



House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny: Fourth Progress Report

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

HOUSE OF COMMONS

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Mr Andrew Dismore MP (Labour, *Hendon*) (Chairman)
Nia Griffith MP (Labour, *Llanelli*)
Dr Evan Harris MP (Liberal Democrat, *Oxford West & Abingdon*)
Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)
Mark Tami MP (Labour, *Alyn and Deeside*)

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

Publications

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

Current Staff

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

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Summary

The Joint Committee on Human Rights examines the human rights implications of all Government and private bills, and selected pre- and post-legislative documents, 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/HC1575.

This is the Committee's Fourth Legislative Scrutiny Progress Report of this Session. In this Report the Committee draws the special attention of both Houses to one matter arising from the Local Government and Public Involvement in Health Bills, and the Committee also publishes correspondence from Ministers about three other Bills on which it has already reported, and about the Equality Act 2006 (Sexual Orientation) Regulations 2007. The Committee comments on continuing concerns which it has about the Tribunals, Courts and Enforcement Bill (paragraphs 3.1 to 3.7). It also welcomes clarification by the Government of whether the Sexual Orientation Regulations cover the curriculum and the delivery of it, and says that it intends to return to this and other matters relating to the Regulations when the Government publishes the Discrimination Law Review and in the light of any judicial reviews in this area (paragraphs 5.1 and 5.2).

Local Government and Public Involvement in Health Bill

The main purpose of the Bill is to give effect to the Government's proposals for reform of the local government system in England. In the Committee's view only Part 10 of the Bill, about proposed reform of the regime relating to ethical standards of conduct for local government, raises a significant human rights issue (Paragraphs 1.1-1.3). On the face of it, clause 141 of the Bill would mean that local authority members are subject to regulation of their conduct outside their performance of their functions and therefore in their private life. The Explanatory Notes to the Bill state that it is "possible" that this provision engages Articles 8 and 10 ECHR but is capable of being exercised compatibly with the rights in the European Convention on Human Rights (paragraphs 1.4-1.7).

The Committee is in no doubt that the provision engages the rights to respect for private life and to freedom of expression in Articles 8 and 10 ECHR and finds the statement in the Explanatory Notes inadequate. The Chairman therefore wrote to the Minister on 23 January asking for a fuller explanation. No response has been received and the Committee has therefore looked elsewhere for answers to its questions (paragraphs 1.8- 1.11).

The Government has made clear that its policy objective is confined to enabling the model code of conduct to cover criminal convictions (paragraphs 1.13-1.16). The Committee welcomes the Government's clarification, but two problems remain. First, the Government's limited intention is not reflected on the face of the Bill itself. Second, the Government appears to intend that any criminal conviction, however minor, should be capable of counting as conduct which could reasonably be regarded as bringing a member's office into disrepute. The Committee recommends that in order to minimise the risk of incompatibility with Articles 8 and 10 ECHR, the Bill should be amended to provide on its face that private conduct shall be within the scope of the code of conduct only where it results in a criminal conviction relevant to the member's official duties (paragraphs 1.17-1.21).

Bills and other documents drawn to the special attention of both Houses

1 Local Government and Public Involvement in Health Bill

Date introduced to first House	12 December 2006
Date introduced to second House	
Current Bill Number	HC Bill 77
Previous Reports	None

Background

1.1 This is a Government Bill introduced into the House of Commons on 12 December 2006. The Rt Hon Ruth Kelly MP, Secretary of State for Communities and Local Government, has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998. The Explanatory Notes accompanying the Bill set out the Government's view of the Bill's compatibility with the Convention rights at paragraph 467. The Bill completed its Committee stage on 8 March 2007.

The effect of the Bill

1.2 The main purpose of the Bill is to give effect to the Government's proposals for reform of the local government system in England, set out in the local government white paper *Strong and Prosperous Communities*,¹ and of the current arrangements for patient and public involvement in the provision of health and social care services.

1.3 Most of the Bill does not, in our view, raise any significant human rights issues. Part 10 of the Bill, however, which gives effect to the Government's proposals for reform of the regime relating to ethical standards of conduct for local government, contains one provision which in our view does raise a significant human rights issue.

