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House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny: Third Progress Report

Fifth Report of Session 2006-07

*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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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.

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Summary

The Joint Committee on Human Rights examines the human rights implications of Government and private bills in accordance with the new legislative scrutiny sifting system which it has adopted from the start of Session 2006-07. A full explanation of the Committee's scrutiny procedures is given in the Committee's Twenty-third Report of Session 2005-06, *The Committee's Future Working Practices*, HL Paper 239/HC 1575.

This is the Committee's third Legislative Scrutiny Progress Report of this Session. In this Report the Committee draws the special attention of both Houses to two Government bills. The Committee has already reported on other aspects of the Tribunals, Courts and Enforcement Bill in its Second Report of this Session.

Justice and Security (Northern Ireland) Bill

In the Committee's view the Bill raises three groups of significant human rights issues concerning: juries and non-jury trials; the powers of the Northern Ireland Human Rights Commission; and additional powers for the police and the Army (paragraphs 1.1-1.5).

The Committee acknowledges that the Government is under a positive obligation to ensure the safety and security of jurors and to guarantee the right of everyone charged with a criminal offence to receive a fair trial. It therefore accepts in principle the need for safeguards to protect jurors against intimidation and for provision for trial without a jury where there is a danger of jury tampering or of perverse verdicts (paragraphs 1.7-1.14).

The Committee welcomes the Bill's reinstatement of a presumption in favour of jury trial in Northern Ireland. It accepts that tightly-defined departures may be needed. But the Committee is concerned that the breadth of the proposed power of the DPP to certify non-jury trial where the defendant is an "associate" of a person who is or has at any time been a member of a proscribed organisation gives rise to a risk of arbitrary interference with the right to freedom of association and the right to respect for private life and is potentially discriminatory. The Committee is not persuaded that the Bill contains sufficient safeguards against the arbitrary exercise of the Director of Public Prosecution's wide power to certify that trial should be without a jury and questions the Bill's provisions to oust the jurisdiction of the ordinary courts to entertain challenges to the exercise of that power, while welcoming Government amendments to narrow the scope of the clause. Nor is the Committee satisfied that the proposed administrative guidelines on juror checks and the Crown's exercise of its right of "stand-by" uphold the principle of equality of arms between defence and prosecution, which is inherent in the ECHR concept of a fair trial (paragraphs 1.6-1.50).

The Committee welcomes the Bill's provisions to enable the Northern Ireland Human Rights Commission to institute or intervene in human rights legal proceedings. It considers however that some of the restrictions on the two other new powers accorded by the Bill to the NIHRC, to compel evidence and to access places of detention, are unjustifiable. The Committee recommends that the Bill be amended to make clear that a notice requiring production of evidence cannot be cancelled by a court on the ground that the matter has already been sufficiently investigated by another person. It considers that there should be no blanket ban preventing the NIHRC from raising questions about the intelligence services in

its investigations and that an unrestricted right of access to places of detention is necessary, subject to control by judicial review. The Committee also considers that the proposal to impose a time limit on the exercise of the NIHRC's new powers to compel evidence could present an insuperable obstacle to the effective exercise of its statutory powers and recommends that the time limit be deleted from the Bill (paragraphs 1.51 - 1.72).

The Committee is concerned that some of the Bill's provisions for additional powers for the police and the military may risk incompatibility with the right to liberty in Article 5 ECHR and the right to respect for private life in Article 8 ECHR and advocates changes (paragraphs 1.73-1.97).

Tribunals, Courts and Enforcement Bill

In this Report the Committee considers the human rights implications of the Bill's enforcement powers, following information received from the Government after the Committee's previous Report on the Bill. The Committee advocates the introduction of a clear regulatory framework for enforcement agents to reduce the risk of breach of Article 8 ECHR on right to respect for privacy and family life, and calls for further safeguards on the certification of enforcement agents. (paragraphs 2.6-2.15).

The Committee recommends a number of amendments to the bill to ensure that the exercise of enforcement agents' powers of entry, search and seizure do not lead to a risk of incompatibility with Convention rights. Welcomes the Government's proposed amendment to limit enforcement agents' use of force and recommends others. The Committee also makes a number of recommendations about the categories of goods exempt from seizure, and says that the definition of "exempt goods" should be clearly identified on the face of the Bill (paragraphs 2.16-2.31)

In the Committee's view uncertainty as to whether enforcement agents will be considered public authorities for the purposes of the Human Rights Act 1998 could raise a significant risk of incompatibility with Articles 8 and 13 ECHR (paragraphs 2.32-2.38).

Bills drawn to the special attention of both Houses

Government Bills

1 Justice and Security (Northern Ireland) Bill

Date introduced to first House	27 November 2006
Date introduced to second House	
Current Bill Number	HC Bill 10
Previous Reports	None

Background

1.1 This is a Government Bill introduced into the House of Commons on 27 November 2006. The Rt Hon Peter Hain MP, Secretary of State for Northern Ireland, has made a statement of compatibility under s.19(1)(a) of the Human Rights Act 1998. The Explanatory Notes accompanying this Bill set out the Government's view of the Bill's compatibility with the Convention rights at paras 152-181. The Bill completed its Committee stage on 25 January 2007 and is due to reach Report stage on 6 February 2007.

1.2 On our initial consideration of the Bill we thought that it raised a number of significant human rights issues and we therefore wrote to the Minister on 19 December 2006 asking for a fuller explanation of the Government's view that the proposals in the Bill are compatible with human rights in certain respects.¹ We received the Minister's reply in a letter dated 22 January 2007 from Paul Goggins MP, Parliamentary Under-Secretary of State for Northern Ireland.² We are grateful to the Minister for his detailed response.

1.3 We also considered that the Bill's provisions relating to the powers of the Northern Ireland Human Rights Commission ("the NIHRC") are very significant in their potential effect on the capacity of the NIHRC to further the promotion and protection of human rights in Northern Ireland, and on its status as a national human rights institution. These are matters in which this Committee has a longstanding interest³ and which we recently discussed with the NIHRC during our visit to Belfast in November 2006. We therefore wrote to the Chief Commissioner of the NIHRC asking it to provide us with a memorandum of evidence setting out the NIHRC's views of these provisions in the Bill, in particular its views of the likely effects of the various restrictions on the proposed new powers and whether the NIHRC would wish to see included in the Bill any of the additional powers for the NIHRC which it has recommended in the past.⁴ We also

¹ Appendix 1b.

² Appendix 1d.

³ Cf. Fourteenth Report of Session 2002-03, *Work of the Northern Ireland Human Rights Commission*, HL Paper 132/HC 142.

⁴ Appendix 1a.

indicated that we would welcome any comments the NIHRC might have on the human rights implications of any other provisions in the Bill. We received a response setting out the Commission's views on the human rights issues raised by the Bill⁵ and appending a copy of a Parliamentary briefing on the clauses of the Bill concerning the powers of the Commission prepared for the purposes of the Public Bill Committee considering the Bill. We are grateful to the NIHRC for its detailed responses to our questions.

The effect of the Bill

1.4 The main purpose of the Bill is to introduce measures which the Government says are necessary to deliver its commitment to security normalisation in Northern Ireland. Part VII of the Terrorism Act 2000 contains counter-terrorism provisions particular to Northern Ireland, including provision for so-called Diplock courts, whereby certain scheduled offences are tried without a jury. The Government proposes to repeal Part VII in July 2007 if security conditions permit. This Bill makes provision in anticipation of that repeal. It introduces reforms to the jury system to reduce the risk of jury intimidation and partisan juries and introduces a new system of non-jury trial for use in exceptional cases. It extends the powers of the Northern Ireland Human Rights Commission and provides certain additional powers for the police and the military. It also provides for the permanent regulation of the private security industry in Northern Ireland.

1.5 In our view the Bill raises three groups of significant human rights issues, concerning

- (1) Juries and non-jury trials;
- (2) the powers of the Northern Ireland Human Rights Commission; and
- (3) additional powers for the police and the Army.

(1) Juries and non-jury trials

1.6 The Bill's provisions reforming the jury system in Northern Ireland raise a number of significant human rights issues.

(a) Justification for new system of non-jury trial

1.7 The Bill provides for a new system of non-jury trial to replace the Diplock courts.⁶ Under the current law in Northern Ireland, the presumption is that trials for scheduled offences will be without a jury, subject to the Attorney General exercising his discretion to direct that a case is to be tried before a jury. Under the Bill the position would be reversed: the presumption would be for jury trial, subject to the power of the DPP for Northern Ireland to issue a certificate that trial is to be conducted without a jury. The power to issue such a certificate is exercisable if the DPP suspects that any one of a number of conditions is met and is satisfied that because of this there is a risk that there might not be a fair trial if it were to be conducted with a jury.⁷

⁵ Appendix 1c.

⁶ Clauses 1-8.

⁷ Clause 1.

1.8 The Explanatory Notes to the Bill correctly state that the Bill's provision for non-jury trial does not infringe the right to a fair trial in Article 6(1) ECHR, because that right does not confer the right to trial by jury: both trial by jury and trial by judge alone provide valid mechanisms for the determination of a criminal charge by an independent and impartial tribunal.⁸ However, the Bill's provision for non-jury trial still requires justification, for two reasons. First, the common law recognises a right to jury trial, restrictions on which are possible in principle but require justification.⁹ Second, a difference of treatment within the scope of application of a Convention right requires justification under Article 14 ECHR even if the difference of treatment does not itself amount to a breach of the relevant Convention right.

1.9 The main justification for the introduction and continuation of the Diplock courts in Northern Ireland was to prevent jury intimidation. The Bill contains other measures designed to reduce the risk of juror intimidation (considered below). However, the Explanatory Notes state that, even with these proposed jury reforms, "it is not yet possible for Northern Ireland to operate entirely without the fall-back of some special arrangements for a small number of exceptional cases."¹⁰ The new system of non-jury trial is said to be "necessary to ensure that trials continue to be fair in Northern Ireland and that the quality of justice remains high."

1.10 The Explanatory Notes do not, however, contain any more detailed justification for the proposed new system of non-jury trials. We decided that we wanted to reach our own view as to whether there is sufficient justification for this provision in the Bill. We therefore asked the Government for a more detailed justification of the need for the new power, including up to date evidence of the incidence of juror intimidation in Northern Ireland compared to the rest of the UK, and an explanation of why the other measures in the Bill to reduce the risk of jury intimidation are not considered by the Government to be adequate.

1.11 The Government says that it is difficult to gain a true picture of the scale of jury tampering and perverse verdicts in Northern Ireland given the restrictions on enquiring into what goes on inside the jury room. The police only have intelligence of eleven cases where jury tampering has been reported since 1999, but seven of these were between 2004 and 2006 and seven of the eleven involved people with paramilitary connections. The Minister also says that he is aware of many more anecdotal examples where there appears to have been intimidation in a case and one recent case where a trial collapsed as a result of jury tampering. The Government mainly relies on information about the prevalence of intimidation more generally in Northern Ireland, including the Seventh Report of the Independent Monitoring Commission ("the IMC") in October 2005, the Northern Ireland Crime Survey of 2003/04 and the fact that the Police Service of Northern Ireland ("the PSNI") recorded 74 instances of witness intimidation in 2004/05 (compared to 29 in 2001/02).

1.12 The Government argues that intimidation is therefore still a significant problem in Northern Ireland, despite the recent improvements in the security situation, and poses a

⁸ EN paras 153-4.

⁹ See our consideration of the Fraud (Trials without a Jury) Bill, Second Report of Session 2006-07, *Legislative Scrutiny: First Progress Report*, HL Paper 34/HC 263, at para 5.10.

¹⁰ EN para. 7.

significant risk to the ability of the criminal justice system to deliver fair trials in certain cases. It says that there is also a perception that intimidation of jurors occurs. Although many of the juror protection measures in the Bill should reduce the scope for jurors to be intimidated and so help also to reduce the perception or fear of intimidation, these measures do not prevent a juror from being recognised by the defendant or his associates. The security assessment from PSNI and the IMC is that in the context of paramilitary control of communities, intimidation and fear of intimidation is expected to continue for the time being. Although the Government acknowledges that perverse verdicts and juror intimidation are only likely to happen in a minority of cases, it is significant enough to pose a risk to the safety of jurors, and the Government is therefore under an obligation to address it.

1.13 The NIHRC acknowledges that the risks of perverse verdicts and intimidation of jurors need to be dealt with in order to move to a presumption of trial by jury. However, it argues that any departure from trial by jury should require to be justified by demonstrating the presence of exceptional circumstances that must be clearly legislated for, so as to ensure that non-jury trials are indeed the exception rather than the norm. Although it welcomes the fact that the Bill includes some of the recommendations previously made by the NIHRC to address the risk of jury intimidation, such as restrictions on the disclosure of juror information, it considers that the current situation in Northern Ireland does not justify the adoption of provisions relating to non-jury trials which are not deemed acceptable in England and Wales. In the NIHRC's view, provided certain safeguards are put in place to deal with the risks of juror intimidation and perverse verdicts, it is possible to abandon the Diplock Court system without further delay.

1.14 We acknowledge that the Government is under a positive obligation to ensure the safety and security of jurors. It is also under a positive obligation to guarantee the right of everyone charged with a criminal offence to receive a fair trial. We therefore accept in principle the need for safeguards to protect jurors against intimidation and for provision for trial without a jury where there is a danger of jury tampering or of perverse verdicts.

1.15 Such provision already exists for England and Wales in s. 44 of the Criminal Justice Act 2003. It provides that the prosecution may apply to a judge of the Crown Court for an order that the trial be conducted without a jury and that the judge must make such an order if satisfied that both of the following two conditions are satisfied:

- (1) that there is evidence of a real and present danger that jury tampering would take place; and
- (2) that, notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.

1.16 We note that the Government's response to our question about up to date evidence of the incidence of juror intimidation in Northern Ireland did not provide any information about the incidence of such intimidation in Great Britain, as requested.

Actual evidence of juror intimidation in Northern Ireland appears to be relatively scarce, and we do not consider the Minister's account of anecdotal evidence to be a satisfactory basis on which to legislate. We accept, however, that there is evidence of a level of intimidation in local communities which may be unusually high, compared to Great Britain, due to the legacy of the paramilitary conflict.

1.17 We welcome the Bill's reinstatement of a presumption in favour of jury trial in Northern Ireland. In our view the necessity for any departures from that presumption must be shown to be clearly demonstrated and the exceptions drawn as narrowly as possible. On balance, we accept in principle that there may need to be departures from the presumption for reasons which are specific to the circumstances of Northern Ireland, which may be capable of justifying different provision from that already contained in s. 44 of the Criminal Justice Act 2003 for England and Wales. However, we would expect these departures to be very tightly defined and demonstrably related to the general problem of intimidation and sectarianism in Northern Ireland.

1.18 It is against this background that we turn to consider the detail of the different provision that the Bill makes for Northern Ireland.

(b) Width of DPP's power to certify

1.19 The Bill gives the DPP for Northern Ireland the power to issue a certificate that a trial on indictment is to be conducted without a jury if he suspects that any one of four conditions are satisfied and that there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.¹¹ The four conditions are:

- (1) that the defendant is, or has at any time been, a member of a proscribed organisation, or is an associate of such a person;
- (2) that the offence was committed on behalf of a proscribed organisation, or a proscribed organisation was otherwise involved with, or assisted in, the carrying out of the offence;
- (3) that an attempt has been made to prejudice the investigation or prosecution of the offence on behalf of a proscribed organisation or with the involvement or assistance of a proscribed organisation; and
- (4) that the offence was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group towards another person or group.

1.20 "Associate" for the purposes of the first condition is defined to include a "friend" or a "relative",¹² as well as spouses or former spouses, civil partners or former civil partners, and co-habiting partners or former partners. A proscribed organisation is defined to include an organisation which was proscribed at the time of a person's membership of the organisation. The power to certify is therefore extremely wide. This raises questions of compatibility with the right to freedom of association in Article 11 ECHR, the right to

¹¹ Clause 1(2).

¹² Clause 1(10)(d) and (e).

respect for private and family life in Article 8 ECHR, and the right not to be discriminated against in the enjoyment of Convention rights in Article 14 ECHR. We therefore asked the Government for a more detailed justification for applying the power to certify to people who are associates of members or former members of proscribed organisations.

1.21 The Government response largely relies on its security assessment. It says that the security assessment that the Government has received is that members of paramilitary groups do attempt to intimidate witnesses and jurors in cases where close friends or family members are the defendant in order to secure acquittals, and that former members of paramilitary groups also continue to intimidate their communities and attempt to use this to secure acquittals. The Government also points out that a connection with a member or former member of a paramilitary group would not be enough on its own to justify a decision for non-jury trial in a case: the DPP would also need to be satisfied of the risk thereby posed to the administration of justice.

1.22 In the NIHRC's view, the first condition is extremely problematic. The inclusion of "friend", which is very subjective, and "relative", which is very open-ended, within the meaning of "associate" makes the condition extremely broad in scope and so gives the DPP an extremely broad power to prevent a jury trial. The Commission also considers that there is a risk of a breach of Article 14 in conjunction with Article 6(1) ECHR, insofar as the Bill makes it possible for a person to be denied a trial by jury on the basis of having been born into a family one of whose members had at some time broken a particular law.

1.23 We remain concerned about the breadth of the first condition. We would accept the possible need for a departure from the presumption of jury trial where the defendant is or has at any time been a member of a proscribed organisation, but we are concerned about the extension of this to "associates" of such people. We agree with NIHRC that "friend" is an extremely vague and subjective term and potentially very broad in scope and that "relative" is also a very open-ended concept. As the clause is currently drafted a person may be deprived of a jury trial, for example, if the DPP suspects that the person is a friend or relative of a former member of a formerly proscribed organisation. We accept that the DPP must also be satisfied that this poses a risk to a fair trial, and that this does narrow the scope of the power to some extent.¹³ Nevertheless, we are concerned that the breadth of the first condition gives rise to a risk that the power to certify will be used arbitrarily, in a way which is incompatible with the right to freedom of association and the right to respect for private life, and potentially discriminates against the friends and relatives of members or former members of proscribed or formerly proscribed organisations. We recommend that the clause be amended to remove the reference to "associates".

1.24 We also asked the Government what safeguards there would be against this extremely broad power being exercised arbitrarily.

1.25 The Government in its response states that the decision is one of mode of trial only, decisions which the DPP already takes when deciding whether certain offences should be tried summarily or on indictment, and that the defendant will still be able to make

¹³ Clause 1(2)(a) and (3)(b).

representations to the DPP about the mode of trial decision. There will be no special rules of evidence or sentencing in non-jury trials, and the judge must give a reasoned verdict when convicting. Appeals against conviction or sentence will be possible without leave. The Government is satisfied that these safeguards provide adequate protection to the defendant and ensure that they will suffer no detriment from being tried without a jury.

1.26 The NIHRC point out the lack of any substantial safeguards against misuse of the power. First, whereas the current provision for England and Wales in s. 44 CJA 2003 requires the prosecution to apply to a judge of the Crown Court for an order that the trial be conducted without a jury, under the Bill the decision rests with the DPP. Second, the threshold which the DPP must meet is extremely low: he need merely “suspect” that any of the stipulated conditions is met, and be “satisfied” that there is therefore “a risk” that the administration of justice might be impaired. This is considerably lower than the requirement in s. 44 CJA 2003 that there must be evidence of a real and present danger that jury tampering would take place and that the likelihood of such tampering is so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury. Third, there is nothing in the Bill which makes it a precondition of the issue of a certificate for non-jury trial that the DPP first be satisfied that other steps, such as police protection, cannot be taken to prevent jury tampering. Fourth and finally, in the Bill as drafted there is no or very little in the way of subsequent judicial control (see further below).

1.27 We are not persuaded that the Bill contains sufficient safeguards against the arbitrary exercise of the DPP’s very wide power to certify that trial should be without a jury. We recommend that the Bill be amended to provide additional safeguards, for example by raising the threshold that the DPP is required to meet before certifying, by requiring that the DPP be satisfied that other less restrictive measures will not prevent jury tampering, and by providing for judicial control.

(c) Ouster clause

1.28 The Bill purports to oust the jurisdiction of the ordinary courts to entertain challenges to the DPP’s decision to issue a certificate, including challenges to the legality of that decision.¹⁴ It also purports to subject s. 7 of the Human Rights Act (by which proceedings can be brought claiming that a public authority has infringed a Convention right) to the ouster clause.¹⁵

1.29 The Explanatory Notes to the Bill state that this clause does not oust the jurisdiction of the courts altogether, but rather restricts the grounds on which the issue of a certificate by the DPP may be challenged.¹⁶ Challenge would still be possible on grounds of dishonesty or bad faith. The notes also claim that such a limitation on the grounds on which a certificate can be challenged is not incompatible with the right of access to a court in Article 6(1) ECHR because the DPP’s decision to issue a certificate does not amount to the determination of a civil right.

¹⁴ Clause 7(1) and (2).

¹⁵ Clause 7(3).

¹⁶ EN paras 34 and 154.

1.30 This provision raises the very significant issue of preclusion or restriction of the right of access to court, recognised as fundamental both by the common law and in the scheme of the ECHR by the European Court of Human Rights. Although on its face the clause permits challenge on grounds of bad faith or dishonesty, it expressly precludes challenge on grounds of lack of jurisdiction or error of law (in other words, on grounds of illegality). Clause 7(1) of the Bill states baldly that “No court may entertain proceedings for questioning (whether by way of judicial review or otherwise) any decision of the DPP for Northern Ireland in relation to the issue of a certificate under section 1” and clause 7(2) states explicitly that this prevents a court from hearing any challenge on grounds of lack of jurisdiction or error of law. In practical terms, this means, for example, that if the DPP issued a certificate on the basis that a person was a member of an organisation which in fact had never been proscribed, it would be impossible to challenge that decision in the courts.

1.31 We therefore wrote to the Minister asking for the Government’s justification for proposing such a wide statutory ouster of the courts’ jurisdiction to review the legality of a delegated decision, and why in the Government’s view it is compatible with the rule of law to legislate to prevent any court from considering whether a delegated decision-maker has acted without jurisdiction or on the basis of an error of law.

