the operation of the scheme.<sup>5</sup>

1.10 Clause 2(1) states that the administrator of the scheme, the “CORE keeper” may be either authorised or required by the scheme to take any specified steps in relation to the information kept by him in pursuance of the scheme. CORE schemes will be bound by the existing regulatory framework under the Representation of the People Act 1983 which governs access to electoral registers, and allow for public inspection of the electoral register and related documents, or for the supply of those documents to members of the public, either free of charge, or on payment of a prescribed fee.<sup>6</sup> Clause 2 also provides however that these rules may be modified in their application to CORE schemes, where the Secretary of State considers such modification appropriate (clause 2(3)(b)).

## Human Rights Compatibility

1.11 Since the information held under the CORE scheme is likely to include personal identifying information, CORE schemes engage the right to respect for private life under Article 8 ECHR. Under Article 8.2, interference with private life may be justified where it is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society and proportionate to the aim pursued. We consider that the retention of information necessary for the effective conduct of elections would be justified as a necessary and proportionate

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<sup>5</sup> Clause 1(11)

<sup>6</sup> Clause 2(2), para. 47 EN

interference with Article 8 rights in the interests of the protection of the right to free elections under Article 3 of Protocol 1 ECHR.

1.12 Article 8 would also be engaged where personally identifying information held under the CORE scheme was disclosed to third parties. Whilst the disclosure of information from the scheme by the CORE keeper for purposes related to the effective administration of elections would be likely to be justified under Article 8.2, this may not be the case where information is disclosed for unrelated purposes, including for example to commercial organisations for marketing purposes. In *R (Robertson) v Wakefield Metropolitan Council*,<sup>7</sup> there was found to be a disproportionate interference with Article 8 rights where the applicant's entry on the electoral register was disclosed to a commercial concern for marketing purposes,<sup>8</sup> against the express wishes of the applicant. It was also held in that case that such disclosure, in the absence of an individual right of objection, imposed a disproportionate and unjustifiable constraint on the applicant's Article 3 Protocol 1 rights to participate in the democratic process.<sup>9</sup>

1.13 Following the *Robertson* case, the Representation of the People (England and Wales) (Amendment) Regulations 2002 provided for the maintenance of both a full Register, and an edited Register. The edited Register omits the names of those who have requested to be excluded from it, and it is the edited Register only which is available for purchase for marketing purposes.

1.14 We asked the Secretary of State for Constitutional Affairs to clarify whether the information which could be disclosed from CORE schemes would include the full Register, or the edited Register only, and whether the terms of CORE schemes would ensure a right of objection to the disclosure of information held under such schemes for commercial marketing purposes.

1.15 The Secretary of State in his reply assures the Committee that CORE schemes will not affect the protection of privacy rights in the disclosure of electoral material. He makes clear that in carrying out their functions, CORE keepers will be required to comply with existing regulations under the Representation of the People Act, and the transfer of functions from Electoral Registration Officers to CORE keepers will not detract in any way from voters' right of objection to the disclosure of electoral information concerning them for marketing purposes. It is not envisaged that clause 2(3)(b) of the Bill, which on its face could allow for the modification of these regulations in relation to CORE schemes, would be used to effect any changes to the regulations on the disclosure of information from the electoral roll. Rather, clause 2(3)(b) "is necessary as some rules that currently apply to EROs would not be relevant to a core keeper." **We welcome the government's assurances on this point. We agree that, on the application of the existing regulations as to disclosure, CORE schemes are likely to operate in accordance with Article 8 rights to respect for private life. Nevertheless, we consider that, to clarify that no modification of the disclosure**

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7 [2001] EHC Admin 915

8 Under the Representation of the People (England and Wales) Regulations 2001

9 In the subsequent case of *R (Robertson) v Experian Ltd* [2003] EWHC 1760 (Admin) however, it was held that the sale of the electoral register to a credit reference agency did not breach Article 3 of Protocol 1, or Article 8 ECHR, since information sold to the agency would not be used for marketing purposes and "it was undoubtedly permissible to conclude that the public interest in the facilitation of credit and the control of fraud outweighed the very modest interference with the right to vote." (para.15)

regulations is intended, the limited purpose of clause 2(3)(b) as explained by the Secretary of State in his reply should be made clear on the face of the Bill.

## Use of Personal Identifying Information

1.16 Part 3 of the Bill provides for a system by which electors would be required to provide personal information to confirm their identity. Such a system is already in use in Northern Ireland, and under the Bill could be generally adopted across the UK. Under clause 13, persons applying for registration, or wishing to amend their entry on the Register, may be required to provide “personal identifiers”. In England, Wales and Scotland, personal identifiers would include a signature, date of birth or other information to be prescribed;<sup>10</sup> in Northern Ireland, they would include a signature, date of birth, national insurance number, statement of residence or address at which the individual is registered or has applied to be registered to vote.<sup>11</sup> This information is to be retained and supplied to polling stations to allow the identity of voters to be confirmed.<sup>12</sup>

1.17 Clause 15 allows for the scheme of personal identifiers to be piloted in certain local authority areas. Following reports from such pilot schemes (clause 16), the Secretary of State may by order provide for the system of personal identifiers permitted by the Bill to apply in all or certain classes of election.<sup>13</sup>

1.18 Under clause 14(9), personal identifying information may be disclosed to other registration officers in connection with their duties; to returning officers in connection with their functions; and to persons preparing or conducting legal proceedings under the Representation of the People Act. Under clause 14(9)(d) it may also be disclosed to “such other persons for such other purposes as may be prescribed.”

## Human Rights Compatibility

1.19 The collection and retention of data to establish personal identity,<sup>14</sup> as well as any disclosure of this data, engages Article 8 ECHR, the right to respect for private life.<sup>15</sup> Such interference with Article 8 rights falls to be justified under Article 8.2 as in accordance with law, in pursuit of a legitimate aim, and necessary in a democratic society and proportionate to the aim pursued. The interference with Article 8 rights involved in the retention of identifying information by registration officers pursues the aim of the protection of the rights of others under Article 3 of Protocol 1 to elections which ensure the free expression of the opinion of the people. In protecting against electoral fraud, the measures assist in safeguarding Article 3 Protocol 1 rights. **In our view the retention of basic identifying information, such as a signature, date of birth or national insurance number, would amount to a necessary and proportionate interference with Article 8 rights for the purposes of protecting Article 3 Protocol 1 rights.**

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10 Clause 14, new section 13E (2)

11 Clause 14, new section 13E (3)

12 Clause 14, new section 13E (8); EN para. 89

13 With the exception of Scottish local government elections

14 *Friedl v Austria* (1996) 21 EHRR 83

15 *Leander v Sweden* (1987) 9 EHRR 433, para. 48

1.20 Disclosure of identifying information which could be shown to be necessary for purposes connected with the conduct of elections or of electoral fraud proceedings would also be likely to be justified under Article 8.2. We note, however, that clause 14(9)(d) allows regulations to provide for open-ended disclosure to persons other than registration officers, returning officers, or those involved in relevant court proceedings, for purposes which are to be prescribed, including, it appears from the face of the Bill, purposes unconnected with the administration of elections or the prevention of electoral fraud. Such disclosure would have implications for unwarranted interference with Article 8 rights through the disclosure of personal information which was not necessary and proportionate in pursuit of one of the legitimate aims recognised in Article 8.2. Such disclosure would also have implications for the protection of Article 3 Protocol 1 rights to vote, since the knowledge that, for example, a national insurance number could be passed on to a range of public or private bodies for commercial, law enforcement, or unrelated regulatory purposes could act as a deterrent to registration.<sup>16</sup>

1.21 We asked the Secretary of State for Constitutional Affairs to clarify the circumstances in which information would be disclosed under clause 14(9)(d), and whether disclosures under this provision would be limited to those necessary for the administration of elections or the prevention of electoral fraud. In response, it was explained that those to whom information would be disclosed under this clause would be likely to include those entitled to attend the opening of the postal ballot paper envelopes, so that they are entitled to view the personal identifiers by reference to which the Returning Officer proposes to reject a vote. It was further clarified that the Government does not propose making the list of personal identifiers widely available, and will not, for example, make the list available for public inspection, or to the political parties, credit reference agencies or for general sale. **We welcome these assurances. We note however, that new section 13E(9)(d) appears to allow for disclosure that is considerably wider and more intrusive of privacy rights than that envisaged by the Government. In our view, Article 8 rights would be most effectively protected were disclosure to other persons under new section 13E(9)(d) to be limited to disclosures for the purpose of the administration of elections, or the prevention of electoral fraud.**

1.22 We also raised with the Secretary of State the possibility of a discriminatory impact of a requirement to produce a national insurance number or a date of birth at voter registration, for those who do not have a national insurance number and for those, in particular persons who have arrived in the UK as unaccompanied refugee children, who may not know their date of birth. An adverse impact on these groups could raise issues under Article 14 ECHR read with Article 3 of Protocol 1. To the extent that the requirement might deter individuals from voting, it would also raise issues under Article 3 of Protocol 1.

1.23 The Government response points to the arrangements for the existing scheme of personal identifiers which has operated in Northern Ireland since 2002. Under these arrangements, those who wish to register to vote but who do not have a national insurance

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<sup>16</sup> *R (Robertson) v Metropolitan Council*, op cit., finding a breach of Article 3 of Protocol 1 in the disclosure of the applicant's entry on the electoral register to a commercial organisation against his wishes, and citing the US Court of Appeal, Fourth Circuit, decision in *Greidnger v Davis* (1993) 988 Federal Reporter (2nd Series) 1344 where a breach of the right to vote was found to arise from the requirement to supply a social security number when registering to vote, in circumstances where the voter registration lists were available for purchase.

number may instead provide a statement that they do not possess a national insurance number. Similar provision is allowed for under clause 14(1) of this Bill (new section 13E(3)(c)).

1.24 There is no provision, either under the Bill or under the current Northern Ireland legislation, for alternative arrangements to be made for voters who are unable to provide a date of birth as an identifier at registration. The Government does not consider that this has given rise to any problems of discrimination in Northern Ireland. It is envisaged, however, that any different impact it might have in other parts of the UK can be assessed in pilot schemes provided for under clauses 15 to 17.

1.25 We accept of course the right of the state to ascertain whether an individual is eligible to vote, but we nevertheless remain concerned that a requirement to produce a national insurance number may have a deterrent effect on voter registration, and that even a requirement for prospective voters to provide a statement that they do not have a national insurance number may discourage registration in some cases. We are also concerned that, in parts of the UK which have a more diverse population, and larger numbers of recent immigrants, than Northern Ireland, the practical effect of a requirement to provide a date of birth may be to discourage some sections of the population from voting. **We remain concerned that requirements to provide a national insurance number or a date of birth as personal identifiers may risk breach of rights under Article 3 of Protocol 1 ECHR, and Article 14 ECHR.**

## Eligibility of Commonwealth Citizens to Stand for Election

1.26 Clause 22 of the Bill, together with Part 3 of Schedule 1, restricts the eligibility of Commonwealth citizens for election to the House of Commons, the European Parliament and Local Authorities. Under the current law, all Commonwealth citizens are eligible for election.<sup>17</sup> Clause 22 would restrict the right to stand for election to those Commonwealth citizens who either do not require leave under the Immigration Act 1971 to enter or remain in the UK, or have been granted indefinite leave to remain in the UK.<sup>18</sup>

1.27 The consequences of this restriction are set out in clause 22(4). Clause 22(4)(a) provides that if a Commonwealth citizen who falls outside of these categories is elected to the House of Commons, that election is void. Under clause 22(4)(b), if a person validly elected to the House of Commons subsequently becomes disqualified from membership, as a Commonwealth citizen outside the specified categories, his or her seat is automatically vacated.<sup>19</sup>

## The Human Rights Engaged

1.28 The right to stand for election, an implied right under Article 3 of Protocol 1, is a qualified right, and may be restricted on grounds including age,<sup>20</sup> nationality,<sup>21</sup> knowledge

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17 British Nationality Act 1981, Section 37 and Schedule 7, amending the Act of Settlement 1700 section 3

18 Clause 22(2)

19 Procedures under the House of Commons Disqualification Act 1975 apply to persons disqualified under clause 21, as they do to persons disqualified under the 1975 Act: clause 21(5)

20 *W, X, Y and Z v Belgium* 2 DR 110

of the national language,<sup>22</sup> or membership of foreign legislatures.<sup>23</sup> Such restrictions must be proportionate and not arbitrary.<sup>24</sup> The discretion to exclude must not be unfettered or exorbitantly wide, but must be circumscribed with sufficient precision by the law, and must contain safeguards against bias.<sup>25</sup>

### ***The Immigration Asylum and Nationality Bill***

1.29 The potential impact of clause 22, and therefore its compatibility with the Convention rights, needs to be considered in light of related provisions of the Immigration Asylum and Nationality Bill currently before Parliament. Clause 53 of the Immigration Asylum and Nationality Bill allows for British citizens, in practice those British citizens who are dual nationals (including persons who are nationals of Commonwealth countries), to be deprived of their British citizenship, where the Secretary of State considers that the deprivation is conducive to the public good.<sup>26</sup> Clause 54 of that Bill provides for the deprivation of the right of abode of non-nationals, including Commonwealth citizens who have a right of abode under section 2 of the Immigration Act 1971, where the Secretary of State considers that it would be conducive to the public good for an individual to be excluded or removed from the UK. We note that therefore eligibility for the removal of rights will not apply equally to those with dual nationality and those without it.