The scope of the code of conduct for local councillors

1.4 The Local Government Act 2000 introduced a new ethical framework for local government, including a statutory code of conduct for local councillors policed by the Standards Board for England.² The Act imposes a duty on councillors to give a written undertaking to observe the code of conduct "in performing his functions".³ The current model code of conduct provides that a councillor must not in his or her official capacity "or any other circumstance" conduct himself or herself in a manner which could reasonably be regarded as bringing his or her office or authority into disrepute.⁴

¹ Cm 6939.

² Sections 49-52 Local Government Act 2000.

³ Section 52 Local Government Act 2000.

⁴ Para. 4 of the Model Code of Conduct for Local Authority Members.

1.5 The Bill provides for the extension of codes of conduct for local authority members to apply to conduct other than in the performance of their official functions as members.⁵ It amends the relevant provisions of the Local Government Act 2000 to provide that the principles which govern the conduct of members and the provisions of the code of conduct which they are required to follow include principles and provisions which are to “apply at all times” to a member or co-opted member.⁶ The Bill would also remove the words “in performing his functions” from the provision of the Local Government Act 2000 which imposes the duty to comply with the code of conduct.⁷

1.6 On the face of it this would mean that local authority members are subject to regulation of their conduct, including by sanctions such as suspension or disqualification from being a member, outside their performance of their functions as a member and therefore, by necessary implication, in their private life.

1.7 The Explanatory Notes to the Bill state that “it is possible” that this provision may engage Articles 8 and 10 of the Convention, but assert that the clause “is considered to be capable of being exercised compatibly with the rights set out in the Convention.”⁸ The Notes say nothing more about the reasons for introducing the provision, other than that it is being introduced “following comments made by the court in a recent case (*Ken Livingstone v the Standards Board for England*)”.⁹

1.8 In our view there is no doubt that the Bill’s proposed extension of the scope of the conduct of local authority members that may be covered by codes of conduct engages members’ right to respect for their private life in Article 8 ECHR and their right to freedom of expression in Article 10 ECHR. The effect of the changes will be that sanctions can be applied to a member in respect of actions taken or statements made in their private life. The provision therefore has the potential to give rise to breaches of Articles 8 and 10 ECHR in practice. For the reasons we have frequently given in previous reports, we do not consider adequate the statement in the Explanatory Notes that the power is capable of being exercised compatibly with Convention rights. Such reliance on sections 3 and 6 of the Human Rights Act would render parliamentary scrutiny for human rights compatibility virtually meaningless. Where a statutory power engages Convention rights and is so wide that it gives rise to a risk of being exercised incompatibly with those rights, we want to know more about the Government’s reasons for its confidence that the power will not be so exercised in practice. Our Chair therefore wrote to the Minister on 23 January 2007 asking for the Government’s reasons for introducing the change, and for a more detailed explanation of why in the Government’s view the interference with the Article 8 and 10 rights of local authority members is justified.¹⁰ We asked for a response by 5 February 2007.

1.9 We regret to report that, more than six weeks after the date by which we requested a response, and despite several reminders, we still have not received a response from the Minister to our short inquiry. We cannot recall a previous occasion on which a letter

⁵ Clause 141.

⁶ Clause 141(1)-(3), inserting new provisions into ss. 49-51 of the Local Government Act 2000.

⁷ Clause 141(4), amending s. 52 of the Local Government Act 2000.

⁸ EN paras 330 and 467.

⁹ EN para. 467.

¹⁰ Appendix 1.

from us has effectively been ignored by a Minister. The proper performance of our function of scrutinising bills before Parliament for human rights compatibility depends on Government departments responding to our inquiries as fully and promptly as possible to enable us to report to Parliament in good time. We now have no alternative but to report on this Bill without the benefit of the Minister's response to our questions. We draw this matter to the attention of each House.

1.10 In the absence of a response from the Minister, we have sought to find the answers to our questions from other sources. In January 2005 the Committee on Standards in Public Life considered the question in its Tenth Report in which it made a number of recommendations about the ethical framework for local government.¹¹ The Committee pointed out that in England and Wales the code of conduct applies mainly to members acting in their official capacity but also appeared to concern conduct in private life, and that this raised difficult and contentious issues. It recommended that the phrase "in any other circumstances" should be removed from the model code of conduct for local authority members so as to make a clear distinction between private and official conduct, and that private conduct that is wholly unrelated to an individual's official capacity should fall outside the ethical framework.

