



House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny: First Progress Report

Second Report of Session 2006-07

Drawing special attention to:

Corporate Manslaughter and Corporate Homicide Bill

Welfare Reform Bill

Consumers, Estate Agents and Redress Bill

Fraud (Trials without a Jury) Bill

Tribunals, Courts and Enforcement Bill



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*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 Lester of Herne Hill
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Publications

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

Current Staff

The current staff of the Committee are: Nick Walker (Commons Clerk), Bill Sinton (Lords Clerk), Murray Hunt (Legal Adviser), Judy Wilson (Inquiry Manager), Angela Patrick (Committee Specialist), Jackie Recardo (Committee Assistant), Suzanne Moezzi (Committee Secretary) and James Clarke (Senior Office Clerk).

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Contents

Report	Page
Summary	4
1. Introduction	9
Bills drawn to the special attention of both Houses	11
Government Bills	11
2 Corporate Manslaughter and Corporate Homicide Bill	11
Background	11
(1) The scope of the offence and the obligation to protect life	11
(2) Deaths in custody and other exemptions for public bodies	12
(3) Justifications for differential treatment of different bodies	13
3 Welfare Reform Bill	15
Introduction	15
The Effect of the Bill	15
Human Rights Standards	16
Human Rights Implications of the Bill	18
(1) Work-related Activity: Compulsion and Convention Rights (Part 1)	19
(2) Contracting-out (Clause 15)	21
(3) Benefits and Under-25s	22
(4) Housing Benefit and Anti-Social Behaviour	22
(5) The use of Social Security information and information sharing	24
(6) Extension of Sanctions for Benefit Fraud	25
4 Consumers, Estate Agents and Redress Bill	27
Background	27
Effects of the Bill	27
Human Rights Implications of the Bill	27
(1) Redress Schemes and Access to Court	28
<i>Access to a fair hearing: Consumers (Article 6(1) ECHR)</i>	28
<i>Access to a fair hearing: Suppliers and Estate Agents (Article 6(1) ECHR)</i>	28
<i>Independence and Impartiality</i>	29
<i>Due process</i>	30
(2) Grounds for Prohibiting an Estate Agent from Practising	30
(3) Modification of Licence Conditions: Access to Court	32
5 Fraud (Trials without a Jury) Bill	34
Background	34
The effect of the Bill	34
Status of the “right” to jury trial	34
Justification for limiting jury trial in serious and complex fraud cases	35
6 Tribunals, Courts and Enforcement Bill	37
Background	37

The effect of the Bill	37
(1) Independence of tribunals	38
(2) Availability of legal aid for tribunals	39
(3) Justification for differential access to legal remedies	41
(4) Distress for Rent and Commercial Rent Arrears Recovery	43
<i>Minimum Rent</i>	44
<i>Access to Court</i>	45
<i>Execution of CRAR</i>	46
(5) Cultural Property: Immunity from Seizure	46
Bills not requiring to be brought to the attention of either House on human rights grounds	49
Government Bills	49
Private Bills	50
Formal Minutes	51
Appendices	52
Appendix 1a: Letter from the Chairman to The Rt Hon. John Hutton MP, Secretary of State for Work and Pensions re Welfare Reform Bill	52
Appendix 1b: Letter dated 13 December 2006 from Jim Murphy MP, Minister of State for Employment and Welfare Reform, Department for Work and Pensions re Welfare Reform Bill	57
Appendix 2a: Letter from the Chairman to Lord Truscott, Parliamentary Under Secretary of State for Energy, Department for Trade and Industry re Consumers, Estate Agents and Redress Bill	78
Appendix 2b: Letter dated 19 December 2006 from Lord Truscott, Parliamentary Under Secretary of State for Energy, Department for Trade and Industry re Consumers, Estate Agents and Redress Bill	80
Appendix 3a: Letter from the Chairman to The Rt. Hon. Dr John Reid MP, Secretary of State for the Home Department re Fraud (Trials Without a Jury) Bill	86
Appendix 3b: Letter dated 17 January 2006 from Joan Ryan MP, Parliamentary Under Secretary of State, Home Office re Fraud (Trials Without a Jury) Bill	87
Appendix 4a: Letter from the Chairman to The Rt Hon. Baroness Ashton of Upholland, Parliamentary Under Secretary of State, Department for Constitutional Affairs re Tribunals, Courts and Enforcement Bill	88
Appendix 4b: Letter from the Chairman to The Rt Hon. Baroness Ashton of Upholland, Parliamentary Under Secretary of State, Department for Constitutional Affairs re Tribunals, Courts and Enforcement Bill	91
Appendix 4c: Letter dated 19 December from The Rt Hon. Baroness Ashton of Upholland, Parliamentary Under Secretary of State, Department for Constitutional Affairs re Tribunals, Courts and Enforcement Bill	94
Appendix 4d: Letter dated 17 January 2007 from The Rt Hon. Baroness Ashton of Upholland, Parliamentary Under Secretary of State, Department for Constitutional Affairs re Government Amendments to The Tribunals, Courts and Enforcement Bill	101

Appendix 5: Letter from James Purnell MP, Minister of State for Pensions Reform, Department for Work and Pensions re Pensions Bill	102
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Bills Reported on by the Committee (Session 2006-07)	109
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Summary

From the start of this parliamentary Session the Committee has been conducting legislative scrutiny in line with its Report of last Session into its future working practices. As this is the Committee's first Legislative Scrutiny Progress Report this Session it offers some explanation of its new methods of scrutiny. The aim is to prioritise the most significant human rights issues in legislation more effectively and to improve the accessibility, timeliness and overall value of its legislative scrutiny work, mainly by:

- scrutiny of all Government and private Bills for their human rights implications;
- a raising of the threshold of significance of human rights issues raised by bills;
- introduction of a new sifting system;
- informal and provisional timetables for reporting

with the intention of focussing Reports on the most significant human rights issues raised by a bill and making greater use of freestanding Reports on individual bills (paragraphs 1.1-1.3).

This Report considers first those bills which the Committee has further scrutinised after an initial decision that they raised human rights issues crossing its significance threshold. Each Legislative Scrutiny Progress Report will also contain, as appropriate, a list of those bills "cleared from scrutiny". The Committee's web pages also draw attention to points it is considering and invite submissions from outside organisations. Although this Progress Report deals solely with bills, the Committee is subjecting selected pre- and post- legislative documents to the same sifting process. When it has gained further experience of operating its new legislative scrutiny system the Committee may evaluate it and report its views (paragraphs 1.4-1.8).

In this Report the Committee draws 5 Government bills to the attention of both Houses. In addition, the Committee lists twelve further Government Bills and five private bills which do not raise human rights issues of sufficient significance to warrant its undertaking further scrutiny of them. In relation to one of those Government bills, the Pensions Bill, the Committee observes that some its provisions would enhance the protection of human rights, notably of women and carers; and that the Department for Work and Pensions provided a helpful, full and exemplary human rights memorandum, in addition to the bill's Explanatory Notes, for which the Committee is grateful (paragraphs 7.1 – 7.2).

Corporate Manslaughter and Corporate Homicide Bill

The Committee reported previously on this bill in its Twenty-seventh Report of Session 2005-06. In this Report the Committee takes into account the Minister's response to a letter sent following the Committee's previous examination of the bill.

In the Committee's view there is a gap in the criminal law which means that the UK cannot guarantee that recourse to the criminal law will always be possible where there has been a serious breach of the right to life as a result of a gross management failure and Article 2 of

the European Convention on Human Rights (ECHR) requires it; the new offence fails to fill that gap and therefore fails to satisfy the obligation in Article 2 ECHR to protect the right to life (paragraphs 2.1-2.7).

The Committee remains of the view that exclusion from the scope of the new offence of deaths in custody and other deaths caused by gross management failure in the public sector where no individual can be proved to be responsible is likely to lead to the UK being found to be in breach of its positive obligation to protect life under Article 2 ECHR (paragraphs 2.8 - 2.13).

The Committee is concerned that excluding unincorporated bodies from the scope of the new offence will lead to distinctions which appear entirely arbitrary, and it does not see why the offence could not have been made to apply to undertakings, with a specific exclusion for sole traders (paragraphs 2.14 - 2.17).

Welfare Reform Bill

Although the Government accepts that a significant number of clauses in this bill may engage Convention rights, it at first gave no explanation for its view that they were “considered to be capable of being exercised compatibly with the Convention [ECHR]”. The Committee reiterates its view that bare assertions of compatibility undermine the ability of Parliament to scrutinise. It welcomes however the Minister’s full and prompt response to its request for a fuller explanation (paragraphs 3.1-3.3).

The bill’s aim is to help more ill or disabled people move into employment. A great deal of the detail is left to secondary legislation. The Committee reiterates its view that in such cases a full and detailed explanation of the Government’s views on the compatibility of the proposals is needed at an earlier stage (paragraphs 3.4 - 3.6).

The bill could enhance human rights. The inadequacy of the government’s original explanation of its human rights compatibility may be due to the politically charged character of social welfare law and policy which has led to a general reluctance on the part of the European Court of Human Rights (ECtHR) and the domestic courts to find that Convention rights are engaged in this field (paragraphs 3.6 – 3.8.)

The Committee welcomes the Government’s approach of assessing Convention compatibility on the basis that non-contributory benefits are protected by Article 1, Protocol 1 ECHR (paragraphs 3.9 – 3.12).

In the Committee’s view, the bill raises a number of significant human rights issues. In some cases, the Committee takes the view that the bill’s provisions are unlikely to give rise to any significant risk of incompatibility with ECHR. In others, the Committee recommends amendments or draws concerns to the attention of both Houses (paragraphs 3.13 – 3.48).

Consumers, Estate Agents and Redress Bill

The Committee welcomes the Minister’s full and speedy response to its request for a fuller explanation of the Government’s view of compatibility with the ECHR on three significant human rights issues raised by the bill (paragraphs 4.1 – 4.3).

The Committee considers that the bill’s provisions are unlikely to interfere with the Convention rights of consumers. But it considers that neither the Committee nor

Parliament can conduct any meaningful scrutiny of the compatibility of the proposed redress scheme while its composition and scope and the identity of the relevant decision maker remain unspecified. The Committee also considers that there is inadequate detail on the face of the bill to ascertain how a decision on a complaint would be taken (paragraphs 4.4 – 4.9).

The Committee proposes amendments to various clauses of the bill to reduce the risk of significant incompatibility with ECHR and draws other concerns to the attention of both Houses (paragraphs 4.10 – 4.29).

Fraud (Trials without a Jury) Bill

In the Committee's view the Explanatory Notes to the bill correctly state that the bill itself does not give rise to any issues of compatibility with ECHR. The right to a fair trial in Article 6 (1) ECHR does not include a right to jury trial. The Committee considers however that jury trial has attained the status of a right recognised at common law, limitation or restriction of which requires express authorisation in primary legislation and careful justification (paragraphs 5.1 – 5.10).

The Committee is satisfied that that the proposed limitation on jury trial in this category of case is a proportionate interference in what it regards as a common law right to jury trial. The Committee also welcomes the Government's unequivocal assurance that the justifications relied on in relation to serious and complex fraud cases do not apply equally to trials for other offences such as terrorism, murder and drugs (paragraphs 5.11 – 5.14).

Tribunals, Courts and Enforcement Bill

The Committee welcomes the Bill's increased protection for the independence of tribunals as a positive, human rights enhancing measure, including its provisions separating tribunals from their sponsoring departments (paragraphs 6.1 – 6.13).

The Committee hopes the Government will reconsider its restrictive approach to the availability of legal aid for representation before tribunals (paragraphs 6.14 – 6.19).

The Committee notes that the Asylum and Immigration Tribunal ("AIT") is excluded from the scope of the new arrangements and the Upper Tribunal is precluded from exercising any powers of judicial review in matters concerning immigration and nationality. The Committee is concerned that the differential access to legal remedies created by a unique, single-tier tribunal for immigrants and asylum seekers lacks objective justification in Convention terms (paragraphs 6.20 – 6.31).

The Committee welcomes the Government's decision to abolish the common law remedy for distress for unpaid rent against residential properties as a positive, human rights-enhancing measure. It considers that there is no human rights objection in principle to the provision of a remedy for the recovery of unpaid commercial rent without prior judicial oversight, provided adequate safeguards are in place (paragraphs 6.32 – 6.38).

The Committee is concerned that if the sum of minimum rent for Commercial Rent Arrears Recovery (CRAR) is set too low this may lead to a risk of incompatibility with Article 1, Protocol 1, ECHR and with Article 8 ECHR. The Committee may return to consideration of the procedure for execution of recovery in the light of the Minister's response to the

Committee's request for further information (paragraphs 6.39 – 6.40).

The Committee has several concerns on the issue of immunity from seizure of cultural property (paragraphs 6.46 to 6.54).

1. Introduction

1.1 From the start of this parliamentary Session we have been conducting legislative scrutiny in line with the principles and practices set out in our Report of last Session into our future working practices.¹ As this is the first Legislative Scrutiny Progress Report which we are publishing in the current parliamentary Session we offer some brief initial words of explanation about the new methods of scrutiny work which we are now employing, which will affect the structure, content and timing of Progress Reports such as this one and other Reports scrutinising bills and other documents related to legislation.

1.2 A full explanation of the system of scrutinising legislation which we have adopted from the start of this Session is provided in our future working practices report.² This system is designed to enable us to prioritise the most significant human rights issues in legislation more effectively, and to improve the accessibility, timeliness and overall value of our legislative scrutiny work. Its principal features are—

- scrutiny of all Government and private bills for their human rights implications, with private Members' bills scrutinised from now on only on an *ad hoc* basis, but normally only if they both raise issues of major human rights significance and appear likely to become law
- a raising of the threshold of significance of human rights issues raised by bills, or provisions of bills, in accordance with which we would consider that an issue requires further examination by us leading in most cases to a Report drawing it to the attention of both Houses
- introduction of a new sifting system, delegated to our Chairman and through him to our Legal Adviser, to sift all Government and private bills on publication to determine whether their provisions meet the raised threshold, applying the sifting criteria which we have adopted,³ and which therefore merit further scrutiny through correspondence with Ministers or other means
- informal and provisional timetables, subject to review after an experimental period, of seeking to report to both Houses our conclusions on each bill which we scrutinise further before the bill has left the first House and ideally, subject to allocation of resources, within 8 to 10 weeks after publication of the bill.

1.3 We expressed our intention that our eventual Reports on bills would focus on the most significant human rights issues raised by a bill, rather than exhaustively on all the human rights issues raised by it, and that we would consider further whether to express our conclusions on compatibility questions in our own voice, rather than “second-guessing” the view that courts might take in future cases. In the expectation that the number of bills on which we reported would be substantially fewer than in the past, we also expressed our

¹ Twenty-third Report of Session 2005-06, *The Committee's Future Working Practices*, HL Paper 239/HC 1575.

² *Ibid.* paras 18 to 50.

³ *Ibid.* paras 27 to 29

intention to make greater use of freestanding reports on individual bills, to enhance the accessibility of our legislative scrutiny work to parliamentarians and others.⁴

1.4 This Report is structured to consider first those Bills which we have subjected to further scrutiny after an initial decision that they raised human rights issues crossing our significance threshold. In the case of these bills, the further scrutiny has taken the form of correspondence with Government Ministers. This correspondence is published in hard copy for the first time as Appendices to this Report, but we point out that we are now routinely placing copies of such correspondence on our webpages⁵ before their publication in Reports such as this one, to enhance the visibility of our scrutiny process. Following this exchange of correspondence, we are now in a position to report to both Houses our conclusions in respect of each of these bills.

1.5 Each Legislative Scrutiny Progress Report will also contain, as appropriate, a list of those bills which we have “cleared from scrutiny” on consideration of the outcome of the relevant sift or sifts since the previous time we reported on legislative scrutiny. An updated list of these bills is also maintained on our webpages.

1.6 Our webpages also draw attention to those points on bills which we are considering and invite submissions from outside organisations on such points. Such submissions are always welcome, and we are grateful to those who take the trouble to send them in to us.

1.7 Although this Progress Report deals solely with bills, we are subjecting selected pre-legislative and post-legislative documents to the same sifting process and future Progress Reports will report to both Houses significant human rights issues which we consider are raised by such documents.

1.8 When we have gained further experience of operating our new legislative scrutiny system we may evaluate it and report our views. Such a report is likely to consider, among other issues, the extent to which the information on human rights issues raised by bills provided to us and to Parliament as a whole by the Government when it presents bills is of sufficient quality to meet our requirements and to enable our new system to function effectively.

⁴ *ibid.* para 77

⁵ Refer to JCHR website:

www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchrls06_07.cfm.

Bills drawn to the special attention of both Houses

Government Bills

2 Corporate Manslaughter and Corporate Homicide Bill

Date introduced to first House	16 November 2006
Date introduced to second House	5 December 2006
Current Bill Number	HL 19
Previous reports	27 th and 31 st of 2005-06

Background

2.1 This is a Government Bill, carried over from the last Session. We reported on the Bill before its Second Reading in the House of Commons, welcoming the Bill as a human rights enhancing measure, but setting out our views on what we considered to be the most significant human rights issues raised by the Bill and we wrote to the Minister asking for further explanation in relation to those points.⁶ We indicated that we might report again on the Bill when we received the Minister's reply.