1.32 The Government’s explanation is that the Bill’s restrictions on challenge to the DPP’s decision are intended to put on a statutory footing the current case-law concerning challenges to the Attorney General’s decision whether or not to deschedule a case (that is, approve it as being appropriate for trial by jury) under the current legal framework of the Diplock courts. The case which the Government has in mind is a decision of the High Court of Northern Ireland called *Shuker*, in which a challenge was made to the decision of the Attorney General not to exercise his power to certify for jury trial the offences with which the defendants had been charged.¹⁷ According to the Government, “the court ruled that the procedure for determining mode of trial of the accused is not a process suitable for the full panoply of judicial review. Judicial review would be possible, however, on grounds such as bad faith, dishonesty, or other exceptional circumstances.” In his letter responding to our question, the Minister says that he is not seeking to exclude judicial review altogether, but is merely intending to put the case-law in *Shuker* on a statutory footing and to allow limited challenges to the issue of a certificate for non-jury trial by the DPP. He also argues that to allow every decision of the DPP to be challenged would result in considerable delay, and may lead to cases that are not safe to be tried before a jury having to be so tried, because the intelligence on which the DPP’s decision is based could not be disclosed. In any event, the Minister argues, the restriction should be seen in the context of the nature of the DPP’s decision, which only concerns the mode of trial.

1.33 We welcome the Minister’s undertaking at Committee stage to reflect further on the wording of the clause before Report stage. However, we note that the Minister also states in his letter to us that he “remains committed to the principle behind clause 7”. We therefore make three observations on the justifications offered by the Government, in the hope that these may still inform debate on any proposed amendment to the clause.

¹⁷ In *Shuker and others* [2004] NIQB 20.

1.34 First, a careful reading of the decision of the High Court of Northern Ireland in the Shuker case reveals that the ouster clause in clause 7 of the Bill is identical in effect to the argument made by the Attorney General and rejected by the court in that case. It was argued by the Attorney General that his decision was non-justiciable, that is, immune from judicial review altogether except on grounds of bad faith, because the decision-making process entailed the application of high policy and was frequently based on sensitive material that could not be disclosed without risk to certain vital public interests.¹⁸ That argument was expressly rejected by the High Court of Northern Ireland, which held that it was satisfied that the decision of the Attorney General on whether a case should be de-scheduled is not within the exceptional category that is exempt from judicial review, albeit that there are significant constraints on the extent of review that may be undertaken.¹⁹ In light of this, we regret to say that we find the explanation given in the Explanatory Notes and by the Minister in his letter, that this clause is merely intended to give statutory effect to the decision in *Shuker*, disingenuous. In fact, clause 7(1) and (2) of the Bill are an attempt to put into statutory form the very argument which was made by the Attorney General and rejected by the High Court of Northern Ireland in *Shuker*.

1.35 Our second observation is that the provision in clause 7(2) of the Bill, which purports to prevent a court from deciding whether a decision of the DPP's was a nullity by reason of lack of jurisdiction or error of law, goes far beyond what the court actually held in *Shuker*. It is correct that the court held that in certain situations a decision which is subject to judicial review generally may be exempt from certain grounds of challenge or that the scope of the challenge under some of the conventional judicial review grounds will have to be modified or adjusted in order to reflect the specific nature of the decision attacked.²⁰ It is also correct that the court concluded that the Attorney General's decision about de-scheduling offences "is not a process which is suitable for the full panoply of judicial review superintendence."²¹ It said that "this is *par excellence* a procedure on which the courts should be reluctant to intrude."²² However, the only ground in respect of which the court held the decision is not amenable to judicial review is failure to comply with the requirements of procedural fairness. The court was at pains to point out that although it had concluded that judicial review was not available to challenge the decision of the Attorney General in this particular case, it did not consider that judicial review will be excluded in every circumstance. As well as being reviewable on grounds of bad faith, the court said "depending on the circumstances of other cases that may arise, further grounds of judicial review challenge may be deemed appropriate but we do not consider that it would be helpful, or even possible to predict what those grounds might be."²³ **Clause 7(2) of the Bill, which purports to preclude challenge on grounds of lack of jurisdiction or error of law, therefore goes significantly beyond the actual decision in *Shuker*, which only rules out judicial review of such decisions on the ground of procedural unfairness and expressly leaves open the possibility of judicial review being available on other grounds in the circumstances of future cases.**

¹⁸ *Shuker* at para. 6.

¹⁹ *Ibid*, at paras 7 and 13.

²⁰ *Ibid*, at para. 17.

²¹ *Ibid*, at para. 25.

²² *Ibid*, para. 26.

²³ *Ibid*, para. 27.

1.36 Our third observation concerns the appropriateness, in human rights terms, of including such sweeping statutory ouster clauses in legislation. This is the first time that the Government has included such an ouster clause in a Bill since the ouster clause contained in the Asylum and Immigration (Treatment of Claimants etc.) Bill as introduced in the 2003-04 Session. Our predecessor Committee was highly critical of that clause in a number of reports on the Bill in which it pointed out that it is now widely regarded as an indispensable feature of the rule of law that there be a right of access to a court to challenge the legality of Government action.²⁴ The Government eventually withdrew that clause in the face of overwhelming parliamentary opposition. **In our view the current clause raises the same rule of law concerns. We acknowledge that there are good reasons why courts on judicial review of the DPP's decision should exercise restraint, not least the fact that the DPP's decision-making process will usually involve the evaluation of material of a sensitive nature which it may not be possible to disclose without causing undue harm to the public interest. In our view, however, these are considerations which should be dealt with on a case-by-case basis, rather than by a wide-ranging legislative ouster of judicial review precluding such consideration in all cases. It should be for the court to decide, in the circumstances of a particular case, whether the DPP has demonstrated that the issue raised by the applicant for judicial review cannot be determined by the court without disclosing information which is damaging to the public interest.**

1.37 The Government has now introduced an amendment which would:

- (1) remove altogether the reference in clause 7(2) to a court being prevented from entertaining proceedings on the basis that the DPP's decision was a nullity by reason of lack of jurisdiction or error of law;
- (2) maintain the prohibition in clause 7(1) preventing any court from entertaining any proceedings for questioning the decision of the DPP "except on the grounds of (a) dishonesty, (b) bad faith or (c) other exceptional circumstances."
- (3) replace the clause subjecting s. 7(1) of the Human Rights Act 1998 to the ouster clause with a clause subjecting the ouster clause to s. 7(1) HRA.

We welcome the narrowing of the scope of this previously sweeping clause by these amendments, and in particular the subsection of the ouster clause to the Human Rights Act 1998. However, we note that the amendment still does not meet all of our concerns expressed above. A prohibition on judicial review except on grounds of dishonesty, bad faith or "other exceptional circumstances" does not make sufficiently clear in our view that judicial review for lack of jurisdiction or error of law will still be available. In our view the rule of law requires no less.

(d) Equal opportunity of defence and prosecution to conduct juror checks

1.38 The Bill introduces new restrictions on revealing jurors' information to the defence.²⁵ The purpose of the restrictions is to reduce the risk of juror intimidation. This is obviously a legitimate aim. However, the introduction of such restrictions raises the

²⁴ Third, Fifth, Thirteenth, Fourteenth and Seventeenth Reports of Session 2003-04.

²⁵ Clause 9.

question of whether the defence is being placed at an unfair disadvantage compared to the prosecution in terms of its ability to conduct juror checks and so to challenge a juror.

1.39 The Explanatory Notes state that Article 6 ECHR does not confer a right to access information pertaining to jurors. However, the principle of “equality of arms”, which is inherent in the ECHR concept of a fair trial, requires that no party is placed at a substantial disadvantage compared to other parties to the proceedings. As the Explanatory Notes make clear, in certain circumstances the police will be permitted to carry out additional juror checks.²⁶ However, the Notes state that there will be no inequality of arms between the parties because it is intended that such checks will be carried out by police not connected to the prosecution and that the Attorney-General will issue guidelines strictly to limit the occasions when such additional checks can be undertaken.

1.40 We asked the Government whether the Attorney General’s proposed guidelines would be made available, and if not, what the likely content of those guidelines would be, to help us decide whether the arrangements envisaged by the Government will be adequate to ensure that there will be no inequality of arms between the defence and the prosecution. The Government responded that the policy in relation to the guidelines on jury checks has yet to be settled, but it is anticipated that the guidelines will closely reflect those on juror checks that already apply in England and Wales, a copy of which it helpfully provided.²⁷

1.41 The reason given by the Government for the difference of approach to juror checks by the prosecution and the defence is that there may be certain types of exceptional case of public importance where routine checks may not be sufficient to ensure the proper administration of justice. In such cases, the Government says, it is in the interests both of justice and the public that there should be further safeguards against the possibility of bias and in such cases checks which go beyond investigation of criminal records may be necessary.

1.42 Such additional juror checks by the prosecution are envisaged in cases relating to national security or terrorism. The guidelines explain that the aspects of these cases which may make it desirable to seek extra precautions are twofold. First, in security cases there is a danger that a juror, either voluntarily or under pressure, may make an improper use of evidence which, because of its sensitivity, has been given in camera. Second, in both security and terrorist cases, there is a danger that a juror’s political beliefs are so biased as to go beyond normally reflecting the broad spectrum of views and interests in the community to reflect the extreme views of sectarian interest or pressure groups to a degree which might interfere with his fair assessment of the facts of the case or lead him to exert improper pressure on other jurors. To ascertain whether these risks are present, it may be necessary to conduct further investigations with the records of police Special Branches and, in appropriate cases, the security services.

1.43 Such “authorised checks” require the personal authority of the Attorney General. The results of such authorised checks are sent to the DPP who decides what information ought to be brought to the attention of prosecuting counsel. The Guidelines envisage that

²⁶ EN para. 156.

²⁷ Appendix 1d.

the information obtained through such additional checks may lead to the Crown exercising its right of stand-by (i.e., asking for a juror to be replaced, considered below), where the information affords strong reason for believing that a particular juror might be a security risk, be susceptible to improper approaches or be influenced in arriving at a verdict for political or sectarian reasons.²⁸

1.44 The Government's view is that providing for additional jury checks in limited circumstances does not confer any unfair advantage on the Crown, or subject the accused to any unfair disadvantage, and that any concerns over fairness and equality of arms can be allayed by setting out clearly in administrative guidelines the circumstances in which jury checks may be carried out by police not connected to the prosecution.

1.45 We have given careful consideration to the Government's arguments but we are not persuaded that the proposed administrative guidelines, if modelled on the existing guidelines for England and Wales, overcome concerns about equality of arms between the defence and the prosecution in cases concerning national security or terrorism. The guidelines themselves envisage that the information revealed during an authorised juror check by the prosecution may justify exercise of the prosecution's remaining right to stand-by. This in itself seems to us to be a breach of the principle of equality of arms for the simple reason that the prosecution in national security and terrorism cases has an opportunity, not available to the defence, to conduct juror checks and remove jurors on the basis of the information so obtained. A breach of the principle of equality of arms is not capable of justification.

1.46 To avoid a breach of the principle of equality of arms, it would be necessary, in our view, either to retain the defence's equivalent right of peremptory challenge, or for the Crown to be prepared to disclose enough of the gist of the information obtained by way of its further authorised checks to support a challenge to a juror for cause. A challenge for cause, in our view, is capable of including a challenge on the basis that the juror is a security risk, susceptible to improper approaches, or liable to be influenced in arriving at a verdict for political or sectarian reasons.

(e) Abolition of defence's right of peremptory challenge

1.47 The Bill also abolishes the defendant's right of peremptory challenge in Northern Ireland.²⁹ The Explanatory Notes state that the abolition of this right should not in principle compromise in any way the defendant's right to a fair trial, as the defendant will continue to enjoy adequate protection due to the retention of his right to challenge any juror for cause.³⁰ However, the Explanatory Notes do not provide any justification for the abolition of this right of peremptory challenge. We therefore asked the Government to provide the justification.

1.48 The Government explained that the reason for abolishing the defence's right of peremptory challenge is to limit the defendant's ability to "pack" a jury and thereby reduce the risk of perverse verdicts. The Government considers it likely that in a

²⁸ *Ibid*, para. 9.

²⁹ Clause 12. The right of peremptory challenge was abolished in England and Wales by s. 118 of the Criminal Justice Act 1988.

³⁰ EN para. 157.

polarised society such as Northern Ireland there are jurors who may be influenced by their political and religious backgrounds when reaching a verdict. It points out that the NIHRC called for the abolition of the right to peremptory challenge in its response to the review of the Diplock courts in 2000, arguing that such challenges pander to a stereotypical thinking and further entrench prejudice in Northern Ireland.

1.49 The NIHRC, however, points out that clause 12 of the Bill only implements its recommendation in part. It recommended that in order to reduce the risk of perverse verdicts, both the defence's right to peremptory challenges and the Crown's right to stand-by ought to be removed. The NIHRC believes that if the right to peremptory challenge is to be abolished, this should be accompanied by the abolition of the use of stand-by, in order to be compatible with the principle of "equality of arms" implicit in Article 6(1) ECHR (i.e. that no party must be under a procedural disadvantage compared to any other party to the litigation).

1.50 The Government argue that there is no breach of the principle of equality of arms because any imbalance is acceptable. It relies on a combination of the prosecution's duty to act with absolute propriety, the court's obligation to intervene to ensure that appropriate standards of propriety are observed, and the introduction of counterbalancing restrictions on the exercise by the Crown of its right to require jury panel members to stand-by. We asked the Government whether a draft of the Attorney-General's proposed guidelines on restriction of stand-by would be made available, and the Government responded that they would be the same as those that currently apply in England and Wales. In accordance with those guidelines, the Crown will only exercise their right of stand-by in future where information comes to light suggesting that a juror is not suitable for jury service.

1.51 As explained above, however, one of the circumstances in which the Guidelines clearly envisage that it would be proper for the Crown to exercise its right to stand-by a juror is where an authorised juror check by the prosecution reveals information affording strong reason to believe that a particular juror might be a security risk, be susceptible to improper approaches, or be influenced by political/sectarian reasons in arriving at a verdict. **In our view, for the reasons given above, this continued opportunity for the prosecution to stand-by a juror is in breach of the principle of equality of arms, however rarely in practice the right is exercised.**

(2) The powers of the Northern Ireland Human Rights Commission

The Bill's provisions

1.52 The Bill's provisions in relation to the powers of the Northern Ireland Human Rights Commission (NIHRC) arise from a lengthy process of negotiation and consultation. The Northern Ireland Act 1998, which established the Commission and set out its functions and powers, required the Commission to make recommendations about its own effectiveness within 2 years of its establishment, which it duly did in March 2001, submitting 25 recommendations to the Government. In May 2002 the Government produced its initial response; the Commission then withdrew some recommendations and added new ones, and the Government issued a further consultation paper in

November 2005. The results of that consultation, which informed the relevant provisions of this bill, were published in November 2006.³¹

1.53 The previous JCHR took a close interest in the adequacy of the NIHRC's powers to promote and protect human rights in Northern Ireland, reporting on the subject in Session 2002-03.³² In its final report of the 2001-2005 Parliament, that Committee recorded its "profound dissatisfaction" that it had taken the Government so long to respond to the NIHRC's review of its powers.³³ We discussed this question with Commissioners and staff of the NIHRC on a visit to Belfast in November 2006, before publication of the Bill.

1.54 Clauses 13 to 15 of the Bill extend the powers of the NIHRC in three ways:

- Clause 13 enables the NIHRC to institute or intervene in legal proceedings on human rights grounds, disregarding the victim test in s.7(3) of the Human Rights Act 1998, though there has to be one or more actual or potential victims of the alleged unlawful act by a public authority;
- Clause 14 allows the NIHRC to compel a person to produce documents or information in their possession, or to give oral evidence, for the purpose of an investigation under s. 69(8) of the Northern Ireland Act 1998;
- Clause 15 grants the NIHRC the power to access places of detention, again for the purpose of an investigation under s. 69(8) of the 1998 Act.

1.55 The new powers under Clauses 14 and 15 are subject to a number of restrictions and conditions. The Explanatory Notes describe these as safeguards to help ensure that the powers are used appropriately by the Commission and complied with by public authorities.³⁴ In its *Response to Consultation* document, the Government also says that, in relation to the power to compel evidence, it will ensure that the human rights of those who might be placed in danger from the release of evidence are adequately protected.³⁵

1.56 In relation to the exercise of both powers, the NIHRC must have prepared terms of reference of an investigation and sent these to persons affected by it.³⁶ The powers may only be used in respect of matters arising, and situations that exist, on or after 1 January 2008,³⁷ and the Commission may not use its power to compel evidence in relation to documents or matters created before, or giving information relating to a time before, that date.³⁸ Also in relation to the exercise of the power to compel evidence, notices given by the NIHRC may be disregarded if they would require the disclosure of national security information.³⁹ In such cases the Commission may apply to the tribunal established under s.65 of the Regulation of Investigatory Powers Act 2000 for an order requiring the person

³¹ *Response to Consultation: The Powers of the Northern Ireland Human Rights Commission*, NIO, November 2006.

³² Fourteenth Report of Session 2002-03, *op. cit.*

³³ Nineteenth Report of Session 2004-05, *The Work of the Committee in the 2001-2005 Parliament*, HL Paper 112/HC 552, paras 162 to 166.

³⁴ para. 8.

³⁵ *Response to Consultation, op. cit.*, para. 14.

³⁶ Clause 16.

³⁷ Clause 19 (1).

³⁸ Clause 19(2).

³⁹ New section 69(B) of the Northern Ireland Act 1998, inserted by Clause 14.

to comply, rather than to the county court as it will be able to do in relation to other grounds on which people may fail to comply with a notice to produce evidence. A new provision prevents the NIHRC from considering in an investigation whether an intelligence service has acted, or is acting, in a way which is incompatible with a person's human rights, or other matters concerning human rights in relation to an intelligence service.⁴⁰

1.57 The power to access places of detention may only be exercised if the NIHRC has considered whether that place of detention has been sufficiently investigated by another person, and concluded that it has not.⁴¹ It may not be used until 15 days have elapsed from the provision of the terms of reference of an investigation to the person responsible for the place of detention, who may apply to a county court to prevent the NIHRC accessing the place of detention, or for restrictions to be imposed on the exercise of the power.⁴²

1.58 Following our initial consideration of the Bill, we wrote to the NIHRC asking them to set out their view of the likely effects of the various restrictions on its proposed new powers. In response the Commission provided us with the briefing it prepared for Committee stage of the Bill in the Commons in relation to Clauses 13 to 19. In our letter to the Government on the Bill, we also requested further justification from the Government of the restrictions, and the Government's view as to whether the power to access places of detention as set out in the Bill is sufficient to enable the NIHRC to be part of the UK's National Preventive Mechanism under the (NPM) under the Optional Protocol to the UN Convention against Torture (OPCAT).

(a) Human rights proceedings

1.59 The NIHRC welcomes Clause 13 of the Bill, enabling it to institute or intervene in human rights legal proceedings. This Clause provides the NIHRC with powers analogous to those which the Commission for Equality and Human Rights will possess under s.30 of the Equality Act 2006. **We welcome this provision, which will enhance the NIHRC's effectiveness in promoting and protecting human rights.**

(b) Powers to obtain evidence and access places of detention

1.60 In its Committee stage briefing the NIHRC expresses strong concern about the fact that the powers relating to evidence and access provided in the Bill are offered "in a very limited form, hedging them with exclusions, limitations and procedural obligations, and adding little value in terms of the protection of human rights."⁴³ The Government, on the other hand, states that given the broad remit of the Commission, it is important that the powers are subject to appropriate safeguards, arguing that there "are many public bodies with responsibility for ensuring compliance with human rights law in specific parts of the

⁴⁰ New subsections 69B(5) and (6) of the 1998 Act, inserted by Clause 14.

⁴¹ New subsection 69C(4) of the 1998 Act, inserted by Clause 15.

⁴² New subsections 69C(5) and (6) of the 1998 Act, inserted by Clause 15.

⁴³ NIHRC Committee stage briefing on Clauses 13-19, para. 5. See <http://www.publications.parliament.uk/pa/cm200607/cmpublic/justice/memos/m0102.htm> on the Public Bill Committee's webpages.

public sector and it is not necessary for the Commission to duplicate the work of these bodies”.⁴⁴

1.61 The NIHRC identifies three key issues arising from the provisions of the Bill

- restrictions on the use of evidential powers, including “national security” exclusions
- fettering of access to places of detention
- the time limit on using new powers.⁴⁵

(c) Restrictions on evidential powers

1.62 The NIHRC argues that the provision in the Bill enabling a recipient of a notice which the Commission may issue requiring the production of evidence to apply to a county court for cancellation of the notice would not add to the protection of human rights, and cites the UN Paris Principles in support of its view that national human rights institutions should be able to take action falling within their competence, subject to responsible use of their powers as determined, in this case, against the ordinary threshold of judicial review.⁴⁶

1.63 Similar provisions exist in the Equality Act 2006 in respect of inquiries, investigations and assessments to be undertaken by the Commission for Equality and Human Rights (CEHR).⁴⁷ In one respect, however, the NIHRC is more circumscribed than the CEHR will be. In respect of a notice issued by the NIHRC, the county court may cancel it on the grounds that the requirement imposed by the notice contravenes the new subsection 69A(4) of the 1998 Act, establishing the requirement for the Commission to have considered whether a matter has been sufficiently investigated by another person and to have concluded that it has not. It is not clear on the face of the Bill whether this is merely a procedural obligation, and that the court only has power to cancel the notice if the Commission has failed to go through the prescribed procedural step before issuing the notice, which in our view would be unobjectionable, or whether the court can cancel the notice because in the court’s view the matter has already been sufficiently investigated by another person.⁴⁸ The NIHRC appears to interpret the Bill as meaning the latter. It points out that it avoids duplication of work with other regulatory bodies through Memoranda of Understanding and other protocols, and argues that the activities of other oversight bodies should not create any ground to object to an investigation by the Commission.

1.64 We consider it is reasonable for the NIHRC to be subject to essentially the same judicial oversight of its powers to compel evidence as that which will apply to the CEHR, and we do not consider that the right of the recipient of a notice to apply to

⁴⁴ Appendix 1d.

⁴⁵ NIHRC Committee stage briefing on Clauses 13-19, para 6.

⁴⁶ *Ibid*, paras 9 and 10.

⁴⁷ Paragraphs 9 and 10 of Schedule 2.