1.30 “Conducive to the public good” under both provisions is to be informed by, though not limited to, the new list of “unacceptable behaviours”, which include terms which we considered in our report on Counter-terrorism Policy and Human Rights, to be unacceptably vague.<sup>27</sup> We considered the very wide breadth of the concept of “conducive to the public good” and the lack of a requirement for a reasonable belief on the part of the Secretary of State, that the individual met this criterion, had the potential to lead to arbitrary deprivations of the Convention rights.

1.31 The effect of clause 22 of this present Bill, taken together with the relevant provisions of the Immigration Asylum and Nationality Bill would appear to be that:

- An election candidate, who was dual national of the UK and a Commonwealth State, and whose right of abode in the UK was dependent on his British citizenship, could be deprived of his British citizenship on grounds that the deprivation was “conducive to the public good” and thus prevented from contesting the election;
- An election candidate, who was a Commonwealth citizen with a right of abode in the UK under the Immigration Act 1971, could be deprived of his right of abode in

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21 *Ganchev v Bulgaria* 87-A DR 130, where a prohibition on dual nationals from election to parliament was not challenged by the applicant on Article 3 Protocol 1 grounds. Although not directly relevant to restrictions on the Article 3 of Protocol 1 rights of non-nationals, it should be noted that Article 16 ECHR states that nothing in Articles 10, 11 and 14 ECHR shall be regarded as preventing states from imposing restrictions on the political activity of aliens.

22 *Podkolzina v Latvia* App No 46726/99

23 *M v UK* App No 10316/83

24 *Zdanoka v Latvia* App No 58278/00

25 *Podkolzina v Latvia*, op cit.

26 JCHR, Third Report of Session 2005–06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, HL Paper 75-I, HC 561-I, at paras. 155–158.

27 *ibid.* at para.166

the UK on grounds that his removal was conducive to the public good, and thus be unable to contest the election;

- A Commonwealth citizen, whose right of abode was dependent on either dual nationality or the 1971 Act, who was an elected Member of the House of Commons, could be required to vacate his seat following a determination by the Secretary of State that deprivation of his British citizenship, or his removal from the jurisdiction, would be conducive to the public good.

### **Human Rights Compatibility**

1.32 We raised the question of the human rights compatibility of these provisions in our letter to the Secretary of State for Constitutional Affairs. In reply, the Secretary of State “rejects the view that enactment of the relevant clauses would create inconsistency with Article 3 Protocol 1 ECHR”, citing the long-standing powers of deprivation of British citizenship in UK law, and the widespread powers of deprivation of nationality in other states. We also note the response of the Home Office to our report on Counter-terrorism policy and human rights,<sup>28</sup> in which the Home Secretary rejects the suggestion that the grounds for deprivation of British nationality should be circumscribed, since it would “not ... be appropriate to constrain the present and future Secretaries of State by, for example, setting out on the face of the Bill the precise circumstances in which [the Secretary of State] would be able to remove citizenship or the right of abode.” The Home Secretary defends the lack of a requirement of reasonable belief on the part of the Secretary of State that an individual’s presence in the UK is not conducive to the public good, on the grounds that it is the Secretary of State who will be in the best position to judge the requirement of the public interest. He assures us that the powers to remove citizenship and the right of abode would and could not be directed in a discriminatory fashion against particular ethnic groups, and points to the safeguards under the British Nationality Act 1981 and the Race Relations Act 1976, which protect against such discriminatory exercise of the Secretary of State’s powers. The Home Secretary further rejects our suggestion that the powers to deprive someone of citizenship or a right of abode would be exercised arbitrarily, since the decision would be subject to a full merits appeal.

1.33 We welcome the Home Secretary’s assurance that powers to deprive persons of citizenship or a right of abode will be subject to full merits appeals. We also accept the legitimacy of powers of deprivation of nationality, where they are provided for in terms that are legally certain and proportionate. Nevertheless, we do not consider that the Government’s response adequately addresses the particularly wide grounds on which the Secretary of State could exercise powers to deprive of nationality or rights of abode, and thereby restrict political participation, under clause 22 of this Bill, in combination with the Immigration, Asylum and Nationality Bill. **We consider that the power of the executive either to prevent an individual from contesting an election, or remove an elected member of the House of Commons, would be exercisable on very wide and ill-defined grounds in relation to Commonwealth citizens or certain individuals with dual British / Commonwealth nationality and would therefore allow for significant, and possibly arbitrary, interference with the right to contest an election under Article 3 of Protocol 1**

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<sup>28</sup> Tenth Report of Session 2005–06, *Government Response to the Committee’s Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, HL Paper 114, HC 888.

ECHR.<sup>29</sup> In our view the measures also risk disproportionate interference with the Article 10 rights of Commonwealth citizens who stand for election, or are elected Members of Parliament, in that they would be left open to significant penalties if their political speech were to be construed by the Secretary of State as “not conducive to the public good” or “justifying terrorism”, both vague and indeterminate standards, the potential application of which would be likely to have a chilling effect on political speech. We draw this to the attention of both Houses.

## Removal of electoral rights following convictions for postal vote fraud

1.34 Clause 40 creates new offences relating to applications for postal and proxy votes. Under clause 40, an offence is committed where a person, with the intention of depriving someone of their vote, or to gain a vote to which he is not entitled, or for financial gain, either:

- applies for a postal or proxy vote as another person;
- makes some other false statement in applying for a postal or proxy vote;
- induces an election official to send correspondence related to a postal or proxy vote to an address other than that of the voter; or
- causes correspondence related to postal or proxy votes not to be delivered to the intended recipient.

1.35 Under clause 40 (5) a person who commits this offence is guilty of a “corrupt practice” under the 1983 Act and may therefore be disqualified from standing for election or from voting, for five years, in addition to a sentence of imprisonment or a fine. **Deprivation of the right to vote following conviction under clause 40 interferes with the right to vote under Article 3 of Protocol 1 ECHR, but in our view would be likely to be justified as a proportionate interference with these rights in the interests of preventing electoral fraud and thus protecting the electoral rights of others.**

## Access to Election Documents

1.36 Clauses 41–45 amend the law on access to certain election documents by the general public, and by political parties and candidates. Clause 41(5)(c), amending the existing electoral rules in Schedule 1 of the Representation of the People Act 1983, provides that, following a Parliamentary election, registered political parties and candidates must on request be supplied with marked copies of the Register, postal voters list,<sup>30</sup> list of proxies and the proxy postal voters list. Regulations may make provision for the supply of such documents, for the form in which they are supplied and the payment of fees for them and may allow for conditions to be imposed on the inspection or supply of documents, including restrictions on copying, restrictions on the use of information contained in documents, restrictions on disclosing the document to other persons, and on using the

<sup>29</sup> *Podkolzina v Latvia*, op cit.

<sup>30</sup> Clause 45 makes provision for the creation of marked postal voters lists, which are not presently maintained

information in the document for purposes other than that for which it was supplied (clause 41(5)(c)).

1.37 Clause 42 makes provision for access to election documents in elections other than Parliamentary elections, mirroring the provision in relation to Parliamentary elections. Clause 42(1) requires certain election documents to be made available for inspection by members of the public and copies of such documents supplied to members of the public, subject to regulations. These documents include all documents required by legislation to be retained, but do not include individual ballot papers, completed corresponding number lists, certificates as to employment on the day of the election, or personal identifying information (clause 44(5)). Clause 42(2) provides for access to additional election documents by political parties, candidates or agents of candidates. Such persons must on request be supplied with marked copies of the register, postal voters list, list of proxies and the proxy postal voters list. Regulations under clause 42(3) may impose conditions relating to the supply and inspection of documents under clauses 42(1) and 42(2), similar to those which may be imposed on documents related to Parliamentary elections under clause 41.

1.38 We wrote to the Secretary of State asking what restrictions will be placed on disclosure of electoral documents under these provisions in order to comply with Article 8 and Article 3 of Protocol 1. The Secretary of State acknowledges that since the marked register contains details of electors, any access to them should be in accordance with data protection and human rights principles, which are to be protected by regulations made under the Bill. The Government envisages that regulations made under clauses 41 and 42 will be guided by those in the existing Representation of the People Regulations concerning access to the marked electoral register and by the *Robertson* case.<sup>31</sup> The regulations will also be based on the decision report issued by the Clerk of the Crown following the May 2005 general election, concerning access to election documents arising from the general election, and the principle set out in that report that inspection of the marked register will be open only to those who have a legitimate interest in the marks themselves and not merely an interest in the names and addresses of electors. The government notes that such persons might include political parties and elected representatives, who wish to use the marked register for campaigning purposes, and law enforcement agencies seeking access to the marked register for the prevention and detection of crime.

1.39 The disclosure of marked copies of the Register is likely to engage Article 8 ECHR, in that it discloses whether an individual has voted in a previous election. This disclosure may also raise issues under Article 3 of Protocol 1 ECHR, which protects the right to a secret ballot. Since rights under both Article 8 and Article 3 of Protocol 1 are qualified rights, interference with them may be justified where necessary and proportionate to a legitimate aim. Whether disclosure of documents under clauses 41 and 42 will be justified, therefore, will depend on the public interest in the particular disclosure, as well as the safeguards provided by the legislation and regulations, to protect against the misuse or further disclosure of the document. **Whilst we consider that disclosure of the marked register to political parties and candidates is in principle capable of justification under Article 8, in our view the extent of possible disclosure of election documents under clause 42, for purposes not specified on the face of the Bill, including for example the prevention of crime, requires further scrutiny by Parliament in order to establish that it will in**

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31 Appendix 1(b)

**practice amount to necessary and proportionate interference with Article 8 rights. We draw this to the attention of both Houses.**

### **Decision of the European Court of Human Rights in *Hirst v UK***

1.40 The Committee also notes that the Government has not taken the opportunity afforded by this Bill to rectify the incompatibility found in October 2005 by the Grand Chamber European Court of Human Rights in *Hirst v UK*, where it held that the blanket deprivation of voting rights for convicted prisoners breached Article 3 of Protocol 1. The Grand Chamber noted that the ban on voting applied to a wide range of offenders, and did so in a way that was indiscriminate, applying irrespective of length of sentence, gravity of the offence committed, or individual circumstances. Sentencing in the criminal courts made no reference to the disenfranchisement consequent on imprisonment. There had not been any reasoned parliamentary debate on the ban on prisoner voting, which attempted to justify the ban. Although a wide margin of appreciation should be granted to national legislatures in relation to voting rights, this margin of appreciation was not all-embracing. The Court concluded that the general, automatic and indiscriminate nature of the ban meant that it fell outside of the State's margin of appreciation and breached Article 3 of Protocol 1. The Court reserved the question of whether a more targeted ban, applying only to certain categories of offenders, would comply with Article 3 of Protocol 1.

1.41 The Secretary of State, in response to our query as to why no steps had been taken in this Bill to rectify the incompatibility found in *Hirst*, pointed to the complex issues of both legislation and practice raised by the case. In a written statement of 2 February 2006, the Secretary of State for Constitutional Affairs stated that:

The ECtHR indicated that there should be proper debate about those issues and I have therefore concluded that the best way forward would be to embark on full public consultation in which all the options can be examined and which will give everyone the opportunity to have their say. A consultation document is therefore in preparation and I hope it will be available for discussion in a few weeks time. Thereafter there will be a period for those with an interest to make their views known, which will help to inform the development of future policy.<sup>32</sup>

**1.42 We regret that Parliament has not been afforded the opportunity to consider the important issue of prisoner voting rights in the course of its scrutiny of the present Bill. We nevertheless welcome the consultation exercise proposed. We look forward to the publication of the consultation document and will return to consider the conclusions of the consultation.**

## 2 Equality Bill

Date introduced to first House	18 May 2005
Date introduced to second House	11 November 2005
Current Bill Number	HC Bill 99
Previous Reports	16 <sup>th</sup> Report of 2004–05, 4 <sup>th</sup> Report of 2005–06

### Introduction

2.1 This is a Government Bill, introduced in the House of Lords on 18 May 2005, which completed its report stage in the House of Commons on 16 January 2006. We reported on the Bill in our Fourth Report of this Session, in which we commented in detail on the proposals for the creation of a Commission for Equality and Human Rights, as well as on the human rights compatibility of the Bill. In this report, we confine our comments to Part 2 of the Bill, in light of amendments to the Bill in the House of Commons, and the Government's response to our Fourth Report.