2.2 We received the Minister's reply in a letter from Gerry Sutcliffe MP, Parliamentary Under Secretary of State at the Home Office, dated 25 October 2006 and we published it without comment in order to ensure that it was available to inform parliamentary debate on the Bill.⁷ The Bill completed its passage through the Commons on 4 December 2006, and will soon be reaching Report Stage in the Lords.

2.3 We now report briefly on the extent to which the human rights concerns raised in our earlier report remain in light of the Minister's response.

(1) The scope of the offence and the obligation to protect life

2.4 In our earlier report, we said that the positive obligation to protect life in Article 2 ECHR required the UK to ensure that it is possible under its criminal law to bring a prosecution in circumstances where there has been a serious breach of the right to life as a result of the gross management failure of a private or public organisation, but no identifiable individual within the organisation can be proved to be responsible for the failure. Given the Government's acceptance of the deficiencies in the current criminal law, which prevent larger private bodies and a wide range of public bodies from being prosecuted for gross negligence manslaughter, it was our view that there is a clear obligation under Article 2 to introduce an offence of corporate manslaughter of sufficiently wide scope to enable recourse to the criminal law against both private and public bodies in such circumstances.⁸

⁶ Twenty-seventh Report of 2005-06, *Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill*, HL Paper 246/HC 1625.

⁷ Thirty-first Report of 2005-06, *Legislative Scrutiny: Final Progress Report*, HL Paper 277/HC 1715.

⁸ Twenty-seventh Report of Session 2005-06, *op. cit.* at paras 1.21-1.36.

2.5 Significantly, the Government in its response acknowledges that “there is in some situations an obligation under Article 2 ECHR to permit recourse to the criminal law in circumstances where there has been a serious breach of the right to life as a result of a gross management failure” and that “the current law is unsatisfactory in that it is very difficult for large private organisations to be prosecuted for gross negligence manslaughter.” However, the Government does not accept that the relevant case-law translates into a requirement to introduce a statute of a particular kind or with a particular coverage, and that there is therefore no obligation to have an offence of corporate manslaughter. It argues that the means by which a State chooses to protect the right to life in its national law is within its “margin of appreciation” (that is, the area of discretion left to States by the European Court of Human Rights when deciding precisely how to implement its obligations under the ECHR). In the Government’s view, it is open to the UK (“within the UK’s margin of appreciation”) to satisfy its obligation to protect life under Article 2 by making available a range of remedies, including personal criminal liability, but it is under no ECHR obligation either to introduce an offence of corporate manslaughter or to make that offence of any particular scope.

2.6 We welcome the Government’s acknowledgment that in certain circumstances there is an obligation under Article 2 to permit recourse to the criminal law where there has been a serious breach of the right to life as a result of a gross management failure, and that the current law is deficient because it is very difficult to prosecute large private organisations for gross negligence manslaughter. In our view, however, it follows from these twin acknowledgments that there is currently a gap in our criminal law which means that, on the current state of the law, the UK cannot guarantee that recourse to the criminal law will always be possible in circumstances where there has been a serious breach of the right to life as a result of a gross management failure and Article 2 requires it.

2.7 The starting point, therefore, is that there is a gap in our criminal law which exposes the UK to the risk of being found by the European Court of Human Rights to be in breach of Article 2 ECHR in the circumstances of a particular case. This being so, the State’s margin of appreciation, on which the Government relies, is not relevant: there is a gap in protection and a Convention obligation to fill it by making recourse to the criminal law possible. **The simple question for Parliament, therefore, is whether the proposed new offence of corporate manslaughter is of sufficiently wide scope to fill this acknowledged gap in UK law’s protection for the right to life. We remain of the view, for the reasons given in our earlier report, that the various restrictions on and exclusions from the scope of the offence make it clear that, as currently hedged about with so many qualifications and exclusions, the new offence fails to fill that gap and therefore fails to satisfy the obligation in Article 2 to protect the right to life.**

(2) Deaths in custody and other exemptions for public bodies

2.8 In our earlier report we welcomed the express application of the new offence to a range of Crown bodies and the express disapplication of Crown immunity from prosecution as measures capable of enhancing the UK’s compliance with the positive obligation to protect life in Article 2 ECHR.⁹ However, we expressed our concern that the effect of various provisions restricting the definition or the scope of application of the offence is to preclude

⁹ Twenty-seventh Report of Session 2005-06, op. cit. at paras 1.37-1.38.

the possibility of prosecution for corporate manslaughter in precisely those contexts, such as deaths in custody, in which the positive obligation in Article 2 ECHR is at its strongest and may require, in the circumstances of a particular case, that criminal prosecutions be brought.¹⁰

2.9 The Government in its response offers three justifications for excluding deaths in custody and in other public sector contexts from the scope of the new offence.

2.10 First, it argues that the decisions taken by public bodies when exercising public functions have a public policy dimension, involving matters such as the allocation of public resources, which are matters more appropriate for an elected Government to decide than for criminal courts. **In our view, while we agree that courts should only have a very limited role in decisions about the allocation of public resources, this reason cannot justify a sweeping exclusion from the new criminal offence of any decision taken by a public body in the performance of a public function.**

2.11 Second, the Government argues that public bodies are subject to wider forms of accountability, including accountability to Parliament, accountability under the Human Rights Act 1998, accountability through public inquiries and the existence of specific watchdogs such as the Independent Police Complaints Commission. **In our view, however, those wider forms of accountability have proved inadequate in the past to prevent deaths caused by gross management failures in public bodies, and in any event they cannot have the same deterrent effect as the possibility of criminal prosecution and conviction. The purpose of the offence is to protect lives by preventing violations of the right to life, and the European Court of Human Rights in its Article 2 case-law has repeatedly stressed the importance of the deterrent effect of the criminal law in protecting life.**

2.12 Third, the Government seeks to justify the exclusions on the ground that criminal investigations are costly and disruptive and it would not be in the public interest to impose a resources burden on the Crown. **In our view this concern with cost and resources belittles the importance of what is at stake: the right to life.**

2.13 Having considered the Government's arguments, we therefore remain of the view expressed in our earlier report, that the exclusion from the scope of the new offence of deaths in custody and other deaths caused by gross management failure in the public sector where no individual can be proved to be responsible is likely to lead to the UK being found to be in breach of its positive obligation to protect life under Article 2 ECHR.

(3) Justifications for differential treatment of different bodies

2.14 We asked the Government for a more reasoned justification for the Bill's differential treatment of unincorporated compared to incorporated bodies and of public bodies compared to private bodies, on the assumption that Article 14 ECHR applies (which the Government does not accept). We have dealt with the Government's justifications for treating public bodies differently above.

¹⁰ Ibid., para. 1.43.

2.15 The Government explains that it appeared far less pressing that an offence of corporate manslaughter should cover unincorporated organisations for two reasons: first, because the common law offence of gross negligence manslaughter does not currently extend to unincorporated bodies and, secondly, because of the nature of the activities carried out by unincorporated bodies, they rarely, if ever, cause fatalities. It would also be inappropriate, in the Government's view, for an offence which is intended to increase the liability of organisations, as distinct from individuals, to affect individual members of unincorporated bodies. There are also practical problems relied on by the Government: membership of unincorporated bodies change with time, and there is a less firmly defined relationship between the members and those who manage the body.

2.16 We are grateful to the Government for its more detailed explanation of why unincorporated bodies are treated differently by the Bill. We have considered the justifications given and while we recognise that some very real practical problems arise, we remain concerned that since there is often very little difference in practice between an incorporated and an unincorporated entity, which might be engaging in the same activities, excluding unincorporated bodies from the scope of the new offence will lead to distinctions which appear entirely arbitrary.

2.17 We also asked the Government why it had decided not to make the new criminal offence apply to "undertakings" (meaning any trade or business or other activity providing employment) as it had originally proposed in 2004. The Government replied that "undertaking" would include the business of a sole trader, and since the purpose of the Bill is to ensure that criminal liability exists in circumstances where it would be inadequate to rely on individual liability, it would be illogical and unnecessary to apply corporate liability to the business of a sole trader. **Since the category of "undertakings" is wider than sole traders, however, we do not see why the offence could not have been made to apply to undertakings with a specific exclusion for sole traders mirroring the exclusion for corporations sole in clause 1(2) of the Bill.**

3 Welfare Reform Bill

Date introduced to first House	16 November 2006
Date introduced to second House	10 January 2007
Current Bill Number	HL 24
Previous reports	None

Introduction

3.1 This is a Government Bill carried over from the last session.¹¹ The Bill was brought to the House of Lords on 10 January 2007 and no date has been set for Second Reading.¹² Lord McKenzie of Luton, Parliamentary Under-Secretary for Work and Pensions has made a statement of compatibility with Convention rights under s.19(1)(a) of the Human Rights Act 1998. The Explanatory Notes accompanying the Bill set out the Government's view of the Bill's compatibility with the European Convention on Human Rights at paras 371-374.¹³

3.2 The Government accepts that a significant number of clauses in the Bill may engage Convention rights, namely the rights guaranteed by Articles 6, 8, 14 ECHR and Article 1, Protocol 1 ECHR (i.e. the rights to a fair hearing in the determination of civil rights or obligations, the right to respect for home and private life, the right to enjoy Convention rights without unjustified discrimination and the right to respect for the peaceful enjoyment of possessions). Despite this concession, the Explanatory Notes provided with the Bill contain no explanation for the Government's view that all of the relevant powers, provisions or regulations which may engage Convention rights are "considered to be capable of being exercised compatibly with the rights set out in the Convention." **We reiterate our view that bare assertions of compatibility with Convention rights undermine the ability of Parliament to scrutinise any statement of compatibility.**

3.3 We wrote to the Minister asking for a fuller explanation of his Government's view on the compatibility of the Bill with the Convention.¹⁴ We received the Minister's response on 13 December 2006.¹⁵ We welcome the full and prompt response provided by the Minister.

The Effect of the Bill

3.4 The Bill's aim is to help more ill or disabled people move into employment.¹⁶ It implements the proposals discussed in the Government's recent Welfare Reform Green Paper, "A new deal for welfare - Empowering people to work".¹⁷ It provides for a new benefit called the Employment and Support Allowance ("ESA") to replace incapacity benefit from 2008 and enables the Government to make regulations imposing benefit sanctions for failure to participate in work-focused health-related assessments, work-focused interviews or work-related activities. It provides for housing benefit to be

¹¹ HC Bill 208

¹² HL Bill 24

¹³ HL Bill 24 - EN

¹⁴ Appendix 1a.

¹⁵ Appendix 1b.

¹⁶ Appendix 1b, at para 26.

¹⁷ Cm 6730, January 2006

withdrawn as a sanction against people who have been evicted for anti-social behaviour and who refuse to engage in rehabilitation programmes. It enables the sharing of social security information between the Department of Work and Pensions and local authorities and for an extension of the “two-strikes and you’re out” rules under which benefits can be withdrawn from people convicted of benefit fraud.

3.5 A great deal of the detail in this Bill is left to secondary legislation. Although we welcome the publication by the Department of Work and Pensions of a number of draft Regulations to assist Parliamentary scrutiny,¹⁸ we note that a number of relevant Regulations have not been published in draft, including Regulations on criteria and conditions for health related assessments and for work-related activity. We acknowledge that the Government intend to develop further the proposals for conditionality based on work-related activity in light of the “Pathways to Work” experience. We also note the Minister’s explanation that the current Bill follows the precedent in social security legislation for much of the detail to be set out in secondary legislation. The Minister explains that this approach gives the Government the “necessary flexibility” to make changes in the light of operational experience and changing circumstance.¹⁹ The Disability Rights Commission has expressed their concern about the lack of detail on the face of the Bill.²⁰ **We reiterate our concern that where a significant amount of detail is left to Regulations, or statutory guidance, scrutiny of those proposals for compatibility with the United Kingdom’s human rights obligations may lead to further avoidable correspondence with the Minister, or a negative conclusion on compatibility, which may otherwise have been avoided.**²¹ In such cases, there is a particularly strong case for a full and detailed explanation of the Government’s views on the compatibility of the proposals in the relevant Bill to be provided to us at an earlier stage.

Human Rights Standards

3.6 In so far as this Bill is designed to assist more disabled people into employment, it has the potential to be a human rights enhancing measure. We note that the Standard Rules accompanying the United Nations World Program of Action on Disabled Persons provide that States should recognize the principle that persons with disabilities must be empowered to exercise their human rights, particularly in the field of employment. States should actively support the integration of persons with disabilities into open employment.²² The Standard Rules are not an international Convention, and are not binding on the United Kingdom. However, we note that the Government consider that they “imply a strong moral and political commitment on the part of States to take action for the equalisation of opportunities for persons with disabilities”.²³ We note that the new United Nations Convention on the Rights of Persons with Disabilities provides that State Parties will recognise the right of persons with disabilities to work, on an equal basis with others and provides that State Parties shall “safeguard and promote the realisation of the right to

¹⁸ DCA, Welfare Reform Bill, Draft Regulations and Supporting Material, October 2006; Herein, “DCA Draft Regulations”

¹⁹ Appendix 1b

²⁰ Disability Rights Commission Welfare Reform Bill Response, July 2006, pages 4-5

²¹ See for example: Fifth Report of Session 2005-06, *Legislative Scrutiny: Second Progress Report*, Immigration, Asylum and Nationality Bill (HL Bill 43), para 2.22.

²² Standard Rules on the Equalisation of Opportunities for Disabled Persons, UN General Assembly Resolution, 48/96, 20 December 1993

²³ DFID, Disability, poverty and development, February 2000, page 6. <http://www.dfid.gov.uk/pubs/files/disability.pdf>

work” (Article 27).²⁴ The Convention will be opened for signature and ratification in March 2007.

3.7 Despite this admirable aim, it is of considerable concern that a Bill which it is accepted may engage a significant number of Convention rights was originally accompanied by little substantive explanation of the Government’s view that the Bill’s provisions were compatible.

3.8 This may be explained, but not excused, by the subject matter of the Bill. The socio-economic nature and politically charged character of social welfare law and policy has led to a general reluctance on the part of the ECtHR, or the domestic courts, to find that Convention rights are engaged or interference unjustified in this field.

Benefits as “Possessions” (Article 1, Protocol 1 ECHR)

3.9 The Bill deals with a number of contributory and non-contributory social welfare benefits. ESA will have contributory and non-contributory elements. The European Court on Human Rights (“ECtHR”) treats contributory benefits as “possessions” for the purpose of Article 1, Protocol 1 ECHR. Any interference with or deprivation of established rights to contributory benefit must be strike a “fair balance” between the property rights of the individual and the public interest and must be in accordance with law.²⁵ Although the ECtHR has been reluctant to extend the protection of Article 1, Protocol 1 ECHR to non-contributory benefits, their recent case-law suggests that all benefits must be treated as possessions protected by the Convention.²⁶ **Although domestic courts continue to take the view that Article 1, Protocol 1 ECHR will not apply to non-contributory benefits, such as housing benefit, the Government has chosen to assess the Convention compatibility of these provisions on the basis that non-contributory benefits are protected by Article 1, Protocol 1 ECHR.**²⁷ We welcome this approach. We consider that where there is an ambiguity in the law, the United Kingdom’s human rights obligations will be best fulfilled if proposed legislation is scrutinised, according to the precautionary principle, on the basis of the broader interpretation.

3.10 The margin of appreciation afforded to States is extremely wide but it is not entirely unbounded. The State must provide reasons for any differential treatment and evidence that a proposal, which interferes with existing rights to social benefits, strikes a fair balance between the rights of the individual and the public interest.²⁸

“Possessions” and Due Process (Article 6(1) ECHR)

3.11 Decisions engaging the right to respect for the peaceful enjoyment of possessions must generally comply with the right to a fair hearing by an independent and impartial Tribunal guaranteed by Article 6(1) ECHR.²⁹

²⁴ Text Adopted by the Plenary Session of the General Assembly on 13 December 2006, A/61/611
<http://www.un.org/esa/socdev/enable/rights/convtexte.htm>

²⁵ *Gaygusuz v Austria* (1997) 23 EHRR 364.

²⁶ *Stec v UK* (App No 65731/01) Judgment 12 April 2006; *Zeman v Austria* (App No 23960/02), Judgment, 29 June 2006.

²⁷ Appendix 1b, paras 6- 8. See *R (Couronne) and others v Crawley Borough Council* (2006) EWHC 1514 (Admissible).

²⁸ *Zeman v Austria*, see note 26.

²⁹ See for example: *Jacobsson v Sweden* (1989) 12 EHRR 56 at paras 65-77.

Positive Obligations, Welfare Support and the State (Article 8 ECHR)

3.12 In some limited circumstances, there may be a positive obligation on the state to provide welfare support, or accommodation, in order to afford adequate protection to the right to respect for private or family life (as guaranteed by Article 8 ECHR).³⁰ If this positive obligation is engaged, any failure to meet it must be proportionate, justifiable and without discrimination (Article 8 (2); Article 14 (ECHR)).