⁴⁸ Cf. proposed new subsection 69C(7)(c), under which the court has power to make an order concerning the NIHRC’s access to places of detention if the Commission “has failed to comply with” the requirement that it must first consider whether there has been sufficient investigation by another person and conclude that it has not. This wording seems more clearly to presuppose only a procedural obligation on the Commission.

the county court for cancellation of the notice on the grounds that it is unnecessary or unreasonable would be an undue infringement of the NIHRC's independence of action. We do, however, agree with the Commission that a court should not be able to cancel a notice on the grounds that the matter to which the notice relates has already been sufficiently investigated by another person, if that is the intended effect of new subsection 69A(5)(b). Indeed, we consider that if this were the effect of the new subsection it would create an unjustifiable limitation on the Commission's freedom of action, failing to take into account its specific role to promote and protect human rights which is not fully shared by other regulatory bodies in Northern Ireland. We recommend that proposed new subsection 69A(5) be amended to make clear that the ground on which the notice can be cancelled is that the Commission has not complied with the procedural obligation in new subsection 69A(4), and so bring it into line with the equivalent provision in proposed new section 69C(7)(c).

1.65 We also note that in her recent report on her investigation into allegations of collusion between the police and their informants,⁴⁹ the Police Ombudsman for Northern Ireland said that it is “essential that, in the arrangements for the future strategic management of National Security issues in Northern Ireland, there will be accountability mechanisms which are effective, and which are capable of ensuring that what has happened here does not recur.”⁵⁰ The effect of the blanket prohibition on the NIHRC considering human rights matters in relation to the intelligence services in proposed new subsection 69B(5) would be that the NIHRC has no role to play in such accountability mechanisms, which would be a surprising position for an independent national human rights institution.

1.66 We recognize and accept the need to protect information the disclosure of which could affect national security. However, we agree with the NIHRC that there should be no blanket ban preventing it from raising questions about the intelligence services in its investigations. In the context of Northern Ireland, such a limitation would be a severe blow to the credibility and effectiveness of the Commission in protecting and promoting human rights.

(d) Access to places of detention

1.67 In relation to the restrictions placed on the Commission's new power to access places of detention, the Government argues that the Northern Ireland Prison Service has been subject to inspections and external reviews from 17 different bodies since 2004, and that it is right that “places of detention have the opportunity to suggest that an additional investigation is not necessary if it has only recently co-operated with an investigation by another body in very similar territory”.⁵¹ It also points out that, despite the fact that a place of detention will have a 15-day period during which it can appeal against a visit, once that period is over or any application against the use of the power has been determined in the Commission's favour, the Commission will have unrestricted access for the purposes of the relevant investigation.⁵² The Commission argues, on the other

⁴⁹ *Statement by the Police Ombudsman for Northern Ireland on her investigation into the circumstances surrounding the death of Raymond McCord Junior and related matters* (22 January 2007).

⁵⁰ *Ibid* at p. 15.

⁵¹ Appendix 1d.

⁵² *Ibid*.

hand, that its power of access to places of detention must allow for unannounced visits if it is to be effective as a means of discouraging or uncovering human rights violations.⁵³ It also points out that, unless it has announced a formal investigation, it will be reliant on the permission of the relevant authorities to undertake a visit in pursuance of its other statutory responsibilities.

1.68 In response to our question the Government did not provide us with its assessment of whether the power to access places of detention as set out in the Bill was sufficient to enable the NIHRC to be part of the UK's National Preventive Mechanism (NPM) under OPCAT. Instead it said that discussions on the nature of the NPM and the various bodies which should be part of it are still in progress and no final judgment has been reached.⁵⁴ Article 20 of OPCAT requires States Parties, *inter alia*, to grant NPMs "access to all places of detention and their installations and facilities" and "the liberty to choose the places they want to visit and the persons they want to interview".

1.69 In our view the restrictions placed on the NIHRC's powers to access places of detention by the Bill are far too onerous to enable it to carry out its statutory responsibilities in an effective manner. We consider that an unrestricted right of access to places of detention for the Commission, subject to the redress of judicial review if the Commission uses its power inappropriately, is necessary to enable the Commission to protect the human rights of those in the custody of the state. We also consider that the proposals in the Bill make it very doubtful whether the Commission could form part of the UK's National Preventive Mechanism under OPCAT.

(e) Time limit on using new powers

1.70 The Commission may only exercise its new powers to compel evidence and access places of detention on or after 1 January 2008. In his letter to us, Mr Goggins says this is in accordance with the Government's belief that the Commission's investigations should be "forward looking".⁵⁵ In the House of Commons Public Bill Committee he indicated that he would be giving the matter further consideration and the Government might table its own amendment for report stage, primarily because of the Commission's concerns about conducting its present business.⁵⁶

1.71 The Commission points out that Clause 19 of the Bill as introduced would prevent it from requiring the production of any document created on or before 31 December 2007, even if it was directly relevant to a human rights violation existing on or arising after 1 January 2008. It also notes that no such time limits will apply in respect of the work of the CEHR or the Scottish Human Rights Commissioner, and that in sufficiently grave matters the Police Ombudsman is not restricted by any such time limit.⁵⁷

1.72 For report stage in the Commons the Government duly tabled amendments to bring forward the cut-off date from 1 January 2008 to 1 August 2007. If made, these amendments will represent a marginal improvement over the bill as introduced. They

⁵³ NIHRC Committee Stage briefing for Clauses 13-19 para 27, *op. cit.*

⁵⁴ Appendix 1d.

⁵⁵ Appendix 1d.

⁵⁶ Public Bill Committee, *Justice and Security (Northern Ireland) Bill*, 18 January 2007, col 106.

⁵⁷ NIHRC Committee stage briefing for Clauses 13-19, para. 36.

will not however address the difficulties created for the NIHRC by their inability to compel the production in information created before, or relating to a time before, the new date.

1.73 We consider that the cut-off established by Clause 19 is not only surprising and artificial, but also represents an unjustifiable restriction on the powers of the NIHRC to decide independently on its priorities for investigations and other work. In particular, the manner in which Clause 19 disapplies the Commission’s new powers to compel evidence in respect of information or documents created before 1 January 2008 (or 1 August 2007 if the bill is amended to that effect at Commons report stage), or relating to a time before that date, could present an insuperable obstacle to the Commission’s effective exercise of its statutory powers. We recommend that Clause 19 should be deleted.

(3) Additional powers for the police and the military

1.74 The Bill provides various additional powers to stop and question and of arrest, entry, search and seizure for the police and military, which raise issues of compatibility with the right to liberty in Article 5 ECHR and the right to respect for private, family life and home in Article 8 ECHR.

1.75 The NIHRC in its submission makes the general point that there are striking similarities between certain of these provisions and those contained in Part VII of the Terrorism Act 2000 which the NIHRC believes are no longer required in Northern Ireland in current conditions. It argues that powers such as the power of a member of the armed forces to arrest civilians without being required to inform them of the reasons for their arrest are extraordinary powers of a kind that a state should require only in the most extreme emergencies. It says that such powers are not currently used or needed by the Army in Northern Ireland, and their enactment in new legislation, without any sunset clause or any other limit of time, is not consistent with the Government’s commitment to a process of normalisation in Northern Ireland.

1.76 While we see the force of the NIHRC’s arguments, we find that we are not in a position to make judgments about the extent to which security conditions in Northern Ireland have now “normalised”. For the purposes of this Report we therefore do not address important questions about the necessity for some of these powers in relation to current conditions, but confine ourselves to assessing their human rights compatibility in other respects.

(a) Duration of stop and question

1.77 The Bill provides the police and members of the armed forces on duty with the power to stop a person “for so long as is necessary” to question him to ascertain his identity and movements.⁵⁸ Members of the armed forces are also given a power to stop a person “for so long as is necessary” to question him to ascertain what he knows about a

⁵⁸ Clause 20(1).

recent explosion or another recent incident endangering life, or about a person killed or injured in a recent explosion or incident.⁵⁹

1.78 The Explanatory Notes state that this power does not engage the right to liberty in Article 5 ECHR because it involves stopping a person for a relatively short time in order to question, which does not amount to a deprivation of liberty.⁶⁰ It is correct that a short detention pursuant to a stop and search power will not normally amount to a deprivation of liberty.⁶¹ However, the wording of this power to stop and question contains nothing on its face which limits the amount of time for which a person can be stopped. On the contrary, it authorises stopping a person for so long as is necessary to question him to ascertain certain facts. There is no objective standard on the face of the provision to constrain the very wide power. We therefore wrote to the Minister asking why the power is not expressed in terms of the amount of time that is *reasonably* necessary.

1.79 The Minister in his response relies on the decision of the House of Lords in *Gillan* to argue that the right to liberty in Article 5 ECHR will not ordinarily be engaged by this power because the exercise of the power will not ordinarily involve a deprivation of liberty within the meaning of Article 5: the questioning would normally amount to no more than a few minutes. Although there is no explicit duration stated in the clause, questioning will only, other than in unusual or special circumstances, be for a very limited time because it can only relate to the matters stated in the clause. The exercise of the power will therefore usually be a restriction on liberty of movement rather than a deprivation of liberty, so that Article 5 does not apply. In any event, argues the Government, addition of the word “reasonably” before “necessary” would not be of any benefit, because it would add nothing to the court’s ability already to decide that detaining the person concerned was not in fact necessary, or that the officer did not in fact believe it to be necessary, which already provide some safeguard against abuse of the power. It would, however, in the Government’s view have a significant disadvantage, namely that it would introduce an element of uncertainty as to the scope of the power, which would affect the operational effectiveness of the police and armed forces in Northern Ireland.

1.80 We accept that ordinarily the use of this power would not engage Article 5 ECHR because the stop in question would be brief. We are concerned about what the Minister describes as “the unusual or special circumstances” in which the questioning lasts for longer. For example, if the officer asking the questions is sure that the person stopped is withholding the information he is seeking to ascertain, he is likely to consider it to be necessary to continue to question him until he has ascertained the information which he is convinced the person is withholding. In those circumstances, it is conceivable that the detention of the person for questioning may amount to a deprivation of liberty so as to trigger the application of Article 5 ECHR. The question which would then arise is whether the deprivation is “in accordance with a procedure prescribed by law” as required by Article 5.

⁵⁹ Clause 20(2).

⁶⁰ EN para. 162.

⁶¹ *Gillan v Metropolitan Police Commissioner* [2006] UKHL 40, in which a student and a journalist in the vicinity of an arms fair were stopped and searched under the Terrorism Act 2000 and the House of Lords considered the compatibility of the power with the right to liberty in Article 5 ECHR.

1.81 In our view the lack of any objective standard in the clause conferring the power regulating the duration of the exercise of the power in any particular case gives rise to a risk of incompatibility with Article 5 on the basis that the deprivation of liberty pursuant to the power is not sufficiently regulated by any legal standard. The insertion of the word “reasonably” before “necessary” would remedy this deficiency and enable a court to decide whether the duration of the detention was such as could reasonably be considered necessary to ascertain the information sought. In the absence of such an objective standard on the face of the clause, there is a risk that the power will be interpreted by those exercising it as authorising detention for as long as they consider necessary to obtain what they regard as satisfactory answers to their questions.

(b) Information on arrest

1.82 The Bill provides a member of the armed forces with a power to arrest and detain a person for up to four hours if he or she suspects that the person is committing, has committed or is about to commit any offence.⁶² A member of the armed forces making such an arrest is deemed by the Bill to comply with any rule of law requiring him to state the ground of arrest if he states that he is making the arrest as a member of Her Majesty’s forces,⁶³ unless the rule of law requiring him to state the ground of arrest “has effect only by virtue of the Human Rights Act 1998.”⁶⁴

1.83 Section 28(3) of the Police and Criminal Evidence Act 1984 (“PACE”) provides that “no arrest is lawful unless the person arrested is informed of the ground for the arrest at the time of, or as soon as is practicable after, the arrest.”

1.84 Article 5(2) ECHR provides:

“Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”

1.85 The effect of the Bill therefore appears to be to disapply s. 28(3) PACE for the purposes of this particular power of arrest, but to leave the requirements of Article 5(2) ECHR in place.

1.86 The Explanatory Notes explain that the purpose of the power is to allow sufficient time for a police officer to attend in order to re-arrest the person and charge them with an offence, if appropriate.⁶⁵ The reason for not requiring them to provide detailed legal grounds for arrest is said to be that “they are not expected to know the law as intimately as a police constable.” The Minister, in his response to our letter, made clear that the rationale for the provision is so as not to impose excessive requirements on the armed forces: “a simple to use power of arrest that is effective in the range of circumstances in which it might arise, and is suitable for members of the forces (who will not have the extensive experience of the police in exercising such powers) is essential.” The Government’s concern is that the operational effectiveness of the armed forces would be

⁶² Clause 21(1).

⁶³ Clause 21(2).

⁶⁴ Clause 21(5).

⁶⁵ EN paras 60-61.

impaired if the requirement were too onerous. If the grounds of arrest were wrongly stated by a member of the armed forces it could mean that the arrest would be held to be unlawful, and any actions to restrain the individual may also be illegal. If members of the armed forces became reluctant or uncertain about the use of these powers, it would hamper their ability to react appropriately in complex and fast-moving situations.

1.87 The Minister is satisfied that the clause satisfies the procedural requirement in Article 5(2) ECHR. We accept that, according to European Court of Human Rights case-law interpreting Article 5(2), it is not always necessary for the relevant information to be given at the very moment of the arrest, provided it is given within a sufficient period following the arrest, and the extent of the information required depends on the circumstances.⁶⁶ For example, an arrested person can be taken to a police station before being given the information. However, precisely what Article 5(2) requires is likely to depend on the circumstances of the particular case. In our view, if there are no good operational reasons for delaying the provision of the requisite information, and it is clear that the information was available to and understood by the arresting officer, there would seem to us to be a risk of a breach of Article 5(2) if that information is not provided to the detainee until four hours later. Since the requirements of Article 5(2) have been elaborated in judgments of the Court interpreting the standard contained in that Article in the circumstances of particular cases, in our view it is questionable whether the provisions of the Bill as currently drafted provide enough guidance to members of the armed forces about what type of information they must provide on arresting somebody and precisely when they must provide it.

1.88 Bearing in mind that the member of the armed forces making the arrest must suspect that the person arrested has committed, was committing or was about to commit an offence, in our view there does not appear to be a good reason in principle why the arresting officer should not be required at the very least to inform the detainee of the facts which are the foundation of the decision to detain, and asked whether he admits or denies the allegations. This would reduce the risk of findings of incompatibility with Article 5(2) in particular cases.

1.89 We note from the Minister's response that in fact where a person is detained by a member of the armed forces they will be informed in general terms of their reason for their arrest. This will normally be a reference to the facts giving rise to the arrest, such as the individual being seen throwing a petrol bomb. Soldiers are already given guidance in training to explain the factual grounds giving rise to the arrest. We welcome this, which we think is very likely to satisfy the requirements of Article 5(2) in most cases. **We recommend that in order to reduce the risk of incompatibility with that Article, this practice be turned into a requirement on the face of the Bill.**

(c) Breadth of power of entry of premises

1.90 The Bill provides the police or a member of the armed forces with a power to enter premises (including a vehicle) without a warrant, if he or she "considers it necessary in the course of operations for the preservation of the peace or the maintenance of order."⁶⁷

⁶⁶ *Fox, Campbell and Hartley v UK* (1990) 13 EHRR 157 at para. 40.

⁶⁷ Clause 22(1).

A police officer requires authorisation from an officer of at least the rank of superintendent, unless it is not reasonably practicable to obtain such authorisation. There is no equivalent requirement of authorisation by a senior officer where the power is exercised by a member of the armed forces.

1.91 The power to enter premises without a warrant is very broadly worded and contains no objective standard. The Government's reasons are the same as in relation to the provisions considered above: introducing objective words into the formulation of the power would impair operational effectiveness because it would introduce uncertainty into the scope of the power: officers may be prevented from taking decisions which are operationally necessary because they are not certain whether a third party would consider it to be reasonably necessary. The Government also claims that oversights and safeguards exist even with such a subjectively worded power, in that the officer's factual basis for believing the action to be necessary can be tested in court and it would be open to a court to find that it was not necessary, or that he did not believe it to be necessary.

1.92 In our view, however, judicial control over subjectively worded powers is significantly weaker than where the definition of the power contains an objective standard such as reasonableness. We recommend that the power of entry in clause 22 should be expressed in objective terms, such as where the police officer or member of the armed services reasonably considers it necessary, in order to reduce the risk of the power being found to be incompatible with Article 8 ECHR. We also recommend that there be an equivalent requirement of authorisation by a senior officer where the power is exercised by a member of the armed forces.

(d) Detention during search of premises

1.93 The Bill provides the police or members of the armed forces with a power to enter and search premises to ascertain if there are munitions unlawfully on the premises or wireless apparatus on the premises where there is a reasonable suspicion that such items are present.⁶⁸ The Bill gives the officer carrying out such a search the power to require a person to remain on the premises for up to four hours, extendable to 8 hours in total, if he reasonably believes it necessary in order to carry out the search or prevent it from being frustrated.⁶⁹

1.94 The Explanatory Notes acknowledge that this power could be used in such a way as to engage Article 5 ECHR, because in theory the requirement to remain on the premises could last for up to 8 hours.⁷⁰ However, they state that in practice individuals would be allowed to leave the premises or move around them subject to some restrictions and for a much shorter time, and that guidance will be issued to police and the armed forces on the appropriate use of this power so as to ensure that these powers are not exercised in a way that engages Article 5.

1.95 Requiring a person to remain on premises for up to 8 hours during the conduct of a search of those premises is clearly capable of amounting to a deprivation of liberty for the purposes of Article 5. We therefore asked the Minister which of the enumerated

⁶⁸ Schedule 3, para. 2.

⁶⁹ *Ibid*, para. 3.

⁷⁰ EN para. 163.

exceptions to the right to liberty in Article 5 the Government relies on in cases where the exercise of the power amounts to a deprivation of liberty. The Minister in his response acknowledges that the power could clearly be applied in ways and for a duration which would engage Article 5, and argues that in such a case the deprivation of liberty would be within the scope of Article 5(1)(b), that is, in order to secure the fulfilment of an obligation prescribed by law. This is because, applying the reasoning of Lord Bingham in *Gillan*, it is an offence to obstruct or frustrate a search of the premises, and any detention is therefore to secure effective fulfilment of that obligation.

1.96 We accept that this does appear to be the effect of Lord Bingham's comments in *Gillan*. However, as we commented in our recent Report on the Offender Management Bill,⁷¹ we find this to be a circular argument of potentially alarming breadth, and doubt whether the same view would be taken by the European Court of Human Rights. In our view, the exception to the right to liberty in Article 5(1)(b) has been given a very narrow scope by that Court, to cover only those situations where a person is detained to compel him to fulfil a pre-existing, specific and concrete obligation which he has until then failed to satisfy. We doubt that it covers deprivation of liberty for the purposes of a search, where the only obligation prescribed by law is the obligation to co-operate with the search. **We therefore doubt whether detention for up to 8 hours during a search of premises is compatible with the right to liberty in Article 5 ECHR.**

1.97 The Committee has also frequently commented that conferring a power of this width, which is capable of interfering with the right to liberty, and leaving it to as yet unpublished guidance to regulate the use of that power so as to avoid incompatibility, is not satisfactory, because it deprives the Committee, and Parliament, of the opportunity to subject the scope of the power to the careful scrutiny its subject matter demands. We asked the Minister whether he would make a draft of the guidance available.

1.98 **We welcome the Minister's indication that he intends to make a draft of the guidance available during the passage of the Bill.**

⁷¹ Third Report of Session 2006-07, *Legislative Scrutiny: Second Progress Report*, HL Paper 39/HC 287, para 3.31.

2 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	2 nd of Session 2006-07 (HL Paper 34/HC 263)

Background

2.1 We previously reported on this Bill in our Second Report of this Session. In our previous Report we indicated our intention to return to the question of the powers of enforcement in light of the Government's response to our request for further information on the Government's view that the relevant provisions in the Bill were compliant with Convention Rights.⁷² We wrote to the Minister on 19 December 2007⁷³ and received the Minister's response in a letter dated 16 January 2006.⁷⁴ We thank the Minister for her prompt response.

2.2 Currently bailiffs have a right of entry to debtors' premises, but generally that right may only be exercised with the permission of the occupier and without the use of force.⁷⁵ The Bill proposes to create a single process for the enforcement of debts through seizure and sale of goods, implementing the Government's proposals in their White Paper, *Effective Enforcement*.⁷⁶ The Bill enables the Secretary of State to establish a certification scheme for "enforcement agents";⁷⁷ proposes broad statutory powers of entry, search and seizure for enforcement agents, including powers of forced entry for the purpose of enforcement of debts by taking control of goods.⁷⁸

2.3 Citizens Advice argue that the proposals in the Bill do not contain adequate safeguards to protect vulnerable debtors from unscrupulous enforcement agents. They have conducted a survey of their local bureaux which indicates that 36% of bureaux consider that bailiffs are misrepresenting their existing powers of entry and that 61% have experience of bailiffs harassing or intimidating CAB clients. They argue that the Bill should be amended to ensure that proposed powers of entry are accompanied by effective safeguards and that enforcement agents should be subject to "full regulation", including the possibility for sanctions other than the removal of their licence to act.⁷⁹

2.4 The European Court of Human Rights takes a robust approach to powers of entry, search and seizure.⁸⁰ These powers are invasive and must be accompanied by clear

⁷² Second Report of Session 2006-07, *Legislative Scrutiny: First Report*, HL Paper 34/HC 263, paras 6.2 and 6.45.

⁷³ *Ibid*, Appendix 4b (Letter dated 19 December 2006).

⁷⁴ Appendix 2.

⁷⁵ *McLeod v Butterwick* [1998] 2 All ER 901. There are limited exceptions to this rule, including powers of bailiffs enforcing fines imposed by magistrates pursuant to the Magistrates Courts Act 1980.

⁷⁶ Cm 5744(2003).

⁷⁷ Clauses 54–56.

⁷⁸ Schedules 12–13.

⁷⁹ Citizens Advice, House of Lords Committee Stage Briefing, 11 January 2007 (See www.citizensadvice.org.uk).