### Part 2: Discrimination on Grounds of Religion or Belief

2.2 Part 2 of the Bill introduces statutory protection against discrimination on grounds of religion or belief in the provision of goods, facilities and services. In our previous report on the Bill, we raised several queries regarding the human rights compatibility of Part 2, in particular in relation to exceptions to the prohibition on discrimination established in Part 2, including the general exceptions for schools, particular exceptions applying to faith schools, and the exception for school transport. As we noted in our previous report, Part 2 provides statutory support for rights of non-discrimination under Article 14 ECHR, read in conjunction with Article 8, the right to respect for private and family life, and Article 9, the right to freedom of religion or belief. As Part 2 relates to religious discrimination in education, it also engages Article 2 of Protocol 1, ECHR which protects the qualified right of parents to have their children educated in accordance with their religious and philosophical convictions.

#### *Exceptions for schools*

2.3 In our previous report, we expressed concern that the breadth of the exceptions for schools under what is now clause 50 of the Bill to the duty of non-discrimination on grounds of religion or belief, could permit pupils to be subject to a range of detriments which might not be objectively and reasonably justified in the interests of protecting the rights to freedom of religion of others, in breach of the Convention rights, in particular the Article 9 ECHR right to freedom of religion and belief, read in conjunction with the right to freedom from discrimination in Article 14 ECHR. We pointed out that although the exceptions in Part 2 were unlikely to be incompatible on their face with the Convention rights, their wide scope would fail to prevent treatment contrary to the Convention rights. We also underlined the importance of statutory guidance to be produced before Part 2 comes into force, making clear that all schools which are Human Rights Act public authorities retain obligations to comply with ECHR rights of non discrimination, irrespective of the exceptions under the Bill.

2.4 In its response to our report, the Government defended the general exceptions to the clause 49 duty of non-discrimination, which apply to all schools, in relation to the content of the curriculum and religious worship (clause 50(2)). It points to the need to protect the curriculum against attempts to undermine it by minority religious groups, and to ensure that the curriculum delivers a broad and balanced education. It also wishes to continue present policy requiring schools to provide acts of worship of a broadly Christian character, without making equivalent provision for all other faiths, whilst retaining the right of parents to withdraw their children from such acts of worship.

2.5 Nevertheless the Government accepts our view in relation to the exceptions for faith schools. It agrees that permitting faith schools to exclude a pupil or subject a pupil to any other detriment on the grounds of religion or belief goes beyond what is needed to protect the freedom of religion of faith schools. At report stage of the Bill in the House of Commons, the Government responded to our concerns by tabling an amendment to what is now clause 50 of the Bill. The amendment restricts the faith schools exception in clause 50(1), so that the exception to the duty of non-discrimination in clause 49 does not permit religious discrimination in exclusions, or allow discrimination in subjecting pupils to “any other detriment”. In her response to our Report the Minister comments that: “while we have no reason to suppose that faith schools do or would discriminate in these respects against children of other faiths or none, we are happy to make it clear that the exception is intended to be limited only to those areas which are essential in order to enable faith schools to continue to operate as such”.<sup>33</sup> In their response to our Report, the Government also undertake to provide non-statutory guidance to schools, which will make it clear that exceptions under the Bill do not override rights of non-discrimination under the Human Rights Act. We welcome the amendment to clause 50, and the undertaking to provide guidance on the non-discrimination obligations of schools under the Human Rights Act. We trust that such guidance will be produced before Part 2 of the Bill comes into force.

### ***School Transport***

2.6 We also raised, in our previous report, the question of discriminatory provision for school transport to faith or non-faith schools. Under what are now clauses 51 (2)(b) and 51(3)(b), the prohibitions on religious discrimination by local education authorities and education authorities do not apply in their provision of school transport. Under clause 52 (4)(k)(v), the prohibition on religious discrimination by public authorities does not apply to school transport functions. We raised the concern that these provisions would permit Local Education Authorities to discriminate by providing transport to faith schools for children of parents with a particular religious conviction which is not catered for at a local school, but refusing transport to children of parents with non-religious or atheist conviction where their local school had a religious character. We pointed out that such disparity of treatment could give rise to discrimination in breach of Article 14 ECHR read with Article 9 ECHR or Article 2 of Protocol 1 ECHR. Given that in practice it appears that some LEAs have failed to make equal transport provision for children of parents with non-religious convictions, we emphasised the need for guidance to clarify the duty under the

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<sup>33</sup> Appendix 2. Comments to similar effect were made by the Minister for Women and Equality Meg Munn MP at Report stage in the House of Commons: HC Deb., 16 January 2006, col. 647

Human Rights Act to make equal provision for school transport for children of parents with both religious and non-religious beliefs.

2.7 In its response to our Report, the Government states that the Committee's advice will be reflected in the revised guidance on school transport to be issued in draft alongside the forthcoming Education and Inspections Bill. **We look forward to the publication of the draft guidance which we intend to consider in our scrutiny of the Education and Inspections Bill.**

### 3 Health Bill

Date introduced to first House	27 October 2005
Date introduced to second House	
Current Bill Number	HC 110
Previous Reports	6 <sup>th</sup> Report of 2005–06

3.1 In our Sixth Report of this Session we reported our views on this Bill and indicated that we had written to the Minister asking for the objective justification for the proposed differential treatment of employees and members of the public in licensed premises not serving food or membership clubs compared to employees and members of the public in other enclosed premises in which smoking will be prohibited. We indicated that we might report again on the Bill when we had received the Minister’s reply.

3.2 We received a response from the Minister in a letter dated 25 January 2005.<sup>34</sup> The Minister says that the need for justification does not arise, for two reasons. First, she says that Article 14 (the non-discrimination provision in the Convention) is not engaged, because it only applies where a person’s status is based on “personal characteristics” which put that person in a particular position. Second, she says that “in any event this is a policy matter for Parliament to decide in a difficult and important area. Once Parliament has adopted a solution, it would not be for the courts to impose their own view.” No justification for the proposed exemptions is therefore offered by the Government.

3.3 We do not accept the Government’s reasons for refusing to provide any justification for the proposed exemptions from the prohibition on smoking. First, Article 14 ECHR is not as narrow in scope as the Minister asserts. The case-law of the European Court of Human Rights does not confine “status” to status flowing from “personal characteristics”. As we mentioned in our earlier report, the sorts of differences of treatment which have been held to be within the scope of Article 14 in Strasbourg include differential treatment of owners of non-residential as opposed to residential buildings in relation to eviction orders,<sup>35</sup> and differential treatment of people injured at work compared to people injured outside the workplace in relation to entitlement to bring proceedings for personal injury.<sup>36</sup> In neither case was the status in question based on “personal characteristics”. More tellingly still, companies, which not being natural persons do not have “personal characteristics”, have been recognised as entitled to rely on Article 14 ECHR to complain of their different treatment compared to other companies.<sup>37</sup>

3.4 Second, the decision of the House of Lords in *Ghaidan v Mendoza*,<sup>38</sup> in which it relied on s. 3 of the Human Rights Act to interpret the Rent Act’s protection for surviving spouses in a way which avoided it being incompatible with Article 14 ECHR, demonstrates that under the Human Rights Act the courts will consider whether exemptions from protective measures are unjustifiably discriminatory, even where Parliament has expressed its view. **In any event, to enable Parliament to reach its own view on the compatibility of the exemptions with human rights standards, it should in our view be provided with the**

34 Appendix 3

35 *Scollo v Italy* (1996) 22 EHRR 514

36 *Handwerker v Germany* (1996) 22 EHRR CD 125

37 *National Provincial Building Society v UK* (1998) 25 EHRR 127

38 [2004] UKHL 30, [2004] 2 AC 557

**justifications relied on. In the absence of any justification from the Government, we would advise both Houses that it is not clear that the exemptions are compatible with human rights standards.**

## 4 Immigration, Asylum and Nationality Bill

Date introduced to first House	22 June 2005
Date introduced to second House	17 November 2005
Current Bill Number	HL 66
Previous Reports	3 <sup>rd</sup> and 5 <sup>th</sup> Reports of 2005–06

4.1 We publish as Appendices to this Report, without comment in light of the advanced stage of the Bill's progress through Parliament, three items of correspondence that we have received about the Bill:

- i) A letter dated 21 December 2005 from Rt Hon Charles Clarke MP, Secretary of State for the Home Department, clarifying the Government's understanding of the scope of the enabling power in the Bill concerning the requirements that may be placed on employers to prevent the employment of illegal migrant workers.
- ii) A letter dated 12 January 2006, also from the Home Secretary, enclosing a memorandum setting out the Government's detailed response to our report on this Bill in our Fifth Report.
- iii) A letter dated 12 January 2006 from the Public and Commercial Services Union expressing its grave concerns that the clauses in the Bill enabling private contractors to carry out searches of vehicles could have damaging consequences on the detection and treatment of clandestines.

4.2 The Government's Response to the views we expressed in our Third Report of this Session on the Government amendments to the Bill brought forward to give effect to counter-terrorism measures has already been published as an Appendix to our Tenth Report of this Session.<sup>39</sup>

# Bills not brought to the attention of either House

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## 5 Terrorism (Northern Ireland) Bill

Date introduced to first House	11 October 2005
Date introduced to second House	1 December 2005
Current Bill Number	HL 50
Previous Reports	None

5.1 The main purpose of this Bill is to extend the life of Part 7 of the Terrorism Act 2000, which contains provisions which extend only to Northern Ireland and are due to expire on 18 February 2006. The Bill provides for the Part 7 provisions currently in force to remain in force until 31 July 2007, by which date the Government aims to repeal the provisions if the security situation in Northern Ireland permits. In case it does not, the Bill enables the Secretary of State to extend the provisions of Part 7 by order for a specified period up to 1 August 2008.

5.2 We note that this is a Bill renewing provisions which have been renewed annually, by order, since they first came into force on 19 February 2001. This Committee has not previously reported to Parliament on the renewal of those provisions, and it does not propose to do so on this occasion. We do, however, intend to conduct a full compatibility scrutiny of the various measures contained in Part 7 in the event that the Secretary of State exercises his power in the Bill to extend the life of the provisions beyond 31 July 2007.

# Formal Minutes

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**Monday 6 February 2006**

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness

Mary Creagh MP

Lord Campbell of Alloway

Mr Richard Shepherd MP

Lord Judd

Lord Plant of Highfield

Baroness Stern

\* \* \* \*

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

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

Paragraphs 1.1 to 1.24 read and agreed to.

Paragraph 1.25 read, as follows:

“ We accept of course the right of the state to ascertain whether an individual is eligible to vote, but we nevertheless remain concerned that a requirement to produce a national insurance number may have a deterrent effect on voter registration, and that even a requirement for prospective voters to provide a statement that they do not have a national insurance number may discourage registration in some cases. We are also concerned that, in parts of the UK which have a more diverse population, and larger numbers of recent immigrants, than Northern Ireland, the practical effect of a requirement to provide a date of birth may be to discourage some sections of the population from voting. **We remain concerned that requirements to provide a national insurance number or a date of birth as personal identifiers may risk breach of rights under Article 3 of Protocol 1 ECHR, and Article 14 ECHR.**”

Question put, that the paragraph stand part of the Report.

The Committee divided.

Content, 7

Not Content, 1

Lord Bowness  
 Lord Campbell of Alloway  
 Mary Creagh MP  
 Mr Andrew Dismore MP  
 Lord Judd  
 Lord Plant of Highfield  
 Baroness Stern

Mr Richard Shepherd MP

Paragraphs 1.26 to 1.28 read and agreed to.

Paragraph 1.29 read, amended and agreed to.

Paragraphs 1.30 to 1.32 read and agreed to.