1.11 The Government rejected this recommendation. In December 2005 it published a discussion paper, *Standards of conduct in English local government: the future*, in which it said:

"We believe that councillors should set an example of leadership to their communities, and that they should be expected to act lawfully even when they are not acting in their role as members. We do not agree therefore that the code should be amended so as only to refer to actions by members in their official capacity and not their private lives. Following its review of the code, the Standards Board has, however, recommended that the current rule should be amended to provide that **certain behaviour outside official duties should continue to be regulated, but that this should be restricted only to matters that would be regarded as unlawful**. We accept this proposal, since it would balance the need for members to continue to set an example to their communities, and the need to exclude from proscription actions of which certain people might merely disapprove."¹²

1.12 In the recent case involving the Mayor of London,¹³ who accused a journalist who he knew to be Jewish of being "like a concentration camp guard" as he left an official reception, the Adjudication Panel for England had found that the Mayor had failed to comply with the Code of Conduct of the Greater London Authority, even though he was not at the time fulfilling his official duties, and should be suspended for four weeks. The High Court, however, allowed the Mayor's appeal on the basis that the code of conduct did not apply because the Mayor had not been acting in his official capacity as Mayor when he made the relevant remarks to an Evening Standard journalist, and the code did not extend to regulating the Mayor's private conduct.

¹¹ Committee on Standards in Public Life, *Tenth Report, Getting the balance right: implementing standards in public life*

¹² *Standards of conduct in English local government: the future*, ODPM, 15 December 2005, at p. 28.

¹³ *Ken Livingstone v Adjudication Panel for England* [2006] EWHC 2533 (Admin) (19 October 2006).

1.13 The High Court held that the words “in performing his functions” covered activities that were apparently within the performance of a member’s functions, and applied to a member who misused his position as a member even when not acting in his official capacity. However, it did not cover conduct in the member’s private life: the High Court held that if it is thought appropriate to subject members to a code which extends to conduct in their private life, Parliament should spell out what is covered.¹⁴ Since the remarks to the journalist were not made in the performance of the Mayor’s functions, the Code of Conduct did not apply and the Adjudication Panel had therefore been wrong in deciding that he had failed to comply with it.

1.14 In reaching this conclusion, the High Court held that the restraints on freedom of expression imposed by the code of conduct to uphold proper standards in public life were in principle capable of justification under Article 10(2) ECHR, but those restraints should not extend beyond what is necessary in order to maintain those standards. In the Court’s view, to interpret the code as extending to the conduct in question was not necessary in a democratic society. Collins J. made clear that in his view the link between the conduct in question and his membership of the authority was necessary: “it is important that the flamboyant, the eccentric, the positively committed – one who is labelled in the somewhat old fashioned terminology, a character – should not be subjected to a Code of Conduct which covers his behaviour when not performing his functions as a member of a relevant authority.” The judge accepted that the result of this construction of the Act and the Code is that unlawful conduct is not necessarily covered by the Code: “Thus a councillor who shoplifts or is guilty of drunken driving will not if my construction is followed be caught by the Code if the offending had nothing to do with his position as a councillor.”¹⁵

1.15 In its *Consultation on Amendments to the Model Code of Conduct for Local Authority Members*, issued in January 2007, the Department for Communities and Local Government says that it is in response to this case that the Government has decided to amend the Local Government Act 2000 in the current Bill “so that behaviour in a private capacity might be included within the remit of a code of conduct.”¹⁶ It says that the case casts some doubt on the ability of the code of conduct to proscribe behaviour of members in their private capacity, and is based on a narrower interpretation than that previously applied by the Government. Until this decision, the Consultation Paper says, the Government had assumed that it was possible to take a wider view of what private conduct could be relevant, including actions not necessarily to do with the member’s position as a councillor, but which may affect the member’s reputation and electors’ confidence in him or her. The Consultation Paper says that if the provisions in the Bill are enacted, “Ministers are currently minded to provide that only private behaviour for which the member has been convicted by a court should be proscribed by the code of conduct, ... and not behaviour falling short of a criminal offence.” This is reflected in the draft model code of conduct which is appended to the Consultation Paper, which expressly provides that the conduct which could reasonably be regarded as bringing a member’s office or authority into disrepute “may include a criminal offence”.¹⁷

¹⁴ [2006] EWHC 2533 (Admin) at paras 29-30.

¹⁵ *ibid.* at para. 30.