⁸⁰ *Keegan v United Kingdom*, App No 28867/03, 18 July 2006, para 34. In this case, police officers entered a property pursuant to a warrant, seeking evidence in a criminal investigation. The suspect was no longer connected with the property and had not been for a significant period of time. The Court concluded that, as no reasonable steps appeared to have been taken to confirm the connection between the property and the suspect, the search was disproportionate and in breach of Article 8 ECHR. The applicants had no remedy in domestic law, as the police officers had acted in accordance with a warrant and had not acted maliciously. The failure to provide a remedy was in breach of Article 13 ECHR.

justification in order to meet the requirements of Article 8(2) ECHR that any interference with the right to respect for private life and the home is necessary. The legislative framework for these powers must afford adequate and effective safeguards against abuse *in practice*.⁸¹ Whether the safeguards in the Bill are adequate to meet the requirements of Article 8(2) ECHR will depend on the nature, scope and duration of the proposed powers of entry, search and seizure, the circumstances in which they will be authorised, the identity of the individuals authorised to conduct them, and the remedies provided by national law. An individual adversely affected by the exercise of these powers must have access to an effective remedy for any alleged breach of their Convention rights as guaranteed by Article 13 ECHR.⁸²

2.5 The Explanatory Notes accept that the enforcement provisions in the Bill engage individual debtors' and third parties' rights to a fair hearing (Article 6 ECHR), right to respect for their family and private life and their home (Article 8 ECHR) and the right to peaceful enjoyment of their property (Article 1, Protocol 1 ECHR). They go on to explain that the Government consider that a creditor is "entitled to the effective recovery of money lawfully due to him or her. A debtor is entitled to no greater intrusion on his or her property or privacy than is needed to achieve that". The Government accept that the provisions in the Bill "involve striking a balance", but the Explanatory Notes give no indication of the reasons why the Government consider that balance has been achieved by the provisions in the Bill.⁸³ We accept that protecting the rights of creditors to recover outstanding debts is a legitimate aim. The question is whether the framework proposed by the Bill for enforcement by taking control of goods contains adequate safeguards to ensure that the rights of debtors, their families and third parties are not disproportionately restricted in practice. We have a number of concerns which we consider below.

(1) Certification of Enforcement agents

2.6 The identity of the individual, and the number of individuals, exercising a power of forced entry is clearly relevant for the purposes of analysing whether the exercise of those powers will be compatible with the right to respect for home and private life, and to physical integrity, guaranteed by Article 8 ECHR and the rights to quiet enjoyment of property guaranteed by Article 1, Protocol 1 ECHR. In practical terms, the likelihood of the powers granted by the Bill being exercised in a manner compatible with Convention rights will increase if the exercise of those powers is monitored and regulated effectively. The Explanatory Notes explain that persons who currently take control of goods are not subject to any uniform regulatory system. *Effective Enforcement* proposed a new licensing regime to guard against any malpractice and to protect debtors. Although "this remains the Government's long-term aim", there is no provision for such a scheme in this Bill. The Bill instead proposes a reformed certification process for Enforcement agents,

⁸¹ *McLeod v United Kingdom* 27 EHRR 493, paras 51-58 (Although police officers had acted within the bounds of their powers in domestic law, the manner in which they had participated in a forced entry into the applicant's property – without checking the authority of her ex-husband to enter the property – rendered their actions a disproportionate interference with the applicant's right to respect for private life and home as guaranteed by Article 8 ECHR).

⁸² *Keegan v United Kingdom*, App No 28867/03, 18 July 2006.

⁸³ HL 5–EN, para 607.

building on the existing certification process for bailiffs.⁸⁴ The Government has recently published a freestanding consultation paper on the Regulation of Enforcement Agents.⁸⁵

2.7 Citizens Advice have expressed their concern that the Regulatory proposals proposed by the Government in 2003 are not encapsulated in this Bill. They have proposed amendments to the Bill which would lead to the creation of an independent regulatory body for enforcement agents and bailiff companies. This body would have the power to issue licences to enforcement agents, to impose conditions on those licences and issue sanctions and order redress in the event of misconduct.⁸⁶ We consider that it is uncertain whether individual enforcement agents will be treated as public authorities for the purposes of the Human Rights Act 1998. If not, they will have no general duty to act in a manner which is compatible with the Convention rights of debtors and third parties. In her response to our Chairman's letter, which raised this issue, the Minister did not clarify whether the Government considered that enforcement agents would be considered "public authorities" or not.⁸⁷ **We consider that the introduction of a clear regulatory framework for enforcement agents would be a valuable additional safeguard for the Convention rights of debtors and third parties affected by search and seizure. We consider that, without an effective means of monitoring and regulating the execution of the invasive powers provided by the Bill, there will be a greater risk that these powers may be used in a way which leads to a breach of Article 8 ECHR. We draw this to the attention of both Houses.**

2.8 The Bill enables the Secretary of State to introduce regulations permitting certificates to be issued to enforcement agents subject to certain conditions, but otherwise imposes very few safeguards to guarantee that individuals exercising enforcement powers will have adequate and appropriate knowledge and skills to exercise their extended powers in a way which respects Convention rights.⁸⁸

2.9 The Minister explains that the Government intend that the new enhanced and extended certification process will include a requirement for Enforcement agents to undergo training in certain key areas.⁸⁹ Enforcement agents will need a thorough knowledge of enforcement law and will be required to undergo training in fields such as diversity awareness, dealing with conflict (including restraint techniques) and identifying vulnerable or potentially vulnerable debtor groups. The Government consider that this training will ensure that enforcement agents are fully aware of the Convention rights of all parties with whom they come into contact.⁹⁰ They argue that judicial oversight will ensure that, without the requisite training, certificates will not be awarded. It is intended that regulations will require that Enforcement agents will be required to meet certain conditions before being granted a certificate. These include:

- Educational qualifications;

⁸⁴ HL 5–EN, para 244. The Explanatory Notes explain that a certification process currently exists for Bailiffs pursuant to the Distress for Rent Rules 1998.

⁸⁵ DCA, CP2/07, 30 January 2007.

⁸⁶ Citizens Advice, House of Lords Committee Stage Briefing, 11 January 2007 (op. cit.).

⁸⁷ Appendix 2, para 4-6.

⁸⁸ Clauses 55-56.

⁸⁹ Appendix 2.

⁹⁰ Appendix 2.

- The level of approved training that has to be undertaken;
- Compulsory criminal records checks;
- References;
- That the applicant is not an undischarged bankrupt or involved in certain trades (such as the buying and selling of debt).

2.10 Regulations are expected to require a security bond of £10,000 to be lodged and will provide for a complaints system which will be administered by the court which issues certificates. The court will have the power to impose sanctions on a certified enforcement agent and will be able to award compensation to the complainant.⁹¹ The Minister explains that although these provisions will provide valuable safeguards for the rights of debtors and third parties, that “for reasons of flexibility” she would prefer to leave such details to secondary legislation.⁹² The possible condition for certification mentioned by the Bill is the requirement for fees to be paid and for security to be provided.⁹³

2.11 We consider that the conditions which the Government intend to place on applicants for certification to act as an enforcement agent will provide valuable safeguards for the rights of debtors and third parties to respect for their private life and their rights to peaceful enjoyment of their property. The requirement that individuals exercising powers of entry, search and seizure will be subject to supervision will be a significant factor in ensuring that the powers in the Bill are exercised in a manner which is proportionate. However, none of these safeguards are on the face of the Bill. We draw this to the attention of both Houses.

2.12 We reiterate our frequently expressed view that where safeguards are necessary to guarantee individual Convention rights, and in particular, to accompany compulsory powers such as powers of entry, search and seizure that those safeguards should be expressed on the face of the Bill in order both to increase legal certainty and to offer valuable protection to Convention rights.⁹⁴ We do not consider that the need for “flexibility” is adequate justification for the failure to include safeguards for Convention rights as part of a statutory framework. For example, the Bill currently provides that Regulations *may* make provisions in relation to the certification scheme and that those regulations may require certificates to be issued subject to conditions. We welcome the Government amendment agreed at report stage in the House of Lords, which will require the Secretary of State to make Regulations, but note that the amended bill will not require those Regulations to have any specific content or substance.⁹⁵

2.13 We can see no significant reason why the Secretary of State should not be required to make Regulations which must include the detail of the proposed certification scheme, permitting certificates to be issued only if the Court is satisfied that the applicant is a fit and proper person to hold a certificate, including that the applicant had the relevant

⁹¹ DCA Detailed Policy Statement on Delegated Powers, page 29.

⁹² Appendix 2.

⁹³ Clause 56(2)(a)-(b).

⁹⁴ See for example, Twentieth Report of 2005-06, *Legislative Scrutiny: Tenth Progress Report*, HL Paper 186/HC 1138 paras 2.51–2.60 (Compensation Bill).

⁹⁵ HL Deb, 31 January 2007, col 278.

educational qualifications and training necessary to act as a certified enforcement agent. **We recommend that the Bill be amended to provide that no certificate will be issued unless each of the criteria identified by the Government in their response is satisfied, including the requirement that an individual applicant satisfy training and educational requirements (which may be further elaborated in Regulations) and that the Court shall have the power to determine complaints against certified enforcement agents, including the power to impose sanctions and to award compensation. We draw this to the attention of both Houses.**

2.14 We note that the Bill enables the Secretary of State to modify “or supplement” the powers in Schedule 12 of the Bill to make provision for cases where a certificate is suspended, cancelled or expires.⁹⁶ No explanation of how this power is intended to be exercised is provided by the Explanatory Notes, or the further detailed policy statement on delegated powers prepared by the Department. It would be inappropriate to allow the Secretary of State the power to permit uncertified Enforcement agents to act where a Court had removed their certificate, or that certificate had expired. This would undermine the purpose of certification and could in practice lead to a risk that the powers of entry, search and seizure in the Bill may be exercised in a disproportionate manner.

2.15 We note that an individual may act *as* an enforcement agent – including in the exercise of forced entry – if he acts in the presence, and under the direction of, a person who is a certified enforcement agent.⁹⁷ The Bill provides that third parties may assist enforcement agents in the exercise of any of their powers.⁹⁸ This could mean that, provided one certified enforcement agent is present, entry, search and seizure of goods could actually be effected by any number of other individuals not subject to certification. We consider that this seriously reduces the value of the Minister’s assurance that the powers in the Bill will be exercised by persons who have had adequate training and who are subject to the supervision of the Court. Given the broad powers permitting enforcement agents to employ third party assistants, we can see no reason to provide that an individual acting under the supervision of an enforcement agent should be considered himself an “enforcement agent”. We consider that this could lead to some confusion as to the certified status of an individual and the level of training and expertise that person holds. In addition, we note that those acting as Enforcement agents will enjoy immunity from liability for trespass in accordance with Schedule 12. We welcome the assurance of the Minister that an enforcement agent will be personally responsible for any action taken, including the actions taken by those assisting him. As noted above, although access to an effective remedy for a breach of Article 8 ECHR, or Article 1, Protocol 1 ECHR will be relevant, it will not in itself render a breach of either of those articles justified or proportionate. **We recommend that Clause 55 of the Bill be amended to provide that only certified enforcement agents (or those specifically exempted from certification by the Bill) are to be treated as enforcement agents for the purposes of the statutory powers created by the Bill. We draw this to the attention of both Houses.**

⁹⁶ Clause 56(2)(f).

⁹⁷ Clause 55.

⁹⁸ Schedule 12, para 27 (1)–(3).

(2) Powers of Entry, Search and Seizure

2.16 The Bill proposes that, in certain circumstances, a certified enforcement agent will be able to enter any “relevant premises” without a warrant.⁹⁹ Relevant premises are any premises where an enforcement agent “reasonably believes” that the debtor “usually lives” or carries on a trade or business (including third party premises).¹⁰⁰ An enforcement agent may only take control of goods if they are goods of the debtor. If an enforcement agent does not “reasonably believe” that a debtor “usually lives” at a property or carries on a trade and business there, he must obtain a warrant in order to gain a right of entry. The Government accept that the enforcement agent should have a reasonable belief that he is attending the right property before attempting entry or re-entry into premises. The Minister explains that “reasonable belief” will be “based upon the evidence that the agent will have to hand when calling at the premises”. She notes that when executing a judgment, the enforcement agent will be acting upon information contained in a judgement, warrant or writ issued by the Courts. This safeguard is not on the face of the Bill.¹⁰¹ The Bill provides for rights of entry and unlimited re-entry for enforcement agents based upon their “reasonable belief” as to the debtors’ connection with the property.¹⁰² While this power does not extend to entry by the use of force, it is very broad and we consider that it could lead to a wider interpretation in practice than that intended by the Government. **If powers of entry without a warrant are intended to be limited to the premises identified by the information in the relevant judgment, warrant or writ, we consider that this should be clearly expressed on the face of the Bill. We recommend that the Bill be amended accordingly.**

2.17 **In any event, we recommend that the Bill should require the Secretary of State to issue statutory guidance to enforcement agents on the bounds of their powers, and if necessary, that guidance should specifically address the evidence needed to form a “reasonable belief” that a debtor “usually lives” at a property or “carries on a trade or business” there. We consider that it is important to ensure that these new statutory powers are not misunderstood, or misrepresented, in order to protect the rights of debtors’ families and third parties against unnecessary or disproportionate invasions of their right to respect for their private life. We draw this to the attention of both Houses.**

Use of Reasonable Force

2.18 The Bill gives enforcement agents general powers of forced entry without judicial oversight in some circumstances. In all other circumstances, an enforcement agent may apply for a warrant to use reasonable force in the pursuit of the powers granted by the Bill. These powers significantly expand upon existing powers of bailiffs, and other enforcement agents to use force.

⁹⁹ In pursuit of any writ or warrant of control, or any right of Commercial Rent Arrears Recovery (“CRAR”).

¹⁰⁰ Schedule 12, para 14.

¹⁰¹ Appendix 2.

¹⁰² Schedule 12, para 14 (6).

General powers to use reasonable force

2.19 Where an agent is exercising a right of re-entry pursuant to a writ or a warrant of control and he reasonably believes that the debtor carries on a trade or business at the premises (or where a civilian enforcement officer, exempt from authorisation by the Bill, but governed by the Magistrates Courts Act, is authorised to act in relation to a fine or order of the court)¹⁰³, the agent will have a general power to use reasonable force to gain entry.¹⁰⁴ The Minister told us that the Government was considering whether to restrict powers of re-entry without a warrant to premises that were wholly commercial.¹⁰⁵ The Government proposed an amendment to this effect for consideration at Report stage in the House of Lords. After representations by both the enforcement industry and the debt advice sector, the Minister withdrew this amendment. There was some concern that restricting the right to use force to effect re-entry would encourage enforcement agents to seize goods on a first visit, rather than enter into a walking possession agreement. The Minister was concerned that vulnerable debtors would still need protection in domestic premises. She undertook to think again, and suggested that further protection could be offered in secondary legislation.¹⁰⁶ **We welcome the Government’s proposed amendment to clarify that the use of force to gain re-entry to premises used to carry out a trade or business without a warrant does not extend to the use of force to enter a dwelling or to do anything in a dwelling. We consider that this amendment will ensure that reasonable force is not used by any certified enforcement agent to access any premises used in whole, or in part, as a residential property, without prior judicial authorisation. We consider that this amendment would provide a valuable safeguard for the rights of debtors and third parties to respect for private life and home, as guaranteed by Article 8 ECHR. We draw this to the attention of both Houses.**

Judicial authorisation to use reasonable force

2.20 The Court may issue a warrant to an enforcement agent to use “reasonable force to enter the premises or to do anything for which entry is authorised”, if “prescribed conditions are met”. The Court may require a constable to assist an enforcement agent in his execution of the warrant.¹⁰⁷ The Government intend that:

“[T]he court’s power should only be used as a last resort and each individual case will be judged on its merits....[T]hese conditions will include:

- that all other methods of enforcement have failed;
- that the property is inhabited by the debtor;
- normal entry attempts have been unsuccessful;
- there is reason to believe that there are suitable goods on the premises to satisfy the debt (and evidence to support that belief);

¹⁰³ Schedule 12, paragraph 18.

¹⁰⁴ Schedule 12, paragraph 19.

¹⁰⁵ Appendix 2.

¹⁰⁶ *Ibid.*

¹⁰⁷ Schedule 12, paras 20-22.

- the enforcement agent has considered the likely means required to gain entry; and
- the enforcement agent will leave the property in a secure state

The judge may also take other factors into account when taking his decision, including:

- the size of the debt;
- the type of the debt; and
- any other information about the debtor’s personal circumstances”

2.21 The Minister explains that the Government consider that these conditions are sufficient to ensure that the provisions relating to warrants for forced entry are Convention compliant.¹⁰⁸ She explains that the conditions are not on the face of the Bill in order to “ensure the necessary flexibility to change these requirements in future, should circumstances dictate, without the need for further primary legislation”. **We recommend that the Bill be amended to specify the minimum conditions which the applicant enforcement agent must satisfy in order to secure a warrant for the use of force. While the Bill could enable the Secretary of State to add to these conditions by secondary legislation, we consider that it would not be appropriate to permit the basic conditions identified by the Government to be amended or removed without full Parliamentary scrutiny. We draw this to the attention of both Houses.**

2.22 The Secretary of State may extend the power to use force to include the power to use force against persons.¹⁰⁹ The Government intend that the relevant regulations will only permit force against persons to be used in a restraining capacity to enable an enforcement agent to carry out his lawful duties without threat of physical interference or harm.¹¹⁰ We note that third party assistants will be permitted to assist enforcement agents in relation to any lawful use of force. **We consider that the authorisation of the use of force against persons by statute is a particularly serious matter which requires clear conditions and close Parliamentary scrutiny. We note the Minister’s reassurance that any enforcement agents and their assistants “remain subject to the law when carrying out their duties” and that, for example, they may be prosecuted for assault. We recommend that the Bill be amended to limit the Secretary of State’s power to extend the use of force to include the use of force against persons, to circumstances where that force is necessary and used in a “restraining capacity to enable an enforcement agent to carry out his lawful duties without threat of physical interference or harm” and to prevent the use of force by anyone other than a certified enforcement agent. We consider that these limitations will reduce the risk that the provisions may be exercised in a manner which may lead to a risk of incompatibility with the individual right to physical integrity guaranteed by the right to be free from inhuman and degrading treatment and the right to respect for private life (Articles 3 and 8 ECHR). We draw this to the attention of both Houses.**

¹⁰⁸ Appendix 2, Section 3.

¹⁰⁹ Schedule 12, para 24(2).

¹¹⁰ DCA Detailed Policy Statement on Delegated Powers, page.24.

Exempt Goods

2.23 An enforcement agent may take control of any goods in premises which he has the power to enter, or on the highway, provided those goods are goods “of the debtor” and not “exempt”. Regulations may permit the seizure of exempt goods “in prescribed circumstances”.¹¹¹ The Government intend that exempt goods will “include tools, books, vehicles and other items of equipment as are necessary to the debtor for use personally by him in his employment, business or vocation; and such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying his basic domestic needs and those of his family”. The definition may also include domestic pets, and sufficient cash to support basic domestic needs. The Government consider that the items that will be considered as necessary for satisfying basic domestic needs will include a cooker, a fridge, a washing machine, a dining table and sufficient chairs to seat each member of the household, bed and bedding for each member of the household, a telephone and any medical equipment. A computer may be considered necessary for the debtor’s employment business or vocation. Fixtures and fittings to provide lighting, washing and heating facilities (e.g., baths, light sockets etc) will also be exempt.¹¹²

2.24 Citizens Advice argue that the definition of those goods exempt from seizure will be a valuable safeguard for vulnerable debtors and their families rights to respect for their private lives and home and that the definition of “exempt goods” ought to be on the face of the Bill.¹¹³ We consider that the more intrusive enforcement is, the greater justification will be necessary to meet the requirements of Article 8(2) ECHR. With this in mind, we agree that the definition of “exempt goods” ought to be clearly identified on the face of the Bill. We consider that this would reduce the risk that the exercise of these powers might lead to a breach of Article 8 ECHR. **We consider that the Bill should be amended to explicitly exempt from enforcement (a) those goods which are reasonably required by the debtor, or any member of the household, for use in his employment, profession, trade or business or reasonably required by the debtor or any member of the household in their education and training; and (b) those goods which are reasonably required to satisfy the basic domestic needs of the debtor and any member of the debtor’s household. We consider that the Bill could specify that, as a minimum, the goods identified by the Government should be considered necessary for the basic domestic needs of the debtor and the debtor’s household. It should be open to the Secretary of State to add to this list by Regulations. We note that that the existing list fails to mention clothing and any items necessary for the care or upbringing of a child of the household. We consider that these items should also be expressly exempted from enforcement.**

2.25 The Bill empowers the Secretary of State to authorise the seizure of exempt goods (provided the debtor is provided with replacements in accordance with Regulations).¹¹⁴ The Government has given the example of seizure of an antique dining table and chairs, seized and replaced with another less expensive set. Any replacement must be “suitable” and the Government envisage that regulations will state that any replacements should be

¹¹¹ Schedule 12, para 11.

¹¹² DCA Detailed Policy Statement, paras 129-133.

¹¹³ Citizens Advice, House of Lords Committee Stage Briefing, 11 January 2007, *op. cit.*

¹¹⁴ Schedule 12, para 11 (2).

adequate to meet the needs of the debtor in the same way as the items taken would have done.¹¹⁵ We consider that this important limitation should be expressed on the face of the Bill. **We recommend that the Bill is amended to restrict the Secretary of State’s power to authorise the seizure of otherwise exempt goods to circumstances where replacements are provided which are capable of meeting the debtor’s needs in the same way as the exempt goods. We consider that items essential for business or work should remain exempt. We draw this to the attention of both Houses.**

Other Safeguards

2.26 The Minister explains that restrictions on the powers of entry, search and seizure in the Bill “will provide sufficient protection to debtors’ rights to respect for the home and family life and to protect individual rights to physical integrity whilst also taking into account the rights of the creditor”. These include safeguards as to the times at which an enforcement agent will be permitted to attend at a debtor’s premises and that access to any premises will be restricted to “normal” methods (including doors or French windows, but not via open windows or skylights, or by putting a “foot in the door”). Neither of these restrictions is on the face of the Bill, although the Bill permits the Secretary of State to make regulations in relation to the taking control of goods.¹¹⁶

2.27 The Bill provides that an enforcement agent may only take control of goods when the debtor has been given notice. Regulations will provide the minimum period of notice, the form of the notice, what the notice must contain, how it must be given and who will give it.¹¹⁷ The Government have indicated that the relevant period will be 7 days.¹¹⁸ Regulations may provide for the circumstances in which a Court may dispense with the need for notice.