Paragraph 1.33 read, as follows:

“. We welcome the Home Secretary’s assurance that powers to deprive persons of citizenship or a right of abode will be subject to full merits appeals. We also accept the legitimacy of powers of deprivation of nationality, where they are provided for in terms that are legally certain and proportionate. Nevertheless, we do not consider that the Government’s response adequately addresses the particularly wide grounds on which the Secretary of State could exercise powers to deprive of nationality or rights of abode, and thereby restrict political participation, under clause 22 of this Bill, in combination with the Immigration, Asylum and Nationality Bill. **We consider that the power of the executive either to prevent an individual from contesting an election, or remove an elected member of the House of Commons, would be exercisable on very wide and ill-defined grounds in relation to Commonwealth citizens or certain individuals with dual British/Commonwealth nationality and would therefore allow for significant, and possibly arbitrary, interference with the right to contest an election under Article 3 of Protocol 1 ECHR.<sup>1</sup> In our view the measures also risk disproportionate interference with the Article 10 rights of Commonwealth citizens who stand for election, or are elected Members of Parliament, in that they would be left open to significant penalties if their political speech were to be construed by the Secretary of State as “not conducive to the public good” or “justifying terrorism”, both vague and indeterminate standards, the potential application of which would be likely to have a chilling effect on political speech. We draw this to the attention of both Houses.**”

Amendment proposed, in line 8, to leave out from the word “Bill.” to the end of the paragraph.—(*Mr Richard Shepherd.*)

Question put, That the Amendment be made.

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1 *Podkolzina v Latvia*, op cit.

The Committee divided.

Content, 1

Not Content, 5

Mr Richard Shepherd MP

Lord Bowness

Mary Creagh MP

Lord Judd

Lord Plant of Highfield

Baroness Stern

Paragraph agreed to.

Paragraphs 1.34 to 5.2 read and agreed to.

Summary read and agreed to.

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

Several Papers were ordered to be appended to the Report.

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

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[Adjourned till Monday 13 February at 4 pm.]

# Appendices

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## Appendix 1(a) Letter from the Chair to Lord Falconer, Secretary of State for Constitutional Affairs and Lord Chancellor, re Electoral Administration Bill

As you know, the Joint Committee on Human Rights scrutinises every Bill introduced into Parliament for compatibility with Convention rights as defined under the Human Rights Act 1998 and with other international human rights instruments to which the UK is a party. The Committee is currently considering how to report to each House on the Electoral Administration Bill. It has carried out an initial examination of the Bill, and will be reporting its preliminary views shortly. Whilst the Committee considers the majority of the provisions in the Bill to be human rights compatible, and in many cases to support compliance with the Convention rights, there are a number of points on which we would appreciate clarification or further explanation, in order to assist the Committee in arriving at a final view.

### CORE Schemes

Part 1 of the Bill provides for the establishment, by order of the Secretary of State, of one or more Co-ordinated Online Record of Electors (CORE) Schemes. Such schemes would consolidate information currently held on electoral registers as well as other “related material” on an electronic database. Clause 2(1) states that the administrator of the scheme, the “CORE keeper” may be either authorised or required by the scheme to take any specified steps in relation to the information kept by him in pursuance of the scheme. CORE schemes will be bound by existing regulations on access to electoral registers under the Representation of the People Act 1983 but under clause 2 these rules may be modified in their application to CORE schemes, where the Secretary of State considers such modification appropriate (clause 2(3)(b)).

Since the information held under the CORE scheme is likely to include personal identifying information, the retention and disclosure of information held on CORE schemes is likely to engage the right to respect for private life under Article 8 ECHR. The Committee considers that the disclosure of information from the scheme by the CORE keeper for purposes related to the effective administration of elections would be likely to be justified as a necessary and proportionate interference with Article 8 rights in the interests of the protection of the rights of others. This may not however be the case where information is disclosed for unrelated purposes, including for example to commercial organisations for marketing purposes.

We note that, following case of *R (Robertson) v Wakefield Metropolitan Council*,<sup>1</sup> where Article 8 rights were found to be breached by disclosure of information from the Register to a marketing company without consent, the Representation of the People (England and Wales) (Amendment) Regulations 2002 provide for the maintenance of both a full Register, and an edited Register. The edited Register omits the names of those who have

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<sup>1</sup> *R (Robertson) v Wakefield Metropolitan Council* [2001] EHC Admin 915. It was also held in that case that such disclosure, in the absence of an individual right of objection, imposed a disproportionate and unjustifiable constraint on the applicant’s Article 3 Protocol 1 rights to participate in the democratic process. In the subsequent case of *R (Robertson) v Experian Ltd* [2003] EWHC 1760 (Admin) however, it was held that the sale of the electoral register to a credit reference agency did not breach Article 3 of Protocol 1, or Article 8 ECHR, since information sold to the agency would not be used for marketing purposes and “it was undoubtedly permissible to conclude that the public interest in the facilitation of credit and the control of fraud outweighed the very modest interference with the right to vote.” (para.15)

requested to be excluded from it, and it is the edited Register only which is available for purchase for marketing purposes.

**Question 1: Please clarify whether the information which may be disclosed from the CORE scheme, will include the full Register, or the edited Register only. Will the terms of CORE Schemes ensure that there is a right of objection to the disclosure of information held under such schemes for commercial marketing purposes?**

#### USE OF PERSONAL IDENTIFYING INFORMATION

Part 3 of the Bill provides for a system by which electors would be required to provide personal information to confirm their identity. Under clause 13, registration officers can require those applying for registration, or wishing to amend their entry on the register, to provide “personal identifiers.” This information is to be retained and supplied to polling stations to allow the identity of voters to be confirmed.<sup>2</sup> Under clause 14(9), personal identifying information may be disclosed to other registration officers in connection with their duties; to returning officers in connection with their functions; and to persons preparing or conducting legal proceedings under the Representation of the People Act. Under clause 14(9)(d) it may also be disclosed to “such other persons for such other purposes as may be prescribed.”

The Committee considers that the retention of basic identifying information, such as a signature, date of birth or national insurance number, would amount to a necessary and proportionate interference with Article 8 rights for the purposes of protecting Article 3 Protocol 1 rights. It notes, however, that requirements to provide a national insurance number, or a date of birth, in order to register to vote, have potentially discriminatory effects, raising issues under Article 14 ECHR read with Article 3 of Protocol 1, for those who do not have a national insurance number and for those, in particular persons who have arrived in the UK as unaccompanied refugee children, who may not know their date of birth. To the extent that the requirement might deter individuals from voting, it would also raise issues under Article 3 of Protocol 1.

The Committee considers that disclosure of identifying information, which could be shown to be necessary for purposes connected with the conduct of elections or of electoral fraud proceedings would also be likely to be justified under Article 8.2. However, the provision under clause 14(9)(d) which allows regulations to provide for open-ended disclosure to persons other than registration officers, returning officers, or those involved in relevant court proceedings, for purposes which are to be prescribed, including, it appears, purposes unconnected with the administration of elections or the prevention of electoral fraud, has the potential to lead to breaches of Article 8 through the disclosure of personal information which is not necessary and proportionate in pursuit of one of the legitimate aims recognised in Article 8.2. Such disclosure would also have implications for the protection of Article 3 Protocol 1 rights to vote, since the knowledge that, for example, a national insurance number could be passed on to a range of public or private bodies for commercial, law enforcement, or unrelated regulatory purposes could act as a deterrent to registration

**Question 2: What measures are envisaged to prevent any discriminatory impact of requirements to provide national insurance numbers or dates of birth at voter registration, and to ensure that these requirements do not deter certain voters from registration?**

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<sup>2</sup> Clause 14, new section 13E (8); EN para. 89

**Question 3: In what circumstances is it envisaged that information will be disclosed under clause 14(9)(d)?**

**Question 4: Will consideration be given to limiting potential disclosures under this provision, to disclosures necessary for the administration of elections or the prevention of electoral fraud?**

ELIGIBILITY OF COMMONWEALTH CITIZENS TO STAND FOR ELECTION

Clause 21 of the Bill, together with Part 3 of Schedule 1, restricts eligibility of Commonwealth citizens for election to the House of Commons, the European Parliament and Local Authorities. Under the current law, all Commonwealth citizens are eligible for election.<sup>3</sup> Clause 21 would restrict the right to stand for election to those Commonwealth citizens who either do not require leave under the Immigration Act 1971 to enter or remain in the UK, or have been granted indefinite leave to remain in the UK.<sup>4</sup>

The consequences of this restriction are set out in clause 21(4). Clause 21(4)(a) provides that if a commonwealth citizen who falls outside of these categories is elected to the House of Commons, that election is void. Under clause 21(4)(b), if a person validly elected to the House of Commons subsequently becomes disqualified from membership, as a Commonwealth citizen outside the specified categories, his or her seat is automatically vacated.<sup>5</sup>

The right to stand for election, an implied right under Article 3 of Protocol 1, is a qualified right, and may be restricted on grounds including age,<sup>6</sup> nationality,<sup>7</sup> knowledge of the national language,<sup>8</sup> or membership of foreign legislatures.<sup>9</sup> Such restrictions must be proportionate and not arbitrary:<sup>10</sup> they must therefore be sufficiently precisely set down in law, must contain safeguards against bias and must not allow an unfettered discretion to exclude.

The potential impact of clause 21, and therefore its compatibility with the Convention rights, needs to be considered in light of related provisions of the Nationality Immigration and Asylum Bill currently before Parliament. New Clause 52 of the Nationality Immigration and Asylum Bill allows for British citizens, in practice those British citizens who are dual nationals (including persons who are nationals of Commonwealth countries), to be deprived of their British citizenship, where the Secretary of State considers that the deprivation is conducive to the public good.<sup>11</sup> New Clause 53 of that Bill provides for the deprivation of the right of abode of non-nationals, including Commonwealth citizens who have a right of abode under section 2 of the Immigration Act 1971, where the Secretary of State considers that it would be conducive to the public good for an individual to be excluded or removed from the UK.

The meaning of “conducive to the public good” under both provisions is to be informed by, though not limited to, the new list of “unacceptable behaviours”, which include terms

3 British Nationality Act 1981, Section 37 and Schedule 7, amending the Act of Settlement 1700 section 3

4 Clause 21(2)

5 Procedures under the House of Commons Disqualification Act 1975 apply to persons disqualified under clause 21, as they do to persons disqualified under the 1975 Act: clause 21(5).

6 *W, X, Y and Z v Belgium* 2 DR 110

7 *Ganchev v Bulgaria* 87-A DR 130, where a prohibition on dual nationals from election to parliament was not challenged by the applicant on Article 3 Protocol 1 grounds.

8 *Podkolzina v Latvia* App No 46726/99

9 *M v UK* App No 10316/83

10 *Zdanoka v Latvia* App No 58278/00

11 See Third Report of Session 2005–06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, HL Paper 75-I, HC 561-I, paras. 155-158.

which the Joint Committee on Human Rights considered in its report on Counter-terrorism Policy and Human Rights,<sup>12</sup> to be unacceptably vague. The Committee considered the very wide breadth of the concept of “conducive to the public good” and the lack of a requirement for a reasonable belief on the part of the Secretary of State, that the individual met this criterion, had the potential to lead to arbitrary deprivations of the Convention rights.

The effect of clause 21 of this present Bill, taken together with the relevant provisions of the Nationality Immigration and Asylum Bill would appear to be that:

- An election candidate, who was a dual national of the UK and a Commonwealth State, and whose right of abode in the UK was dependent on his British citizenship, could be deprived of his British citizenship on grounds that the deprivation was “conducive to the public good” and thus prevented from contesting the election;
- An election candidate, who was a Commonwealth citizen with a right of abode in the UK under the Immigration Act 1971, could be deprived of his right of abode in the UK on grounds that his removal was conducive to the public good, and thus be unable to contest the election;
- A Commonwealth citizen, whose right of abode was dependent on either dual nationality or the 1971 Act, who was an elected Member of the House of Commons, could be required to vacate his seat following a determination by the Secretary of State that deprivation of his British citizenship, or his removal from the jurisdiction, would be conducive to the public good.

It appears to the Committee that the power of the executive under the Bill to either prevent an individual from contesting an election, or to remove an elected member of the House of Commons, would be exercisable on very wide and ill-defined grounds in relation to Commonwealth citizens or certain individuals with dual British / Commonwealth nationality. These powers would allow for significant, and potentially arbitrary, interference with the right to contest an election under Article 3 of Protocol 1 ECHR, since they allow the Secretary of State a very wide discretion to interfere with those rights in respect of certain categories of persons, a discretion which is not clearly circumscribed in legislation.<sup>13</sup> The measures would also appear to risk disproportionate interference with the Article 10 rights of Commonwealth citizens who stand for election, or are elected Members of Parliament, in that they would be left open to significant penalties if their political speech were to be construed by the Secretary of State as “not conducive to the public good” or “justifying terrorism”, both vague and indeterminate standards, the potential application of which would be likely to have a chilling effect on political speech.

**Question 5: Why is it considered that clause 21 of the Bill, read in light of clauses 52 and 53 of the Immigration Nationality and Asylum Bill, is compatible with Article 3 Protocol 1, and Article 10 rights?**

ACCESS TO ELECTION DOCUMENTS

Clause 41(5)(c), amending the existing electoral rules in Schedule 1 of the Representation of the People Act 1983, provides that, following a Parliamentary election, registered political parties and candidates must on request be supplied with marked copies of the Register, postal voters list,<sup>14</sup> list of proxies and the proxy postal voters list. Regulations may

<sup>12</sup> JCHR, Third Report of Session 2005–06, op cit.