Human Rights Implications of the Bill

3.13 In our view, the Bill raises a number of significant human rights issues:

- a) Whether the increased use of compulsion through the imposition of benefit sanctions for failing to participate in work-related activities in Part 1 of the Bill carries a risk of incompatibility with the Convention rights of people with health conditions and disabilities (Part 1) (Articles 6, 8 ECHR; Article 1, Protocol 1 ECHR and Article 14 ECHR);
- b) Whether the involvement of private and voluntary sector contractors in the delivery of the new regime, including in the making of decisions regarding benefit sanctions, gives rise to inferior protection for the Convention rights of benefit recipients given the uncertainty over the meaning of “public authority” in the HRA as a result of the courts’ interpretation of that phrase (Clause 15);
- c) Whether the distinctive treatment of single persons under 25 years old for the purposes of the initial assessment period for entitlement to ESA is justified, proportionate and compatible with Article 14 ECHR (when considered together with Article 8 ECHR and Article 1, Protocol 1 ECHR);
- d) Whether the withdrawal of housing benefit as a sanction against households who have been evicted for anti-social behaviour and who refuse to engage in a rehabilitation programme is compatible with the right of vulnerable claimants and third party members of the household to respect for their home and family life, as guaranteed by Article 8 ECHR (Clause 28);
- e) Whether there is sufficient detail and adequate safeguards in place in respect of the information sharing provisions in the Bill to ensure compatibility with Article 8 ECHR (Clauses 28, 33, 38-42);
- f) Whether there are sufficient procedural safeguards, including sufficient discretion, to ensure that automatic loss of benefit in cases of repeated benefit fraud does not have a disproportionate impact on the Convention rights of benefit recipients and their families (Clause 46) (Article 8, Article 1, Protocol 1 ECHR).

³⁰ *Marzari v Italy* (2000) 30 EHRR CD 218; *Anufrijeva v Secretary of State for the Home Department* (2004) 2 WLR 603 at para 43.

(1) Work-related Activity: Compulsion and Convention Rights (Part 1)

3.14 A person entitled to ESA will be assessed in order to ascertain whether their capability for work is limited to the extent that it is not reasonable for them to participate in “work-related activity” (i.e. “limited capability for work-related activity”).³¹ Any claimant with “limited capability for work-related activity” will be placed in the “support group”. All other ESA claimants may be required to comply with certain conditions in order to ensure their benefit entitlement is paid in full. These are a) “work-related health assessments” (Clause 10); b) “work-related interviews” (Clause 11) and c) “work-related activity” (Clause 12). The Bill enables a claimant’s benefit to be reduced (“sanctioned”) if a claimant fails to comply with these conditions without “good cause”.

3.15 It is the Government’s view that the imposition of sanctions on claimants for failure to comply, without good cause, with the conditionality requirements will not interfere with the rights of the claimant and the members of their family arising under Article 8 ECHR as “it is within the claimant’s “gift” to comply, and compliance will lead to the full amount of ESA becoming payable.

3.16 The Minister explains that if, contrary to their contention, both Article 8 and Article 1, Protocol 1 ECHR are engaged, that the Government consider that any interference with either of those rights is justified and proportionate. The introduction of sanctions is intended to assist claimants; no sanction will ever exceed the amount of the “work-related activity component” of ESA and it will remain entirely within the control of the claimant to comply with the requirements and to have their benefit restored to its full amount.

3.17 We consider that, provided there are adequate safeguards in place to guard against the arbitrary, or discriminatory, use of sanctions and to protect vulnerable claimants and their families from extreme hardship, it is unlikely that these proposals would give rise to any significant risk of incompatibility with Article 1, Protocol 1 ECHR or Article 8 ECHR.

3.18 We have reviewed the intended safeguards proposed by Government, including those in the published draft Regulations and in the proposals for operational guidance. We consider that these additional safeguards, including the provision for notice of any required action (such as attendance at an assessment or interview) which may lead to a sanction, provisions for deferrals and waivers of requirements to participate in work-related activities, will provide valuable safeguards to ensure that claimants are not treated arbitrarily and will enhance legal certainty. If these safeguards are put in place, and operated in a consistent manner, it is unlikely that the sanctions regime will lead to a risk of incompatibility with Article 8 ECHR, or Article 1, Protocol 1 ECHR.

3.19 We have a few remaining concerns arising from the Minister’s response which we consider below.

³¹ Clause 9.

Work-related Conditionality: Sanctions and Hardship (Article 8 ECHR)

3.20 The Government accept that Article 8 ECHR could be engaged if sanctions “were to create extreme hardship to such a degree that there was an impact upon private and family life”.³²

3.21 The level of hardship and deprivation that is required to establish that a State has failed to provide adequate support in breach of Article 8 ECHR is extremely high. It is more likely that a degree of support will be required if the welfare of children is involved.³³

3.22 The Explanatory Notes explain that an individual award of ESA will be made up of an “income-related allowance” (a means-tested allowance) or a “contributory allowance” (a contributions based allowance) supplemented, for those entitled to ESA, but not in the support group, by a “work-related activity” component. (Those in the support group will be entitled to a “support” component, which will not be subject to conditionality.)

3.23 The Minister explains that as the level of sanction imposed will not exceed the amount of “work-related” component paid to the claimant, there is no risk of extreme hardship or any interference with Article 8 ECHR. **Despite this reassurance, there is nothing on the face of the Bill to limit sanctions to the work-related component of ESA. Further details are provided in draft Regulations. Regulations under Clauses 10, 11 and 12 may make provision for determining the amount by which an allowance is to be reduced, when the reduction is to start and for how long it is to continue. Regulation 12(1) of the draft Regulations on Work Focused Interviews provided that the amount of the reduction will be 50% of the work-related component for the first four weeks and 100% of the work-related component thereafter. We consider that the inclusion of this limitation on the face of the Bill would provide a valuable safeguard of the minimum level of income available to ESA claimants subject to sanction, against any significant hardship and would protect against the risk of any breach of Article 8 ECHR.**

3.24 It appears from the Explanatory Notes that it is the Government’s intention that the minimum income which an individual ESA claimant would receive when subject to sanctions would not fall below the minimum applicable amount relevant for the purposes of income support (£57.45, on April 2006 figures). We accept that it is appropriate that minimum and applicable prescribed amounts for the purposes of social welfare are dealt with by means of secondary legislation. **On the current figures, we do not consider that there is any significant risk that the European or domestic Courts would consider that an ESA claimant subject to sanctions would suffer hardship sufficient to engage Article 8 ECHR.**

Work-related Conditionality: Sanctions and Article 6(1) ECHR

3.25 It is the Government’s intention that any decision which attracts a financial sanction will be subject to appeal.³⁴ The Bill extends the application of the Social Security Act 1998 provisions on the making of benefit decisions by the Secretary of State and subsequent

³² Appendix 1b, para 5.

³³ *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406, para 43. See also *Morris v Westminster City Council* (2005) EWCA CIV 1184.

³⁴ Appendix 1b.

rights of independent appeal to decisions relating to Employment and Support Allowance. An appeal to the Social Security and Child Support Tribunal will lie against any decision of the Secretary of State which is “made on a claim for, or an award of” Employment and Support Allowance, which is not expressly excluded and against any decision “not on a claim or award”, which is expressly prescribed. Any decision to impose a sanction, pursuant to the Regulatory powers in the Bill, will need to be specifically prescribed. So, for example, the draft Regulations on work-focused interviews provide for an appeal against a decision that an ESA claimant has failed without good cause to take part in a work-focused interview.³⁵

3.26 We consider that an appeal to the Social Security and Child Support Tribunal (which is subject to a further appeal to the Social Security Commissioners and then to the Court of Appeal on a point of law) would satisfy the requirements of Article 6(1) ECHR for a hearing by an independent and impartial tribunal.

3.27 However, there is nothing on the face of the Bill, or in the Social Security Act 1998, which requires the Secretary of State to provide a right of appeal against a decision that an ESA claimant does not have “good cause” for failing to participate in an assessment, interview or other work-related activity (that is, against the decision to impose a sanction). **We recommend that the Bill is amended to require that any regulations made under Part I which provide for a decision to impose a sanction, based on a failure to show “good cause”, are accompanied by a right of appeal.**

(2) Contracting-out (Clause 15)

3.28 Clause 15 gives the Secretary of State a wide power to contract out a significant number of his functions relating to the proposed conditionality of Employment Support Allowance, including the power to impose sanctions (Clause 15(2)(a)).

3.29 We note that, in their report on the Green Paper, the Work and Pensions Committee expressed concern about how conditionality might be enforced. That Committee recommended that the decision to administer a benefit sanction should rest with a DWP decision maker rather than a contracted service provider.

3.30 The Minister has explained that the Secretary of State will retain overall responsibility for ensuring that the actions of private contractors acting pursuant to Clause 15 are compatible with Convention rights. He explains that the terms of any contract made in pursuit of Clause 15(2) will “take account of” the Secretary of State’s responsibilities under the Human Rights Act.³⁶

3.31 The application of the Human Rights Act to private bodies performing the functions of a public authority is an issue on which we have expressed our concern on numerous occasions. We are currently undertaking a further inquiry building on our earlier Report on the Meaning of Public Authority in Section 6 of the Human Rights Act.³⁷ In that Report, we concluded that the interpretation of Section 6 of the Human Rights Act had led to a risk of disparate application of the Act, gaps and inconsistencies in human rights protection

³⁵ Draft Regulation 15, see note 15.

³⁶ Appendix 1b.

³⁷ Seventh Report of Session 2003-04, *The Meaning of Public Authority Under the Human Rights Act*, HC 382/HL 39.

and to a risk that the United Kingdom could be considered in breach of its obligations under Articles 1 and 13 ECHR to give effective protection to Convention rights and to provide an effective remedy for their breach. We were unconvinced that the inclusion of contractual terms for human rights protection in Government contracts could provide fully comprehensive, consistent and equal human rights protection for the recipients of public services on an equal basis with statutory responsibility under section 6 of the Human Rights Act.

3.32 We remain concerned that, generally, contract compliance will not provide effective protection for the Convention rights of individuals where the functions of public authorities are assumed on a day-to-day basis by a private commercial or voluntary organisation. We draw this matter to the attention of both Houses.

(3) Benefits and Under-25s

3.33 Basic allowance rates will be aligned with the rates for Job Seekers Allowance during the assessment phase for ESA.³⁸ The Minister relies on the decision of the House of Lords in *Reynolds* to support the Government's conclusion that there is objective justification for the differential treatment of under-25s in the benefits system. In that case, the House of Lords considered that there was adequate justification for the same distinction in relation to Job Seekers Allowance.³⁹ The Minister relies on the same justification offered to the House of Lords in *Reynolds*, namely that younger claimants have lower earning potential than claimants over 25 and also have lower living costs.⁴⁰

3.34 We have considered the justification offered by the Minister and consider that it is unlikely that the differential treatment of under-25s during the process of assessment for Employment and Support Allowance would lead to a risk of incompatibility with Article 14 ECHR.

(4) Housing Benefit and Anti-Social Behaviour

3.35 The Bill amends the Contributions and Benefits Act to enable local authorities to withhold housing benefit from a person who has been evicted as a result of anti-social behaviour where that person fails without good cause to comply with a "warning order" served upon him. A warning notice is defined as a notice served on the claimant requiring him to take a "specified action" with the "aim of ending, or preventing repetition of, the conduct which may lead or has led to" the claimant's earlier eviction. Secondary legislation may provide that either a) a claimant's benefit may be reduced for failure to comply or b) benefit may only be payable subject to conditions. The relevant local authority will have the discretion to stop a period of sanction running if it considers the sanction "should no longer apply".⁴¹ The Government intends to pilot these provisions in about 10 authorities in England for a period of 2 years.

³⁸ See EN at paras 51-52.

³⁹ [2005] UK HL 37.

⁴⁰ Appendix 1b.

⁴¹ Clause 30 (1)

3.36 We acknowledge that there is no general requirement in the Convention for the State to provide housing or housing benefit.⁴² The Government accepts however, that Article 8 ECHR may be engaged by these proposals. They consider that the imposition of a housing benefit sanction for anti-social behaviour would be justifiable as it pursues the aim of the protection of the rights of others and as it aims to improve the quality of life of the individuals themselves. The Minister argues that all local authorities will be subject to the Section 6 HRA 1998 duty to act compatibly with Convention rights and expresses confidence that “a sanction would only be imposed where it was proportionate to do so, particularly bearing in mind the safeguards that will be built into the system”.⁴³

3.37 There are very few safeguards on the face of the Bill. We have considered the Minister’s explanation of the Government’s views on compatibility. He explains that for the purpose of the protection of an individual’s possessions, any reduction in benefit would be justified having regard to the policy objectives, namely the reduction of anti-social behaviour and the protection of the rights of others. **We accept that the reduction of housing benefit in the circumstances envisaged by the Bill is unlikely to give rise to any significant risk of incompatibility with Article 1, Protocol 1 ECHR.**

3.38 **We remain concerned that the imposition of housing benefit sanctions on households evicted as a result of anti-social behaviour may pose a risk to the home and family life of vulnerable claimants and third party family members, including children, who may be penalised for the actions of a family member who they cannot control, and whose private and family lives may be significantly affected by the withdrawal of housing benefit (Article 8 ECHR).** The Office of the Children’s Commissioner has stressed that any decision to take a child into care as a result of a housing benefit sanction rendering a family unable to support their child would have to comply with the United Kingdom’s domestic and international obligations, including under the United Nations Convention on the Rights of the Child and would need to comply with the principle of “best interests of the child” and the rights of the parent and the child to respect for their family life guaranteed by Article 8 ECHR.⁴⁴ Both the Children’s Commissioner and the Social Security Advisory Committee doubt whether the proposed sanctions regime will be capable of meeting the Government’s policy aims. For example, the Children’s Commissioner considers that, on the basis of the socio-economic research on those known to act anti-socially, there does not appear to be evidence that the threat of loss of housing benefit would compel those responsible for the anti-social behaviour to comply with rehabilitative actions.⁴⁵

3.39 We note the provision in the draft Regulations for the treatment of individuals facing hardship (see Regulation 5, draft Housing Benefit (Loss of Benefit) (Pilot Scheme) Regulations 2007). We also note the commitment made by the Minister that local authorities will be able to exercise their discretion to lift the application of a sanction in individual cases. We welcome the recognition by the Minister that, in addition to these provisions, a Local Authority will have the discretion to decide not to impose any sanction

⁴² *Chapman v UK* (2001) 33 EHRR 18, *O’Rourke v UK*, App No 39022/97, Decision 26 June 2001 (Inadmissible).

⁴³ Appendix 1b.

⁴⁴ Response to a Consultation on the Proposal by the DWP to introduce a Housing Benefit Sanction for Anti-Social Behaviour; Office of the Children’s Commissioner, July 2006, page 4.

⁴⁵ *Ibid*, page 4; see also *Social Security Advisory Committee Report*, 2005-06, Nineteenth Report, chapter 5.

in circumstances which might lead to hardship for vulnerable claimants or their families and the recognition that the Local Authority will be required by Section 6 HRA 1998 to exercise this discretion to prevent any breach of Article 8 ECHR arising.⁴⁶

3.40 The Minister has accepted that the application of Article 8 ECHR in these circumstances will be difficult and that, within the framework envisaged by the Government, much will depend on the discretion of local authorities:

The application of Article 8 to this kind of case is very difficult. There will be situations where it is justifiable and proportionate to sanction housing benefit to such an extent that rent is unpaid and the household is, as a result evicted from their home for rent arrears. In other cases, this will not be a justifiable and proportionate result. In no case will this be a desirable result.

3.41 The Government stresses that a local authority taking a decision to impose a sanction will be required to consider carefully all the features of the particular case and to balance the rights of all members of the household against the interests of other members of the community. The Government intends to provide guidance to all local authorities on how to exercise their powers.⁴⁷

3.42 We consider that the operation of these provisions may lead to a risk of incompatibility with Article 8 ECHR. We welcome the recognition of the Government that guidance will be necessary to ensure that Local Authorities will act in a manner which respects individual's rights to respect for their family and private lives. We are not in a position to assess whether this guidance will be adequate to meet the risk that these provisions could be applied in a manner which endangers the rights of vulnerable claimants and their families to respect for their private and family lives. We ask that the Government provide us with copies of the relevant guidance in draft when it is available. We draw this to the attention of both Houses.

(5) The use of Social Security information and information sharing

3.43 The Bill contains a significant number of provisions on the use of social security information and information sharing. The exchange of information relating to an individual's private life engages the right to private life in Article 8 ECHR. We have previously expressed our concern that where provisions seek to create new information sharing powers, the breadth of those powers should be clearly identified, and any relevant safeguards should be included on the face of the Bill.⁴⁸

3.44 Clause 40 of the Bill contains broad provisions on the use of information relating to social security, child support or war pensions or any evidence relating to any "specified benefit". These specified benefits are to be prescribed by Regulations. The Bill provides that any "relevant authority" may use for "any relevant purpose" any social security information which it holds. A relevant purpose is limited to a purpose prescribed by regulations "which relates to a claim which is made, or could be made, for a specified benefit". The Minister explains that the Government considers that these measures are

⁴⁶ Appendix 1b.

⁴⁷ Appendix 1b.