2.28 The Bill also provides that an enforcement agent may only enter and remain on premises during “prescribed times of day”. There is nothing on the face of the Bill to restrict these prescribed times to times which are “reasonable”. The Government have indicated that they intend that the prescribed times of day will be 6am until 9pm (or during normal business hours outside this time, if the relevant premises are business premises).¹¹⁹

2.29 An enforcement agent will only be required to identify himself to persons in charge of the relevant premises when “requested”. We accept that the enforcement agent is required to provide a notice for the debtor explaining what he is doing, but that the content and form of this notice will be defined in secondary legislation.

2.30 We note that under the provisions of the Police and Criminal Evidence Act 1984 (“PACE”), a constable acting under a search warrant may be subject to more express statutory restrictions than an enforcement agent acting in pursuit of a civil debt. For example, the constable will generally be required to conduct the search at a “reasonable hour” and will generally be unable to seize items subject to legal professional privilege.¹²⁰

¹¹⁵ DCA Detailed Statement on Policy, para 141.

¹¹⁶ Schedule 12, para 13 (3).

¹¹⁷ Schedule 12, para 7.

¹¹⁸ DCA Detailed Policy Statement, para 135.

¹¹⁹ *Ibid*, para 153.

¹²⁰ Police and Criminal Evidence Act 1984, Sections 8 and 16.

The power of a constable to conduct search and seizure under PACE is closely regulated by Code B of the PACE Codes of Practice. That Code contains provisions on the making of an application for a warrant and the conduct of any search and seizure. It clearly states that the rights to privacy and respect for property are “key principles of the Human Rights Act 1998” and that a search must be fully and clearly justified before proceeding.¹²¹ The Bill makes no provision for a similar Code of Practice to apply to the conduct of entry, search and seizure by enforcement agents. We note that *Effective Enforcement* envisaged that it would be for any Regulatory Body to consider whether or not a Code of Practice was necessary.¹²²

2.31 We reiterate our view that where safeguards are necessary to ensure the protection of Convention rights, those safeguards ought to be clearly identified on the face of the Bill. In cases where the State is using, or authorising the use of, intrusive powers such as entry, search and seizure, we consider that the case for including minimum safeguards (such as the requirement that an enforcement agent should identify himself and the authority for his entry the premises to an occupier without need for a request; the minimum period of notice required; the requirement that entry take place at a “reasonable” time, and protection for material subject to legal professional privilege) on the face of primary legislation is particularly strong. We draw this to the attention of both Houses.

(3) Access to an Effective Remedy

2.32 Access to an effective domestic remedy for any possible breach of an individual’s right to respect for their home or private life will be relevant to the assessment of whether that interference may be considered proportionate. Equally, a failure to provide an effective remedy for an alleged breach of Article 8 ECHR, may lead to a breach of Article 13 ECHR. Although Article 13 ECHR, which guarantees access to an effective remedy in relation to breaches of the ECHR, is not one of the Convention rights guaranteed by the Human Rights Act 1998, the United Kingdom remains bound in international law to implement all of their obligations under the Convention.

2.33 In *Keegan v United Kingdom*, the European Court of Human Rights decided that where domestic remedies against the police were limited to circumstances where “malice” in the execution of a warrant could be proved, the United Kingdom failed to provide an effective remedy for a disproportionate forced entry and search conducted negligently and in breach of Article 8 ECHR. The Court considered that the Convention required that the applicant should be able to raise the question of the proportionality of a forced entry, search and seizure in a forum capable of granting him redress.¹²³

2.34 This case took place before the implementation of the Human Rights Act 1998, which gives individuals a right to bring proceedings to seek a remedy for any interference by a public authority with breaches of Convention rights.¹²⁴ In our view, it remains

¹²¹ *Code of Practice for Searches of Premises by Police Officers*, December 2005, para 1.2.

¹²² *Effective Enforcement*, para 113.

¹²³ App No 28867/03, Judgment 18 July 2006, paras 41–42.

¹²⁴ Sections 7-8.

uncertain whether an individual enforcement agent will be considered a public authority for the purposes of the Human Rights Act.¹²⁵

2.35 The Explanatory Notes explain that the Bill sets out remedial action for debtors against enforcement agents who breach the procedure set out in the Bill. The Bill makes no provision for remedies against enforcement agents who are acting unlawfully “from the outset”, as these matters are already covered by the existing law of tort. Debtors and third parties will continue to be able to pursue a remedy for conversion, interference with goods or trespass if an enforcement agent acts illegally (for example, without authorisation, or with notice that a debt has already been satisfied).¹²⁶

2.36 The Bill provides that third party owners of goods will be able to bring proceedings to prevent the sale of goods, or to seek the proceeds of any sale. Enforcement agents’ liability for the sale, and for the proceeds of any sale, are limited to circumstances where the agent had notice that the goods were not the debtor’s goods (or not his alone), or where a lawful claimant had made an application to the court claiming an interest in the goods. An enforcement agent will have notice of an interest in goods if he would have discovered that interest having made “reasonable enquiries”.¹²⁷

2.37 The Bill also provides that in so far as an enforcement agent fails to follow the procedures identified in the Bill or acts pursuant to a writ, warrant or order or other instrument which is defective, this will not “make the enforcement agent [or the creditor for whom he acts] a trespasser”. If an enforcement agent, in effecting an entry, fails to comply with the statutory procedure, he will only be liable in trespass to a debtor if he acts without a reasonable belief that he is complying with the statutory procedure and that the instrument authorising his actions is not defective.

2.38 We consider that it is uncertain whether enforcement agents will be considered public authorities for the purposes of the Human Rights Act 1998. Debtors and third parties are unlikely to have access to an effective remedy unless domestic courts, acting in accordance with the interpretative obligations imposed by the Human Rights Act 1998, consider whether these powers granted by the Bill were exercised in breach of Article 8 ECHR within the existing means of redress outlined above. If the courts fail to do this, we consider that there could be significant risk of incompatibility with Article 8 ECHR and Article 13 ECHR. We draw this to the attention of both Houses.

¹²⁵ Our predecessor Committee set out its concerns about the uncertainty of the law in this area in its Seventh Report of Session 2003-04, *The Meaning of Public Authority*, HL Paper 39/HC 382.

¹²⁶ EN para 258.

¹²⁷ Schedule 12, Clauses 63–65.

Formal Minutes

Monday 5 February 2007

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Judd	Nia Griffith MP
Lord Lester of Herne Hill	Mark Tami MP
The Earl of Onslow	
Lord Plant of Highfield	
Baroness Stern	

Draft Report [Legislative Scrutiny: Third 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 2.38 read and agreed to.

Summary read and agreed to.

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

Several papers were ordered to be appended to the Report.

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

[Adjourned till Wednesday 21 February 2007 at 9.00am.]

Appendices

Appendix 1a: Letter dated 18 December 2006 from the Chairman to the Northern Ireland Human Rights Commission, re Justice and Security (Northern Ireland) Bill

As part of our normal process of scrutinising the human rights implications of Government legislation, my Committee has decided to examine a number of matters arising from the provisions of the Justice and Security (Northern Ireland) Bill.

We consider the Bill's provisions relating to the powers of the NIHRC to be very significant in relation to their effect on your capacity to further the promotion and protection of human rights in Northern Ireland, and on your status as a national human rights institution. As you will recall, we discussed these issues during our recent visit to you.

We would be very grateful if you could provide us with a memorandum of evidence setting out the NIHRC's view of these provisions (Clauses 13 to 19 of the Bill). In particular, it would be helpful for us if you could set out your view of the likely effects of the various restrictions on your proposed new powers. It would also be helpful if you could let us know if you would wish to see included in the Bill any of the other additional powers for the NIHRC which you have recommended in the past, with your reasons.

In addition, if you are able to in the time available, we would welcome any comments you might have on the human rights implications of other provisions contained in the Bill. The other principal human rights matters we will be considering in our scrutiny are—

- The adequacy of the justification for the proposed new system of non-jury trials, the width of the DPP's power to certify that a trial should be conducted without a jury, and the purported ouster of the jurisdiction of the ordinary courts to determine the legality of the DPP's decision to issue a certificate
- Whether the Bill introduces an inequality between the defence and the prosecution in their respective opportunities to challenge jurors in relation to the new restrictions on revealing jurors' information to the defence and the abolition of the defence's right of peremptory challenge
- The additional powers for the police and military of stopping and questioning and of arrest, entry, search and seizure.

It would be helpful if any evidence you submit could be with us by 19 January.

Appendix 1b: Letter dated 19 December 2006 from the Chairman to The Rt Hon. Peter Hain MP, Secretary of State for Northern Ireland, re Justice and Security (Northern Ireland) Bill

The Joint Committee on Human Rights is considering the human rights compatibility of the Justice and Security (Northern Ireland) Bill. 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 in the following respects.

(1) Justification for new system of non-jury trial

The Committee is considering whether in its view there is sufficient justification for the proposed new power to dispense with jury trial in certain cases.

The Explanatory Notes to the Bill correctly state that the Bill's provision for non-jury trial does not infringe the right to a fair trial in Article 6(1) ECHR, because that right does not confer the right to trial by jury: both trial by jury and trial by judge alone provide valid mechanisms for the determination of a criminal charge by an independent and impartial tribunal.¹²⁸ However, the Bill's provision for non-jury trial still requires justification, for two reasons. First, the common law recognises a right to jury trial, restrictions on which are possible in principle but require justification. Second, a difference of treatment within the scope of application of a Convention right requires justification under Article 14 ECHR even if the difference of treatment does not itself amount to a breach of the relevant Convention right.

The main justification for the introduction and continuation of the Diplock courts in Northern Ireland was to prevent jury intimidation. The Bill contains other measures designed to reduce the risk of juror intimidation. However, the Explanatory Notes state that, even with these proposed jury reforms, "it is not yet possible for Northern Ireland to operate entirely without the fall-back of some special arrangements for a small number of exceptional cases."¹²⁹ The new system of non-jury trial is said to be "necessary to ensure that trials continue to be fair in Northern Ireland and that the quality of justice remains high."

Q1. Please provide a more detailed justification of the need for the new power, including up to date evidence of the incidence of juror intimidation in Northern Ireland compared to the rest of the UK, and an explanation of why the other measures in the Bill to reduce the risk of jury intimidation are not considered by the Government to be adequate.

(2) Width of DPP's power to certify

The Committee is considering the human rights implications of the DPP's very wide power to certify that a trial should be conducted without a jury, and in particular its implications for freedom of association and the right to respect for private and family life.

The power to certify can be exercised if the DPP "suspects" that a person is an "associate" of a person who is, or has at any time been, a member of a proscribed organisation, if he is also satisfied that the administration of justice might thereby be impaired.¹³⁰ "Associate" is defined to include a "friend" or a "relative", as well as spouses or former spouses, civil partners or former civil partners, and co-habiting partners or former partners. A

¹²⁸ EN paras 153-4.

¹²⁹ EN para. 7.

¹³⁰ Clause 1(2)(a) and (3)(b).

proscribed organisation is defined to include an organisation which was proscribed at the time of a person's membership of the organisation. The power to certify is therefore extremely wide. A person may be deprived of a jury trial, for example, if the DPP suspects that the person is a friend or relative of a former member of a formerly proscribed organisation (if he is also satisfied that this poses a risk to a fair trial).

Q2. To assist the Committee's consideration of whether the width of the power to certify constitutes a justifiable interference with a person's freedom of association and right to respect for their private and family life, please provide a more detailed justification for applying the power to certify to people who are "associates" of members or former members of proscribed organisations.

Q3. What safeguards are contemplated to guard against the risk of the power being abused?

(3) Ouster clause

The Committee is considering the human rights compatibility of the Bill's purported ouster of the jurisdiction of the ordinary courts to determine the legality of the DPP's decision to issue a certificate.

The Explanatory Notes state that this clause does not oust the jurisdiction of the courts altogether, but rather restricts the grounds on which the issue of a certificate by the DPP may be challenged.¹³¹ Challenge would still be possible on grounds of dishonesty or bad faith. The notes also claim that such a limitation on the grounds on which a certificate can be challenged is not incompatible with the right of access to a court in Article 6(1) ECHR because the DPP's decision to issue a certificate does not amount to the determination of a civil right.

This provision raises the very significant issue of preclusion or restriction of the right of access to court, recognised as fundamental both by the common law and in the scheme of the ECHR by the European Court of Human Rights. Although on its face the clause permits challenge on grounds of bad faith or dishonesty, it expressly precludes challenge on grounds of lack of jurisdiction or error of law (in other words, on grounds of illegality). Clause 7(1) states baldly that "No court may entertain proceedings for questioning (whether by way of judicial review or otherwise) any decision of the DPP for Northern Ireland in relation to the issue of a certificate under section 1" and clause 7(2) states explicitly that this prevents a court from hearing any challenge on grounds of lack of jurisdiction or error of law.

This is the first time that the Government has included such a sweeping ouster clause in a Bill since the ouster clause contained in the Asylum and Immigration Bill of 2004 as introduced. This Committee's predecessor was very critical of that clause in a number of reports on that Bill. The Government withdrew the clause in the face of overwhelming parliamentary opposition.

¹³¹ EN paras 34 and 154.

Q4. What is the Government’s justification for proposing such a wide statutory ouster of the courts’ jurisdiction to review the legality of a delegated decision?

Q5. Please explain why in the Government’s view it is compatible with the rule of law to legislate to prevent any court from considering whether a delegated decision-maker has acted without jurisdiction or on the basis of an error of law.

(4) Equal opportunity of defence and prosecution to challenge jurors

The Committee is considering whether the Bill introduces an inequality between the defence and the prosecution in their respective opportunities to challenge jurors.

The Explanatory Notes state that Article 6 ECHR does not confer a right to access information pertaining to jurors. However, the principle of “equality of arms” which is inherent in the ECHR concept of a fair trial requires that no party is placed at a substantial disadvantage compared to other parties to the proceedings. As the Explanatory Notes make clear, in certain circumstances the police will be permitted to carry out additional juror checks.¹³² However, the Notes state that there will be no inequality of arms between the parties because it is intended that such checks will be carried out by police not connected to the prosecution and that the Attorney-General will issue guidelines to strictly limit the occasions when such additional checks can be undertaken.

Q6. Will a draft of the Attorney General’s proposed guidelines be made available while the Bill is still before Parliament? If not, what will be the likely content of those guidelines?

(5) Abolition of defence’s right of peremptory challenge

The Committee is considering the Bill’s abolition of the defendant’s right of peremptory challenge.¹³³

The Explanatory Notes state that the abolition of this right should not in principle compromise in any way the defendant’s right to a fair trial, as the defendant will continue to enjoy adequate protection due to the retention of his right to challenge any juror for cause.¹³⁴ However, the Explanatory Notes do not provide any justification for the abolition of this right of peremptory challenge.

Q7. Please provide the justification for the abolition of the defendant’s right of peremptory challenge. Why is it considered necessary to abolish the right in Northern Ireland but not in the rest of the UK?

The abolition of the right may also raise an issue of equality of arms. The Explanatory Notes refer to the Government’s intention to counterbalance the abolition of the defendant’s right by the introduction of restrictions, to be contained in Attorney-General’s guidelines, on the exercise of the Crown’s equivalent use of “stand-by”.

¹³² EN para. 156.

¹³³ Clause 12.

¹³⁴ EN para. 157.

Q8. Will a draft of the Attorney General’s proposed guidelines be made available while the Bill is still before Parliament? If not, what will be the likely content of those guidelines in this respect?

(6) The powers of the Northern Ireland Human Rights Commission

The Committee is considering the Bill’s provisions in relation to the powers of the Northern Ireland Human Rights Commission (“NIHRC”). The previous JCHR took a close interest in the adequacy of the NIHRC’s powers to promote and protect human rights in Northern Ireland, reporting on the subject in Session 2002-03.¹³⁵ In its final report of the 2001-2005 Parliament, that Committee recorded its “profound dissatisfaction” that it had taken the Government so long to respond to the NIHRC’s review of its powers.¹³⁶ The Committee also discussed this question with the NIHRC on its recent visit to Belfast.

The new powers to compel evidence under Clause 14 and to access places of detention under Clause 15 are subject to a number of restrictions and conditions. The Explanatory Notes (paragraph 8) describe these as safeguards to help ensure that the powers are used appropriately by the Commission and complied with by public authorities. In its *Response to Consultation* document, the Government also says that, in relation to the power to compel evidence, it will ensure that the human rights of those who might be placed in danger from the release of evidence are adequately protected.¹³⁷

When the Committee visited Belfast recently, before the publication of the Bill, the NIHRC appeared content with the proposal to enhance their powers in the three respects provided for in the bill. From informal contacts with the NIHRC since publication of the bill, however, it is understood that they now have serious concerns about the restrictions contained in the bill on the exercise of the powers to compel evidence and to access places of detention. We have therefore written formally to NIHRC asking them to set out any concerns they have about the restrictions placed on the new powers set out in the bill, and whether they would wish to see other powers which they have recommended included in the bill.

Q9. Please provide further justification of the restrictions placed on the NIHRC’s proposed powers to compel evidence and to access places of detention.

Q10. Please provide the Government’s assessment of whether the power to access places of detention as set out in the bill is sufficient to enable the NIHRC to be part of the UK’s National Preventive Mechanism under OPCAT.

(7) Miscellaneous additional powers for the police and the military

The Committee is considering the Bill’s provision of additional powers to stop and question and of arrest, entry, search and seizure for the police and military, which raise

¹³⁵ Fourteenth Report of Session 2002-03, *Work of the Northern Ireland Human Rights Commission*, HL Paper 132/HC 142.

¹³⁶ Nineteenth Report of Session 2004-05, *The Work of the Committee in the 2001-2005 Parliament*, HL Paper 112/HC 552, paras 162 to 166.

¹³⁷ para. 14.

issues of compatibility with the right to liberty in Article 5 ECHR and the right to respect for private, family life and home in Article 8 ECHR.

(a) Duration of stop and question

The Bill provides the police and members of the armed forces on duty with the power to stop a person “for so long as is necessary” to question him to ascertain his identity and movements.¹³⁸ Members of the armed forces are also given a power to stop a person “for so long as is necessary” to question him to ascertain what he knows about a recent explosion or another recent incident endangering life, or about a person killed or injured in a recent explosion or incident.¹³⁹

The Explanatory Notes state that this power does not engage the right to liberty in Article 5 ECHR because it involves stopping a person for a relatively short time in order to question, which does not amount to a deprivation of liberty.¹⁴⁰ However, the wording of this power to stop and question contains nothing on its face which limits the amount of time for which a person can be stopped. On the contrary, it authorises stopping a person for so long as is necessary to question him to ascertain certain facts. There is no objective standard on the face of the provision to constrain the very wide power.

Q11. Why is the power to stop and question not expressed in terms of the amount of time that is *reasonably* necessary?

(b) Information on arrest

The Bill provides a member of the armed forces with a power to arrest and detain a person for up to four hours if he or she suspects that the person is committing, has committed or is about to commit any offence.¹⁴¹ A member of the armed forces making such an arrest is deemed to comply with any rule of law requiring him to state the ground of arrest if he states that he is making the arrest as a member of Her Majesty’s forces,¹⁴² unless the rule of law requiring him to state the ground of arrest “has effect only by virtue of the Human Rights Act 1998.”¹⁴³

The Explanatory Notes explain that the purpose of the power is to allow sufficient time for a police officer to attend in order to re-arrest the person and charge them with an offence, if appropriate.¹⁴⁴ The reason for not requiring them to provide detailed legal grounds for arrest is said to be that “they are not expected to know the law as intimately as a police constable.”

The effect of the Bill appears to be to disapply s. 28(3) PACE for the purposes of this particular power of arrest, but to leave the requirements of Article 5(2) ECHR in place. Since the requirements of Article 5(2) have been elaborated in judgments of the Court

¹³⁸ Clause 20(1).

¹³⁹ Clause 20(2).

¹⁴⁰ EN para. 162.

¹⁴¹ Clause 21(1).

¹⁴² Clause 21(2).

¹⁴³ Clause 21(5).

¹⁴⁴ EN paras 60-61.

interpreting the standard contained in that Article, it is questionable whether the provisions of the Bill provide enough guidance to members of the armed forces about what type of information they must provide on arresting somebody and when they must provide it.

Q12. What is the precise justification for not requiring a member of the armed forces to state the grounds for arrest when exercising this power?

Q13. Bearing in mind that the member of the armed forces must suspect that the person arrested has committed, was committing or was about to commit an offence, why should the arresting officer not be required at the very least to inform the detainee of the facts which are the foundation of the decision to detain, and asked whether he admits or denies the allegations?

(c) Breadth of power of entry of premises

The Bill provides the police or a member of the armed forces with a power to enter premises (including a vehicle) without a warrant, if he or she “considers it necessary in the course of operations for the preservation of the peace or the maintenance of order.”¹⁴⁵ A police officer requires authorisation from an officer of at least the rank of superintendent, unless it is not reasonably practicable to obtain such authorisation. The power to enter premises without a warrant is very broadly worded and contains no objective standard.

Q14. Why is the power of entry not at least expressed in objective terms, such as where the police officer or member of the armed services *reasonably* considers it necessary?

(d) Detention during search of premises

The Bill provides the police or members of the armed forces with a power to enter and search premises to ascertain if there are munitions unlawfully on the premises or wireless apparatus on the premises where there is a reasonable suspicion that such items are present.¹⁴⁶ The Bill gives the officer carrying out such a search the power to require a person to remain on the premises for up to four hours, extendable to 8 hours in total, if he reasonably believes it necessary in order to carry out the search or prevent it from being frustrated.¹⁴⁷

The Explanatory Notes acknowledge that this power could be used in such a way as to engage Article 5 ECHR, because in theory the requirement to remain on the premises could last for up to 8 hours.¹⁴⁸ However, they state that in practice individuals would be allowed to leave the premises or move around them subject to some restrictions and for a much shorter time, and that guidance will be issued to police and the armed forces on the appropriate use of this power so as to ensure that these powers are not exercised in a way that engages Article 5.

¹⁴⁵ Clause 22(1).

¹⁴⁶ Schedule 3, para. 2.

¹⁴⁷ *Ibid.*, para. 3.

¹⁴⁸ EN para. 163.