<sup>13</sup> *Podkolzina v Latvia*, op cit.

<sup>14</sup> Clause 45 makes provision for the creation of marked postal voters lists, which are not presently maintained.

make provision for the supply of such documents, for the form in which they are supplied and the payment of fees for them and may allow for conditions to be imposed on the inspection or supply of documents, including restrictions on copying, restrictions on the use of information contained in documents, restrictions on disclosing the document to other person, and on using the information in the document for purposes other than that for which it was supplied (clause 41(5)(c)).

Access to election documents in elections other than Parliamentary elections is provided for in clause 42. Clause 42(1) requires certain election documents to be made available for inspection by members of the public and copies of such documents supplied to members of the public, subject to regulations. Clause 42(2) provides for access to additional election documents by political parties, candidates or agents of candidates. Such persons must on request be supplied with marked copies of the register, postal voters list, list of proxies and the proxy postal voters list. Regulations under clause 42(3) may impose conditions relating to the supply and inspection of these documents, similar to those which may be imposed on documents related to Parliamentary elections under clause 41.

The disclosure of marked copies of the Register, disclosing whether individuals have voted is likely to engage rights under Article 8 ECHR and Article 3 of Protocol 1 ECHR. Interference with these rights may be justified, however, where disclosure is limited and subject to sufficient safeguards.

**Question 6: Please provide the Committee with further information on the restrictions which will be placed on disclosure of electoral documents under the regulations to be made under clauses 41 and 42 in order to ensure compliance with the Convention rights.**

***Hirst v UK***

We note that this Bill does not rectify the incompatibility found in October of this year by the Grand Chamber European Court of Human Rights in *Hirst v UK*, where it was held that the UK's blanket denial of voting rights to convicted prisoners breached Article 3 of Protocol 1. The Grand Chamber considered that the ban was indiscriminate in its effect, since it applied irrespective of the length of the sentence, gravity of the offence committed, or individual circumstances. It therefore considered that it fell outside the wide margin of appreciation accorded to states in relation to voting rights, and breached Article 3 of Protocol 1. The Court reserved the question of whether a more targeted ban, applying only to certain categories of offenders, would comply with Article 3 of Protocol 1.

**Question 7: Why has it been decided not to take the opportunity presented by this Bill to rectify the incompatibility found in *Hirst*?**

**Question 8: What is the timetable envisaged for the implementation of the *Hirst* judgment?**

**Question 9: What is the Government's current thinking on the steps to be taken in response to the judgment in *Hirst*, in particular which categories of prisoners will be permitted to vote, or the criteria to be applied to voting rights for prisoners, under the amended law?**

I would be grateful if you could respond to these questions by 20 January 2006.  
21 December 2005

## Appendix 1 (b) Letter from Rt Hon Lord Falconer, Secretary of State for Constitutional Affairs and Lord Chancellor, to the Chair, re Electoral Administration Bill

Thank you for your letter of 21 December, which covered a number of issues raised by the Joint Committee on Human Rights in Its Initial examination of the Electoral Administration Bill. The answers to the points that you raise in your issues are set out below.

### CO-ORDINATED ON-LINE RECORD OF ELECTORS (CORE) SCHEMES

**Question 1: Please clarify whether the information which may be disclosed from the CORE scheme, will include the full Register, or the edited Register only. Will the terms of CORE schemes ensure that there is a right of objection to the disclosure of information held under such schemes for marketing purposes?**

The regulated duties of CORE scheme keepers as regards the giving out of information from electoral registers and related material are designed to mirror those that apply to an electoral registration officer. If, for example, a CORE scheme provides for the task of providing the full register to the British Library, that task will be performed by CORE scheme keeper rather than an ERO. When doing so, the CORE scheme keeper must comply with all the provisions of the regulations, and will be subject to the same offences regarding breach of official duty (the result of the clause 7 amendment to the 1983 Act) and the other provisions of regulations made under the powers cited in clause 2(2) of the Bill.

Detailed provision as to what version of the registers may be provided and to whom and for what specified purposes are set out in Part 6 of the Representation of the People (England and Wales) Regulations 2001 (SI 2001/341 as amended in 2002). CORE schemes will not detract in any way from the right of objection to the disclosure of information held under such schemes for commercial marketing purposes. Electors will continue to be able to 'opt-out' their details from appearing on the edited register. Information in the full register will only be disclosed to authorised users for restricted purposes as specified under the 2001 Regulations mentioned above. This includes registered political parties, registered credit reference agencies and the police.

Clause 2(3(b)), mentioned in your letter, allows modification of the existing legislative provisions regarding how a register is to be compiled and maintained and how access to it is controlled, insofar as they apply to a CORE keeper and their information. The clause is necessary as some rules that currently apply to ERO's would not be relevant to a CORE keeper. For example, we would not want a CORE scheme keeper to have any duty to keep hard copies of the full or edited register available for public inspection. It is most likely that the task of maintaining a hard copy available for public inspection would continue to be retained by the ERO and not conferred on the CORE keeper.

Current proposals for how access to information rules are established for CORE are set out in the consultation paper, *The Co-ordinated Online Record of Electors (CORE)—The implementation of national access arrangements*, published on 14<sup>th</sup> December.

### USE OF PERSONAL IDENTIFIER INFORMATION

**Question 2: What measures are envisaged to prevent any discriminatory impact of requirements to provide national insurance numbers or dates of birth at voter registration, and to ensure that thin requirements do not deter certain voters from registration?**

The requirement to provide a national insurance number when registering to vote has existed in Northern Ireland since 2002, under the amendments made to the Representation of the People Act 1983 by the Electoral Fraud (Northern Ireland) Act 2002. While the Electoral Administration Bill alters the drafting of those existing provisions—in order to provide for separate changes to the registration process in Great Britain—it does not alter the application or the national insurance number policy in Northern Ireland or extend it to the remainder of the United Kingdom.

For people in Northern Ireland who are seeking to register to vote but who do not have a national insurance number, provision exists for this requirement to be replaced by a statement by the individual that they do not possess this particular identifier. This facility is restated in the Bill at clause 14(1), which inserts new section 13E(2)(c) to the 1983 Act.

In relation to date of birth, this identifier is also already collected in Northern Ireland under the Electoral Fraud (Northern Ireland) Act 2002. We are not aware of this policy having had a discriminatory impact. However, recognising the differences that exist between Northern Ireland and the rest of the UK, and in view of the possibility that the collection of additional personal identifiers in Great Britain might deter people from registering to vote, the Bill includes provision in clauses 15 to 17 for personal identifiers to be piloted at a local authority level prior to any national implementation.

Through piloting, the Government hopes to gain evidence both as to whether the additional personal identifiers of a signature and date of birth should be rolled out on a permanent and nation-wide basis, and how any such implementation may be most effectively managed. Proceeding in this way should ensure that we are best placed to safeguard both the security of the electoral process and the accuracy and completeness of the electoral register.

**Question 3: In what circumstances is it envisaged that information will be disclosed under clause 14(9)(d)?**

**Question 4: Will consideration be given to limiting potential disclosures under this provision, to disclosures necessary for the administration of elections or the prevention of electoral fraud?**

Clause 14(1) inserts a new section 13E into the 1983 Act. New section 13E(9)(d) provides a regulation making power to allow the list of persons with access to the record of personal identifiers created under new section (13E)(8) to be extended via secondary legislation. This reflects the existing power in the Representation of the People Act 1983 (section 53 and para 10B of Schedule 2) to specify who may be granted access to the full and edited registers in secondary legislation.

Persons envisaged as being named under this power include persons entitled to attend the opening of the postal ballot paper envelopes, so that they are entitled to view the personal identifiers by reference to which the Returning Officer proposes to reject a vote.

We do not propose making the list of personal identifiers available widely. For example, we do not propose providing this information for public inspection, or to the political parties, credit reference agencies, or—in relation to those people on the edited register—providing it for general sale.

#### ELIGIBILITY OF COMMONWEALTH CITIZENS TO STAND AT ELECTION

You refer to the provisions in the Bill (now found at clause 22) that restrict the right to stand for election to those Commonwealth citizens who either do not require leave under

the Immigration Act 1971 to enter or remain in the UK or have been granted indefinite leave to remain in the UK. The purpose of this provision is to ensure that as far as possible elected representatives are able to represent their communities for the term of their office.

**Question 5: Why is it considered that clause 21 of the Bill, read in light of clauses 52 and 53 of the Immigration Nationality and Asylum Bill, is compatible with Article 3 Protocol 1, and Article 10 Rights.**

You explain that the potential impact of clause needs to be considered in light of provisions in clauses 52 and 53 of the Immigration, Asylum and Nationality Bill currently before Parliament.

The Immigration, Asylum and Nationality Bill would modify one of the existing statutory criteria for deprivation of citizenship, and create a power to remove the right of abode where this latter right did not derive from the possession of British citizenship.

These are not new concepts. The power to remove British nationality by order of the Secretary of State has existed since 1915. It has traditionally been exercised in cases where the conduct of the individual was considered to be wholly inconsistent with his possession of British nationality, and where the removal of his British nationality seemed likely to afford the wider public an increased level of protection. A necessary consequence of the removal of British nationality was that the person concerned lost the various rights and privileges that stemmed from it, including the right to reside in the United Kingdom. As you have indicated, a consequence of the removal of British nationality could be that a person will no longer be eligible to stand as an election candidate or an elected MP could be required to vacate his seat. This will be inevitable given that there are nationality requirements for persons wishing to stand in elections and take up office, if elected.

Deprivation of nationality is widely practised by other States, including parties to the European Convention on Human Rights, and is recognised as a legitimate procedure in international law. We reject the view that enactment of the relevant clauses would create inconsistency with Article 3 Protocol I of the ECHR.

ACCESS TO ELECTION DOCUMENTS

**Question 6: Please provide the Committee with further information on the restrictions which will be placed on disclosure of electoral documents under the regulations to be made under clauses 41 and 42 in order to ensure compliance with Convention rights.**

Clause 41 inserts new provisions into the parliamentary election rules concerning the control of election documents after parliamentary elections. At present, documents arising from a parliamentary election—such as ballot papers and marked copies of polling station registers—are required to be securely stored and retained for one year after the election. These documents may be accessed in certain circumstances to specified persons. Certain documents, such as ballot papers and counterfoils, may only be inspected by order of the Speaker or the courts in the event of an election petition or investigation into fraud. Other documents including the marked register are more widely available, and may be inspected or supplied, subject to certain conditions. Following the general election in May 2005, the Clerk of the Crown using his powers under the Representation of the People Act 1983, issued a decision report regulating access to election documents arising from the general election, which imposed conditions on the supply of them and the purposes for which they may be used.

Clause 41 provides for a new framework to be put in place governing access to and supply of parliamentary election documents. This will cover the marked list of returned postal votes that is being established under clause 45 of the Bill. You highlight that the marked register discloses whether individuals have voted. As we all recognise, the marked register is an invaluable campaigning tool and helps political parties and candidates to boost participation in the electoral process. The clause provides for political parties and candidates to continue to have access after the election to marked copies of the electoral register, and also to the marked postal voters list. However, we have to be mindful that marked registers contain details of electors and any access to them should be in accordance with data protection and human rights principles. The clause therefore allows regulations to be made by the Secretary of State specifying who may have access to parliamentary election documents, under what conditions, and the purposes for which they may be used. There is power for a fee to be levied for the supply of election documents. Breach of the conditions relating to supply of the register will be an offence, and a person found guilty on summary conviction will be liable to a fine of up to £5,000.

As you know, clause 42 concerns election documents in elections other than Parliamentary elections and provides for such election documents—including marked copies of the register and the marked postal voters list—to be made available for public inspection and to be supplied on request. The clause provides for regulations to be made governing access to and supply of election documents. As with Parliamentary elections, the regulations may cover who may access the election documents, and the purposes for which they may be used, in a manner that is consistent with data protection principles. There is provision for fees to be charged for the supply of documents.

The precise nature of the regulations that will be made under clauses 41 and 42 will be set out once the Electoral Administration Bill is enacted. However, at this stage, when developing the regulations we expect to be guided by the provisions in the existing Representation of the People Regulations concerning access to the electoral register, which were drafted taking into account the *Robertson* case concerning access to the electoral register, and the decision report issued by the Clerk of the Crown following the May 2005 general election concerning access to election documents arising from the general election. The decision report made clear that anyone wishing to inspect the marked register must have an interest in the marks themselves and not merely an interest in the names and addresses of electors. The report included a comprehensive, but non-exhaustive list of those groups that had been identified as having potentially legitimate purposes to inspect the marked register, and/or to purchase copies. The list included political parties and elected representatives, who might use the marked register for campaign purposes, and law enforcement agencies who might use the register for the prevention and detection of crime.