⁴⁸ Seventh Report of Session 2004-05, *Legislative Scrutiny: Third Progress Report (Gambling Bill)*, paras 2.23-2.28.

necessary to “improve benefit administration and to reduce intrusion into a person’s private life in connection with their claims for benefit”. The Explanatory Notes explain that this new clause will enable local authorities to promote the take up of benefits administered by the Department for Work and Pensions. They give the example of enabling a local authority which has gathered information in relation to a claim for housing benefit or council tax benefit to use that information to complete a claim form for pension credit (administered by the Department) with the aim of encouraging an individual to take up this benefit). There is nothing on the face of the Bill to restrict this power in this manner. The relevant draft Regulations limit the exchange of information to use only for the purposes of encouraging, advising or assisting a person to make a claim for social security benefits.⁴⁹ **We recommend that the Bill is amended to limit the purposes for which information may be used pursuant to the provisions in Clause 40 to circumstances intended to encourage, advise or assist an individual to make a claim.**

3.45 Clause 41 provides for the sharing of information relating to certain income-related benefits for purposes connected with the application of a grant paid under a “relevant enactment” in connection with welfare services. The Secretary of State has the power to determine the relevant grant by Regulations. Certain bodies which provide welfare services supported by grant may be provided with information relating to specified income-based benefits by other persons who hold that information. Certain bodies including local authorities which administer housing benefit or to whom any relevant grant is paid (or persons who provide services in relation to either function) will be permitted to use information which is held for any “prescribed purpose” for another prescribed purpose or to provide that information to a third party for a prescribed purpose. The relevant prescribed purposes will be defined by Regulations, but must relate to housing benefit or welfare services. The powers on the face of the Bill appear to be very broad. The Minister explains that the measures under Clause 41(1) are intended to ensure that recipients of support under the “Supporting People” programme receive the level of support to which they are entitled. The aim of Clause 41(2) is to “ensure that housing benefit teams have necessary and appropriate information on which to base certain decisions”. Those decisions will be prescribed in secondary legislation. Neither of these clauses is restricted to these purposes and although limitations are provided in draft Regulations, it appears that these provisions permit the Secretary of State to make regulations for the purposes of information sharing which are wider than the purposes identified. **We are not in a position to assess whether these Regulation making powers will consistently be applied in a manner compatible with the protection offered to personal information by Article 8 ECHR. We draw this to the attention of both Houses.**

(6) Extension of Sanctions for Benefit Fraud

3.46 Clause 46 would enable a benefit entitlement to be removed or reduced where a person is convicted of benefit fraud twice and the second offence takes place within five years of the first offence, rather than three as at present. The Explanatory Notes indicate that it is the Government’s view that it is “possible” that this clause might engage Articles 6, 8, 14, and Article 1, Protocol 1 ECHR.

⁴⁹ Draft Regulations, Social Security (Claims and Information) Regulations 2007, Regulation 6 (2).

3.47 The Minister has explained that it is the Government's view that "extending the legislation will build upon the positive deterrent effect already seen by reducing the volume of benefit fraud re-offenders since the Loss of Benefit Provision commenced in April 2002 and tackle the remaining habitual offenders.

3.48 We consider that it is unlikely that the extension of the "two-strikes" provisions to cover a five, rather than a three-year period would lead to a significant risk of incompatibility with Convention rights.

4 Consumers, Estate Agents and Redress Bill

Date introduced to first House	16 November 2006
Date introduced to second House	
Current Bill Number	HL 25
Previous reports	None

Background

4.1 This is a Government Bill introduced in the House of Lords on 16 November 2006. The Bill had its third reading in the House of Lords on 10 January 2007.⁵⁰ No date has been set for second reading. Lord Truscott, Parliamentary Under-Secretary, Department of Trade and Industry has made a statement of compatibility with Convention rights under s.19(1)(a) of the Human Rights Act 1998. The Explanatory Notes accompanying the Bill set out the Government's view of the Bill's compatibility with the European Convention on Human Rights at paras 247 - 254.⁵¹

4.2 After our preliminary scrutiny of the Bill, we wrote to the Minister on 4 December 2006 asking for a further explanation of the Government's views on three significant human rights issues raised by the Bill.⁵² The Minister responded on 19 December 2006.⁵³ We welcome the Minister's full and speedy response.

Effects of the Bill

4.3 The purposes of the Bill include the creation of a new statutory National Consumer Council, replacing current consumer watchdogs over gas, electricity, water and postal services; enabling the Secretary of State to require service providers in those sectors to belong to redress schemes to ensure resolution of complaints and to award compensation where warranted; and strengthening the regulation of estate agents, including by expanding the circumstances in which the Office of Fair Trading can take regulatory action against estate agents.

Human Rights Implications of the Bill

4.4 In our view, the Bill raises three significant human rights issues:

- a) whether the redress schemes which the Bill empowers the Secretary of State to require service providers to belong to will be compatible with the right of access to an independent and impartial tribunal for the determination of civil rights in Article 6(1) ECHR;
- b) whether the extension of the grounds on which an estate agent can be prohibited by the OFT from doing estate agency work to include circumstances in which the OFT consider that an individual has committed (but not convicted of) an offence is compatible with Article 6(2) ECHR;

⁵⁰ HL Bill 25

⁵¹ HL Bill 2 - EN

⁵² Appendix 2a.

⁵³ Appendix 2b.

- c) whether access to judicial review of decisions to modify licence conditions which require licence holders to pay for expenses associated with a new redress scheme is adequate to satisfy the requirements of Article 6(1) ECHR for a hearing by an independent and impartial tribunal with full jurisdiction.

(1) Redress Schemes and Access to Court

4.5 Part 2 of the Bill makes provision for the creation of compulsory consumer redress schemes for gas, electricity, postal services and water industries and Part 3 makes similar provision in relation to estate agents. There is very little detail in the Bill on how the proposed redress schemes will operate in practice. The Bill enables the Secretary of State to require “regulated suppliers” in the gas, electricity, postal services and water industries to belong to an “approved redress scheme”;⁵⁴ the Estate Agents Act 1979 is amended to require estate agents to enable the Secretary of State to require persons engaged “in estate agency work in relation to residential property” to be members of an “approved redress scheme”.⁵⁵ Any approved redress scheme must provide for consumer complaints to be considered by an “independent person”. Delegated legislation will deal with the types of complaints which will be covered by the scheme; the types of consumers who may bring complaints under the scheme and precisely which estate agents or suppliers might be excluded from the scheme.

Access to a fair hearing: Consumers (Article 6(1) ECHR)

4.6 We considered the compatibility of a redress scheme with the right of access to a court for the determination of rights and obligations in Article 6(1) ECHR in our report on the NHS Redress Bill.⁵⁶ We concluded that, as there was nothing in the Bill which prevented an individual pursuing his or her claim in Court – as opposed to pursuing a settlement under the redress scheme – there was no incompatibility with Article 6(1) ECHR. The preservation of the possibility of ordinary civil proceedings was crucial to the scheme’s compatibility with Article 6. **There is nothing on the face of the Bill which precludes the bringing of proceedings as an alternative to the pursuit of a complaint through a redress scheme. The Minister has confirmed that a consumer will be free to choose to pursue a judicial remedy.**⁵⁷ We do not consider that these provisions are likely to interfere with the Convention rights of consumers.

Access to a fair hearing: Suppliers and Estate Agents (Article 6(1) ECHR)

4.7 The Explanatory Notes state that “these provisions engage Article 6(1) because it is likely that the supplier or estate agent’s right of access to the Courts will be restricted when a complaint is the subject of a determination under a redress scheme”. The Minister explains in his response to the Chairman’s letter that:

- “[I]t is quite likely that when a supplier signs up to an approved redress scheme it will have to agree to forego the right to take legal proceedings in respect of disputes which a

⁵⁴ Clause 46

⁵⁵ Clause 52; Schedule 6

⁵⁶ Fifteenth Report of Session 2005-06, *Legislative Scrutiny: Seventh Progress Report*, HL Paper 144/HC 989, paras 5.1-5.5.

⁵⁷ Appendix 2b, Page 2

consumer chooses to pursue through the scheme. For example, if there is a billing dispute between a consumer and a supplier, in which the consumer claims to have been over billed, the supplier will not be able to sue the consumer to recover the amount it claims is due if the consumer chooses to pursue the matter through the redress scheme”

4.8 An estate agent member of a redress scheme would not be able to commence legal proceedings in respect of complaints which a buyer or seller of residential property elects to pursue through an approved redress scheme. A supplier or an estate agent against whom a complaint is made will not be able to bring proceedings in libel based on any allegations made in the course of a complaint.⁵⁸ A decision reached on a complaint by the independent person, “will be binding” on the relevant supplier or estate agent. The independent person responsible for investigating complaints will have broad powers to require an apology; the payment of an undefined sum of compensation; or “any other action in the interests of the complainant”.⁵⁹ The Minister does not indicate whether the relevant supplier or estate agent will have any right of appeal from a decision on a complaint or any other means of challenging a determination before a court or tribunal. We re-iterate our view that where legislative proposals engage human rights, generally, those provisions should be defined on the face of the Bill with sufficient precision to allow for meaningful scrutiny by our Committee and by both Houses of Parliament. The requirements of legal certainty may be satisfied by the inclusion of detailed, technical provisions in secondary legislation, or in guidance. In this case, a statutory requirement is proposed which the Government accepts engages Article 6(1) ECHR, without sufficient detail to assess how the proposals will impact upon Article 6(1) ECHR rights in practice. **It is impossible for us, or Parliament, to conduct any meaningful scrutiny of the compatibility of the proposals where the composition and scope of the proposed redress scheme and the identity of the relevant decision maker remains unidentified. We draw this to the attention of both Houses.**

4.9 The relevant questions for the purposes of Article 6(1) ECHR are a) whether the relevant “independent” person or “Ombudsman” will be adequately independent and impartial to satisfy the requirements of the Convention and b) whether the procedures adopted by the approved redress scheme are adequate to satisfy the requirements for a fair hearing as guaranteed by Article 6(1) ECHR.

Independence and Impartiality

4.10 The Government considers that there are adequate safeguards on the face of the Bill to ensure that any decisions which determine the civil rights and obligations of suppliers or estate agents will be taken by an “independent and impartial tribunal”. A redress scheme may only be approved if the complaints are determined by an “independent person”, independent of a regulated supplier and the relevant regulator; and an estate agents redress scheme must provide for complaints to be determined by an independent person (“the ombudsman”).⁶⁰ The Minister explains that the regulator or the OFT in deciding whether to approve a scheme will be required to have regard to generally accepted principles of good practice in relation to consumer redress and will be bound by Section 6 HRA 1998 to act in a manner compatible with Article 6(1) ECHR.

⁵⁸ Clause 47(4); Schedule 6, para 3, New Schedule 3, para 14.

⁵⁹ Clause 48(6); Schedule 6, para 3, New Schedule 3, para 2(3).

⁶⁰ Clause 47(1), 47(2); Schedule 6, paragraph 8(a)

4.11 While these are valuable safeguards, we remain concerned that these provisions may lead to a risk of incompatibility with Article 6(1) ECHR. An independent and impartial tribunal must be independent of the executive, the parties and the legislature. In determining whether this requirement is met, regard must be had to the manner of appointment of a tribunals member, their term of office and the existence of guarantees against outside pressures.⁶¹ The appointment process for the relevant “independent person” determining complaints, their terms of appointment, and the scope of their powers are all to be determined at a later date. The Secretary of State may order that a supplier or an estate agent be a member of a redress scheme which is administered by the Secretary of State or by a person designated by the Secretary of State. Despite the potential for the Secretary of State to be directly involved in the regulatory process, the definition of “independence” does not include any requirement that the relevant independent person taking decisions on complaints relating to relevant suppliers must be independent of the Secretary of State.

Due process

4.12 There is inadequate detail on the face of the Bill to ascertain how a decision on a complaint will be taken. The Minister points again to the safeguards provided in the Bill (for example, requiring the OFT and the relevant regulator to have regard to the general principles of good practice in relation to redress schemes) and the Section 6 duty to act compatibly with Article 6(1) ECHR when deciding to approve a scheme.

4.13 Given the lack of detail on the face of the Bill, we cannot determine conclusively that these provisions do not risk incompatibility with the right of an individual supplier or estate agent to a fair hearing by an independent and impartial tribunal as guaranteed by Article 6(1) ECHR.

4.14 We look forward to receiving copies of the relevant Orders of the Secretary of State requiring suppliers and estate agents to belong to an approved redress scheme. We would be grateful if draft copies could be provided to us as soon as they are available.

(2) Grounds for Prohibiting an Estate Agent from Practising

4.15 Clause 54 extends the circumstances in which the OFT may consider the fitness of an estate agent. The Bill proposes to amend the Estate Agents Act to permit the OFT to consider the fitness of an estate agent who has “committed an offence”. The Explanatory Notes explain that this amendment would allow the OFT to consider the fitness of an individual who is considered to have “committed” an offence, but has not been convicted:

For example, the individual may have accepted a police caution, or the OFT may have evidence from Trading Standards Officers or the Financial Services Authority of an offence having been committed where those authorities do not wish to prosecute for some reason.

4.16 Statements on an individual’s guilt of an offence without due process of law (i.e. a conviction by a criminal court);⁶² voicing belief in an individual’s guilt before conviction;⁶³

⁶¹ *Bryan v United Kingdom* (1995) 21 EHRR 342, at para 37

⁶² *Minelli v Switzerland* (1983) 5 EHRR 554, at para 37

or throwing doubt on an acquittal through adverse statements on an individual's guilt⁶⁴ are all likely to breach the presumption of innocence guaranteed by Article 6(2) ECHR. Similarly, findings or judicial declarations in parallel or subsequent proceedings based on assumptions of guilt after acquittal by a criminal court will breach Article 6(2) ECHR.⁶⁵

4.17 The Explanatory Notes rely on the duty of the OFT, in taking a decision on fitness to practice, to act in compliance with Convention rights (Section 6, HRA 1999). In response to the Chairman's letter, the Minister relies on Section 6; on similar precedents in Consumer Credit licensing; the "robust procedures" adopted by the OFT in determining whether the evidence in the possession of the OFT is sufficient to establish the "required evidential threshold".⁶⁶

4.18 We are concerned that the Secretary of State chooses to rely on existing domestic legislative precedents in this context. The Minister notes that:

The OFT will exercise its powers in deciding whether an individual has committed an offence in a similar way that it currently does and has done for many years in relation to the Consumer Credit Act 1974. Section 25(2) of that Act allows that in determining whether an applicant for a standard license is a fit person to engage in credit related activities or hold a license, the OFT may have regard to a number of relevant factors including whether the applicant has committed any offence involving fraud or dishonesty or violence.

4.19 The Minister does not however explain why, in his view, this precedent is compatible with the Convention.⁶⁷ **Where the Government seeks to rely on legislative precedents to support their conclusion that a Bill is compatible with Convention rights, we ask that the Minister explain the underlying reason the Government believes that the precedent is itself compatible with the United Kingdom's human rights obligations. We draw this to the attention of both Houses.**

4.20 It is clear from the Explanatory Notes, the Minister's response to the Chairman's letter and the precedent set by the Consumer Credit Act, the OFT will engage in the consideration of an individual's guilt independent of any criminal conviction. **In so far as the decision of the OFT adjudicator is expressly based upon the guilt of a defendant or an accused of an offence where they have not been convicted by a criminal court or voluntarily accepted a police caution, it is our view that there is a significant risk that actions and statements of the OFT, acting on its powers both this Bill and Section 25 of the Consumer Credit Act 1974, will breach Article 6(2) ECHR. We draw this to the attention of both Houses.**

4.21 The European Court of Human Rights has drawn a clear distinction between statements and consequent actions based upon "strong suspicions" of guilt as opposed to conclusions that an individual has "committed" an offence. For example, in *Del Latte v Netherlands*, the Court noted that in cases involving claims for compensation for pre-trial

⁶³ *Alленet de Ribemont v France* (1995) 20 EHRR 557 at para 41; *Daktaras v Lithuania*, App No 42095/98, Judgment, 10 October 2000

⁶⁴ *O v Norway*, App No 29327/95, Judgment, 11 February 2003, at para 38

⁶⁵ *Y v Norway*, App No 56568/00, Judgment 11 February 2003

⁶⁶ Appendix 2b, Page 6.

⁶⁷ Appendix 2b.

detention by defendants who had been acquitted, the Court had “distinguished between decisions which describe a “state of suspicion” and decisions which contain a “finding of guilt”.⁶⁸ Given the clear reference to an individual having “committed an offence” in the text of the Bill, and the policy intention behind the proposed change, it is unlikely in our view that the risk of incompatibility can be effectively avoided by the promulgation of guidance on the interpretation and application of the powers of the OFT. **We consider that, in order to remove the risk of incompatibility with Article 6(2) ECHR, Clause 54(2) should be amended to remove any reference to an individual having “committed” an offence. We consider that the policy objectives behind the proposed change could be achieved without risk of incompatibility if the powers of the OFT were extended to include a power to consider fitness to practice with reference to improper conduct (which might incorporate evidence gathered in the course of an investigation by trading standards officers, or by the Financial Services Authority). We draw this to the attention of both Houses.**⁶⁹

(3) Modification of Licence Conditions: Access to Court

4.22 The Bill gives the relevant regulatory authorities the power to amend licence conditions to require the licence holder to pay certain sums, including “the appropriate proportion” of certain expenses, which is defined to mean “such proportion of the expenses as the Secretary of State considers is reasonable having regard to” certain matters.⁷⁰ The Explanatory Notes acknowledge that these provisions engage Article 6(1) but that the decision-making process is compliant with Article 6(1) ECHR because any determination of a civil right by the modification of a licence condition “will be subject to judicial review”.