Requiring a person to remain on premises for up to 8 hours during the conduct of a search of those premises is clearly capable of amounting to a deprivation of liberty for the purposes of Article 5. The Committee has frequently commented that conferring a power of this width, which is capable of interfering with the right to liberty, and leaving it to as yet unpublished guidance to regulate the use of that power so as to avoid incompatibility, is not satisfactory, because it deprives the Committee, and Parliament, of the opportunity to subject the scope of the power to the careful scrutiny its subject matter demands.

Q15. Which of the enumerated exceptions to the right to liberty in Article 5 does the Government rely on in cases where the exercise of this power amounts to a deprivation of liberty?

Q16. Will the Government make available in draft form while the Bill is still before Parliament the guidance on which it intends to rely to ensure that the power is not exercised incompatibly with Article 5?

I would be grateful for your response by 19 January 2007.

Appendix 1c: Letter from the Northern Ireland Human Rights Commission, re Justice and Security (Northern Ireland) Bill

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,¹⁴⁹ advising on legislative and other measures which ought to be taken to protect human rights,¹⁵⁰ advising on whether a Bill is compatible with human rights¹⁵¹ and promoting understanding and awareness of the importance of human rights in Northern Ireland.¹⁵² In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding ‘soft law’ standards developed by the human rights bodies.

2. The Commission has submitted a separate Parliamentary briefing on clauses 13-19 of the Bill, which concern the powers and functions of the Commission. For ease of reference that briefing (also available on the website of the Public Bill Committee) is appended to the present paper, which is provided to and at the request of the Joint Committee on Human Rights and deals with the remainder of the Bill. It is important to note that given, firstly, the fact that the Commission was not given sight of any of the proposed wording prior to the Bill’s publication, and secondly, the great haste with which the Bill is proceeding through the Public Bill Committee, this briefing addresses the Bill as introduced and does not take account of any amendments that may have been made, or points raised, in Committee.

¹⁴⁹ Northern Ireland Act 1998, s.69(1).

¹⁵⁰ *Ibid*, s.69(3).

¹⁵¹ *Ibid*, s.69(4).

¹⁵² *Ibid*, s.69(6).

3. The Commission has always taken a particular interest in the provisions of anti-terrorist legislation applicable within Northern Ireland and across the United Kingdom. The Commission has consistently asserted that terrorism should, so far as possible, be dealt with within 'ordinary' criminal justice provisions. Being itself a creation of a peace process that requires to be underpinned with extensive legislative and policy initiatives promoting normalisation and stability, the Commission has also repeatedly called for the lapsing or repeal of emergency measures and special powers, including those relating to non-jury trials and the extra powers of police and the armed forces. The position of the Commission has always been that exceptional measures can only be justified for so long as, and to the extent that, they respond to the exigencies of the situation.

4. It has for some time been apparent that, however imperfect the workings of the democratic institutions envisaged by the 1998 Agreement, the security situation has improved greatly, to the extent that few observers would claim to discern the existence of 'an emergency threatening the life of the nation' (the term employed in relevant international human rights instruments). There must, accordingly, be a strong presumption in favour of normalisation, and a corresponding duty on Government to make a persuasive case for any departure in legislation for Northern Ireland from the arrangements that are held to be appropriate for other UK jurisdictions.

5. The Commission's interest in the Bill therefore goes beyond clauses 13-19, notwithstanding their implications for the way in which the Commission operates, the powers that it has and what that means for the promotion and protection of human rights in the region. This paper concentrates on those aspects of the Bill relating to juries (clauses 1-12) and the powers of the armed forces operating in Northern Ireland (principally clauses 20-27).

Juries and non-jury trial

6. This Commission has previously advocated a reform of the Diplock court system in favour of the presumption of jury trial. The Commission's position has been and remains that there should be a presumption in favour of a single mode of trial on indictment in Northern Ireland as in other UK jurisdictions, with that being trial by jury. Any departure from trial by jury should require to be justified by demonstrating the presence of exceptional circumstances that must be clearly legislated for, so as to ensure that non-jury trials are indeed the exception rather than the norm. The Commission acknowledges that the risks of perverse verdicts and intimidation of jurors need to be dealt with in order to move to a presumption of trial by jury. It has stated elsewhere and maintains, however, that provided certain safeguards are put in place to deal with these risks it is possible to abandon the Diplock Court system without further delay.

7. For example, it has recommended that in order to reduce the risk of perverse verdicts, legislation ought to be enacted to take away the right to peremptorily challenge jurors and to stand by. It notes that this particular recommendation is now included, only in part, in clause 12 of the Bill. As clause 12 stands the right to peremptory challenge of jurors has been taken away from the defence but it would appear that the prosecution will retain the right to request that the Court order members of the jury to stand by. The Commission

believes that if the right to peremptory challenge is to be abolished this should be accompanied by the abolition of the use of stand-by. At present the Bill, by only removing the right from the defendant, is weighted too heavily in favour of the prosecution and this runs counter to the fundamental principle of equality of arms.

8. The Commission has made a number of recommendations to address the risk of jury intimidation, some of which have also been included in the Bill, for example by certain restrictions on disclosure of juror information under clause 8.

9. Despite the positive address of some of these recommendations, the Bill continues to be unsatisfactory. As the Bill stands, the Director of Public Prosecutions for Northern Ireland (DPP) may issue a certificate that any trial on indictment of the defendant (and of any person committed for trial with the defendant) is to be conducted without a jury, provided that at least one of four conditions stipulated in the Bill are met. He may do so on the basis that he is satisfied that in the presence of one of these conditions there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury.

10. This terminology departs too radically from the non-jury provisions of Section 44 of the Criminal Justice Act 2003. Under that Act a trial without jury is permitted where there is “*evidence of a real and present danger* that jury tampering would take place” and that “notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it *necessary in the interests of justice* for the trial to be conducted without a jury” [all italics added]. It further requires the prosecution to apply to a judge of the Crown Court for the trial to be conducted without a jury.

11. In contrast the Justice and Security (Northern Ireland) Bill simply requires the DPP to be “*satisfied*” that there is “*a risk*” that the “*administration of justice*” might be impaired. It is of concern that under the Bill, no explanation or indication is given as to the precise nature of the impairment that each condition stipulated under clause 1 addresses; for example, whether it is jury tampering or the return of a perverse verdict that would present the risk of impairing the administration of justice should the DPP find that Condition 1 were met in a particular case.

12. In any case the Commission believes this threshold of satisfaction along with a belief of possible impairment to the administration of justice to be too low. It therefore recommends that “*satisfied*” is replaced with a requirement that there exists a “*real and present danger*” that the “*interests of justice*” would be “*seriously frustrated*” if the trial were to be heard with a jury before a certificate for non-jury trial can be issued. That would ensure that the legislation at least in this part would better complement the provisions of the Criminal Justice Act 2003.

13. The Commission also maintains its previous assertion, made in October 2006, that just as under the Criminal Justice Act 2003 reform of the Diplock courts in Northern Ireland should require the DPP in Northern Ireland to apply to the Courts for a certificate for non-jury trial. It is inappropriate that this Bill allows the DPP considerable discretion in the

issuing of a certificate for a non-jury trial, in essence permitting one party to a contest to choose the mode of adjudication.

14. Overall, it appears to the Commission that given the low thresholds to be met by the DPP, along with the extremely broad nature of the conditions stipulated in clause 1, the Bill as introduced does not offer any real prospect of substantially reducing the incidence of non-jury trials in Northern Ireland, and it may even lay the ground for an increase.

15. The conditions set out in clause 1 are too broad and arbitrary to be used by the DPP (either as the designated authority to issue the certificate himself or even to apply to the Crown Court for the certificate) as appropriate and meaningful evidence that a jury would be unable to administer justice.

16. Condition 1 is where the defendant is or has at any time been an associate of a person who is, or who has at any time been a member of a proscribed organisation. 'Associate' is defined broadly in the Bill and it is indicated in subsection 10 that a person (A) is the associate of another person (B) if A is a friend, relative, spouse, ex-spouse, partner, ex-partner, cohabitee or former cohabitee of B.

17. Condition 2 under which the DPP can issue a certificate is that the offence or any of the offences was committed on behalf of a proscribed organisation, or a proscribed organisation was otherwise involved with, or assisted in, the carrying out of the offence or any of the offences.

18. Condition 3 is where an attempt has been made to prejudice the investigation or prosecution of the offence or any of the offences and the attempt was made on behalf of a proscribed organisation, or a proscribed organisation was otherwise involved with, or assisted in, the attempt.

19. Condition 4 is that the offence was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards another person or group of persons.

20. The first condition is extremely problematic. The Commission questions how friendship, being such a subjective concept, can possibly be an appropriate criterion in the context of legislation? What evidence, length or level of association, depth of affection, intimacy of relations or frequency of meetings might the DPP, or indeed even the Courts rely on to decide that a friendship exists or has existed? The inclusion of 'relative' gives even greater cause for concern. How far down the line of genealogy will the DPP go to ascertain if a threat to the administration of justice exists on the basis of that relationship? Subsection 10 already lists more tangible ties by including spouse, former spouse, civil partners and former civil partners. This further addition of 'friend' or 'relative' makes the provisions too broad to ensure that non-jury trials are used sparingly.

21. This condition potentially discriminates against defendants who happen to be relatives of members of proscribed organisations by accident of birth and not through any designed, conscious decision to associate with such persons. In effect, whether or not a person has access to the normal or the abnormal mode of trial is to be determined by the past

behaviour of other persons, over whose actions the defendant may never have had any influence. On the face of it, it would suffice to have a cousin who had been in a proscribed organisation for a few months even before the defendant was born. However much one might expect or hope for a more reasonable application, it is unsatisfactory to provide in the letter of the law so great a scope for unreasonableness, in a context where no appeal lies against the DPP's decision.

22. The Commission assumes, although this is not made specific in the Bill, that Condition 1 is designed to address the risk of jury tampering. Government's concern here might be that where there is a tie of friendship or relationship with a member of the proscribed organisation that tie could be used by the defendant to initiate intimidation of jurors by members of the proscribed organisation. That particular logic, however, is dangerous and it makes presumptions about the intended actions of the defendant, possibly discriminating against him/her before any crime in relation to jury tampering has been committed by denying the defendant the trial by jury that would be available to other persons who did not have, or were not known to have, such connections.

23. That position also engages the UK's obligations under Article 6(1) of the European Convention on Human Rights when taken with Article 14 (the non-discrimination clause). Article 14 prohibits discrimination in the protection of the Conventions rights on grounds of, "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". There must be a strong probability that the Convention would be breached, and it would certainly be engaged, by the state prosecutor deciding on the involuntary insertion of a defendant into an abnormal mode of trial, on such a basis as having been born into a family one of whose members had at some time broken a particular law.

24. Similarly, the International Covenant on Civil and Political Rights (ICCPR), to which the UK is also a party, enshrines the right to a fair trial under Article 9 and in addition prohibits discrimination on grounds of birth or other status under Article 2(1). The issues for compliance with the ICCPR are similar to those for the European Convention.

25. Thus, denying trial by jury to those individuals who happen to be born into a particular family, to have married or entered into a relationship with a particular individual, or indeed to have lived in a particular geographical area where they would be more likely to have an association (even unwitting or inadvertent) with a member of a proscribed organisation that might be perceived as a friendship, could potentially lead to the state being found to have breached major international human rights standards by which it has agreed to be bound.

26. Of all the Conditions stipulated in the Bill it is only Condition 3 that outlines the presence of circumstances that suggest the prospect of jury tampering (or, in this instance, other direct interference with the course of justice) is real. Even then however, it does not put the same onus on the relevant criminal justice agencies as does the Criminal Justice Act 2003 to take every reasonable step to protect jurors. The Commission believes it is necessary that the same onus is stipulated in the Bill under discussion.

27. Even more problematically Conditions 1 and 2 appear to be making blanket assumptions that any tie or association with member of a proscribed organisation, or personal involvement past or present in such a group, of itself and without any other evidence is likely to give rise to jury tampering. The Commission's view is that these Conditions will in fact lead to an unacceptably large number of cases being heard without a jury on the basis of assumptions rather than strong evidence that this mode of trial would not be appropriate in a particular case. The Commission therefore recommends that the legislation be restricted to ensuring that the DPP considers the facts of the case before him, the nature of the crime, the defendant's actual ability to cause jurors to be intimidated and the likelihood of that happening even after all reasonable steps have been taken to prevent the possibility of jury tampering; and then, to put the relevant evidence to a judge of the Crown Court to decide ultimately whether the case will be heard in the presence or absence of a jury.

28. Condition 4 would seem to be referring, among other things, to cases of sectarianism even where a proscribed organisation is not directly or indirectly involved. The Commission assumes, although again this is not made clear in the Bill, that Government believes that both the defendant and victim(s) need to be protected from the possibility of the return of a perverse verdict in such cases. It would appear that this provision in the Bill may be addressing the very real problem of sectarianism that still persists in Northern Ireland at a scale not mirrored in Great Britain. The Commission accepts that despite the peace process, sectarianism remains an unfortunate reality of life here and that prejudices along sectarian lines remain deeply ingrained.

29. However, as it stands Condition 4 is too broad. It does not specify that the concern with regard to religious and political hostility is indeed sectarianism as it is manifested in Northern Ireland, and moreover sectarianism displayed in a criminal way at a time when community tensions and divisions are running particularly high. It does not therefore limit the DPP sufficiently to having to prove that given the presumed *sectarian* motivation of the offence, and given the immediate political and social climate of the time with regards to community divisions, the case could not be left to be decided by a jury. The DPP simply has to be satisfied that justice might be impaired, where political or religious hostility has been engaged.

30. This omission means that many of those accused under the Criminal Justice (No. 2) (NI) Order 2004 could be tried without a jury. It may therefore be used so that a case involving Islamophobia or antisemitism, for example, could also be heard without a jury. Criminal offences that appear to be motivated by political hostility towards the Government or towards any group of persons, even where there is no connection to the affairs of Northern Ireland, may equally fall under Condition 4. This potential to broaden out the number of cases that could be heard without a jury to areas that are not specific to the conflict in Northern Ireland does not respond to any identifiable need to deviate from the principle of normalisation, and is not acceptable.

31. The Commission is also concerned about subsection 9 of clause 1 under which a proscribed organisation for the purposes of the proposed legislation will mean an organisation which is proscribed or which has at any time been proscribed and whose

activities are (or were at the time of membership) connected with the affairs of Northern Ireland. That would, at first sight, suggest those organisations traditionally associated with the particular circumstances of Northern Ireland, that is those following a republican or loyalist agenda in the context of this region. However, other proscribed groups, such as those proscribed for ‘glorifying terrorism’ (The Saved Sect and Al Guraaba), who call for the instatement of an ‘Islamic’ regime in the UK could at some future point be engaged in the remit of the Bill. It could be argued that their calls are indeed connected with the affairs of Northern Ireland, in the sense that their political agenda is not limited to Great Britain.

32. Indeed, the Secretary of State, during the second reading of the Bill on 13 December 2006, stated: “Northern Ireland continues to be a challenging operating environment for the police and the Army, not least because the risk of terrorism from dissident republicans, loyalists and international groups remains real”.¹⁵³ The reference to “international groups” would seem to indicate that Government does envisage the Bill being used in the context of international terrorism. That makes the conditions under which the DPP can issue a certificate for non-jury trial even broader and even less acceptable.

33. If it is the case that Government also had the threat of international groups in mind when drafting this legislation, then could that threat of international terrorism be used to justify in Great Britain, as well as Northern Ireland, non-jury trials and extra powers for the armed forces over and above those currently available? We have not had even an unsupported assertion by Government, much less any evidence in the public domain, to suggest that the threat of international terrorism exists to such a degree as to make such measures justifiable in Great Britain. We have, however, had Government acknowledge that the threat from international groups is lower in Northern Ireland than in Great Britain, and lower than that presented by republican and loyalist groups. It is thus of concern that the Secretary of State has added it to his list of concerns in the Northern Ireland context in an attempt to make the provisions more justifiable here. The current situation in Northern Ireland, with or without the threat from international groups, does not justify the existence of two criminal justice systems.

34. If enacted the Bill would perpetuate two criminal justice systems in Northern Ireland, with the inevitable charge of inequality under the law that such duality invites. It would essentially mean that provisions relating to non-jury trials that are not deemed acceptable in Great Britain are legislated for in Northern Ireland. While we acknowledge that the quasi-federal nature of the state does permit some differentiation, a general principle of the human rights law to which the state accedes as one unit is that the human rights of everyone within the state should be afforded the same degree of protection. Thus, for example, Article 26 of the International Covenant on Civil and Political Rights establishes that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

¹⁵³ HC Deb, 13 December 2006, col. 900.

Powers

35. There are striking similarities between certain provisions in the proposed Bill and those under Part 7 of the Terrorism Act 2000, which the Commission believes are not required in Northern Ireland at this time and indeed which were due to come to an end in April 2008 at the latest. The powers of stopping and questioning, arrest, entry and search will still remain with members of the armed forces operating in Northern Ireland along with police officers. The availability of such powers to the armed forces potentially engages Articles 2, 3 and 8 of the European Convention on Human Rights.

36. No state subject to the rule of law would regard it as normal that a member of its armed forces should, for example, be empowered to enter any private premises if he or she thought it necessary “for the preservation of the peace”; nor that a soldier might arrest a person on the mere suspicion that the person was about to commit an offence, with no requirement to give any reason than saying “I am arresting you as a member of Her Majesty’s forces”. These are, beyond any doubt, extraordinary powers, of a kind that a state should require only in the most exceptional emergencies. When Parliament considers whether to make new law putting such powers in a statute without limit of time, it must demand of the Government a most thorough and persuasive case as to why the powers are required. Powers of this kind are not currently used or needed by the Army in Northern Ireland, and Operation Banner, its deployment in support of the police in public order and counter-terrorism, is on the point of coming to an end.

37. The Commission cannot accept that the continuation of such powers is in line with normalisation in Northern Ireland. It is concerned that they will continue to be available to the armed forces, particularly in the absence of any meaningful level of independent investigation, scrutiny and accountability such as has been developed in relation to policing. The experience in Northern Ireland has been that the use of special powers have not prevented many of the atrocities that have been carried out by non-state actors in the region. They have in some instances been counterproductive to the stated goal of restoring law and order, and indeed have been used in ways that have been found to have violated human rights. The availability of these powers, whether they are used or not, will do little to create public confidence that Northern Ireland is indeed moving on from conflict and into normalisation.

38. If a situation were to arise in Northern Ireland, or indeed in Great Britain, requiring the deployment of the armed forces with quasi-policing powers, such powers could be made available through emergency provisions that were in place for a strictly limited period.

39. This Bill will essentially make permanent what was initially intended to be a number of temporary, emergency provisions for Northern Ireland. Clause 40 allows for the Secretary of State to repeal the provisions by order, but there is no ‘sunset’ clause which would automatically require the Secretary of State to go to Parliament to renew the powers after a stated date.

40. The Justice and Security (Northern Ireland) Bill represents, overall, a failure to deliver what Government had previously promised in terms of a programme of normalisation in

the region. The Bill instead offers to provide in permanent legislation for non-jury trials and exceptional powers that hitherto were envisaged as temporary responses to a particularly grave emergency that, quite plainly, no longer exists.

Appendix 1d: Letter dated 22 January 2007 from Paul Goggins MP, Parliamentary Under-Secretary of State for Northern Ireland, re Justice and Security (Northern Ireland) Bill

Thank you for your letter to the Secretary of State about the Justice and Security (Northern Ireland) Bill. As Minister responsible for the Bill, the Secretary of State has asked me to reply. Your letter asked a number of detailed questions about aspects of the Bill. I shall reply to each question in turn.

Q1 – Please provide a more detailed justification of the need for the new power, including up to date evidence of the incidence of juror intimidation in Northern Ireland compared to the rest of the UK, and an explanation of why the other measures in the Bill to reduce the risk of jury intimidation are not considered by the Government to be adequate.

Given the restrictions on enquiring into what goes on inside the jury room it is difficult to gain a true picture of the scale of jury tampering and perverse verdicts in Northern Ireland. What is clear is that for the last 35 years many of the most serious cases in Northern Ireland have been tried in the Crown Court without a jury.

The police only have intelligence of eleven cases where jury tampering has been reported since 1999. However, seven of these have occurred between 2004 and 2006 and seven of the eleven involved persons with paramilitary connections. From talking to practitioners within the system I am aware of many more anecdotal examples where there appears to have been intimidation in a case and one recent case where a trial collapsed as a result of jury-tampering. Obviously, I cannot comment on the latter in any detail.

Paramilitaries continue to maintain control over communities in what is still very much a divided society. In their Seventh Report on paramilitary activity in Northern Ireland (published in October 2005) the Independent Monitoring Commission (IMC) concluded that “Paramilitaries sometimes use violence within those communities, sometimes threats and intimidation... Activities of this kind go hand in hand with unofficial forms of control.” They have not contradicted this view in subsequent reports. It is therefore those cases that have been tried without a jury under the Diplock system that would be most vulnerable to intimidation of jurors were alternative arrangements not put in place.

It is therefore helpful to look at information about the prevalence of intimidation more generally. Although there is not an absolute read-across between intimidation of victims and witnesses and that of jurors it is fair to assume that the same tactics would be used if there were jury trial in all cases and it provides a broad indicator of trends.

Intimidation of witnesses appears to be an increasing problem. PSNI recorded 29 instances of witness intimidation in 2001/02 and 74 in 2004/05, with two instances of threats to harm a witness. However, the Northern Ireland Crime Survey in 2003/04 (the most recent year

for which I have figures) revealed that intimidation is a significantly under-reported offence. Only half of all cases of intimidation or harassment are reported to the police. Around 7% of victims of criminal offences have experienced harassment or intimidation, and this has mainly come from the person who committed the offence.

Intimidation is therefore still a significant problem in Northern Ireland, despite the recent improvements in the security situation. It poses a significant risk to the ability of the criminal justice system to deliver fair trials in certain cases. Money appears to be used in many cases as an incentive to encourage jurors to reach a particular verdict (six of the eleven cases mentioned above). Blackmail and intimidation seem to be used if financial motivators do not have the desired effect. Intimidation already occurs in (among others) assault, murder and attempted murder cases, (all of which are scheduled offences that can currently be tried without a jury). If these patterns of incidents continue, it is clear that significant numbers of such cases relating to paramilitaries will continue to go through the criminal justice system when the alleged perpetrators are prosecuted.