We believe that this approach will ensure that the arrangements in place for access to and supply of election documents will comply with the Convention rights.

*HIRST V UK*

**Question 7: Why has it been decided not to take the opportunity presented by the Bill to rectify the incompatibility found in *Hirst*?**

**Question 9: What is the Government's current thinking on the steps taken in response to the *Hirst* judgment, in particular which categories of prisoners will be permitted to vote, or the criteria to be applied to voting rights for prisoners, under the amended law?**

You refer to the judgment of the Grand Chamber of the European Court of Human Rights in the *Hirst* case concerning the voting rights of prisoners.

The Court found in favour of the applicant, and that there had been a breach of Article 3 of Protocol No 1 of the Convention (which provides for States to undertake to hold elections under conditions which will ensure the free expression of the opinion of the people). As you say, the Court objected to a blanket ban covering all prisoners, regardless of the severity or nature of their crimes and the length of their sentences, which it regards as a “blunt instrument”. The Court has not, however, suggested precisely what measures might be considered compatible. The judgment implies that any decision must be fully debated and emerge from a discussion which considers modern day penal policy and current human rights standards. The Court has not said, however, that all convicted prisoners should have the right to vote.

The judgment raises a number of complex issues which will need careful consideration, including, in particular, what specific measures may need to be taken to implement it, both in terms of possible legislation and in practice. It would be premature at this stage to comment on the precise nature of the steps that may be needed in order to remedy the breach, and the Government is not yet in a position to include provisions in the Electoral Administration Bill on this issue.

**Question 8: What is the timetable envisaged for the implementation of the *Hirst* judgment?**

The Government will shortly make a statement explaining the next steps it intends to take following the *Hirst* judgment, and will be aiming to provide information to the Committee of Ministers within 6 months of the date of the judgment as to the Government’s strategy for remedying the breach.

*23 January 2006*

## Appendix 2 Letter from Rt Hon Harriet Harman QC MP, Minister of State, Department for Constitutional Affairs, to the Chair, Government Response to the Committee's Fourth Report of Session 2005–06, on the Equality Bill

### GOVERNMENT RESPONSE TO JCHR FOURTH REPORT (2005–06) ON EQUALITY BILL

Shortly before Parliament was dissolved for the General Election, the previous Joint Committee on Human Rights published their Sixteenth Report of last Session about the Equality Bill. I apologise for the delay in responding to the Committee's report but I have delayed responding in order to take into account comments and recommendations from the Fourth Report of the current Committee.

The Equality Bill was introduced in to the House of Lords in this present session of Parliament. This Bill was considered in Standing Committee A in December 2005, and will be reported to the House on 16 January.

The previous Joint Committee in their report described the Bill as "the most important legislative measure for the advancement of human rights in this country since the Human Rights Act itself" and the current Committee endorsed those opinions. The current Committee, in its Fourth Report, takes account of the views of the previous Committee and amendments to the Bill. Thus in addressing the points raised by the current Committee, this response covers recommendations in both Reports whilst only referring to paragraphs in the Fourth Report. References to clauses are in the Bill as amended in Committee and printed on 8 December 2005.

**1. The previous Committee noted that there was no express duty or power conferred by the Bill on the Commission to participate in the UK's reporting processes in relation to international human rights treaties. We note that the Minister for Women and Equality, Meg Munn MP, gave an assurance at the Commons standing committee stage that, under its clause 9 human rights powers and its related powers under clause 18 to co-operate with persons or organisations within the UK and abroad, the Commission will be able to work with UN Committees and contribute to their process of examining the UK's compliance with international human rights treaties. We welcome that assurance. We stress the importance we attach to the Commission playing such a role, in accordance with the Paris Principles. [para 11]**

We welcome the Committee's comments and would also add that in Committee, my colleague Baroness Ashton of Upholland responded to an amendment on this point moved by Lord Lester of Herne Hill:

I totally agree that the Commission should have the power to comment independently on the performance of the United Kingdom against our international human rights obligations. That is an important part of the function of a national human rights institution.<sup>15</sup>

As Baroness Ashton went on to explain, these activities would fall within the duties of the Commission under clause 9, particularly clauses 9(1)(b) and (c). In pursuit of these duties, the Commission may use its powers under clause 13 to publish information and undertake research. Under clause 18, the Commission may then in pursuance of its duties under section 9 co-operate with people and organisations interested in human rights in the United Kingdom and abroad. This would allow the Commission, for example, to co-

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<sup>15</sup> HL Deb., 11 July 2005, col. 926

operate fully with the bodies set up under the various international treaties to which the United Kingdom is party, both to monitor the UK's performance against its obligations and to promote the observance of those obligations. This will ensure compliance with the Paris Principles.

**2. ... We note that clause 3(e) makes it clear that the Commission must exercise its functions with a view to ensuring mutual respect between all groups. In our view it is important for the Government to emphasise this before the Bill completes its passage through Parliament. [para 15]**

During the recent Commons debates and in Committee, the Government has consistently highlighted the importance of the Commission encouraging mutual respect, in line with the General Duty the Equality Bill places on it. This duty applies to all groups in society, based on understanding and valuing diversity, and on shared respect for equality and human rights. This does not, however, mean that all groups should always be treated the same. Valuing diversity means recognising difference and responding accordingly. In this way, we anticipate that the new Commission will work towards achieving wider respect between all groups in society.

**3. ... Our predecessors ... did express the expectation that the Commission would keep under review the extent to which in practice individuals with *bona fide* claims under the Human Rights Act were discriminated against in relation to their ability to access the courts in comparison with individuals bringing claims under equality legislation. They also expressed the hope that the Commission would develop a memorandum of understanding with the Legal Service Commission concerning the criteria for strategic funding of human rights cases, as recommended by the Committee in a previous report. We reiterate those views. [para 16]**

Once the Commission has been established, it will be able to review the extent to which human rights cases may be brought before the courts. We have provided an ordermaking power to permit the Commission to continue to support a combined equality and human rights case should the equality arguments fall away.

A memorandum of understanding between the CEHR and the Legal Services Commission must be a matter for the two bodies. We have established the funding remit of the CEHR so that it does not create unnecessary overlap with the Legal Services Commission, but it may be useful for the organisations to discuss and, if necessary, align their strategic priorities.

**4. We sincerely hope that, if the NDPB model is retained in the Bill, it will not lead to problems of perceptions such as have occurred with the ONS. We also appreciate that the Bill is at a late stage in its parliamentary proceedings and it is unlikely that it can be unpicked to substitute an alternative constitutional model for the Commission. However, even if the Bill is not amended in the way we would wish, we would urge the Government to make clear that it would not rule out transforming the constitutional basis of the Commission in the future, to make it wholly independent of Government, if the Commission's voice is weakened by a perception that it is not playing the role of a fully effective constitutional watchdog on human rights and equalities, able and willing to criticise the Government as necessary as part of its functions under the Bill. [para 26]**

We have listened carefully to the views of this Committee and to the concerns raised during the Equality Bill's passage where debate during the parliamentary stages of the Bill

have been full and forthright. Ministers made clear that if a viable alternative model to the NDPB could be found, then full consideration would be given to such a model. None was forthcoming despite concerted efforts by officials, Ministers and those outside Government.

We remain convinced that the NDPB model, which is tried and tested, is the best approach. The existing equality Commissions, which operate within this framework, have exercised their powers with authority and independence, including in their capacity for holding Government to account. We anticipate that the new Commission will do likewise.

However, mindful of the concerns about the new Commission's constitutional independence a strong package of measures, introduced via Government amendment, have been made to the Bill, as recognised by the Committee, that we believe will consolidate overall the Commission's independence.

In particular we have strengthened the appointments process to ensure that these are made by the Secretary of State on the basis of merit, unless there is some other special reason which, by implication, would need to be clearly stated. In addition, the independence of the Commission has been specifically strengthened in respect of determining its activities, timetables and priorities at 42(3) of Schedule 1 and further assurances have also been incorporated into the Bill to ensure the Commission has sufficient funds to perform its functions.

Taken together, these provisions mean that the Commission will be free to operate with the freedom and independence necessary to be effective, acting where appropriate as a partner, champion or regulator of equality and human rights.

Of course, Parliament will be able periodically to review the Commission's performance, and seek to amend the basis of its establishment, should it so decide.

**5. Amendments introduced at third reading in the House of Lords have now removed the tort of harassment in its entirety from the Bill, because of concern about its lack of legal certainty and potential divisiveness. The human rights concerns which related to the differential application of the prohibition on religious harassment and the exceptions to it, therefore no longer apply. [para 36]**

Whilst the removal of these provisions has resolved such issues the Government recognises that the absence of a prohibition on harassment causes a further inconsistency with other discrimination strands and has undertaken to address this issue as part of the Discrimination Law Review.

**6. We remain concerned that the breadth of the exceptions for schools, especially publicly funded schools, performing a public function, to the duty of non-discrimination under the Bill, permit pupils to be subject to a range of detriments which may not be objectively and reasonably justified in the interests of protecting the rights of others, and may therefore be in breach of the Conventions rights. [para 39]**

The exceptions applying to schools as a whole relate to things done in connection with the content of the curriculum or with acts of worship or other religious observance organised by or on behalf of the school. We see it as essential to protect the curriculum delivered in schools against possible attempts by followers of minority religious beliefs to use this legislation to undermine aspects they dislike: for example, claims that the use of computers in the classroom discriminates, directly or indirectly, against pupils whose faith

teaches that modern information technology is evil. In doing this we are taking account of the rights of all children to receive a broad and balanced education, and of the need for schools to be able to deliver the curriculum without the apprehension of possible challenge under the Act. The exception for acts of worship is necessary in the light of the policy which requires schools to provide an act of worship normally of a broadly Christian character, but which does not require equivalent provision to be made for pupils of other faiths, although parents have an absolute right to withdraw their children from school worship. We do not agree that pupils are likely as a consequence to be subjected to detriments which would breach their Convention rights. There is no evidence that this is happening at present, in the absence of legislation in this area. Should experience demonstrate that pupils are in practice subjected to detriments which cannot be objectively justified, the Bill contains regulation-making powers specifically to allow amendment to the scope and application of the exceptions.

**7. Whilst we do not consider the exceptions under clause 49 to be incompatible on their face with the Convention rights, they may in our assessment fail to prevent discrimination which would be contrary to the Human Rights Act. We draw attention to the recommendations we made in our previous Report. We would hope that the Bill would provide for statutory guidance to be produced before Part 2 comes into force, making clear that all schools which are public authorities under the Human Rights Act retain obligations to comply with ECHR rights of non-discrimination irrespective of the exceptions which apply under the Bill. It is essential for any difference in treatment to be objectively justified in order to comply with article 14 ECHR. [para 41]**

The Government has given further consideration to the exceptions for faith schools contained in [what is now] clause 50 and will be tabling amendments at Commons Report stage to remove the exceptions relating to exclusions and to subjecting pupils to “any other detriment”. While we have no reason to suppose that faith schools do or would discriminate in these respects against children of other faiths or none, we are happy to make it clear that the exception is intended to be limited only to those areas which are essential in order to enable faith schools to continue to operate as such. It is not intended to issue statutory guidance under the Bill, but non-statutory guidance will be provided for schools, and this will make clear that exceptions under the Bill do not override rights of non-discrimination under the Human Rights Act.

**8. We are concerned that this current Bill does nothing to dispel, and may reinforce, the apparent misapprehension of some LEAs that it is permissible to discriminate against children of parents with non-religious convictions in the provision of school transport. We reiterate the concerns of the previous Committee, that guidance for LEAs on this matter is inadequate to ensure compliance with the Human Rights Act, and recommend that guidance should be produced under this Bill which should make clear that, as the Government has previously accepted, there is a duty under the Human Rights Act to make equal provision for school transport to support education in accordance with both religious beliefs and non-religious beliefs. [para 49]**

This issue has also been raised by the Education and Skills Committee in their report on the School Transport Bill, which stated “a parent who makes a strong case that a denominational education is not appropriate for their child as a consequence of their demonstrable philosophical convictions, is in a similar position to one who expresses a strong preference for denominational education, with respect to school transport.”

The Committee’s advice will be reflected in the revised guidance on school transport that will be issued in draft alongside the forthcoming Education and Inspections Bill. DfES is

committed to seeking the views of key stakeholders including the churches, secular bodies and those representing children with special educational needs, when we consult on the draft guidance.