4.23 These provisions raise the question of whether on judicial review of a modification of a licence condition, the court would be able to decide for itself whether the proportion of expenses which the licence holder is being required to pay is reasonable, or would be confined to reviewing, on judicial review principles, the reasonableness of the Secretary of State’s view that the amount is reasonable. This is an issue which we have frequently had cause to raise with the Government.⁷¹ It is also an issue on which there continues to be considerable lack of certainty in the Human Rights Act case-law.

4.24 The Government consider that the fact that the Secretary of State’s decision of what is a reasonable proportion of the relevant expenses can be reviewed on judicial review; that the payment conditions in licences will be set or modified by regulators according to “a continuation of an existing well established system of attributing sums to each licence holder”; that there will be a duty to consult on new conditions and that any unreasoned departure from the existing system would be subject to judicial review would be adequate to “provide sufficient safeguards to licensees and opportunities for them to challenge the basis for calculating the quantum of payments”.

⁶⁸ *Del Latte v Netherlands* App No 44760/98, Judgment 9 November 2004, para 31

⁶⁹ Appendix 2b.

⁷⁰ Clause 32, Schedule 1, Part 5

⁷¹ See for example; Fourteenth Report of Session 2005-06, *Legislative Scrutiny: Sixth Progress Report (Civil Aviation Bill)*, HL 134/HC 955, at para 11.

4.25 There are two relevant decisions to be considered for the purpose of Article 6(1) ECHR (a) the decision of the Secretary of State as to the reasonable proportion of expenses; and (b) the decision of the relevant Authority to modify any payment conditions. It appears that the only way a licence holder may challenge either of these decisions is by judicial review.

4.26 In the recent case of *Tsfayo v United Kingdom*, the European Court of Human Rights indicated that judicial review of administrative decisions will only be able to satisfy the requirements of Article 6(1) ECHR in circumstances where the issues to be determined in the decision making process require a “measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims”, or where the assessment of the facts in a particular case are “merely incidental” to a broader judgment on policy which it would be appropriate for a democratically accountable authority to take. The Court decided that the issue to be determined by the decision maker in that case, namely whether there was a “good cause” for the applicant’s delay in making a claim for housing benefit, was a simple question of fact and therefore required determination by an independent and impartial tribunal with full jurisdiction to rehear the evidence and to substitute its own views.⁷²

4.27 The Minister explains that in deciding “a reasonable proportion” of expenses, the Secretary of State will consider material provided by the new National Consumer Council in order to make a proper determination of what is reasonable in relation to its functions and the associated estimated costs. The Secretary of State will “closely involve” the representatives from the relevant industries and sectors in order to “ensure that each industry sector is satisfied that the method of allocating costs is fair and transparent”.

4.28 It appears to us that this is the type of decision which, according to the analysis of the Court in *Tsfayo*, would satisfy the requirements of Article 6(1) ECHR if subject to judicial review. However, in *Tsfayo* the Court was considering the position where there was judicial review of a first instance appeal body. Both of the decisions in this case concern first instance administrative decisions, which are then subject to judicial review. This is an area where there is some considerable uncertainty as to the requirements of Article 6(1) ECHR. **On balance, we consider that there remains a risk that, without a right of appeal, decisions on the modification of payment conditions may give rise to a risk of incompatibility with Article 6(1) ECHR. This risk of incompatibility would be dispelled if either an independent appeal tribunal were established to hear appeals against decisions on payment conditions or a right of appeal to an existing court or tribunal were provided. We draw this matter to the attention of both Houses.**

⁷² *Tsfayo v UK*, App No 60860/00, Judgment 14 November 2006, at paras 39-47.

5 Fraud (Trials without a Jury) Bill

Date introduced to first House	16 November 2006
Date introduced to second House	
Current Bill Number	HC 6
Previous Reports	None

Background

5.1 This is a Government Bill introduced in the Commons on 16 November 2006. The Home Secretary, the Rt Hon John Reid MP, has made a statement of compatibility with Convention rights under s. 19(1)(a) of the Human Rights Act 1998. The Bill is due to complete its passage through the Commons on 25 January 2007.

5.2 We wrote to the Minister on 6 December 2006 asking for answers to two questions to assist us in our scrutiny of the Bill.⁷³ We received a response dated 17 January 2007 from Joan Ryan MP, Parliamentary Under Secretary of State at the Home Office.⁷⁴

The effect of the Bill

5.3 The purpose of the Bill is to make provision for trials without a jury in serious and complex fraud cases.

5.4 Section 43 of the Criminal Justice Act 2003 provides for the prosecution to apply for a trial of such a case to proceed in the absence of a jury, and the judge may so order if he is satisfied that the length or complexity of the case (or both) is likely to make the trial so burdensome upon the jury that the interests of justice require serious consideration to be given to conducting the trial without a jury. The 2003 Act also provides that the commencement of this provision is to be subject to an affirmative resolution of both Houses of Parliament.

5.5 This Bill would repeal the requirement for an affirmative resolution, so that s. 43 of the 2003 Act could be implemented by a commencement order made by the Secretary of State without further parliamentary procedure. The Bill would also add a requirement that applications for non-jury trial, and any non-jury trials resulting from such applications, should be heard by a High Court judge.

Status of the “right” to jury trial

5.6 The Explanatory Notes to the Bill correctly state that the Bill does not itself give rise to any ECHR compatibility issues.⁷⁵ **The right to a fair trial in Article 6(1) ECHR does not include a right to jury trial. A criminal trial by judge alone is not inherently incompatible with Article 6.**

⁷³ Appendix 3a.

⁷⁴ Appendix 3b.

⁷⁵ EN para. 13.

5.7 For this reason our predecessor Committee did not consider that the proposed limitations on jury trial in the Criminal Justice Bill, which became the Criminal Justice Act 2003, raised any human rights issue.⁷⁶

5.8 We recognise, however, that there is a considerable range of views about the precise status of jury trial. The question is one which divides parliamentarians, practitioners and commentators and not necessarily on party lines. At one extreme, some would consider there to be a constitutional right to jury trial in all but minor criminal cases which it is never justifiable to restrict. At the other extreme, some would regard it as a mere modality of trial, enjoying no fundamental status and always capable of restriction, modification or replacement by law. In between these two extremes others may regard jury trial as having attained a degree of special status at common law, requiring any interference with it to be by explicitly authorised by primary legislation and properly justified by reference to publicly articulated reasons.

5.9 The Government in its response takes the view that restrictions on trial by jury need to be justified as a matter of political reality, but “not because trial by jury is protected as a human right in relation to those offences, and in those circumstances, where it is currently available.” It points out that there is a large number of offences for which the defendant has no right to trial by jury, and that there are also indictable only offences where the defendant has no choice in the matter. The circumstances in which jury trial is available is subject to statutory provisions that encroach upon it: for example offences triable either way may be reclassified as summary offences. The law also makes provision for trials even of serious cases without a jury in circumstances where there is a risk of juror intimidation. This is not only in the famous Diplock Courts in Northern Ireland but also more generally.⁷⁷

5.10 We do not take the view that jury trial in England and Wales enjoys the status of a constitutional right which is not capable of restriction or limitation even by legislation. Bearing in mind the many restrictions on jury trial which already exist, not least the fact that the vast majority of criminal cases in this country are disposed of in judge alone courts, we consider this claim to be exaggerated. We do think, however, that jury trial has a sufficiently distinctive place in the legal heritage of England and Wales to have attained the status of a right recognised at common law, which therefore requires express authorisation in primary legislation to be limited or restricted, and careful justification. We have approached the present Bill on this basis.

Justification for limiting jury trial in serious and complex fraud cases

5.11 Parliament is already very familiar with the arguments for and against the restriction of jury trial in serious and complex fraud trials, having debated the issue at length on a number of occasions over the last few years, including when the previous legislation was passed in 2003.

5.12 The Government’s justification, in short, is that a very small number of serious and complex fraud trials result in exceptionally long trials, imposing an intolerable burden on the jury, and nevertheless fail to achieve justice.

⁷⁶ Second Report of Session 2002-03, *Criminal Justice Bill*, HL Paper 40/HC 374, at para. 5.

⁷⁷ Criminal Justice Act 2003 s. 44.

5.13 Opponents of the change argue that the justification has not been made out by the Government, and that other recent attempts to tackle the problems of serious and complex fraud cases, such as the recent protocol to improve the management of large criminal fraud cases, should be given a chance to work before such a drastic step is taken.

5.14 We are satisfied that the proposed limitation on jury trial in this particular category of case is a proportionate interference with what we regard as a common law right to jury trial. The Bill will affect a very small number of cases every year and there are sufficient judicial safeguards on the face of the Bill. We also welcome the Government's unequivocal assurance that the justifications relied on in relation to serious and complex fraud cases do not apply equally to trials for other offences such as terrorism, murder and drugs.

6 Tribunals, Courts and Enforcement Bill

Date introduced to first House	16 November 2006
Date introduced to second House	
Current Bill Number	HL Bill 22
Previous reports	None

Background

6.1 This is a Government Bill introduced in the House of Lords on 16 November 2006. Baroness Ashton of Upholland has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998. The Explanatory Notes accompanying this Bill explain that the Government considers that the Bill engages a number of Convention Rights, but that all of the Bill's provisions are compatible with the ECHR.⁷⁸ The Bill was considered in Grand Committee on 14 December 2006 and will reach Report stage in the Lords on 23 January 2007.

6.2 We wrote to the Minister on 6 and 19 December 2006 asking a number of questions concerning what we consider to be the most significant human rights issues raised by the Bill.⁷⁹ The Minister responded to our first letter in a letter dated 19 December 2006.⁸⁰ In this Report we publish the Minister's response and report on some issues which we consider to be significant in light of the Minister's response. We intend to consider this Bill in a further report in light of the Minister's response to our second letter.

The effect of the Bill

6.3 Part 1 of the Bill creates a new statutory framework for tribunals. It provides for the replacement of the Council on Tribunals with a new supervisory body, the Administrative Justice and Tribunals Council, which will have a broader remit. The Bill proposes that there will be a First-tier and Upper Tribunal. The functions of most tribunals administered centrally will transfer to the new Tribunals. The Asylum and Immigration Tribunal ("the AIT") and the Employment Tribunals will remain separate, but will share a common administration under the Senior President of the Tribunals. Judicial Review functions in respect of some specified cases will transfer from the High Court to the Upper Tribunal.

6.4 Part 2 provides for minimum eligibility requirements for appointment to judicial office, including provision to enable eligibility to be extended beyond barristers and solicitors to the holders of other relevant qualifications such as legal executives.

6.5 Part 3 replaces the current law of rent distress with a modified regime for recovering rent arrears in the commercial property sector. The Bill also provides for new mechanisms and procedures for the enforcement of judgments and orders, and for debt management and relief.

⁷⁸ EN paras 601-613.

⁷⁹ Appendix 4a and 4b.

⁸⁰ Appendix 4c.

6.6 Part 6 of the Bill provides immunity from seizure to objects which have been lent to this country from overseas to be included in a temporary exhibition at a museum or gallery.

(1) Independence of tribunals

6.7 The first issue we have considered is whether the new statutory framework for tribunals and the system of appeals envisaged by the Bill adequately protects the rights of access to court and to a fair hearing by an independent and impartial tribunal guaranteed by both Article 6(1) ECHR and by the common law.

6.8 The Explanatory Notes explain that the Government accepts that Part 1 engages Article 6 (1) ECHR as most matters coming before the new Tribunals will determine civil rights and obligations. The common law rights of access to court and to a fair hearing are of wider application, since they apply in relation to administrative law disputes to which Article 6(1) does not apply (because they do not determine “civil rights” as that phrase has been interpreted by the European Court of Human Rights in the Article 6 case law).

6.9 The Government considers that the Bill secures the requisite independence and impartiality for the new tribunals through “a) the procedure for appointing and selecting judges and other members of the First-tier Tribunal and Upper Tribunal...b) the security of tenure enjoyed by judges and other members of the First-tier Tribunal and Upper Tribunal; and c) the extension of the obligation in section 3 of the Constitutional Reform Act 2005 to uphold the independence of the judiciary to include judges and other members of the First-tier Tribunal and Upper Tribunal”.

6.10 One of the most important objectives of the Bill is to strengthen the independence of tribunals from the Government. Part 1 of the Bill puts it beyond doubt that the tribunal judiciary are independent from the Executive and that the tribunals themselves are independent of the Government departments which make the decisions under review. Clause 1 ensures that the duty to uphold the continued independence of the judiciary, imposed by the Constitutional Reform Act 2005 on the Lord Chancellor and other Ministers of the Crown, extends to the tribunal judiciary.

6.11 **We welcome the Bill’s increased protection for the independence of tribunals as a positive, human rights enhancing measure.** As the Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer, pointed out on Second Reading, tribunals form a large part of and make a significant contribution to the justice system, dealing with over 500,000 disputes a year, often involving the most vulnerable in society – those who have been the victims of crime, persecution, discrimination or unfair treatment or who are involved in disputes over benefit entitlement, tax, asylum or employment.⁸¹ **We agree with the view expressed judicially by Lady Justice Hale (as she then was) that today a right of access to a tribunal is just as important and fundamental as the common law right of access to the ordinary courts:**⁸²

— “There are now a large number of tribunals operating in a large number of specialist fields. Their subject matter is often just as important to the citizen as that determined in

⁸¹ HL Deb 29 November 2006, col. 760.

⁸² *R v Secretary of State for the Home Department, ex p. Saleem* [2001] 1 WLR 443 at 457-8.

the ordinary courts. Their determinations are no less binding than those of the ordinary courts: the only difference is that tribunals have no direct powers of enforcement and, in the rare cases where this is needed, their decisions are enforced in the ordinary courts. In certain types of dispute between private persons, tribunals are established because of their perceived advantages in procedure and personnel. In disputes between citizen and state they are established because of the perceived need for independent adjudication of the merits and to reduce resort to judicial review. This was undoubtedly the motivation for grafting asylum cases onto the immigration appeals system in 1993. In this day and age a right of access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts.”

6.12 The lack of independence of tribunals from the Government departments that sponsor them was one of the most significant findings of the Leggatt Review of Tribunals in 2001.⁸³ Many tribunals have been administered by the Government department responsible for the policy area in which that tribunal has jurisdiction, and those departments are sometimes responsible for the decisions which are appealable to the tribunal. The Bill gives effect to the recommendation of the Leggatt Review that tribunals should become separate from their current sponsoring departments. **We welcome this as a step which marks an important evolution of the status of tribunals as bodies enjoying a constitutional independence equivalent to that of courts.**

6.13 The Government has reassured us that it has conducted a thorough audit of the legislation establishing the tribunals affected by the Bill and have not identified any provisions which are incompatible with the independence of those tribunals, nor is it aware of any provisions which enable Ministers to issue guidance to tribunals as to how they should decide cases.⁸⁴ **We agree that provisions which require tribunals to have regard to guidance which a Minister may have issued to decision-makers as to how they should exercise their powers are not incompatible with the independence of the tribunal judiciary, provided they do not purport to define the issues for determination by tribunals or otherwise attempt to influence the way in which tribunals should determine disputes before them.**

(2) Availability of legal aid for tribunals

6.14 Given the importance of the subject matter dealt with by tribunals, and the possibility of cases before them raising legally complex issues, we asked the Government why the Bill did not provide for legal aid to be available for all tribunals in appropriate cases, and whether it had any plans to extend the availability of legal aid to assist with representation for tribunals (in the language of legal aid, to bring tribunals “within scope”).

6.15 The Government replied that full representation may be available for matters before the courts of England and Wales, but is not generally available for tribunal proceedings, and that it has no plans to extend the availability of legal aid to assist with tribunals. The reason given by the Government is that

⁸³ *Tribunals for Users – One System, One Service*

⁸⁴ Appendix 4c.

— “Tribunals are not courts. Unlike courts, tribunals are inquisitorial, rather than adversarial, in nature. Participants are questioned in order that the relevant information can be elicited, rather than being asked to present an argument. This means that participants should be able to present evidence by themselves.”

6.16 The Government recognises that in some circumstances participants do need representation: the tribunal may be considering matters that affect the appellant’s life or liberty, or physical safety, or the participant may be suffering from a mental illness, and for this reason legal aid for advocacy is available for some tribunals, principally Mental Health Review Tribunals, the Asylum and Immigration Appeal Tribunal and the Employment Appeal Tribunal. The Government also points out that the Lord Chancellor has the power, in exceptional circumstances, to grant legal aid for representation at an individual tribunal, but this is subject to strict criteria.

6.17 We are not persuaded that the Government’s different approach to the availability of legal aid in courts as opposed to tribunals can be justified on the basis that “tribunals are not courts”. Once the Government has accepted that tribunals are as important as courts to people’s everyday lives, as it has in this Bill, in our view it follows that it is necessary to consider whether legal aid should be more widely available in order to make the right of access to such tribunals practical and effective.