The perception that intimidation occurs also represents a serious risk to the delivery of high quality justice via jury trial (and this was recognised in the Diplock report, which acknowledged that 'a frightened juror is a bad juror, even though his own safety and that of his family may not actually be at risk'). The close-knit nature of Northern Ireland society means that individuals are known within their communities. Even when jurors do not personally know a defendant, they could live within a threatening environment and fear that they could become targeted by associates of the defendant. This less overt form of intimidation and the fear of intimidation could potentially be as significant for jurors as the actual acts of intimidation described above.

Many of the juror protection measures in this Bill should not only reduce the scope for jurors to be intimidated but should also help to reduce this fear. For example, balloting jurors by number and restricting access to information about jurors should increase feelings of safety and make it more difficult for individual jurors to be intimidated. However, it does not prevent a juror being recognised by the defendant or his associates if the juror is known to them. Screening of jurors from the public gallery and separate juror accommodation reduce this problem still further, but does not prevent a juror being recognised by the defendant during the trial, or when entering or leaving the court building.

Out of town juries are less likely to be susceptible to intimidation, but in a small jurisdiction like Northern Ireland a notable risk still remains. The police could take action to protect jurors and their families in the way that significant and vulnerable witnesses can be protected in certain cases. However, for this to be effective it would involve significant disruption to the life of the juror and their family – it would involve changes of home, school and employment. In extreme cases, it could mean leaving Northern Ireland. I think that members of the public would consider this too high a price to pay for serving on a jury and it would have a very negative impact on confidence in the justice system.

The security assessment I have received from PSNI (and the IMC have reported in similar terms) is that this context of paramilitary control of communities, intimidation and fear of

intimidation is expected to continue for the time being. Dissident republicans remain the most significant threat to the security forces, and continue to plan for future attacks. They generally continue to use violence as a means of settling internal disputes and imposing discipline, and in an effort to exert control within local communities. The INLA have maintained a military campaign and have been involved in public order situations in 2005. Such situations indicate that INLA are prepared to respond violently to police activity, particularly when it is directed against their organised crime operations. Loyalist paramilitaries continue to pose a threat to members of the security forces.

Levels of paramilitary linked incidents have decreased significantly since 2000 but they remain common. Paramilitary linked shootings incidents are down 10% in 2005 compared to 2004 while bombings have risen 28% over the same period. The rise in bombing incidents is largely due to both Loyalist and Dissident Republican paramilitaries carrying out attacks on security forces during public order situations in the Belfast area during July and September 2005.

It is important to recognise that intimidation of victims and witnesses, perverse verdicts and juror intimidation are only likely to happen in a minority of cases. It is, however, significant enough to pose a risk to the safety of those members of the public who participate in the system as jurors or witnesses. Returning to jury trial in all cases is likely to increase the occurrence of juror coercion and the fear of intimidation felt by jurors. Government and the criminal justice agencies in Northern Ireland could be in breach of their obligations to ensure the safety and security of all those in Northern Ireland if this risk is not addressed.

Q2 – To assist the Committee’s consideration of whether the width of the power to certify constitutes a justifiable interference with a person’s freedom of association and right to respect for their private and family life, please provide a more detailed justification for applying the power to certify to people who are ‘associates’ of members or former members of proscribed organisations.

The security assessment I have received is that members of paramilitary groups do attempt to intimidate witnesses and jurors in cases where close friends or family members are the defendant in order to secure acquittals. This provision is designed to deal with that problem. It also applies to former members of paramilitary groups as these individuals may retain positions of power within their communities as a result of their former status. Again, the security assessment I have received is that former members of paramilitary groups continue to use intimidator tactics to retain control over communities and attempt to use this to secure acquittals in certain cases.

It is important to note that a connection with a member or former member of a paramilitary group would not be enough on its own to justify a decision for non-jury trial in a case. The DPP would need to make a judgement, in the round, of the risks to the administration of justice posed by such a case. If the risks were low, then the defendant would be tried in the Crown Court with a jury. Summary cases would continue to be tried in the magistrates’ court with no special arrangements.

Q3 – What safeguards are contemplated to guard against the risk of the power being abused?

The DPP's decision is one of mode of trial only. The DPP in Northern Ireland already makes such decisions (for example, whether certain offences should be tried summarily before a magistrate or on indictment in the Crown Court). As is the case at present, the defendant will be able to make representations to the DPP about the mode of trial decision. The DPP can take those into account in his decision-making, or can vary his decision at a later stage on foot of the representations received.

Unlike Diplock, no special rules of evidence or sentencing will apply in non-jury trials under the Bill. The sole difference will be whether the case is tried before a jury or by a judge sitting alone. In either case the court will remain the ultimate arbiter of guilt or innocence.

Where the case is tried by a judge sitting alone and there is a conviction, the judge must give a reasoned verdict (under the current Diplock system judges also often give reasons for acquittals but I do not think it appropriate to require this in all cases given the risks that such a judgment could interfere with the presumption of innocence in a case or damage the reputation of victims or witnesses).

It will also be possible to appeal conviction or sentence from a non-jury trial without the need to seek leave of the court first.

I am satisfied that these safeguards provide adequate protection to the defendant in the case and ensure that defendants will suffer no detriment from being tried without a jury.

Q4 – What is the Government's justification for proposing such a wide statutory ouster of the courts' jurisdiction to review the legality of a delegated decision?

The restrictions on challenge to the DPP's decision for non-jury trial in the Bill are intended to put the current caselaw on challenges to the Attorney General's decision whether or not to deschedule a case on a statutory footing. In *In Shuker and Others* [2004 NI 367] the High Court in Northern Ireland considered a challenge of the Attorney General's decision not to certify a case for jury trial (under the Diplock system, the default is non-jury trial for specified offences, but the Attorney General has the power to decide mode of trial by certifying a case into jury trial, a process known as de-scheduling). The court ruled that the procedure for determining mode of trial of the accused is not a process suitable for the full panoply of judicial review. Judicial review would be possible, however, on grounds such as bad faith, dishonesty or other exceptional circumstances.

The restriction also has to be seen in the context of the nature of the DPP's decision. The DPP's decision is one of mode of trial only. He already takes decisions that result in a case being tried summarily or on indictment. The consequence of this decision is that in certain circumstances a defendant can be diverted to a form of trial that is every bit as fair as jury trial, but one which is free from the risk of injustice caused by partisan verdicts of juror intimidation.

To allow every decision of the DPP to be challenged would result in a very considerable delay – which itself undermines justice – in order to argue over issues that are not even relevant to the subject matter of the indictment. This would be wasteful of the limited resources available to the criminal justice system and would act to damage public confidence. It may also result in cases that are not safe to be tried before a jury having to be because the intelligence on which the Director’s decision is based could not be disclosed.

Q5 – Please explain why in the Government’s view it is compatible with the rule of law to legislate to prevent any court from considering whether a delegated decision-maker has acted without jurisdiction or on the basis of an error of law.

I am not seeking to exclude judicial review altogether: my intent is to put the caselaw in *Shuker* on a statutory footing, and to allow limited challenges to the issue of a certificate under clause 1(2) as set out in my response to Question 4 above. The judgment in *Shuker* does not suggest that the rule of law is compromised where at least limited challenge is allowed.

During Commons Committee stage on the Bill there was considerable discussion on this clause. Whilst I remain committed to the principle behind clause 7, in light of the comments made during the debate I undertook to reflect further on the wording of the clause before Report stage. I will write to the Committee again with the outcome of that process.

Q6 – Will a draft of the Attorney General’s proposed guidelines [additional juror checks] be made available while the Bill is still before Parliament? If not, what will be the likely content of those guidelines?

I understand that the Attorney General’s guidelines will be in line with those that apply in England and Wales. Additional juror checks will only be possible in cases relating to national security or terrorism. I have attached a copy of the Attorney General’s current England and Wales guidelines at Appendix 1 to this letter.

In relation to the guidelines on challenge, the restrictions on access to juror information will apply to both the defence and the prosecution. It is considered that the fear of intimidation felt by jurors is exacerbated by the fact that the current system permits their personal details to be known, particularly to the defence. Indeed, Lord Carlile of Berriew QC indicated that it would provide considerable reassurance for jurors, and would diminish the risk of jury intimidation and perverse verdicts, if they could attend court knowing that their details were unknown to the defence and their connections.

While total juror anonymity would carry some benefits, it was considered important to balance these against the risk that prohibiting access to juror information would inhibit the carrying out of additional juror checks by the police, which are themselves designed to reduce the risks of perverse verdicts and juror intimidation. As is the position already in England and Wales, there may be certain exceptional types of case of public importance where routine checks may not be sufficient to ensure the proper administration of justice. In such cases it is in the interests both of justice and the public that there should be further

safeguards against the possibility of bias and in such cases checks which go beyond investigation of criminal records may be necessary.

As indicated previously, it is not considered that providing for additional jury checks in limited circumstances would confer any unfair advantage on the Crown, or subject the accused to any unfair disadvantage. Nonetheless, to allay any concerns over fairness and equality of arms, administrative guidelines prepared by the Attorney General will set out clearly the circumstances in which jury checks may be carried out by police not connected to the prosecution. The policy in relation to the guidelines on jury checks has yet to be settled, but at this stage it is anticipated that they will closely reflect those already in place in England and Wales.

Q7 – Please provide the justification for the abolition of the defendant’s right of peremptory challenge. Why is it considered necessary to abolish the right in Northern Ireland but not in the rest of the UK?

The abolition of peremptory challenge is not peculiar to Northern Ireland. The defendant’s right of peremptory challenge was abolished in England and Wales by the Criminal Justice Act 1988. The provisions in this Bill are therefore a normalising measure, bringing Northern Ireland into line with England and Wales.

The Contempt of Court Act 1981 prohibits the obtaining, disclosing or soliciting of any statements made or opinions expressed by members of a jury in the course of their deliberations. It is therefore difficult to obtain specific evidence in relation to partisan juries and factors influencing jurors’ decisions. However, it is considered likely that, in a polarised society like Northern Ireland, there are jurors who may be influenced by their political and religious backgrounds in reaching a verdict. It is in this context that it is considered that the abolition of peremptory challenge is desirable, as it will limit the defendant’s ability to ‘pack a jury’ and thereby reduce the risk of perverse verdicts.

In its response to the Diplock Review (2000) the Northern Ireland Human Rights Commission called for the abolition of the peremptory challenge, arguing that such challenges pander to a stereotypical thinking and further entrench prejudice in Northern Ireland.

It is for these reasons that we seek to abolish peremptory challenge in criminal trials, while retaining challenge for cause only by both the prosecution and defence.

Q8 – Will a draft of the Attorney General’s proposed guidelines [restriction of stand-by] be made available while the Bill is still before Parliament? If not, what will be the likely content of those guidelines in this respect?

I understand that the Attorney General’s guidelines will be the same as those that currently apply in England and Wales. I have attached a copy of the Attorney General’s current England and Wales guidelines at Appendix 1 to this letter.

As far as the issue of equality of arms is concerned, it is considered that any imbalance is acceptable and does not breach Article 6 human rights principles. The right to trial by jury

in itself is not a guaranteed right. The prosecution are under a duty to act with absolute propriety in every case, and will only exercise their right of stand-by in future, where in accordance with the Attorney General's guidelines, information comes to light suggesting that a juror is not suitable for jury service. Both parties will retain the right to challenge for cause. It is considered that this arrangement best serves the requirements of the justice system.

Having considered carefully the equality of arms issue we concluded that to abolish this right should not, in principle, compromise in any way the defendant's right to a fair trial. Such rights as the defendant may enjoy in this respect will continue to have adequate protection in the perpetuation of his entitlement to challenge an unlimited number of jury panel members with cause and the diligent and impartial exercise by the trial judge of his supervisory duties. Moreover, in so far as any counterbalancing is required, this will surely be provided by the introduction of restrictions on the exercise by the Crown of its right to require jury panel members to 'stand by'. Even in the absence of significant restrictions on the exercise of this Crown right, the fairness of the trial should not be jeopardised for the reason provided by the Court of Appeal in Regina -v- McKinney viz, the obligation on the Crown to act with absolute propriety and the obligation of the court to intervene to ensure that appropriate standards of propriety are observed. This will obviously be reinforced still further if guidelines on the exercise of this right are promulgated.

Q9 – Please provide further justification of the restrictions placed on the NIHRC's proposed powers to compel evidence and to access places of detention.

This Bill extends new powers to the Northern Ireland Human Rights Commission to compel evidence and access places of detention when carrying out investigations. The Government believes that it is right that the Commission has these new powers to allow it to carry out its investigations effectively. We have always been clear that the powers would be subject to proportionate safeguards to ensure that they are used appropriately by the Commission and complied with appropriately by public authorities.

The Commission's key function, for the purpose of which it can carry out investigations, is set out in Section 69 of the Northern Ireland Act 1998: to "keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights". Compared with most public bodies with investigatory powers, this remit is very broad. It is the Government's view that, since the Commission's investigations can rightly range very widely and the new powers which it is to be granted are so significant, it is important that the powers are subject to appropriate safeguards on their use. There are many public bodies with responsibility for ensuring compliance with human rights law in specific parts of the public sector and it is not necessary for the Commission to duplicate the work of these bodies.

The power to access places of detention during an investigation will require no forewarning of the timing of each visit. The Government has concluded, however, that each investigation should be preceded by a 15 day period during which affected public authorities can appeal to the county court, if they believe the Commission's intention to access is unnecessary or unreasonable for the purpose of its investigation. The court will be

able to order the Commission not to access the place of detention, or to place restrictions on the access. After 15 days if no appeal is made, or after an appeal has concluded if the court does not prevent the Commission from accessing a place, the Commission will have unrestricted access for the duration of the investigation. The place of detention will retain the right to appeal against an investigation at any stage but, after the initial 15 days, they can only restrict access after a court has ruled in their favour. It will be a criminal offence for a public authority to obstruct access, other than through this appeal process.

This appeal process parallels the right of appeal that applies when the Commission issues a notice compelling evidence; a right of appeal that is also present in the Equality Act setting out the powers of the Commission for Equality and Human Rights in GB. If there was no 15 day period for appeals at the beginning of the process, places of detention could feel under pressure to appeal all applications for access as soon as the Commission attempts to gain entry, without a proper consideration of whether each case is actually unnecessary or unreasonable.

I am advised that the Northern Ireland Prison Service has been subject to inspections and external reviews from seventeen different bodies since 2004. The particular expertise of the Commission should ensure that its investigations complement those of other bodies; but it is in the Government's view right that places of detention have the opportunity to suggest that an additional investigation is not necessary if it has only recently co-operated with an investigation by another body in very similar territory. It is also important to remember that the Commission are not an emergency response body. There are other bodies that are more appropriate to handle serious allegations which require immediate investigation. I am advised that any such serious allegations, for instance an allegation of assault, would be reported to the PSNI without delay.

The Commission will not be able to use the new power to compel evidence to seek information where its disclosure would have national security implications. This mirrors the arrangements that will be in place for the Commission for Equality and Human Rights, and the relevant provision is closely modelled on the provisions of the Equality Act 2006 in this area. Government is clear that national security must be afforded the same level of protection across the UK.

The power to compel evidence will also be focused on events after 1 January 2008 and information that is created after 1 January 2008 or relates to events after 1 January 2008. The Government believes that the Commission's investigations should be forward looking. That is the best way to ensure that its investigations make a positive contribution to the present and future development of human rights law and practice in Northern Ireland. There are other bodies that are better placed, and specifically mandated, to investigate historic issues. This restriction will not prevent the Commission making or commenting on proposals relating to dealing with the past.

We remain committed to the view that the Commission should use its new powers in ways that are forward looking. However, following discussions between the Secretary of State and the Commission, and consideration in Committee, I have agreed to give further

consideration prior to report stage, to the date from which the new investigatory powers will become effective.

Q10 – Please provide the Government’s assessment of whether the power to access places of detention as set out in the Bill is sufficient to enable the NIHRC to be part of the UK’s National Preventive Mechanism under OPCAT.

Discussions are still in progress within Government and with the United Nations about the nature of the UK’s National Preventive Mechanism. These discussions include which bodies should be part of the NPM and what powers the various bodies making up the NPM should have. No final judgment has been reached on either issue.

Q11 – Why is the power to stop and question not expressed in terms of the amount of time that is *reasonably necessary*?

This issue arises from the absence on the face of clause 20(1) of any limitation on the amount of time for which an individual may be questioned under this power.

As you will know, the European Court and domestic judgments have recognised a distinction between a temporary restriction of movement, and deprivation of liberty within the meaning of Article 5. In particular, the European case of *Guzzardi v Italy* makes the distinction between the restriction on liberty to which Article 5 is directed, and ‘mere restrictions on liberty of movement’. The difference between these 2 situations a matter of intensity and must be determined by reference to a number of factors.

It was held in *HL v United Kingdom* (2004) 40 EHRR 761, paragraph 89 that, “in order to determine whether there has been a deprivation of liberty, the starting-point must be the concrete situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question.”

The House of Lords considered this issue in *Gillan v Metropolitan Police Commissioner*. The case concerned 2 individuals who had been stopped for approximately 20 and 30 minutes respectively, while the police searched them for articles in connection with terrorism. The powers to stop and search were exercised under sections 44 – 45 of the Terrorism Act 2000. There is no requirement for such a stop and search to be based on any reasonable suspicion. It was common ground that the stop was in no sense voluntary: the Act gives a constable the power to detain for the purpose of the search, and to use reasonable force to detain; non-compliance is an offence. A person so detained had to remain for as long as it took in order to complete the search, with no limit of time on the face of the legislation.

In considering whether the power was compliant with Article 5, it was held that the exercise of stop and search powers would not ordinarily involve a deprivation of liberty within the meaning of Article 5. Lord Bingham, noting the *Guzzardi* decision, looked at the factors which would distinguish between a mere restriction on liberty of movement and a situation in which Article 5 is engaged. He held that the instant case was not one to which Article 5 applied, and that the legislation was compatible with the Human Rights Act 1998,

based on the following factors: stops under section 44 would ordinarily be brief, they did not involve the person being arrested, handcuffed, confined or kept in custody. The appellants were detained only in the sense of being prevented from proceeding, or being made to wait. There was therefore no deprivation of liberty in such a case [para 26].

In the alternative, Lord Bingham held that were such a stop to involve a deprivation of liberty, it was permitted by Article 5(1)(b) (detention to secure fulfilment of obligation prescribed by law). Since the legislation makes it an offence to obstruct a constable in the exercise of this power, the obligation had been prescribed by law.

In deciding where these powers fall between restrictions on liberty of movement, and deprivation of liberty, it is clear that the power in clause 20(1) is similar to that considered in Gillan. The same factors mentioned in Lord Bingham's speech at paragraph 26 apply equally to our proposed power to stop and question. The detained person will not be handcuffed or imprisoned, and while there is no explicit duration stated in the clause, the questioning would normally amount to no more than a few minutes. Other than in unusual or special circumstances, questioning will only be for a very limited time because it can only relate to the matters stated in that clause.

Moreover, if this power does engage Article 5, by the same reasoning as Gillan, it is justified because it is in order to secure the fulfilment of an obligation prescribed by law. The public are, by virtue of the provisions in clause 20(3)(non-compliance is an offence) and 32(3) (use of reasonable force) placed under an obligation to provide any information relating to the matters in clause 20 if requested to do so by the police and army and any detention is to secure that information.

For these reasons I am content this clause satisfies Article 5.

Turning to your specific question, we do not have the requirement that the stop be reasonably necessary as it appears to add little in the way of safeguards but confers significant disadvantages.

The duration of questioning of individuals under this power is limited only by reference to what is necessary. The decision as to how long a detention is necessary cannot logically be qualified by 'reasonableness' – it is either necessary or it is not. While the concept of reasonable suspicion can be contrasted with unreasonable suspicion, there is no analogous concept of unreasonable necessity.

We do not think this, in fact, adds anything. Whether a particular decision was necessary can be probed and subject to cross examination; while it is a subjective decision of the officer that does not mean it is closed to challenge. It remains open to a court on the facts to find that it was not necessary, or that the officer did not believe it to be necessary. This is a safeguard against abuse, but avoids the danger that a reference to reasonableness in the legislation would introduce an element of uncertainty as to the scope of the power. That would undermine the ability of police officers and especially members of the armed forces (who are not as experienced as police officers in applying such legal requirements) to use the power effectively. This in turn would affect the operational effectiveness of police and armed forces in Northern Ireland.

We therefore believe that the addition of the word ‘reasonably’ would introduce uncertainty whilst providing no real benefit.

Q12 – What is the precise justification for not requiring a member of the armed forces to state the grounds for arrest when exercising this power?

Although we expect the armed forces to be deployed less and less, it is still necessary for them to have a power of arrest in order for them to be operationally effective when they are deployed. Their ongoing role in Northern Ireland will include a potential role in public order incidents, if the Chief Constable judges such support necessary. This is not a role the armed forces are expected to fulfil in England and Wales. During such a deployment it would be impossible for the armed forces to operate effectively if they were not able to arrest individuals who were, for instance, involved in public order offences and posing a risk to members of the armed forces. It would be impractical to expect the police service to carry out arrests on behalf of the armed forces in an active operational environment. It is also worth noting the considerable differences in the operating environment for the armed forces between Great Britain and Northern Ireland, which remains a unique operating environment despite the progress towards normalisation seen in recent years. Thus, a simple to use power of arrest that is effective in the range of circumstances in which it might arise, and is suitable for members of the forces (who will not have the extensive experience of the police in exercising such powers) is essential.

In considering the armed forces’ power of arrest I note that any detention within the meaning of Article 5 must comply with the procedural safeguards in paragraphs (2) –(4). This power of arrest is justifiable because it falls within one of the exceptions to the right to liberty in Article 5(1).

Article 5(2) requires that a person be informed promptly of the reasons for his or her detention. That obligation has been held to require that a person be informed in simple non-technical language of the factual basis for the detention, and in particular be given an opportunity to deny the allegation.

The purpose of the arrest power is to enable members of the armed forces to arrest individuals, and hold them for a period sufficient to enable the police to arrive without imposing the detailed requirements which police officers must comply with. Police officers, having a greater knowledge and understanding of evidential issues will generally be able to make a more accurate assessment of the situation and decide whether the person should be re-arrested for the offence or released. 4 hours is the maximum time for which a person will be held pending that decision – in the vast majority of cases it is a much shorter time. If the police do re-arrest, they apply the PACE (Northern Ireland) Order 1989, which fulfils the obligation in Article 5(2).