**9. We note that the protection to be provided under Part 3 does not extend to transgendered people; and neither will the gender equality provisions under Part 4 apply to transgender. We recognise that the Government has agreed to consider protection from discrimination for transgendered people as part of the Discrimination Law Review, but regret that this further step has not been taken in this Bill. [para 53]**

We are committed to building on the steps we have already taken to extend rights to transsexual people through the Gender Recognition Act. The Equality Bill provisions on the duty to promote gender equality require public authorities to eliminate discrimination and harassment in employment against transsexual people in line with the protections on grounds of gender-reassignment in the Sex Discrimination Act. We are fully committed to making discrimination against transsexual people in goods and services unlawful. We are taking this forward as part of the Discrimination Law Review. We will then be in a position to frame clear and sensible provisions that sit within the wider framework of equality law and a single Equality Bill.

*13 January 2006*

### **Appendix 3 Letter from Rt Hon Patricia Hewitt MP, Secretary of State for Health, to the Chair, re Health Bill**

Thank you for your letter of 19 December 2005, regarding the Joint Committee on Human Rights' consideration of the Health Bill.

I note that the Committee accepts that the government's proposals comply with both Article 2 (right to life) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR) and that they comply with other international obligations including the requirements relating to smoke-free environments which are contained in the Framework Convention on Tobacco Control. The only question which I am asked to address is whether the government's proposals infringe Article 14 ECHR (prohibition of discrimination).

As you know, Clause 3 of the Health Bill contains a power to make regulations. As it does not contain any exemptions itself, it cannot be discriminatory. Moreover, Clause 76(4)(a) provides that any regulations made under Clause 3 must be approved in draft by both Houses of Parliament under the affirmative procedure. There is therefore a safeguard to ensure that regulations made under the Clause will comply with Convention rights. It therefore seems that the Committee is asking me only to justify the government's proposals as set out in the Labour Party manifesto 2005 and various policy documents.

Article 14 prohibits discrimination on matters within the ambit of other Articles of the Convention where a person has a status which is mentioned in that Article. At the conclusion of a list of particular statuses there is a reference to "other status". Each status (including the "other status") is acquired by a person having the relevant personal characteristics which puts the person in a particular position. There is no discrimination within the meaning of Article 14 where the same provisions apply to everyone.

The proposals to provide exemptions for licensed premises and clubs are not related to any individual's personal characteristic or status within the meaning of Article 14. The intention is that regulations made under the powers in Clause 3 will provide exemptions which relate to every person who enters specified premises, regardless of their personal characteristics or status. In other words the proposed exemptions would apply to all persons in particular premises without reference to their status. In *C v Home Office and CICAP*, Sedley LJ held that Article 14 has to do with who people are, not with what their problem is (paragraph 36).

The fact that a person works in a particular place has no connection with his personal status or characteristics. The proposals apply to everyone, not just employees. Where employees do not enjoy a smoke-free environment neither will members of the public. The public at large cannot possibly be a "status" for the purposes of Article 14, because the persons who enter licensed premises and members' clubs will have an unlimited host of different characteristics.

I therefore do not believe that by exempting certain licensed premises and members' clubs there is differential treatment which is likely to be "treated as being within the 'other status' limb of Article 14" as is stated in your letter. The intention is to make regulations which will provide exemptions which affect every person who enters specified premises, regardless of the personal characteristics or status.

The need for justification does not arise: as I have explained, Article 14 is not engaged by the proposals. In any event, this is a policy matter for Parliament to decide in a difficult and important area. Once Parliament has adopted a solution, it would not be for the courts to impose their own view.

It follows that Clause 3 and the government's policies for licensed premises and private members' clubs do not breach any Convention right.

*25 January 2006*

## Appendix 4 (a) Letter from Rt Hon Charles Clarke, Secretary of State for the Home Department, to the Chair, re Immigration, Asylum and Nationality Bill

### IMMIGRATION, ASYLUM AND NATIONALITY BILL: CIVIL PENALTY ARRANGEMENTS FOR EMPLOYERS OF ILLEGAL WORKERS

On 22 July this year, you wrote to me following your appointment as Chair of the JCHR with a number of questions about the provisions of the Immigration, Asylum and Nationality Bill and the Violent Crime Reduction Bill. Further to my reply of 13 September, I am writing to provide additional detail on one aspect of the Immigration, Asylum and Nationality Bill. I should like to take this opportunity, in the interests of ensuring proper Parliamentary scrutiny, to make absolutely clear our understanding of the full scope of the enabling power provided by the Bill in respect of the requirements that may be placed on employers to prevent the employment of illegal migrant workers.

In your letter of 22 July, you asked what was envisaged by requiring an employer to take steps to “verify” the content of a document produced to him. In my reply, I explained that we envisaged requiring employers to undertake the kind of basic visual checks that are required under the current Immigration (Restrictions on Employment) Order 2004. These include checking that any photograph or date of birth contained in a document is consistent with the appearance of the prospective employee, and that any discrepancy in the names in documents is clarified by a further document such as a marriage certificate or deed poll.

This is indeed the approach we envisage adopting when we come to implement what are now clauses 15–26 of the Immigration, Asylum and Nationality Bill in the period following Royal Assent. We have made clear that implementation will follow an appropriate period of detailed public consultation on the proposed subordinate legislation, and will take place alongside the implementation of the new points based scheme for the admission of migrants for work and study.

The requirements on employers will be arranged around checks of specified documents that establish an individual’s entitlement to work in this country. These will include passports and other national travel documents, documents issued by my Department to those granted refugee status, humanitarian protection or discretionary leave, and documents produced in combination such as birth certificates and the national Insurance number to provide British citizens who do not have passports with an alternative means of demonstrating their right to work. In due course it would be possible to include freestanding ID cards issued under the Identity Cards Bill or relevant documents that are designated under that Bill such as residence permits which will allow them to function as an ID card.

I should like to make clear, however, that the order-making power in clause 15 of the Bill, which will enable us to frame the requirements on employers for the purpose of establishing an excuse against a penalty, is conceivably broader than the analogous power provided in section 8 of the Asylum and Immigration Act 1996. We believe that the Bill would provide a legal basis, at some future point, for the Government of the day to require employers to verify the content of an ID card with the National Identity Register. Such a requirement would, of course, have to take into account the extent to which employers have access to card readers, and could only be introduced following extensive public consultation. Prior to full compulsion under the Identity Cards Bill, employees would always be entitled to produce alternative forms of identification. That is a consequence of the safeguard set out in clause 18 of that Bill. Furthermore, both prior to and after full compulsion, verification of documents against the National Identity Register could only

take place with the consent of the employee, in accordance with clause 14 of the Identity Cards Bill.

I hope that this has clarified the matter.

*21 December 2005*

#### **Appendix 4 (b) Letter and Memorandum (Government Response to the Committee's Fifth Report of Session 2005–06) from Rt Hon Charles Clarke, Secretary of State for the Home Department, to the Chair, re Immigration, Asylum and Nationality Bill**

The JCHR's fifth report of session 2005–06, *Legislative Scrutiny: Second Progress Report*, has considered the human rights implications of the Immigration, Asylum and Nationality Bill. The Committee has outlined a number of concerns in relation to the appeals, civil penalties and information provisions contained in the Bill. A detailed response to the points raised by the Committee is set out in the attached memorandum.

*12 January 2005*

#### **Home Office Memorandum in response to JCHR's fifth report of session 2005–06, *Legislative Scrutiny: Second Progress Report*, with reference to the Immigration, Asylum and Nationality Bill**

##### RIGHTS OF APPEAL

The Committee considers that requiring appeals against variations of leave to be brought out of country is likely to lead to incompatibilities with Article 8 ECHR and Article 13 ECHR in conjunction with Article 8 in particular cases. The report states that this is especially the case where an appeal against removal may be brought on the grounds that a previous decision to refuse to vary or curtail leave was unlawful.

The provisions of the Bill enhance the existing right of appeal against a decision to remove someone from the country so that an appellant may contest previous decisions that gave rise to or facilitated the removal decision. If the appellant makes an asylum or human rights claim then the appeal against a removal decision may be exercised from within the United Kingdom, provided that the claim has not been certified as clearly unfounded. This is precisely to protect appellants from any potential breach of human rights, including article 8, that may occur if they were required to leave the country before appealing.

On the basis that all human rights claims, other than those that are certified as clearly unfounded, can be considered by the AIT prior to removal we believe there is no breach of article 13 of the ECHR. The right to challenge the immigration decision through an in country appeal to the AIT provides an effective remedy in most cases and where a human rights claim is certified as clearly unfounded under section 94 of the 2002 Act it is open to the affected party to challenge this decision by way of judicial review. Accordingly there is no sense in which the changes are in any way incompatible with our obligations under the ECHR.

The Committee considers that removing deemed leave during an appeal process also risks leading to incompatibilities with Articles 8 and 13 ECHR.

The report states that clause 13 makes clear that people who are able to, or who are bringing an appeal against a removal decision will not be committing an offence provided that they have complied with the terms of their leave. It also raises a concern that people

bringing an appeal against removal from in the UK, having made an asylum or human rights claim, will have no leave and therefore no entitlements during the currency of their appeal.

When a decision is made to refuse someone further leave or to curtail existing leave, it is because the individual does not meet the requirements of the immigration rules. A person may contest that decision as part of an appeal against a decision to remove him from the UK but he must leave the country before doing so. However, if he makes an asylum or human rights claim then in order to prevent a potential breach of those fundamental rights the appeal may be brought from within the UK. Those issues are distinct from both the Rules based application and the previous leave of the appellant, so there is no reason why previous leave should be extended during an appeal.

It is not considered that removing leave for people who bring in country appeals against removal decisions which follow a refusal to vary or a curtailment of leave causes any breach of article 8 or 13. Under the present appeals provisions an overstayer who has made an asylum or human rights claim and brings an in country appeal against the decision to remove him from the UK must do so without having any leave. There is no suggestion that this approach is incompatible with our obligations under the ECHR and we would argue strongly that there is nothing in the Convention which requires people to be provided with access to work and benefits during the currency of their appeal.

The Committee considers that the effect of the Bill is that the right to appeal on human rights grounds against variations of leave to enter or remain, or refusals to vary, is no longer enshrined in statute but dependent on a future exercise of the Secretary of State's discretion. The Committee asserts that there is therefore a lack of legal certainty and, unless the discretion is exercised in conformity with the Convention rights, a risk of arbitrariness and incompatibility.

The report states that the right to appeal on human rights grounds is being restricted. This is not the case. An appeal against any immigration decision may be brought on human rights grounds. For individuals who no longer have a separate right of appeal against refusal to vary or variation, there will be an opportunity to contest these decisions on human rights grounds as part of an appeal against a removal decision. The right of appeal on human rights grounds is therefore maintained in every instance in which an immigration decision is made.

A distinction is being made between cases that raise fundamental rights and those that do not. As the Minister has said, people who have been granted Humanitarian Protection will continue to have a separate right of appeal against refusal to vary or curtailment, in the same way that refugees have. This will be achieved by designating Humanitarian Protection under the clause 1 (4) (fb) order making power. During Report stage in the Commons, the Minister also indicated that unaccompanied minors would also be designated under this power.

The appeals system will therefore be differentiated on the basis of the type of leave that a person has been granted. Some will maintain a separate right of appeal against refusal to vary or variation but others will only be able to contest such decisions as part of an appeal against a removal decision. All appellants, however, will maintain the right to appeal on human rights grounds and will be able to remain in the UK while doing so unless their human rights claim is certified as clearly unfounded.

As the report acknowledges, the intention behind the variation appeals provisions in the Bill is to create an effective one-stop appeals system. As the Minister stated during Second Reading of the Bill in the Lords, this issue is likely to be further debated during Lords

Grand Committee. Alternative proposals will be looked at carefully, including those that achieve the primary aim while conferring in-country rights of appeal on a wider range of appellants.

#### CIVIL PENALTIES

The Committee has raised two main points of concern in relation to the measures contained in the IAN Bill on the prevention of illegal migrant working.

The first relates to the fairness and proportionality of the reverse burden provision relating to the circumstances in which an employer can establish an excuse against a penalty for breaching the prohibition on employing illegal migrant workers in clause 15 of the Bill. The Bill provides that an employer can establish an excuse against a penalty by complying with specified requirements prescribed by an order made under clause 15(3). Examples of the type of requirements to be prescribed are set out at clause 15(7). In the draft non-discrimination code published in relation to clause 23, the Government outlined further its intentions in relation to the likely shape of the prescribed requirements on employers to be introduced once the Bill has completed its passage through Parliament and once the Government has had the opportunity to consult publicly on the detail of the proposals.

The Committee has expressed concern that the outline of the prescribed requirements in the draft code suggests that employers may be required to make complicated judgments about a person's immigration status, particularly in determining whether follow-up checks in relation to the worker may be required, casting doubt on the reasonableness of the reverse burden provision.