¹⁶ DCLG Consultation, January 2007, at p. 9.

¹⁷ Para. 4(2) of the draft model code of conduct.

1.16 In proceedings before the Public Bill Committee, the Minister confirmed that the Government's policy objective in seeking to amend the Local Government Act 2000 is only to encompass within the code of conduct instances where members acting outside their official duties receive a criminal conviction.¹⁸ He said "We are trying to say that the code of conduct should not cover a councillor's private life, with the caveat that if a criminal conviction was involved, that should be taken on board by the standards committee." In the Government's view, conduct in a member's private capacity that has resulted in a criminal conviction should be covered by the code of conduct, and the purpose of the provisions in the Bill is to ensure that the necessary enabling powers are provided to enable the code to achieve this. However, the minister was unequivocal that "I am not proposing that the model code should cover any aspect of a member's conduct outside his or her role on the council other than that resulting in a criminal conviction."

1.17 **We welcome the Government's clarification that its policy objective is confined to enabling the model code of conduct to cover criminal convictions.** However, although this reduces the likelihood of the provisions in question leading to breaches of the Article 8 and 10 rights of members, it does not remove the risk of incompatibility to our satisfaction. Two problems remain.

1.18 First, the Government's limited intention is not reflected on the face of the Bill itself. As the Bill stands, it provides for a power which on its face is capable of being exercised so as to make the code of conduct apply to any private conduct of a member, which would be highly likely to give rise to breaches of members' rights to privacy and freedom of expression under Articles 8 and 10 ECHR. The Government's current intention may be only to use that power to provide that private behaviour resulting in a criminal conviction will be covered by the code, which is less likely to result in such breaches, but there is nothing in the Bill to confine the power in this way.

1.19 Indeed this has been acknowledged by the Minister in the course of the Public Bill Committee proceedings, when he said that he was conscious that after reading the explanatory notes and the clause Members of Parliament "will have the impression ... that we are trying to do the opposite of what we are really trying to do."¹⁹ According to the Minister's explanation to the Public Bill Committee, "the law has to be widened and clarified so that the code can be narrowed". We do not understand the Minister's puzzling explanation. The effect of the provision in the Bill is to widen the scope of the code of conduct from that which currently stands following the decision of the High Court in the *Livingstone* case. **We see no reason why the Bill should not expressly state on its face the exact extent to which the code shall apply to private conduct by members, for example by providing that the only private conduct to which the code applies is conduct which has resulted in a criminal conviction. There is no reason, legal or otherwise, why such a limitation should only be contained in the code. On the contrary, in our view, there are very good reasons why such a limitation should be on the face of the Bill, to make it less likely in practice that the power will be exercised incompatibly with Articles 8 and 10.**

1.20 The second problem which remains is that the Government appears to intend that any criminal conviction, however minor, should be capable of counting as conduct which

¹⁸ House of Commons Public Bill Committee, 1 March 2007, col. 420.

¹⁹ House of Commons Public Bill Committee, 1 March 2007, col. 419.

could reasonably be regarded as bringing a member's office into disrepute. This would mean, for example, that a speeding ticket or other regulatory offence of a minor nature would be within the scope of the code of conduct. **We agree with the view of the Committee on Standards in Public Life that only private conduct resulting in a criminal conviction which is relevant to the member's official duties should be within the scope of the code of conduct.**

1.21 In the light of the above, we recommend that in order to minimise the risk of incompatibility with members' rights to privacy and freedom of expression under Articles 8 and 10 ECHR, the Bill should be amended to provide on its face that private conduct shall be within the scope of the code of conduct only where it results in a criminal conviction which is relevant to the member's official duties.

2 Consumers, Estate Agents and Redress Bill

Date introduced to first House	16 November 2006
Date introduced to second House	7 February 2007
Current Bill Number	HC 61
Previous Reports	2 nd Report of 2006-07

2.1 This is a Government Bill brought to the House of Commons on 7 February 2007. It received its second reading on 19 March. We reported on this Bill in our first progress report of this Session. We drew the attention of both Houses to a few matters which we considered raised significant human rights issues, and specifically, a risk of incompatibility with Article 6 ECHR. The Secretary of State responded to our Report in a letter dated 12 March 2007, which we publish as an Appendix to this Report, without further comment.²⁰

²⁰ Appendix 2.