6.18 We accept that often the procedure in tribunals is designed to be more informal and less legalistic than in courts, and that there are very strong reasons for avoiding the over-judicialisation of tribunal proceedings. However, the extent to which the procedure in tribunals is inquisitorial rather than adversarial varies enormously across the wide range of tribunals. While the procedure in the Special Educational Needs and Disability Tribunal may be relatively inquisitorial, for example, the procedure in Employment Tribunals is very court-like in nature.

6.19 In any event, in our view, the distinction between inquisitorial and adversarial proceedings is not on its own sufficient to justify the Government’s difference of approach to tribunals and courts. The nature of the procedure does not exhaust the range of factors which should be relevant to any determination of whether legal aid should be available to those who cannot otherwise afford representation: the complexity of the issues in the case, whether factual or legal, and the importance of what is at stake for the individual are clearly important considerations. In many areas dealt with by tribunals the statutory framework is complex and requires legal assistance to understand, and the presentation of a case within such a framework, even in the less formal forum of a tribunal, often requires legal expertise. **We therefore hope that the Government will reconsider its current restrictive approach to the availability of legal aid for representation before tribunals. Even assuming that the legal aid budget is finite, in our view there should be a less rigid approach to the matters which are “within scope”, and greater sensitivity to the complexity and importance of the issues at stake in a case, which in our view would lead to legal aid more frequently being available in tribunals.**

(3) Justification for differential access to legal remedies

6.20 The Asylum and Immigration Tribunal (“AIT”) is excluded from the scope of the new arrangements, and the Upper Tribunal is precluded from exercising any powers of judicial review in matters concerning immigration and nationality.

6.21 The Explanatory Notes refer briefly to the need to prevent abuse of the system, which is said to justify, uniquely, a single-tier structure in the context of immigration and nationality.⁸⁵

6.22 In our view this feature of the Bill raises the question whether there is an objective and reasonable justification which justifies the differential treatment of non-nationals in relation to their access to legal remedies. We therefore wrote to the Minister asking for a more detailed explanation of the justification for treating immigration and nationality differently by keeping it outside of the new unified system of administrative justice, and for the evidence relied on by the Government in support of its assertion in the Explanatory Notes that there was abuse of the previous two-tier system of asylum and immigration appeals.

6.23 The Minister responded that the AIT was established in response to there being significant delays in the determination of asylum and immigration claims because of the existence of multiple layers of appeal. The AIT is described as “a unique jurisdiction being one of the only areas of law where there is an incentive for those appealing to play the system and seek to cause delay where possible.” The Government relies on the fact that whereas under the previous system appeals were taking 52 weeks to reach a conclusion, with the move to a new single-tier of appeal over 50% of new asylum appeals are being decided within 6 weeks of being received by the AIT and the vast majority within 14 weeks. The Government says that it “does not want to place these improvements in jeopardy by placing the AIT into a two tier structure which may reintroduce delays into the system.”

6.24 As the Government in its response observes, these issues were debated fully during the passage of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Our predecessor Committee, in its report on that Bill, gave careful consideration to this question.⁸⁶ It noted that the Leggatt Report, which recommended a second-tier appeal from all tribunals,

— “specifically considered the immigration appellate authorities (adjudicators and the IAT). It noted that there was a culture of pervasive challenge of decisions of those appellate authorities, but did not conclude from this that there was a need to reduce the levels of appeal to a single tier. On the contrary, the Report recommended that the general model be applied to immigration and asylum: there should be a first-tier immigration and asylum tribunal, which should be the sole judge of issues of fact, and a second-tier tribunal to hear appeals on a point of law only.”

6.25 Our predecessor Committee concluded that “the UK is under a Convention obligation to secure to everyone within its jurisdiction judicial protection for Convention rights which is not less favourable than the protection afforded to UK nationals who wish

⁸⁵ EN para. 23.

⁸⁶ Thirteenth Report of Session 2003-04, *Scrutiny of Bills: Sixth Progress Report*, HL Paper 102/HC 640, paras 1.111-1.118.

to challenge acts or decisions of the administration, unless there is an objective and justifiable reason for such less favourable treatment.”⁸⁷ It considered that the clause in the Bill creating a single tier system of immigration and asylum appeals and restricting access to the higher courts from the single tier tribunal to a narrowly defined form of statutory review gave rise to a very significant risk of a breach of that obligation, and indicated that it would welcome further information from the Government demonstrating the evidential basis for excepting immigration and asylum from the approach which applies in relation to all other parts of the administration.

6.26 Since the passage of the 2004 Act the courts have considered a similar question in a case concerning a challenge to the statutory review provisions contained in the Nationality Immigration and Asylum Act 2002.⁸⁸ The argument was that the provisions of the 2002 Act requiring claimants in the asylum and immigration context to challenge adverse decisions by way of statutory review, inferior in certain respects to judicial review, was unjustified discrimination contrary to Article 14 ECHR in conjunction with Articles 2, 3, 5 and 8 ECHR.

6.27 The Court of Appeal rejected the discrimination argument.⁸⁹ It held that it was wrong to treat as axiomatic that all seeking to appeal from decisions of tribunals are in the same position: those seeking asylum were in a unique position because they had no vested right to enter the United Kingdom: Article 5(1)(f) recognised that special treatment may be appropriate in the interests of immigration control. Alternatively it held that any difference in treatment was objectively justified because immigrants stand in a fundamentally different position to those who may enter or remain by right, and due process did not necessarily mean the same process for all.

6.28 The House of Lords was petitioned for leave to appeal but leave was refused. As is their practice, the House of Lords gave no reasons for its dismissal of the petition.

6.29 In our current inquiry into the Treatment of Asylum Seekers we are frequently encountering examples of asylum seekers being treated differently from UK nationals in a variety of contexts, including access to health services, housing, and benefits. Under the ECHR, discrimination in the enjoyment of Convention rights on grounds of nationality requires particularly weighty justification.⁹⁰ It is true that Article 5(1)(f) shows that the Convention contemplates different treatment for asylum seekers in the context of detention for the purposes of removal, but for all other purposes differences of treatment, compared to UK nationals, within the ambit of Convention rights amounts to nationality discrimination requiring cogent justification. The different treatment of immigrants and asylum seekers in this Bill, in relation to their access to legal remedies, is another example of such nationality discrimination requiring justification.

6.30 We acknowledge that the courts have not upheld a discrimination challenge to limitations placed on the availability of judicial review in the immigration and asylum context. However we find it difficult to see how the decision of the Court of Appeal is

⁸⁷ Ibid, at para. 1.119.

⁸⁸ *R (on the application of G and M) v Immigration Appeal Tribunal and Secretary of State for the Home Department* [2004] EWCA Civ. 1731.

⁸⁹ Op. cit. at paras 30-35.

⁹⁰ *Gaygusuz v Austria* (1997) 23 EHRR 394 at para. 42.

consistent with the decision of the House of Lords in the *Belmarsh* case, that it is wrong to discriminate on grounds of nationality when detaining for purposes outside the contemplation of Article 5(1)(f),⁹¹ and with the dictum of Lord Scarman in an earlier House of Lords case, that “Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection”.⁹²

6.31 We therefore share the concern of our predecessor committee in its report on what is now the 2004 Act that the differential access to legal remedies in creating a unique single-tier tribunal for immigrants and asylum seekers lacks objective justification in Convention terms. We do not consider that the figures provided by the Government concerning the average length of time cases are now taking compared to before the 2004 reforms amount to a justification for the differential treatment. We may return to the general issue of nationality-based discrimination against asylum-seekers in our forthcoming report on the Treatment of Asylum Seekers.

(4) Distress for Rent and Commercial Rent Arrears Recovery

6.32 The Bill abolishes the right of distress for unpaid rent and introduces a new, more limited, regime for self-help in the recovery of commercial rent (Commercial Rent Arrears Recovery, “CRAR”). These proposals follow a long standing consultation on the abolition of the right to distress for unpaid rent. In 1991, the Law Commission recommended that all forms of distress should be abolished, citing the risk of incompatibility with Article 6(1), Article 8 and Article 1, Protocol 1 and Article 14 ECHR.⁹³ In 2000, the Independent Review of Bailiff Law concluded the existing law and practice on distress for rent, particularly as applied to residential properties, gave rise to a real risk of incompatibility with Convention rights.⁹⁴ **We welcome the Government’s decision to abolish the common law remedy for distress for unpaid rent against residential properties as a positive, human rights enhancing measure.**

6.33 Convention rights extend to commercial premises, and the right to respect for private life guaranteed by Article 8 ECHR and the right to respect for the quiet enjoyment of property is not restricted to residential premises. The Explanatory Notes accept that these provisions will engage Articles 6 and 8 ECHR and Article 1, Protocol 1 ECHR.

6.34 The Explanatory Notes explain that it is the Government’s view that “Landlords and tenants of commercial premises deal with each other on commercial terms. It is right that each should discharge his or her obligations to the other promptly, including the tenants obligation to pay the rent”.⁹⁵

6.35 The Bill proposes that subject to notice, and the right of an individual to apply to the court to restrain the exercise of CRAR, an individual landlord will be able to seize goods for the purposes of recovering rent overdue, “without first going to court”. An important safeguard in the Bill is the power of the tenant to ask the Court to intervene to prevent the

⁹¹ *A v Secretary of State for the Home Department* [2004] 2AC 68.

⁹² *R v Khawaja* [1984] AC 74 at 111H.

⁹³ Law Commission Report No 194, *Distress for Rent*, HC 138.

⁹⁴ *Independent Review of Bailiff Law*, Professor J. Beatson QC, June 2000, para 2.26

⁹⁵ HL 2 – EN, para 609

landlord from seizing goods. The Explanatory Notes explain that an order might be made “for example, if there is a genuine dispute about the amount of rent in arrears or the calculation of the net unpaid rent . In those circumstances, the court may suspend the use of CRAR until that dispute is resolved”.

6.36 Other important safeguards, relevant to the proportionality of these provisions – such as the requirement to serve notice of CRAR on a tenant and the minimum sum of rent due before CRAR is available are left to the discretion of the Secretary of State.

6.37 The Independent Review of Bailiff law made a number of recommendations which it considered would reduce the risk of a successful challenge to the regime of distress by bailiffs as incompatible with Convention rights. The regime governing any system of distress should set out (preferably in statute) a) the rights of the creditor, and the debtor to challenge the distress; b) that there should be sufficient time for the debtor or a third party who claims an interest in the goods to apply to court to prevent the sale of the goods at an appropriate stage in the distress proceedings; c) the types of goods against which distress can be levied and those which are exempt should be clearly identified and d) the circumstances in which the debtor, or a third party, can prevent sale of his goods should include rules which ensure that the sanction is not disproportionate to the debtor’s failure to meet his obligations.⁹⁶

6.38 We consider that there is no human rights objection, in principle, to the provision of a remedy for the recovery of unpaid commercial rent without prior judicial oversight. However, adequate safeguards must be in place to:

- a) protect a debtors right under Article 6(1) to challenge the existence of the debt and the appropriateness of the remedy before CRAR is executed;
- b) protect the rights of the debtor to respect for his private life (including the integrity of his business premises) as guaranteed by Article 8 ECHR and to his right to respect for his peaceful enjoyment of his possessions Article 1, Protocol 1 ECHR; and
- c) protect the rights of third parties who may be affected by the exercise of the remedy (for example, to allow third parties to challenge the improper seizure of their property or third party creditors to challenge the recovery of the debt) (Articles 6(1), 8, Article 1, Protocol 1 and Article 14 ECHR).

Minimum Rent

6.39 The Bill provides that the right of CRAR will only arise if a minimum sum of rent is owed when notice is served, and still owed directly prior to the execution of CRAR.⁹⁷ Clearly, the minimum sum of rent owed will be relevant to the question of whether this remedy poses a disproportionate interference with an individual’s rights to privacy and the peaceful enjoyment of his property. In their original consultation document on distress for rent, the Government accepted that

⁹⁶ Recommendation 2

⁹⁷ Clause 69 (3)

- For tenants paying low rents and with small businesses even a fairly low minimum could represent a high proportion of tenants' stock if goods were seized. The problems of setting a specific figure is that rent varies widely and this would prove almost impossible to set fairly.

6.40 It was proposed that CRAR should only be levied when there was a quarter of the annual rent outstanding. The Government explained that this would take into account that most commercial rents are paid quarterly in advance. In the detailed statement on the delegated powers in the Bill, the Government indicate that no decision has yet been taken on the minimum sum, but that the matter will be subject to further consideration:

- We will carry out research to judge where best to set this limit and how it should be calculated. Once initially set ongoing evaluation and research would need to continue to enable periodic update of this limit.⁹⁸

6.41 We are concerned that the Government have indicated that the minimum sums that they propose for consultation are very low and generally set at £200. The Minister has confirmed that these are the figures that will be set. For many commercial premises (including those occupied by small and medium sized businesses), particularly in the capital, this may represent significantly less than one month's rent. We agree with the Government's prior assessment that setting the trigger for CRAR by reference to a specific amount may lead to difficulties owing to changes and fluctuations in the rental market. **We are concerned that if the sum of minimum rent for CRAR is set too low, this may lead to a risk of incompatibility with Article 1, Protocol 1 ECHR and Article 8 ECHR.**

Access to Court

6.42 There is no specific provision for notice in relation to CRAR in the Bill. The notice period for CRAR will, like any other form of enforcement by the taking of goods, be subject to the restrictions in Schedule 12 that an enforcement agent must not take control of goods until a debtor is given adequate notice. The Bill requires that the form and minimum period of notice will be provided by Regulations. We consider that the form and period of notice given in the exercise of CRAR will be particularly important as it will involve the exercise of a self-help remedy without any pre-existing judgment in the creditors' favour. The provision of notice may be the tenant's first notice that his landlord considers that rent is owed and intends to take action for its recovery. In order to safeguard the effectiveness of the right of the tenant to challenge the alleged debt and the appropriateness of the remedy, it is important that the notice provided clearly identifies that the landlord intends to take action; advises the tenant of his right to ask the Court to prevent the exercise of CRAR; and is provided in adequate time to allow the tenant to take legal advice and prepare an application. The Minister has told the Committee that the minimum notice period for CRAR will be longer than in relation to other enforcement actions (14 days, as opposed to seven days).⁹⁹ Regulations will provide that a notice served in order to exercise CRAR must state, on its face, that the tenant has a right apply to the Court to set aside, or suspend the notice and will explain that the tenant may wish to take advice. We welcome these reassurances.

⁹⁸ DCA, Tribunals,, Courts and Enforcement Bill, Detailed Policy Statement on Delegated Powers, 22 December 2006, page 31-32

⁹⁹ Appendix 4c.

6.43 The Bill provides that on application a court may set aside notice for CRAR or may make any order that no further steps may be taken in relation to CRAR without order of the Court. The Bill provides that regulations may make provision for the grounds which the Court must be satisfied before making any such order. The Minister has assured us that it is “anticipated” that any Order will be “largely” left to judicial discretion. An application could be made on any grounds. The Minister gives an example of a judge being able to set aside or suspend a notice where a tenant is deliberately withholding rent owing to an alleged breach of repair obligations. We welcome these reassurances.

6.44 We consider that provided notice of CRAR is adequate to allow the tenant to take effective action to resist its use and that the discretion as to whether to set aside or suspend an order for CRAR remains entirely with the judiciary that it is unlikely that these provisions will give rise to a significant risk of incompatibility with Article 6(1) ECHR.

Execution of CRAR

6.45 The Bill provides that CRAR may only be executed by an enforcement agent acting according to the procedure for enforcement of debts by taking control of goods proposed in Schedule 12. Schedule 12 also provides for the means by which debtors and third parties may challenge the seizure of goods, and their ultimate sale. We have written to the Minister for further information on the Government’s view of the compatibility of Schedule 12 with Convention rights. We may return to the issue of execution in light of the Minister’s response.

(5) Cultural Property: Immunity from Seizure

6.46 We have raised a number of matters with the Minister about the compatibility of the proposed immunity from seizure for cultural property with rights to peaceful enjoyment of his property and rights of access to court.¹⁰⁰ We are grateful to the Minister for her swift response to these questions, which we publish in the context of this report. On 17 January 2006, the Minister wrote to our Chairman highlighting proposed Government amendments to this section of the Bill.¹⁰¹

6.47 The Bill provides that an object usually kept outside the UK, and not owned by a UK resident, brought to the UK for the purposes of a temporary exhibition will be protected from seizure or forfeiture so long as it is within the United Kingdom. The Minister explains that the Government considers that any restriction on access to court or to the individual’s right to the peaceful enjoyment of property would be considered justified and proportionate as a) there will be limited circumstances when the Court will be able to exercise its jurisdiction (but would be unable to order seizure or forfeiture); b) if the Court were able to exercise jurisdiction, a claimant would face significant difficulties in pursuing a claim against property “founded on events which took place many years ago”; and c) there are alternative remedies available for those claimants.

6.48 We welcome the proposed Government amendments which seek to limit the use of the proposed immunity to those museums and galleries which are approved by the

¹⁰⁰ Appendix 4c.

¹⁰¹ Appendix 4d.