The maximum period of delay is therefore 4 hours before the information is given to the individual. It has been held that the requirement that the relevant information be given ‘promptly’ does not imply that it should be at the moment of arrest. In *Fox, Campbell and Hartley*, the ECtHR considered the case of 3 individuals who had been arrested and detained for some hours before being interviewed. It was accepted by all parties that the

arrest did not comply with the obligation in Article 5(2). It was held that the applicants had sufficient information to enable them to understand the grounds for their detention and to deny the allegations only at the point they were interviewed – in all the cases this was some hours later. In the case of the applicants Fox and Campbell, they were arrested at 3.40pm and questioned at between 8.15 and 10pm the same day. Mr Hartley was arrested 7.55 am and questioned at 11.05 – 12.15 pm the same day. The Court held that the requirement for ‘prompt’ information could be satisfied if it was given within this time scale: “in the context of the present case these intervals of a few hours cannot be regarded as falling outside the constraints of time imposed by the notion of promptness in article 5(2).”

I am therefore content that this clause satisfies the procedural requirement in Article 5(2).

The rationale for this decision is so as not to impose excessive requirements on the armed forces. Members of the armed forces are not trained police officers, and could not realistically be expected to fully exercise the procedural rules which constables can. In addition, the changing role of the armed forces in Northern Ireland will mean they are deployed with less and less frequently; we expect the power of arrest will therefore be used increasingly rarely, making it even more impractical for members of the armed forces to become familiar with these procedural requirements.

There is a danger that these powers would be impossible to apply if they were too onerous. If the grounds of arrest were wrongly stated by a member of the armed forces it could mean that the arrest would be held to be unlawful, and any actions to restrain the individual may also be illegal. If members of the armed forces became reluctant or uncertain about the use of these powers, their ability to react appropriately to complex and fast-moving situations would severely hampered.

It may reassure you to know that, although there is no requirement on the face of the provision, in fact where a person is detained by a member of the armed forces they will be informed in general terms of the reason for their arrest. Soldiers are given guidance in training to state “as a member of Her Majesty’s Forces I am arresting you for... (reason)”. In giving their reason the soldier would normally refer to the facts giving rise to the arrest – such as the individual being seen throwing a petrol bomb.

Members of the armed forces, unlike police officers, are neither trained nor empowered to question detainees under caution. In those rare situations when members of the armed forces are forced to arrest suspects the circumstances of the arrest, and anything said by the suspect, would be reported by the soldiers when they transferred the suspect to the PSNI. This information is obviously relevant for a decision by the PSNI as to the propriety of any continued detention after transfer. But any policy which required soldiers to question detainees would be inappropriate as it would trespass into powers and responsibilities properly reserved to the PSNI.

Q13 – Bearing in mind that the member of the armed forces must suspect that the person arrested has committed, was committing or was about to commit an offence, why should the arresting officer not be required at the very least to inform the detainee

of the facts which are the foundation of the decision to detain, and asked whether he admits or denies the allegation?

As noted above, the practice is to explain the factual grounds giving rise to the arrest. As the power is compatible with Article 5(2), imposing any further requirement would be too onerous and risks undermining the usefulness of the power.

Q14 – Why is the power of entry not at least expressed in objective terms, such as where the police officer or member of the armed services *reasonably* considers it necessary?

The danger, as with the issue raised in question 11, is that this creates uncertainty. The test proposed would be a mixture of subject and objective. The power is designed to be used in situations such as when an individual is spotted running into a private house after the firing of shots during a public order event. Such situations require the ability to react swiftly to changing events. The danger of introducing this test is that it may prevent officers making decisions which are operationally necessary because they are not certain whether a third party would consider it to be reasonably necessary. Moreover, it also provides fertile ground for argument as to whether a particular decision was reasonably necessary or not. Currently, as with the power to stop and question, the officer's factual basis for believing the action to be necessary can be tested in court and it would be open to a court to find that it was not necessary, or that he did not believe it to be necessary, and to take such action as is appropriate. This provides oversight and safeguards, without causing uncertainty as to the scope of the power.

Q15 – Which of the enumerated exceptions to the right to liberty in Article 5 does the Government rely on in cases where the exercise of this power amounts to a deprivation of liberty?

This power is limited to four hours, although may be extended to eight on appropriate authority. The arguments in response to question 11 are equally appropriate here; the use of this power would normally amount to a restriction rather than detention, and therefore would not normally engage Article 5.

However, the power could clearly be applied in ways, and for a duration which would engage Article 5. In such a case, the power, like that exercised in *Gillan* is in order to secure the fulfilment of an obligation prescribed by law – the Bill includes an offence at paragraph 8 of Schedule 3 of obstructing or frustrating a search of the premises.

The Committee will also wish to be aware that such powers are in part provided for the safety of police officers and members of the armed forces conducting the searches, as individuals may seek to set off devices hidden within the premises to disrupt a search and injure officers and members of the armed forces.

The police and armed forces have used similar powers for a number of years and are clear that they are only used in a proportionate manner. The powers are unlikely to be used unless individuals attempt to interfere with searches, attempt to leave the property or take other actions which require the police or army to respond. Officers and members of the armed forces take into account the circumstances in the premises – for instance they may

allow a mother-in-law entry to the premises where a young mother is at home with a number of young children (making clear to her that she may not be allowed to leave again for a period of time). General police search guidance focuses on a taking a practical approach to searches, such as by ensuring that kitchens and toilets are searched first, in order to make them available again. I am confident that in fact the power will be exercised in a way which is outwith Article 5, but where Article 5 is engaged, the guidance to which you refer will help to ensure that the powers are used in a way which is proportionate and does not violate Article 5.

Q16 – Will the Government make available in draft form while the Bill is still before Parliament the guidance on which it intends to rely to ensure that the power is not exercised incompatibly with Article 5?

The Committee will understand that such guidance will take time to develop. However, I intend to make a draft of the guidance available during the passage of the Bill, most likely for the House of Lords stages.

I have tried to answer your questions as fully as possible and I hope that this will help the Committee in its deliberations on the Bill. Please let me know if I can assist in any other way.

Appendix 1 Attorney-General's Guidelines

Exercise by the crown of its right of stand-by

1. Although the law has long recognised the right of the Crown to exclude a member of a jury panel from sitting as a juror by the exercise in open court of the right to request a stand-by or, if necessary, by challenge for cause, it has been customary for those instructed to prosecute on behalf of the Crown to assert that right only sparingly and in exceptional circumstances. It is generally accepted that the prosecution should not use its right in order to influence the overall composition of a jury or with a view to tactical advantage.

2. The approach outlined above is founded on the principles that (a) the members of a jury should be selected at random from the panel subject to any rule of law as to right of challenge by the defence, and (b) the Juries Act 1974 together with the Juries (Disqualification) Act 1984 identified those classes of persons who alone are disqualified from or ineligible for service on a jury. No other class of person may be treated as disqualified or ineligible.

3. The enactment by Parliament of s. 118 of the Criminal Justice Act 1988 abolishing the right of defendants to remove jurors by means of peremptory challenge makes it appropriate that the Crown should assert its right to stand by only on the basis of clearly defined and restrictive criteria. Derogation from the principle that members of a jury should be selected at random should be permitted only where it is essential.

4. Primary responsibility for ensuring that an individual does not serve on a jury if he is not competent to discharge properly the duties of a juror rests with the appropriate court officer and, ultimately, the trial judge. Current legislation provides, in ss. 9 and 10 of the

Juries Act 1974, fairly wide discretions to excuse or discharge jurors either at the person's own request, where he offers 'good reason why he should be excused', or where the judge determines that 'on account of physical disability or insufficient understanding of English there is doubt as to his capacity to act effectively as a juror'.

5. The circumstances in which it would be proper for the Crown to exercise its right to stand by a member of a jury panel are: (a) where a jury check authorised in accordance with the Attorney-General's guidelines on jury checks reveals information justifying exercise of the right to stand by in accordance with para. 9 of the guidelines and the Attorney-General personally authorises the exercise of the right to stand by; or (b) where a person is about to be sworn as a juror who is manifestly unsuitable and the defence agree that, accordingly, the exercise by the prosecution of the right to stand by would be appropriate. An example of the sort of *exceptional* circumstances which might justify stand-by is where it becomes apparent that, despite the provisions mentioned in para. 4 above, a juror selected for service to try a complex case is in fact illiterate.

Jury checks

1. The principles which are generally to be observed are (a) that members of a jury should be selected at random from the panel, (b) the Juries Act 1974 together with the Juries (Disqualification) Act 1984 identified those classes of persons who alone are either disqualified from or ineligible for service on a jury; no other class of person may be treated as disqualified or ineligible, and (c) the correct way for the Crown to seek to exclude a member of the panel from sitting as a juror is by the exercise in open court of the right to request a stand-by or, if necessary, to challenge for cause.

2. Parliament has provided safeguards against jurors who may be corrupt or biased. In addition to the provision for majority verdicts, there is the sanction of a criminal offence for a disqualified person to serve on a jury. The omission of a disqualified person from the panel is a matter for court officials but any search of criminal records for the purpose of ascertaining whether or not a jury panel includes any disqualified person is a matter for the police as the only authority able to carry out such a search and as part of their usual function of preventing the commission of offences. The recommendations of the Association of Chief Police Officers respecting checks on criminal records for disqualified persons are annexed to these guidelines.

3. There are, however, certain exceptional types of case of public importance for which the provisions as to majority verdicts and the disqualification of jurors may not be sufficient to ensure the proper administration of justice. In such cases it is in the interests of both justice and the public that there should be further safeguards against the possibility of bias and in such cases checks which go beyond the investigation of criminal records may be necessary.

4. These classes of case may be defined broadly as (a) cases in which national security is involved and part of the evidence is likely to be heard in camera, and (b) terrorist cases.

5. The particular aspects of these cases which may make it desirable to seek extra precautions are (a) in security cases a danger that a juror, either voluntarily or under pressure, may make an improper use of evidence which, because of its sensitivity, has been

given in camera, (b) in both security and terrorist cases the danger that a juror's political beliefs are so biased as to go beyond normally reflecting the broad spectrum of views and interests in the community to reflect the extreme views of sectarian interest or pressure group to a degree which might interfere with his fair assessment of the facts of the case or lead him to exert improper pressure on his fellow jurors.

6. In order to ascertain whether in exceptional circumstances of the above nature either of these factors might seriously influence a potential juror's impartial performance of his duties or his respecting the secrecy of evidence given in camera, it may be necessary to conduct a limited investigation of the panel. In general, such further investigation beyond one of criminal records made for disqualifications may only be made with the records of police Special Branches. However, in cases falling under para. 4(a) above (security cases), the investigation may, additionally, involve the security services. No checks other than on these sources and no general inquiries are to be made save to the limited extent that they may be needed to confirm the identity of a juror about whom the initial check has raised serious doubts.

7. No further investigation, as described in para. 6 above, should be made save with the personal authority of the Attorney-General on the application of the Director of Public Prosecutions and such checks are hereafter referred to as 'authorised checks'. When a chief officer of police has reason to believe that it is likely that an authorised check may be desirable and proper in accordance with these guidelines he should refer the matter to the Director of Public Prosecutions with a view to his having the conduct of the prosecution from an early stage. The Director will make any appropriate application to the Attorney-General.

8. The result of any authorised check will be sent to the Director of Public Prosecutions. The Director will then decide, having regard to the matters set out in para. 5 above, what information ought to be brought to the attention of prosecuting counsel.

9. No right of stand-by should be exercised by counsel for the Crown on the basis of information obtained as a result of an authorised check save with the personal authority of the Attorney-General and unless the information is such as, having regard to the facts of the case and the offences charged, to afford strong reason for believing that a particular juror might be a security risk, be susceptible to improper approaches or be influenced in arriving at a verdict for the reasons given above.

10. Where a potential juror is asked to stand by for the Crown, there is no duty to disclose to the defence the information on which it was founded; but counsel may use his discretion to disclose it if its nature and source permit it.

11. When information revealed in the course of an authorised check is not such as to cause counsel for the Crown to ask for a juror to stand by but does give reason to believe that he may be biased against the accused, the defence should be given, at least, an indication of why that potential juror may be inimical to their interests; but because of its nature and source it may not be possible to give the defence more than a general indication.

12. A record is to be kept by the Director of Public Prosecutions of the use made by counsel of the information passed to him and of the jurors stood by or challenged by the parties to the proceedings. A copy of this record is to be forwarded to the Attorney-General for the sole purpose of enabling him to monitor the operation of these guidelines.

13. No use of the information obtained as a result of an authorised check is to be made except as may be necessary in direct relation to or arising out of the trial for which the check was authorised.

Appendix 2: Letter dated 16 January from The Rt Hon The Baroness Ashton of Upholland, Parliamentary Under Secretary of State, re Tribunals, Courts and Enforcement Bill

Thank you for your letter of 19 December, asking for a further explanation of the Government's view that provisions in Part 3 of the Bill are compatible with the Convention rights.

Taking your points in turn:

1. Why does the Government consider that the “reasonable belief” of an enforcement agent as to the status of individual premises as the basis for a) entry without a warrant and b) the use of forced re-entry without prior judicial authorisation provides adequate protection to debtors, and other third parties, rights to respect for their home and private life (Article 8 ECHR)?

Article 8 is a qualified right. It is limited in that interference is allowed as is permitted by the law for the protection of the rights and freedoms of others. A successful monetary claim represents a "possession" of the creditor, and therefore lawful creditors have the right pursuant to Article 1, Protocol 1 ECHR to enjoy their "possessions" and not to be deprived of them. It is necessary, of course, to find an appropriate balance between the rights of debtors and creditors which, in my view, the Bill achieves.

Having said that, I do accept that the enforcement agent should have a reasonable belief that he is attending the right property before attempting entry or re-entry into premises. This will be based upon the evidence that the agent will have to hand when calling at the premises.

When calling for a judgment, the enforcement agent will be acting upon the information contained within a warrant issued by the courts. When calling for a tax debt, the agent will be acting upon information held on government records, provided and updated by the taxpayer. When calling for a CRAR debt, the agent will be calling at the address specified within the tenancy agreement. This information should give the enforcement agent a "reasonable belief" that he is calling at the right premises. If calling at premises other than where the agent reasonably believes the debtor resides or carries on a trade or business, the agent will require prior judicial authority to do so.

2. Has the Government considered limiting powers of forcible re-entry without judicial oversight to purely commercial premises (i.e. by excluding properties occupied as a

dwelling) in order to limit the risk posed to debtors and their families and to third parties rights to respect for their home and to their physical integrity (i.e. those rights protected by Article 8 ECHR)?

Yes, we are considering whether to amend to the Bill to restrict re-entry without a warrant to premises that are wholly commercial.

3. What conditions do the Government consider must be satisfied before a warrant for forced entry will be compatible with the rights of debtors and third parties under Articles 6 and 8 ECHR and Article 1, Protocol 1 ECHR? Why are these conditions not expressly included on the face of the Bill?

I have outlined in the detailed policy statement on delegated powers for the Bill (a copy of which is enclosed) the conditions the Government believes a judge should take into account before granting a warrant for entry using reasonable force. They are contained at paragraphs 149-150, and are repeated below:

“149. Judicial authority may be granted under paragraph 20 or 21 provided that prescribed conditions are met. It is intended that the court’s power should only be used as a last resort and each individual case will be judged upon its merits. The conditions of which the court needs to be satisfied for granting forced entry will be contained in regulations under paragraph 22(1) of Schedule 12. It is our intention that these conditions will include:

- that other methods of enforcement have failed;
- the property is inhabited by the debtor;
- normal entry attempts have been unsuccessful;
- there is reason to believe there are suitable goods on the premises to satisfy the debt (and evidence to support that belief);
- the enforcement agent has considered the likely means required to gain entry; and
- the enforcement agent will leave the property in a secure state.

150. The judge may also take other factors into account when making his decision, including:

- the size of the debt;
- the type of debt; and
- any other information about the debtor’s personal circumstances.”

I believe these conditions to be sufficient to ensure that the provisions relating to warrants for forced entry are ECHR compliant. The conditions are not on the face of the Bill to ensure the necessary flexibility to change these requirements in the future, should circumstances dictate, without the need for further primary legislation.

Of course, it is important to bear in mind that judges will rightly have the discretion to make appropriate decisions in individual cases, based on the evidence with which they are presented.

4. Why is the Government persuaded that the new certification scheme will ensure that enforcement agents have adequate and appropriate levels of experience to ensure that in practice, their extended powers of entry are used in a way which respects Convention rights?

The new enhanced and extended certification process will include a requirement for enforcement agents to undergo training in certain key areas. Therefore as well as needing a thorough knowledge of enforcement law, agents will have to undergo training in fields such as diversity awareness, dealing with conflict (including restraint techniques), and identifying vulnerable or potentially vulnerable debtor groups. Such training will ensure that enforcement agents are fully aware of the rights of all parties with whom they come into contact guaranteed by Article 8 ECHR and Article 1, Protocol 1 ECHR.

Judicial oversight of the system will also ensure impartiality in its application. Judges will have a discretion not to award certificates if the applicant has not successfully completed the required training or has failed to exhibit a full understanding of these rights. Also, debtors or a third party will be able to complain about the actions of a certificated enforcement agent to the judge who issued the certificate. This procedure will be more easily accessible and more widely advertised than the complaints procedure for the current certification scheme, and will enable complaints to be dealt with speedily and appropriately, should an agent abuse their position.

5. What conditions do the Government imagine might be applied to individual certificates to ensure that appropriate levels of experience and maturity are guaranteed? Is there any reason why these conditions, or categories of conditions, could not be specified on the face of the Bill?

Concepts such as 'experience' and 'maturity' would be very difficult to define. Certificates will be granted on the basis of the applicant producing evidence of having completed the relevant training and exhibiting a suitable level of knowledge of the law, as well as providing suitable bonds, insurance etc, rather than based on concepts such as 'experience' or 'maturity'. Any conditions of a certificate would relate to the debts that an agent can enforce or the geographical area in which he can operate, rather than dealing with issues such as 'experience'. Judges will have the right to refuse an application for a certificate where an applicant has not sufficiently exhibited the right knowledge or skills. Again, for reasons of flexibility, I would prefer to leave such definitions to delegated legislation.

6. What has persuaded the Government that permitting third parties to assist enforcement agents in the execution of forced entry does not create a risk that debt recovery agencies may exercise their powers in a manner which poses a disproportionate interference with the Convention rights of debtors, their families, and third parties?

I believe there are justifications for allowing third parties to assist the enforcement agent, for instance by providing assistance at large premises and preparing detailed inventories. In addition, the enforcement agent will be personally responsible for actions taken, which will include actions taken by those assisting him (other than offences against the person committed by those assisting him, in which case the assistant will be personally liable), in the enforcement of the writ, warrant or statutory debt concerned. The fact that steps can be taken personally against the enforcement agent (by way of the remedies previously outlined) should ensure that the behaviour, by both the agent and those assisting him, is not a disproportionate interference with the rights of debtors, their families or third parties under Article 8 ECHR and Article 1, Protocol 1 ECHR.

I should add, by way of clarification, that the Bill will regulate "enforcement agents" and not debt collectors (you referred to 'debt recovery agencies' in question 6). Debt collectors are already regulated under the Consumer Credit Act 1974.

7. What limitations do the Government intend to impose on the use of enforcement powers by enforcement agents and those who assist them? What safeguards does the Government consider necessary to protect the right to respect for the home, and family life and to protect individual rights to physical integrity?

Limits on the actions of enforcement agents will be set out in regulations, and will include the following:

- certain goods will be exempt from seizure in accordance with a prescribed list;
- there will be restrictions as to the times at which an enforcement agent will be permitted to attend a debtor's premises;
- access to premises will be restricted to 'normal' methods (i.e. doors or French - windows, and not, for example, via open windows, skylights, or by putting a foot in the door); and
- force will only be permitted in order to restrain debtors who are actively physically obstructing or threatening the enforcement agent or resisting the taking into control of goods.

I believe that these restrictions will provide sufficient protection to debtors' rights to respect for the home and family life and to protect individual rights to physical integrity whilst also taking into account the rights of the creditor.

8. We would be grateful if you could confirm that any enforcement agent, or third party assistant, acting in excess of their powers to use reasonable force against persons will be liable for prosecution for offences against the person.

I can confirm that all enforcement agents and third party helpers remain subject to the law when carrying out their duties, for example, they may be prosecuted for assault.

9. We note your commitment to provide in time for Committee stage in the House of Lords a policy statement on how the Government intends to use the delegated powers

in the Bill (HL Deb, 29 November 2006, Col 803). We would be grateful if a copy of this statement (or any draft statement) could be made available to the Committee as soon as possible.

I understand that a copy of the detailed policy statement has already been sent to the Clerk to the Committee, but I enclose a further copy. This document has also been published on the DCA website at: <http://www.dca.gov.uk/legist/delegated-powers.pdf>.

I hope that the Committee finds this helpful.

Bills Reported on by the Committee (Session 2006-07)

*indicates a Government Bill

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

<i>BILL TITLE</i>	<i>REPORT NO</i>
Bournemouth Borough Council Bill	2nd
Concessionary Bus Travel Bill*	3rd
Consolidated Fund Bill*	2nd
Consumers, Estate Agents and Redress Bill*	2nd
Corporate Manslaughter and Corporate Homicide Bill*	2nd
Crossrail Bill*	2nd
Digital Switchover (Disclosure of Information) Bill*	2nd
Fraud (Trials without a Jury) Bill*	2nd
Further Education and Training Bill*	2nd
Greater London Authority Bill*	2nd
Income Tax Bill*	2nd
Investment Exchanges and Clearing Houses Bill*	2nd
Justice and Security (Northern Ireland) Bill*	5th
Legal Services Bill*	3rd
London Local Authorities Bill	2nd
London Local Authorities and Transport for London Bill	2nd
Manchester City Council Bill	2nd
Mental Health Bill*	4th
National Trust (Northern Ireland) Bill	2nd
Northern Ireland (St Andrews Agreement) Bill*	2nd
Offender Management Bill*	3rd
Planning-Gain Supplement (Preparations) Bill*	2nd
Pensions Bill*	2nd
Statistics and Registration Service Bill*	2nd
Tribunals, Courts and Enforcement Bill*	2nd and 5th
Welfare Reform Bill*	2nd
Whitehaven Harbour Bill	2nd