3 Tribunals, Courts and Enforcement Bill

Date introduced to first House	16 November 2006
Date introduced to second House	21 February 2007
Current Bill Number	HC 65
Previous Reports	2 nd and 5 th Reports of 2006-07

Background

3.1 This Bill is currently being considered by a Public Bill Committee in the House of Commons and will be in Committee until 27 March 2007. We reported on this Bill in our Second and Fifth Reports of this session.²¹ We received the Government response to both of these Reports in a letter from Baroness Ashton, Parliamentary Under Secretary of State for Human Rights, on 21 February 2007. We publish this response to inform Parliamentary debate on the progress of this Bill.²² We make a few comments on this response, below.

Enforcement by Taking Control of Goods

3.2 In our earlier Report, we outlined a number of measures which we considered would improve the Bill and which would reduce the risk that the powers of enforcement agents might be exercised in a manner which would be considered to be incompatible with the rights of debtors and third parties to respect for their home, private and family life and physical integrity (as protected by Article 8 ECHR); the right to respect for their possessions and the right to a fair hearing by an independent and impartial tribunal (as guaranteed by Article 6 ECHR); and the right to an effective remedy for any breach of those Convention rights (Article 13 ECHR).

(1) Certification and Regulation of Enforcement Agents

3.3 In her letter to the Committee, the Minister explains that the Government intends to introduce the regulation of enforcement agents by way of Affirmative Order under Schedule 2 to the Private Security Industry Act 2001.

3.4 On 20 March 2007, the Minister for Constitutional Affairs announced that enforcement agents will not be given powers to enter domestic premises using force “until a strict new licensing regime comes into effect”. She explained:

For too long there has been confusion about the rights of bailiffs and the rights of householders. This is especially important as we are often talking about some of the most vulnerable people in our communities. That's why we decided to bring in a range of safeguards to raise the professional standards of bailiffs and protect the public. Concerns have rightly been expressed about the right of bailiffs to force entry to people's homes. We have always said forced entry can only be used as a last resort and when all other avenues have been exhausted. Today, I'm happy to announce this

²¹ Second Report of Session 2006-07, *Legislative Scrutiny: First Progress Report*, HL Paper 34/HC 263, paras 6.1 – 6.53; Fifth Report of Session 2006-07, *Legislative Scrutiny: Third Progress Report*, HL Paper 46/HC 303, paras 2.1 – 2.38.

²² Appendix 3.

power will not come into force until those bailiffs who are not Crown employees are licensed by an independent regulator. This will help to further protect the public.²³

3.5 As we explained in our earlier Report, 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 welcome the Government's decision to delay the implementation of some of the powers proposed for enforcement agents in Part 3 of the Bill until the proposed regulatory regime for enforcement agents is in place. We may return to the Government's proposals for regulation at a later date. We re-iterate however, that although a clear regulatory framework will provide a valuable safeguard for abuse of enforcement agents powers in practice, if the powers granted to enforcement agents are accompanied by inadequate safeguards this could lead to a risk of incompatibility with the Convention rights of debtors and third parties regardless.**

(2) Human rights, safeguards and regulations

3.6 In her response, the Minister rejects a number of our recommendations that specific safeguards should be incorporated in the Bill rather than provided in regulations or Guidance. As in our previous correspondence, the Minister argues that the need for flexibility is adequate to justify leaving a significant amount of detail to secondary legislation. We reiterate our view, expressed in a number of our previous reports, that this is inadequate justification where the safeguards are necessary to provide protection for individual human rights.²⁴

3.7 We are particularly concerned that the Minister continues to argue that it is appropriate to include a power on the face of the Bill to permit the Secretary of State to authorise the use of force against persons by enforcement agents. While we welcome the Minister's recognition that it would be inappropriate for third parties assisting enforcement agents to use force against persons (except in so far as they are able to do so in self-defence). We previously acknowledged the Minister's concession that these regulation making powers, if exercised, would be limited to enabling enforcement agents to use force to restrain debtors. We reiterate that we not consider that these important restrictions should be left to secondary legislation, albeit secondary legislation which may only be approved by affirmative order. **We draw this to the attention of both Houses.**

²³ Press Release, 20 March 2007 028/07.