Department for Culture, Media and Sport. **However, having considered the Minister’s explanation of the Government’s views, it appears that the Government’s assessment of compatibility is largely based upon its view that it is highly unlikely that a case will arise which gives rise to a risk of Convention incompatibility.**

6.49 While it is clear that the Convention right of access to a court is not unbounded, access must be effective and cannot be restricted without justification.¹⁰² The Explanatory Notes explain that the impact of these provisions on the right of access to court will be “temporary limitation”.¹⁰³ However, as the Department of Media, Culture and Sport recognise, “in practice, the legislation is likely to prevent claims being made to works of art which are temporarily in the jurisdiction”.¹⁰⁴ Without a right to enforce a judgment, or to ensure an object remains traceable during proceedings, a right to take proceedings may lose its inherent value. The European Court of Human Rights has clearly stated that the guarantees of Article 6 include the implementation and enforcement of court decisions. The right would be “illusory” if a domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.¹⁰⁵

6.50 In light of this case-law, we consider that, should a case arise in which the domestic courts have jurisdiction, refusing an injunction to prevent the removal of the relevant protected object from the jurisdiction before the hearing of the claim, or barring the seizure of the property in enforcement of a judgment in the claimant’s favour, could lead to a risk of incompatibility with Article 6(1) ECHR.

6.51 The Bill provides that seizure or forfeiture will include “seizure, confiscation or forfeiture, or any other measure relating to the custody or control of the object, in the course of a criminal investigation”. The Minister has reassured us that “Though the police will not be able to seize a protected object, they will be able to examine it at the museum or gallery where it is held – the protection given by the Bill prevents any measure which might affect the custody or control of the object, but does not prevent examination of the object at the premises of the museum (as may be necessary where, for example, the protected object forms part of a crime scene)”. The Minister confirms that the object could be subject to examination and samples could be taken from the object as part of a criminal investigation. Any such evidence would be disclosed to the defence. **We welcome the Minister’s reassurances. Provided these safeguards are in place, we consider that it is unlikely that these provisions will give rise to a significant risk of incompatibility with Article 6 ECHR in a criminal case, not directly involving allegations about the object itself.**

6.52 **However, we remain concerned that the definition of seizure or forfeiture in Clause 127(3) – which refers to any “measure relating to the custody or control of an object, in the course of a criminal or criminal proceedings” –undermine the assurances given by the Minister.** We are assured that the object could be examined by criminal investigators, for the purposes of taking photographs, filming, modelling and taking samples (although the Minister refers to samples of blood, we assume that this would include fingerprints and other samples taken by the police in the course of an investigation). However, for the purposes of performing these activities, the object in

¹⁰² *Golder v United Kingdom* (1975) 1 EHRR 524 (para 35)

¹⁰³ EN, at para 611

¹⁰⁴ DCMS Consultation paper on Anti-Seizure Legislation, 8 March 2006.

¹⁰⁵ *Hornsby v Greece* (1997) 24 EHRR 250 (paras 40-41); *Satka v Greece* (2004) EHRR 26

question would form part of a “crime scene”, and would need to be for all intents and purposes under the custody or control of the police, not the museum or gallery in order to prevent any risk of contamination or loss of evidence. Thus, Section 19 of the Police and Criminal Evidence Act 1984 provides that a constable may “seize” any object which he reasonably believes to be evidence and seizure is necessary to prevent it being “concealed, stolen, lost, damaged, altered or destroyed”. **If access to the protected object were to be arbitrarily determined by the owner of the object, or the museum or gallery, this could lead to a risk that prosecutions might fail for lack of evidence (which may give rise to a risk of incompatibility with the obligation to conduct an effective investigation in Articles 2, 3 and 8) or to a risk that an individual would not receive a fair hearing, compatible with Article 6 ECHR.**

6.53 In relation to the positive obligation of the State to investigate, guaranteed by Articles 2, 3 and 8 ECHR, the Minister explained that the Government considers that it will be extremely rare that a work of art will be relevant to such an investigation. While it may be considered “extremely rare”, we can easily envisage a case where the positive obligation to investigate may be engaged. Consider for example, works of art incorporating (or alleged to incorporate) human tissue. Under the provisions of this Bill, the police would not be able to seize the object, without the permission of the owner, or the museum or gallery, in order to determine the source of the tissue and whether any crime had been committed in the course of a) sourcing that material or b) exhibiting it. **We consider that where work of art is itself central to a criminal investigation, particularly an investigation involving allegations of death or serious assault, placing a blanket immunity on seizure by the police could give rise to a risk of incompatibility with the State’s positive, investigative obligations (as guaranteed by Articles 2, 3 and 8 ECHR).¹⁰⁶ If the positive duty to investigate is engaged, we consider that it is unlikely that the protection of the general public interest in accessing foreign art is likely to provide adequate justification if an investigation is restricted by the immunity afforded to a protected object.**

6.54 **We recommend that the Bill is amended to make it clear that where an object of art which would otherwise attract protection forms part of the evidence in a criminal investigation, the protection offered to an object will not prevent the police taking control of the object for the purposes of gathering, preserving and recording evidence.**

¹⁰⁶ *Oneriyildiz v Turkey*, App No 48939/99, Judgment 30 November 2004 [GC]

Bills not requiring to be brought to the attention of either House on human rights grounds

Government Bills

7.1 We consider that the following Government bills do not raise human rights issues of sufficient significance to warrant us undertaking further scrutiny of them:

Consolidated Fund Bill

Crossrail Bill

Digital Switchover (Disclosure of Information) Bill

Further Education and Training Bill

Greater London Authority Bill

Income Tax Bill

Investment Exchanges and Clearing Houses Bill

Northern Ireland (St Andrews Agreement) Bill

Planning-Gain Supplement (Preparations) Bill

Pensions Bill

Statistics and Registration Service Bill.

7.2 In our Report on our future working practices we said that in considering whether a bill crossed the significance threshold for further scrutiny we would take into account the extent to which the bill furthers the promotion and protection of human rights.¹⁰⁷ Although we do not consider that the Pensions Bill requires us to undertake further more detailed scrutiny, we wish to make two observations about it. **First, in our view a number of the changes introduced by the Bill enhance the protection of human rights, in particular by improving the position of women and carers who have historically been disadvantaged by the pension system. Second, we are grateful to the Department for Work and Pensions for the human rights memorandum it provided to supplement the Explanatory Notes.¹⁰⁸ The memorandum contains a thorough clause by clause analysis of the human rights implications of the Bill, containing detailed reasons for the Government's conclusions about the Bill's compatibility. It refers in detail to possible arguments of incompatibility which have been considered, and contains detailed and up to date references to case-law in support of its conclusions. We were greatly assisted in our scrutiny task by being provided with such a memorandum shortly after the Bill's**

¹⁰⁷ Twenty-third Report of Session 2005-06, op. cit., para 29.

¹⁰⁸ Appendix 5.

introduction. We hope that other Departments will in future adopt the same practice of providing us with such a human rights memorandum when a Bill is introduced.

Private Bills

7.3 We consider that the following private bills do not raise human rights issues of sufficient significance to warrant us undertaking further scrutiny of them:

Bournemouth Borough Council Bill

London Local Authorities Bill

London Local Authorities and Transport for London Bill

Manchester City Council Bill

National Trust (Northern Ireland) Bill

Whitehaven Harbour Bill.

Formal Minutes

Monday 22 January 2007

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Fraser of Carmyllie
Lord Lester of Herne Hill
The Earl of Onslow
Lord Plant of Highfield
Baroness Stern

Mr Douglas Carswell MP
Nia Griffith MP
Dr Evan Harris MP

Draft Report [Legislative Scrutiny: First 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 7.3 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Second 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 Baroness Stern do make the Report to the House of Lords.

[Adjourned till Monday 29 January at 4pm.]

Appendices

Appendix 1a: Letter from the Chairman to The Rt Hon. John Hutton MP, Secretary of State for Work and Pensions re Welfare Reform Bill

The Joint Committee on Human Rights is considering the compatibility of the Welfare Reform Bill with the United Kingdom's human rights obligations. Having carried out an initial examination of the Bill, the Committee would be grateful if you could provide a fuller explanation of the Government's view that the proposals in the Bill are compatible with the Convention rights guaranteed by the Human Rights Act 1998.

a) Explanatory Notes

The Government accepts that a number of clauses in the Bill may engage Convention rights, namely Articles 6, 8, 14 ECHR and Article 1, Protocol 1 ECHR. However, the Explanatory Notes accompanying the Bill contain no explanation for the Government's view that all of the relevant powers, provisions or regulations in the Bill which may engage Convention rights are "considered to be capable of being exercised compatibly".¹⁰⁹

We would be grateful if you could explain which clauses the Government consider engage which Convention rights and why. We would be grateful for a brief explanation of the reasons that have persuaded the Government that the provisions, including any Regulation making powers, are capable of being operated in a way which respects Convention rights.

Legal Certainty, Regulations and Guidance

The Explanatory Notes acknowledge that Regulations made under the powers provided in the Bill may engage Articles 6, 8, 14 ECHR and Article 1, Protocol 1 ECHR. We welcome the publication by the Department for Work and Pensions of a number of draft Regulations to assist parliamentary scrutiny. We note that a number of Regulations have not been made available in draft, including the Regulations which deal with eligibility for Employment and Support Allowance (i.e. assessment for limited capability for work) and on criteria and conditions for health related assessments and for work-related activity (although we note the Government's intention that these proposals will only be further developed in light of the Pathways to Work experience and as and when resources allow).

Why have the Government chosen to leave to secondary legislation a significant number of provisions that may engage Convention rights?

Have any additional draft Regulations or guidance been prepared? If so, the Committee would be grateful for copies to assist in its scrutiny of the Bill.

b) Work-related Activity: Compulsion and Convention Rights (Part 1)

¹⁰⁹ HC Bill 208-EN, 347-350

The Government has explained that a number of safeguards will be necessary to ensure that “no-one has their benefit reduced inappropriately”. They explain that these safeguards are working well in respect of Pathways to Work and it is intended that they will carry forward into the new Employment and Support Allowance. The majority of these safeguards are currently in “operational guidance”.¹¹⁰

What safeguards are proposed to ensure that the rights of those in receipt of Employment and Support Allowance, and their families, guaranteed by Article 8 ECHR and Article 1, Protocol 1 ECHR are not infringed by the provisions in the Bill for work-related conditionality?

Which of these safeguards will be in a) secondary legislation and b) operational guidance and why have these safeguards not been included on the face of the Bill?

In what circumstances would the Government consider it inappropriate to reduce an individual’s benefit entitlement as a sanction?

The detailed provisions on compulsory work-related health assessments and work related activity are left to secondary legislation. As we have previously indicated, while legal certainty can be maintained through the use of secondary legislation and guidance, it is impossible for the Committee to analyse the Convention compatibility of any scheme without an informed picture of how it will work in practice, and specifically what procedural and other safeguards will be afforded to claimants. We note that the draft Employment and Support Allowance (Work Focused Interviews) Regulations, make no provision for a sanction to be waived or reduced in cases of hardship. The Minister has indicated that the powers in the Bill to provide for a reduction in the sanction to “nil” may be considered in the future.¹¹¹

How will the Government ensure that the requirement to attend an assessment, to participate in work-focused interview, or to comply with a requirement to undertake work-related activity will not interfere with the Article 8 ECHR rights of an individual claimant, or their family, without justification?

What has persuaded the Government satisfied that without any provision for a waiver or reduction in the level of a sanction in cases of hardship these provisions can be applied in a way which is compatible with Convention rights?

Work-related activity is defined as any activity which makes it “more likely that the person will obtain or remain in work or be able to do so”. The Explanatory Notes explain that this might include activities such as “work-tasters; programmes to manage health in work; job search assistance; and programmes to assist in stabilising a person’s life”. The Green Paper explained that these programmes for stabilising a person’s life could include “activities to stabilise health conditions (including mental health problems), for example using cognitive behavioural therapy”. The Bill enables the use of sanctions where a person is subject to a requirement to undertake work-related activity and fails to meet prescribed circumstances to be regarded as undertaking work-related activity. The Secretary of State may, by direction order that a particular work-related activity would not satisfy a requirement to

¹¹⁰ “Welfare Reform Bill: Draft Regulations and Supporting Material”, Department for Work and Pensions, 10 October 2006, page 6

¹¹¹ HC Deb, SC(A), 26 October 2006, col 275

undertake work-related activity in the case of a particular claimant. The Minister has stressed that an individual will not be compelled to undertake any specific work-related activity under threat of sanction (Standing Committee A, 26 October 2006, col 290).¹¹² While we consider that the aim of assisting more ill and disabled persons into the workplace is a positive one, vulnerable individuals should not be required to undertake inappropriate activities which may cause them to risk their mental or physical health under threat of sanction. Clearly, the breadth of these proposals will be relevant to any assessment of compatibility with an individual claimant's Convention rights, and in particular, their right to respect for their physical and mental integrity protected by Article 8 ECHR.

There is no express provision on the face of the Bill to provide that an individual will not be compelled to undertake a specific work-related activity. Have the Government considered including this safeguard on the face of the Bill?

Entitlements to social security, including non-contributory benefits, are recognised as "civil rights" for the purposes of Article 6(1) ECHR. Their determination must be accompanied by a fair and impartial hearing by an independent tribunal. The Bill would extend the application of the Social Security Act 1998 provisions on the making of benefit decisions, review of those decisions and rights of independent appeal to Employment and Support Allowance.¹¹³ An appeal will lie against any decision of the Secretary of State which is "made on claim for, or an award of" Employment and Support Allowance, which is not expressly excluded and against any decision "not on a claim or award", which is expressly prescribed. Some of the draft Regulations published prescribe particular decisions – other than on a claim or award - against which an appeal will or will not lie.

There are a number of decisions in the Bill that may be considered a determination of an individual's right to Employment and Support Allowance. The Minister has explained that, it is the Government's view that any decision "which attracts a financial sanction" will be subject to appeal.¹¹⁴

We would be grateful if you could clarify which decisions under the Act, and the proposed Regulations, the Government consider will be relevant determinations for the purposes of Article 6 ECHR;

Why is the Government satisfied that each of those decisions satisfy the requirement for an independent hearing imposed by Article 6(1) ECHR?

The draft Employment Support Allowance (Work-Focused Interview) Regulations provide that a decision that a claimant has failed without good cause to take part in a work focused interview will be subject to appeal, but that any decision to reduce the amount of an individual's benefit, to defer or waive the requirement to take part in a work-focused interview will not.¹¹⁵ Why does the Government consider that those decisions will satisfy Article 6(1) ECHR without recourse to an independent appeal?

c) Contracting Out (Clause 15)

¹¹² Cm 6730, page 43

¹¹³ Schedule 3, Paragraph 6, EN at para 300.

¹¹⁴ HC Deb, SC(A), 19 October 2006, col 137

¹¹⁵ Draft Regulation 15

Clause 15 gives the Secretary of State a wide power to contract out a significant number of his functions relating to the proposed conditionality of Employment Support Allowance, including the power to impose sanctions (Clause 15(2)(a)).

In their assessment of the capability of these provisions to be applied in a Convention compliant way, has the Government taken into account the likelihood that private and voluntary sector bodies administering the provisions for “work-related conditionality” will not be subject to the duty to act in accordance with Convention rights imposed by Section 6 of the Human Rights Act 1998?

In the absence of this duty, how will the Government ensure that the Bill and any accompanying Regulations are applied in a manner that is compatible with the Convention?

d) Employment Support Allowance, Local Housing Allowance and Under-25s

Basic allowance rates will be aligned with the rates for Job Seekers Allowance during the assessment phase for Employment Support Allowance.¹¹⁶ CPAG have argued that this means “young sick and disabled claimants will receive lower rates of benefit than those over 25 and substantially lower than they would have received if they met the contribution conditions for incapacity benefit”.¹¹⁷

A coalition of NGO’s, including CPAG, Shelter, Crisis and Citizens Advice, have called on the Government to use the Welfare Reform Bill to end the single (or shared) room rent restriction rule which applies to single persons under 25 who claim housing benefit. They argue that this distinction, being based on age and marital status is unjustified discrimination against young people, arguing that the restriction puts young people at greater risk of social and financial exclusion, making it more difficult for them to move into work.¹¹⁸

What has persuaded the Government that the distinctive treatment of single persons under 25 years old, for the purposes of a) the initial assessment phase of Employment and Support Allowance and b) the Local Housing Allowance is justified, proportionate and compatible with Article 8 ECHR, Article 1, Protocol 1 ECHR and Article 14 ECHR?

e) Housing Benefit and Anti-Social Behaviour

The imposition of housing benefit sanctions on households evicted as a result of anti-social behaviour may pose a risk to the home and family life of vulnerable claimants and third party family members, including children, who may be penalised for the actions of a family member who they cannot control. We note the provision in the draft Regulations for the treatment of individuals facing hardship (see Regulation 5, draft Housing Benefit (Loss of Benefit) (Pilot Scheme) Regulations 2007. We also note the commitment made by the Minister that local authorities will be able to exercise their discretion to lift the application of a sanction in individual cases.¹¹⁹

¹¹⁶ See EN at paras 51-52.

¹¹⁷ Child Poverty Action Group, Second Reading Briefing , CPAG, July 2006, para 12

¹¹⁸ “Single Room Rent – The Case for Abolition”, October 2006. Available from www.citizensadvice.org.uk

¹¹⁹ EN, para 141.

We note the provision for the treatment of persons facing hardship proposed in the draft Regulations. Why have these safeguards been left to secondary legislation?