The Government is grateful to the Committee for raising this issue, but does not believe that these concerns are justified. It is important to bear in mind that the Government proposes to implement the new illegal working provisions alongside the points based scheme covering the admission of non-EEA nationals for work and study. The points based scheme is relevant in this context, because it will result in a substantial simplification of routes of entry for work and study and the production of clearer documentation to be issued to migrant workers and students, which will be explicit about the nature of the holder's entitlement to work. The Government believes this will assist employers to comply with the prescribed requirements outlined in the draft code.

The introduction of clearer immigration documentation, such as vignettes to be placed in passports, will be backed up with specific guidance material available to employers online via the Home Office website and in hard copy form. In addition, immigration staff will continue to carry out educational visits to employers to explain the nature of their legal duties in relation to checking entitlement to work.

The Immigration and Nationality Directorate is also currently reviewing the telephone helpline service it provides to employers to establish what improvements may be required to support employers in complying with their new legal obligations. In particular, we are examining the possibility of enabling employers to verify whether individual job applicants or employees who have an outstanding application for further leave with the Home Office continue to enjoy the right to work. Such information could only be disclosed where the person concerned gave their consent and where the Home Office could be satisfied as to the identities of the subject and the persons making the enquiry. The helpline will continue to give general advice to employers, as now, on how to interpret immigration stamps and other documentation. The existing helpline service deals with more than 6,000 calls from employers each month in relation to compliance with the current law on the prevention of illegal migrant working, section 8 of the Asylum and Immigration Act 1996.

This underlines our commitment to helping employers comply with their legal obligations in this area.

The Government recognises that the civil penalty proposals could only be implemented once these practical measures to support employers and employees to comply with the legislation were in place.

It is also important to make clear that once the civil penalty arrangements are in force immigration staff enforcing the legislation would in practice always give employers full opportunity to demonstrate that they had complied with the prescribed requirements before considering whether the service of a penalty would be appropriate. As we have made clear in the draft code published in relation to clause 19 of the Bill, where an employer has failed fully to comply with the requirements, but carried out a partial check on the employee and co-operated with the immigration authorities, the employer would receive a caution and advice on how to comply with the prescribed requirements, rather than a penalty for a first time transgression.

In its report, the Committee refers to its correspondence with the Home Secretary on the scope of the enabling power provided by the Bill in respect of the prescribed requirements to be placed on employers. In its letter of 22 July, the Committee asked what was envisaged by requiring an employer to take steps to "verify" the content of a document produced to him. In his reply of September, the Home Secretary explained that he envisaged requiring employers to undertake the kind of basic visual checks that are required under the current Immigration (Restrictions on Employment) Order 2004. This is the approach we will adopt when implementing the illegal working provisions in the Immigration, Asylum and Nationality Bill in the medium term.

The Home Secretary has since written to the Committee to clarify our understanding of the full scope of the enabling power in clause 15 of the Bill and its possible longer-term application. The order-making power in clause 15 of the Bill is conceivably broader than the analogous power provided in section 8 of the Asylum and Immigration Act 1996. We believe that the Bill would provide a legal basis, at some future point, for the Government of the day to require employers to verify the content of an ID card with the National Identity Register. Such a requirement would, of course, have to take into account the extent to which employers have access to card readers, and could only be introduced following extensive public consultation. Prior to full compulsion under the Identity Cards Bill, employees would always be entitled to produce alternative forms of identification. That is a consequence of the safeguard set out in clause 18 of that Bill. Furthermore, both prior to and after full compulsion, verification of documents against the National Identity Register could only take place with the consent of the employee, in accordance with clause 14 of the Identity Cards Bill.

In its report, the Committee raised a second concern in relation to the possible risk of unlawful racial discrimination by employers. The Committee's concern is that it is not mandatory for employers to check the immigration documents of all employees.

The Government entirely shares the Committee's concern that unlawful racial discrimination by employers must be avoided and is aware of the need for clear and careful guidance on how to avoid discrimination in the light of the House of Lords judgment in the Roma case. The Code of Practice on the avoidance of race discrimination in recruitment practice applies to all employers and provides that "*the best way [to avoid discrimination] is to treat **all** applicants in the same way at each stage of the recruitment process*". The Code of Practice will be subject to full consultation with the Commission for Racial Equality and the Equality Commission for Northern Ireland, as well as with appropriate bodies representing employers and bodies representing workers. In addition,

the importance of avoiding unlawful discrimination will be emphasised in a guidance document for employers, which will refer to the Code of Practice on the avoidance of race discrimination and will underline the importance of treating all job applicants in the same way. We will support employers in complying with the new legislation through the introduction of the simpler immigration system provided by the points based scheme, clearer immigration documentation, and an enhanced employer helpline service. We will also monitor the impact of the legislation in co-operation with those statutory Commissions in the United Kingdom responsible for preventing unlawful racial discrimination.

The employment provisions in this Bill do provide an element of compulsion in respect of document checking by employers in that a failure to check employees' documents could result in liability to a civil penalty, or even to prosecution (where the employer knew that the employer was not entitled to work). The incentive to check documents in order to establish an excuse applies equally to all employers in respect of all employees.

We would not be sympathetic to a suggestion, however that employers should be penalised simply for failing to carry out a check where the employee concerned was entitled to work in this country. The mischief we are seeking to prevent is the unlawful employment of migrant workers. Both Houses would rightly find it unacceptable if the Government sought to introduce legislation whereby a British or European Union national could be penalised for employing a close family member of the same nationality with a perfect right to work in this country simply because they failed to carry out a document check.

#### INFORMATION

The Committee has expressed concern that the draft framework for a code of practice does not contain sufficient detail in respect of who may share the data, the specific purposes for which it may be shared, and the procedural safeguards it will be subject to. The report also states that meaningful legislative scrutiny of the data sharing measures is possible only if these details are specified on the face of the Bill.

The e-Borders programme is working to establish the business and operational requirements which will inform the content of codes and provide the level of detail on the handling and retention of data which you seek. Given that this work is still in development, it is not yet possible to provide a completed version for scrutiny. We note the Committee's view that this detail should be provided on the face of the Bill but consider that once the completed code is laid before Parliament, it will provide a greater level of detail on the information sharing practices than would be possible in primary legislation.

The issuing of a code of practice has the additional advantage that once data sharing is in operation, the Border Agencies will have the flexibility to reissue an amended code to reflect the development of new procedures, which may prove necessary in the light of changing operational needs. This flexibility is important given that the threats posed by serious and organised crime, terrorism, illegal immigration, and trafficking in controlled goods and substances are not static. If, instead of reissuing the code of practice, the Border Agencies had to amend primary legislation, they would risk being constrained in their ability to respond quickly and effectively to new operational challenges. This would

have an adverse impact on the effectiveness of Border Agency joint working to secure the UK's borders, which is the primary purpose of these clauses.

Notwithstanding the non-inclusion of the specified data sharing details in primary legislation, the Border Agencies will comply with Convention Rights and, most importantly in the context of data sharing, Article 8 of the ECHR. We believe that the ability to amend the code of practice to take account of emerging operational needs and changing working practices and system processes provides a powerful mechanism for demonstrating and ensuring continuing compliance with Convention Rights. By specifying on the face of the Bill that drafts of the code must be laid before Parliament prior to issue or reissue, the Border Agencies consider that a balance has been struck between facilitating scrutiny from an ECHR perspective of the evolving data sharing activity of the agencies whilst simultaneously ensuring that the code can accurately reflect the developing operating environment in which the Border Agencies work.

Since our previous letter, representatives of the Border Agencies have met the Assistant Information Commissioner and invited his comments on the "Outline Framework for a Code of Practice about Data Sharing". The Assistant Information Commissioner welcomed the publication of the framework, agreed to scrutinise future drafts, and recognised that the framework was a 'living document' subject to revision as the e-Borders business requirements and systems develop.

Lastly, as well as the Border Agencies' obligations under the Human Rights Act 1998, the Data Protection Act 1998 is relevant to the Committee's observations. The Border Agencies are well aware of the need to ensure that personal data processed by them is processed in accordance with the detailed principles of the DPA and its underlying Directive. In particular, the DPA will be relevant to the Committee's concerns about how long data will be retained for. The Codes will provide a mechanism for setting out the principles that will govern retention of data to ensure that the DPA is complied with.

#### CONTRACTING OUT POWERS TO SEARCH AND DETAIN

We very much welcome the Committee's recognition that the Government will ensure that authorised persons will act compatibly with Convention rights regarding s 6 of the Human Rights Act 1998 and that this provision of the Bill does not carry a significant risk of any incompatibility in this regard. The UK Immigration Service is currently finalising details of the training package that must be undertaken by persons seeking authorisation to search. It will, however, mirror that provided to persons currently contracted for detention and escorting duties on behalf of the Immigration Service and includes such elements as race relations and cultural awareness, health and safety and interpersonal skills. Human Rights training will also form part of the package.

### **Appendix 4 (c) Letter from the Public and Commercial Services Union, to the Chair, re Immigration, Asylum and Nationality Bill**

As you will be aware the Public and Commercial Services union (PCS) is the country's fifth largest trade union representing over 325,000 members working in most government departments and privatised areas. PCS have 2,000 members working in UK Immigration Service (UKIS) and also represent 3,000 members working in Her Majesty's Revenue and Customs (HMRC) who search people and vehicles for illegal and prohibited materials.

Since 1994 UKIS have operated a juxtaposed control (Cheriton in the UK and Coquelle in France) where UK and French immigration officials have a reciprocal agreement to exercise immigration powers in control zones to protect our own borders. This was extended in 2003 to include Dover in the UK and Calais and Dunkirk in northern France. This kind of control ensures clandestines found in the British control zone can be handed back to the French authorities who are responsible for dealing with their asylum claim.

With the introduction of the Immigration, Asylum and Nationality Bill, clauses 40 and 41 if passed, would enable private contractors to carry out searches of any vehicles (including ships and aircraft) currently searched by UKIS and customs staff. Contractors currently operate alongside our members at the berth side in Calais, however they do not have the power to examine the inside of a vehicle or search on their own.

This legislation would put private contractors on a par with properly trained and accountable Police, immigration and customs officers and we have grave concerns that contractors who are not properly trained or security checked prior to starting work could abuse this position of trust they are placed in. This could have damaging consequences on the detection and also treatment of clandestines if found in vehicles when searched.

We would urge you as the Chair of the Joint Committee on Human Rights to investigate our concerns as many of our immigration and customs officers recall June 2000 when a group of Chinese clandestines were found dead in a lorry in Dover. Since that time a far greater number of vehicles are searched and it is important that the professionalism of this operation is never compromised.

*12 January 2006*

## Public Bills Reported on by the Committee (Session 2005–06)

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\* indicates a Government Bill

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

<i>BILL TITLE</i>	<i>REPORT NO</i>
<b>Charities Bill*</b>	1 <sup>st</sup>
<b>Children and Adoption Bill*</b>	5 <sup>th</sup>
<b>Civil Aviation Bill*</b>	7 <sup>th</sup>
<b>Commissioner for Older People (Wales) Bill*</b>	6 <sup>th</sup>
<b>Consumer Credit Bill*</b>	1 <sup>st</sup>
Council Tax (New Valuation Lists for England)*	5 <sup>th</sup>
<b>Criminal Defence Service Bill*</b>	1 <sup>st</sup>
Crossrail Bill*	1 <sup>st</sup>
<b>Electoral Administration Bill*</b>	11 <sup>th</sup>
<b>Equality Bill*</b>	4 <sup>th</sup> & 11 <sup>th</sup>
European Union (Accessions) Bill*	5 <sup>th</sup>
<b>Health Bill*</b>	6 <sup>th</sup> & 11 <sup>th</sup>
<b>Identity Cards Bill*</b>	1 <sup>st</sup>
<b>Immigration, Asylum and Nationality Bill*</b>	3 <sup>rd</sup> , 5 <sup>th</sup> & 11 <sup>th</sup>
Merchant Shipping (Pollution) Bill*	1 <sup>st</sup>
National Lottery Bill*	1 <sup>st</sup>
Natural Environment and Rural Communities Bill*	1 <sup>st</sup>
<b>Northern Ireland (Offences) Bill*</b>	7 <sup>th</sup>
<b>Racial and Religious Hatred Bill*</b>	1 <sup>st</sup>
Regulation of Financial Services (Land Transactions) Bill*	5 <sup>th</sup>
<b>Road Safety Bill*</b>	1 <sup>st</sup>
<b>Terrorism Bill*</b>	3 <sup>rd</sup>
Terrorism (Northern Ireland) Bill*	11 <sup>th</sup>
Transport (Wales) Bill*	1 <sup>st</sup>
<b>Violent Crime Reduction Bill*</b>	5 <sup>th</sup>