What has persuaded the Government that the risk to vulnerable claimants, or the family members of claimants, posed by sanctions is justified, proportionate and compatible with the right to respect for family life and the home guaranteed by Article 8 ECHR?

The Government has explained that it considers that the discretion afforded to local authorities by proposed Section 130B(6) is wide enough to permit waiver of the sanction entirely in cases involving claimants or families who are vulnerable. Is there any reason why should not be made explicit on the face of the Bill?

f) Information Sharing Provisions

Clause 38 provides that any relevant authority may use information it holds relating to any specified benefit for any purpose, provided that purpose is prescribed and relates to a claim or a potential claim for a specified benefit. The draft Regulations, permit the exchange of information *only* for the purposes of encouraging, advising or assisting a person to make a claim for social security benefits. The draft Regulations incorporate other safeguards, including limitations on the period which information can be trusted without checking its accuracy and provision for information to be disregarded where it appears inaccurate or inconsistent with other information held by the relevant authority. Clause 39 is similarly wide. The Bill permits the Secretary of State to enable the exchange of information for any purposes connected with the operation of any application of funds provided by a statutory grant, in connection with welfare services. The draft Regulations propose some relevant safeguards, including limiting the purposes for which the information may be exchanged.

The exchange of information relating to an individual's private life engages the right to private life in Article 8 ECHR. We have previously expressed our concern that where provisions seek to create new information sharing powers, the breadth of those powers should be clearly identified, and any relevant safeguards should be included on the face of the Bill.

What safeguards do the Government consider are relevant for the purposes of Article 8(2) ECHR?

What reason, if any, is there is for not including these safeguards on the face of the Bill? For example, have the Government considered:

- **Limiting the purposes for which information can be shared pursuant to Clause 38 to those “encouraging, advising or assisting” an individual to make a claim (currently in draft Regulation 6(2), the draft Social Security (Claims and Information) Regulations 2007)?**
- **Limiting the type of information which may be shared pursuant to Clause 38 (as in draft Regulations 2(1) and 3(1), 5(1) (the draft Social Security (Claims and Information) Regulations 2007)?**
- **Limiting the purposes for which information can be shared pursuant to Clause 39, (as in draft Regulations 3(3) and 4(3), 5, the draft Social Security (Use of**

Information for Purposes relating to Housing Benefit and Welfare Services) Regulations 2007)?

We would be grateful if you would confirm that these information sharing powers will remain subject to the application of the Data Protection Act 1998.

g) Extension of Sanctions for Benefit Fraud

Clause 46 would enable a benefit entitlement to be removed or reduced where a person is convicted of benefit fraud twice and the second offence takes place within five years of the first offence, rather than three years as at present. The Social Security Advisory Committee has observed that these “two strikes and you’re out” sanctions are poorly understood by benefit claimants and that certain groups – such as those with literacy problems, younger claimants, customers with mental health problems, and those from ethnic minorities – seem to be sanctioned more frequently than others (SSAC, Eighteenth Report, 2005, paragraph 1.22).

Why does the Government consider that the extension of the period during which a repeat offence will trigger the imposition of sanctions is necessary and proportionate in light of the rights of claimants and their families under Articles 8 ECHR and Article 1, Protocol 1 ECHR and Article 14 ECHR?

What action, if any, is the Government taking to reduce the complexity of the existing sanctions regime criticised by the Social Security Advisory Committee for their lack of transparency and disproportionate impact on certain vulnerable groups?

I would be grateful for your response by 8 December 2006.

Appendix 1b: Letter dated 13 December 2006 from Jim Murphy MP, Minister of State for Employment and Welfare Reform, Department for Work and Pensions re Welfare Reform Bill

1. Thank you for your letter dated 29 November 2006 addressed to the Secretary of State. He has asked me, as the Minister responsible for the Bill, to respond on his behalf. I will seek to address each of your points in turn. Clause numbers below relate to the Bill as amended in Public Bill Committee.

a) Explanatory Notes

“We would be grateful if you could explain which clauses the Government consider engage which Convention rights and why. We would be grateful for a brief explanation of the reasons that have persuaded the Government that the provisions, including any Regulation making powers, are capable of being operated in a way which respects Convention right”

2. It is the case, of course, that none of the provisions in the Bill (including any of the powers to make subordinate legislation) require the Government to act in a way which is incompatible with the Convention rights. If that had been so, the Secretary of State would not have been able to sign the section 19(1)(a) statement.

Part 1 (Clauses 1 — 28) — Employment and Support Allowance

3. If I may, I will deal first with the new Employment and Support Allowance (“ESA”), which is contained in Part 1 of the Bill. In relation to these reforms and the regulations to be made under this Part, the following articles may be engaged.

4. Article 6 will be engaged for the reason you identify on page 3 of your letter. As you say entitlements to social security, including non-contributory benefits, are recognized as “civil rights” for the purposes of Article 6(1) of the ECHR¹²⁰ and disputes about decisions which decide entitlement to benefit will need to be determined by an independent tribunal at a fair and impartial hearing to ensure compliance. There are clearly various places in Part 1 of the Bill where such a right will need to come into play. For example there will be an appeal from a decision that a particular claimant is not entitled to ESA as a result of failing to satisfy one of the basic conditions in clause 1(3) and decisions which lead to the imposition of a sanction (see clauses 10(2), 11(2) and 12(2)) will be appealable. I will deal with your specific point about Article 6 and the draft work-focused interview regulations later in this letter, but the Government fully acknowledges and will ensure that appeals will lie in relation to any decision that leads to a reduction in entitlement to benefit. Some of this is achieved by amendments made by the Bill to the Social Security Act 1998 and some will be prescribed by regulations made under paragraph 9 of Schedule 3 to that Act.

5. Article 8 could potentially be engaged if the sanctions to be imposed under regulations made under clauses 10, 11 or 12 were to create extreme hardship to such a degree that there was an impact upon private or family life. However, it is our stated intention that the total amount of sanction imposed in relation to any claimant for failure to comply with the conditionality requirements under clauses 10 to 14 will never exceed the amount of the work-related activity component payable to that claimant and as such we do not consider that these sanctions would be an interference under Article 8.

6. As you know, ESA is a new benefit replacing incapacity benefit and income support on the grounds of incapacity. The new benefit will comprise both contributory and income-related elements. The Government accepts that Article 1 of Protocol 1 will be engaged in relation to the contributory element. Following the decision of the European Court of Human Rights in *Stec*¹²¹ it not clear whether that Article will also be engaged in relation to the income-related element for the purposes of Article 14.

7. In *Couronne*,¹²² Bennett J stated:

“As *Camwath U* pointed out in *Esfandiad* there are problems with *Stec*. Furthermore, the dicta of Lord Hoffmann in *Carson* and the dicta of Lord Hope and Lord Scott in *Wilson* are very strong. I do not think it is therefore possible to say that *Stec* has swept all before it. In my judgment, I, as a first instance judge, am bound by *Campbell*. That case may have been dealing with different regulations but the crucial point is that housing benefits and income based JSA are non-contributory and thus do not come within Article 1 FP.”

¹²⁰ See, for example, *Salesi v Italy* (1993)26 EHRR 187 and *Schuler-Zraggen v Switzerland* (1993) 16 EHRR 116

¹²¹ *Stec and Others v The United Kingdom* (Application nos. 65 731/01 and 65900/01)

¹²² *R (on the application of Couronne and others) v Crawley Borough Council and others; R (on the application of Bontemps and others) v Secretary of State for Work and Pensions* [2006] EWHC 1514 (Admin), [2006] All ER (D) 369 (Jun)

8. However, the Government has assessed the justifications for the proposals as if both contributory and non-contributory ESA were capable of being possessions for the purposes of Article 1 of Protocol 1 and within the ambit of that Article for the purposes of Article 14.

9. Different groups may, of course, be treated differently. We have already indicated that the amounts prescribed under clause 2(1)(a) (Amount of contributory allowance) and individual amounts under clause 4(2)(a) (Amount of income-related allowance) will be based on a claimant's age during the assessment phase. It is possible that claimants might argue that they are being discriminated against, contrary to Article 14 together with Article 1 of Protocol 1. Age would be the "status" for the purposes of that Article. The Government considers that it is proportionate to treat these groups differently on the basis of age. There is evidence that younger claimants have less potential for loss of earnings and are more likely to live at home. The claimants' argument that the analogous provision in relation to jobseeker's allowance was discriminatory was rejected by the House of Lords in the *Carson and Reynolds* case.¹²³

10. As the Government develops the detailed policy necessary to implement ESA, it may become necessary to treat different groups differently. We will, of course, ensure that any such treatment is justifiable and proportionate.

Part 2 (Clauses 29 — 39) — Housing Benefit and Council Tax Benefit

11. In connection with the reforms to housing benefit which will arise from Part 2 and from regulations and orders made under that Part, the following Articles may be engaged.

12. Decisions made under the reformed system in relation to housing benefit claims will frequently involve the determination of civil rights, engaging Article 6. The Department believes that the requirements of Article 6 will be satisfied, either by the existence of a right of appeal to the Appeal Tribunal or by the existence of judicial review.

13. It is arguable that decisions relating to housing benefit fall within the ambit of Article 8. The Government considers that, if a decision relating to local housing allowance (clause 29), extended payments (clauses 31-33), a decision to impose a sanction for anti-social behaviour (clause 30) or a decision as to the person to whom benefit should be paid (clause 36) interferes with a person's rights under Article 8, any such interference would be justified under paragraph (2) of Article 8.

14. In particular, the reforms relating to local housing allowance are intended to make the housing benefit system fairer and increase individual choice and the reforms relating to extended payments are intended to make the system easier to administer, for the benefit of both local authorities and claimants. Similarly the reforms relating to payment of housing benefit are intended to encourage personal responsibility and financial inclusion. The interference would thus be in the economic interests of the country and/or for the protection of the rights and freedoms of others and the Government believes the measures are proportionate to those aims. Similarly, the Government considers that the imposition of a housing benefit sanction for anti-social behaviour would likewise be justifiable both for the protection of the rights and freedoms of others and by virtue of the aim of improving

¹²³ *R (Carson and Reynolds) v. Secretary of State for Work and Pensions* [2005] TJKHL 37

the quality of life of the individuals themselves by encouraging them to engage with the rehabilitation support that is offered to them. We are confident that a sanction would only be imposed where it was proportionate to do so, particularly bearing in mind the safeguards that will be built into the system.

15. Some of the clauses in Part 2 and some of the regulations made under Part 2 will deal with the disclosure of information by the Secretary of State, local authorities, rent officers and the court (for example, clause 34 — Information relating to housing benefit and in relation to sanctions for anti-social behaviour under the proposed new section 130F of the Social Security Contributions and Benefits Act 1992). Article 8 could be engaged where information is disclosed under these provisions. The Government considers that it is very likely that any such disclosure would be compatible with Article 8. In particular, it would be for a prescribed purpose, such as the protection of the rights and freedoms of others or the economic well-being of the country, and would be proportionate to that aim, particularly bearing in mind the duty of public authorities to act compatibly with the Convention rights. In most cases, the interference with a person's rights under Article 8 would in any event be relatively minor.

16. It is possible that the housing benefit reforms arising from Part 2 of the Bill could result in some people receiving less benefit than they do at present. It might be argued that this is a breach of Article 1 of Protocol 1. The Government considers that the measures proposed would not be contrary to Article 1 of Protocol 1. Any loss of benefit in an individual case would be justified in the public interest, having regard to the policy objectives referred to above. In addition, transitional protection relating to the local housing allowance and extended payment changes will reduce the number of cases in which less benefit is paid following the changes and will ensure that those affected have sufficient time to adjust their position before any reduction is made.

17. Notwithstanding what has been said about *Couronne* in paragraph 3 above, claims under Article 14 might be made on the basis that certain groups of people are treated differently because of the reforms to housing benefit arising from Part 2. For example, a person who remains on the pre-local housing allowance system might compare himself with someone whose benefit is calculated under the new system. The Government considers that in any case where this argument could be made, the difference in treatment would be justified for the reasons outlined above and would be proportionate to those aims.

Part 3 (Clauses 40—48) — Social Security Administration: General

Clauses 40 to 42- use of social security information

18. The way in which a public authority handles social security information may engage Article 8, but we are satisfied that the proposed provisions can be operated in a way which do not contravene that Article. See our response to question (f) below.

Clauses 45 to 47 - local authority powers to investigate and prosecute benefit fraud

19. These clauses confer new powers on local authorities to investigate and prosecute national benefit offences. A local authority exercising these powers would be obliged to do so in a way which respected Convention rights - particularly Articles 6, 8 and 14. The same

would apply to the Secretary of State where he exercises the power to take over a prosecution started by a local authority.

20. Clause 47 makes a number of consequential changes to the information sharing provisions in the Social Security Administration Act 1992 by giving local authorities access to information relating to national benefit offences as well as allowing the Secretary of State to obtain information from them relating to those offences. This may engage Article 8 but we are satisfied that the provisions have a legitimate aim, namely the prevention of fraud, and are proportionate. The powers would have to be exercised in accordance with data protection requirements.

Clause 48 - loss of benefit for commission of benefit offences

21. See our response to question (g) below. To the extent that Articles 8 and 14 and Article 1 Protocol 1 may be engaged, the Government considers that the proposed amendment to the “two-strikes” provisions in section 7 of the Social Security Fraud Act 2001 is necessary and proportionate.

Parts 4 & 5 (Clauses 49—69) — Miscellaneous & General

Clause 58

22. The amendments made by clause 58 to the definition of “dependant” place spouses and civil partners on the same footing and treat those living together as if they were husband and wife and those living together as if they were civil partners in the same way. The amendments also remove an existing discriminatory provision which has the effect that those living together as husband and wife in Scotland are treated differently to those in England and Wales.

“Why have the Government chosen to leave to secondary legislation a significant number of provisions that may engage Convention rights?”

23. As I am sure you understand it is necessary in relation to social security legislation for much of the detail to be set out in regulations (and as you acknowledge we have sought to provide draft regulations in a number of areas). This is not only so as to make changes easier to effect, but also the level of detail required to set up a new social security benefit would not be appropriate for primary legislation. This approach provides the Secretary of State with the necessary flexibility to make changes in the light of operational experience and changing circumstances. This is particularly important with the introduction of a new benefit where there may need to be urgent ‘settling in’ changes.

24. There is precedent for this in relation to social security. For example the Social Security Contributions and Benefits Act 1992 and the Social Security Administration Act 1992 (which together provide the underpinning legislative framework for entitlement to and administration of social security benefits) and the Jobseekers Act 1995, the Welfare Reform and Pensions Act 1999, the Child Support, Pensions and Social Security Act 2000 and the State Pension Credit Act 2002. We do not consider that this will compromise the compatibility of our proposals. There is no doubt that the secondary legislation will be sufficiently clear and accessible to comply with the Convention. I also believe that in all cases there will be an appropriate degree of Parliamentary scrutiny of the legislation.

“Have any additional draft Regulations or guidance been prepared? If so, the Committee would be grateful for copies to assist in its scrutiny of the Bill.”

25. Ministers hope to provide some further draft Regulations in time for the Committee stage in the House of Lords.¹²⁴ Copies will be made available to Parliament and published more widely as soon as they are ready.

b) Work-related Activity: Compulsion and Convention Rights (Part 1)

“What safeguards are proposed to ensure that the rights of those in receipt of Employment and Support Allowance, and their families, guaranteed by Article 8 ECHR and Article 1, Protocol 1 ECHR are not infringed by the provisions in the Bill for work-related conditionality?”

Which of these safeguards will be in a) secondary legislation and b) operational guidance and why have these safeguards not been included on the face of the Bill?”

Safeguards

26. The purpose of the conditionality requirements is to help claimants to take steps that will enable them to return to or start work. The purpose of reducing payment of a claimant’s ESA if he fails, without good cause, to comply with the conditionality requirements is to encourage compliance with these requirements rather than to punish the claimant. The Government is of the view that the provisions relating to conditionality are a proportionate way of achieving these aims.

27. There are various safeguards in place which will ensure that the Secretary of State will not breach the Human Rights Act in requiring claimants to take part in work-focused health-related assessments, take part in work-focused interviews and undertake work-related activity. We do not think that the sanctions imposed on claimants for failure to comply, without good cause, with the conditionality requirements will interfere with the rights of the claimant and the members of their family arising under Article 8 ECHR. It is within the claimant’s ‘gift’ at any time to comply with conditionality requirements and compliance will lead to the amount of ESA being payable. However, if there is such interference then the Government’s view is that such interference can be justified.

28. The Government is of the view that imposing a reduction in the amount of ESA payable for failing to comply with a conditionality requirement would not amount to an unlawful interference under Article 1 of Protocol 1. The ESA reforms, which aim to increase employment opportunities for sick and disabled people, are clearly in the public interest. As stated above the conditionality requirements are there to encourage involvement in schemes which are intended to assist claimants not to punish them. As such if there were an interference with properly rights the Government is of the view that it would be proportionate and justifiable. The amount of any sanction or combination of sanctions will never exceed the amount of work-related activity component and it is firmly within the control of the individual claimant to start complying with the requirements and thus have the amount of benefit restored to the full amount.

¹²⁴ Standing Committee A, 24 October, col. 216 (the Parliamentary Under-Secretary of State, Anne McGuire MP)