²⁴ See for example, Twentieth Report of Session 2005-06, Legislative Scrutiny: Tenth Progress Report, HL Paper 186/HC 1138, paras 2.51 – 2.60; Twenty-first Report of Session 2005-06, Legislative Scrutiny: Eleventh Progress Report, HL Paper 201/HC 1216, paras 3.10 – 3.13 (Compensation Bill).

4 Welfare Reform Bill

Date introduced to first House	16 November 2006
Date introduced to second House	10 January 2007
Current Bill Number	HL Bill 48
Previous Reports	2 nd Report of 2006-07

4.1 This is a Government Bill which had its Report stage in the House of Lords on 19 March 2007. We reported on this Bill in our Second Report of this Session and raised a few significant human rights issues. Since our Report was published, we have received a submission from the United Kingdom Disabled Peoples Council dated 8 February 2007.²⁵ The Minister of State for Employment and Welfare Reform responded to our Report on 19 February 2007.²⁶ The Parliamentary Under Secretary of State for Work and Pensions wrote again on 7 March 2007 and 13 March 2007.²⁷ We publish this correspondence in the Appendices to this Report without comment, in order to inform Parliamentary debate.

²⁵ Appendix 4a.

²⁶ Appendix 4b.

²⁷ Appendix 4c and 4d.

5 Equality Act 2006 (Sexual Orientation) Regulations 2007

Date introduced	7 March 2007
Previous Reports	6 th Report of 2006-07

5.1 We reported on the Sexual Orientation Regulations in our Sixth Report of this Session. We received the Government response to our Report, in a letter from the Secretary of State for Local Government and Communities dated 7 March 2007. The Government also laid the Great Britain Regulations on that date, and these were subsequently approved by both Houses. In relation to the question raised in our Sixth Report²⁸ as to whether the Government shared our view that the regulations cover the curriculum and the delivery of it, we welcome the clarification, in the debate on the Great Britain Regulations in the House of Lords on 21 March 2007, of the Minister, Baroness Andrews, who stated in response to questions:

He [Lord Lester of Herne Hill] asked me to agree that there was no need to exempt the curriculum, and I can do so. As I explained, the curriculum is not liable to be detrimental in itself, and so the concept of exemption would not apply. Where discrimination really hurts children is in how the curriculum is taught, and that is caught by the regulations. I reiterate that there should be no issue where guidelines are followed by schools, because the guidelines provide for the teaching of sexual relationships in a manner which is designed to be non-stigmatising and to promote respect.²⁹

and-

In answer to his second point, if we agreed that a public authority mandated a curriculum that requires teachers to act in a discriminatory way in breach of regulations, it could be subject to judicial review.³⁰

We publish the letter of 7 March 2007 as an Appendix to this Report without further comment, to inform Parliament and the public.³¹

5.2 We intend to return to this matter, including the treatment of harassment, and differences of the regulations between Northern Ireland and GB when the Government publishes the Discrimination Law Review, and in the light of the outcome of any judicial reviews in this area.

²⁸ Sixth Report of Session 2006-07, *Legislative Scrutiny: Sexual Orientation Regulations*, HL Paper 58/HC 350, para. 67.

²⁹ HL Deb, 21 March 2007, col. 1330.

³⁰ *ibid.*

³¹ Appendix 5.

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

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

Consolidated Fund (Appropriation) Bill

Parliament (Joint Departments) Bill.

Formal Minutes

Monday 26 March 2007

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Judd

Dr Evan Harris MP

Lord Lester of Herne Hill

The Earl of Onslow

Lord Plant of Highfield

Baroness Stern

Draft Report [Legislative Scrutiny: Fourth 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 6.1 read and agreed to.

Summary read and agreed to.

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

Several papers were ordered to be appended to the Report.

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

[Adjourned till Wednesday 18 April at 9.00am.]

Appendices

Appendix 1: Letter dated 23 January 2007 from the Chairman to the Rt Hon Ruth Kelly MP, Secretary of State for Communities and Local Government and Minister for Women re Local Government and Public Involvement in Health Bill

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

The Bill would remove the words "in performing his functions" from the relevant provision of the Local Government Act 2000 and make clear that provisions in codes of conduct are not limited in their application to the conduct of local authority members in an official capacity. This would appear to subject local authority members to codes of conduct covering their behaviour when not performing their functions as a member. The effect of the change will therefore be that sanctions can be applied to a member in respect of actions taken or statements made in their private life.

The Explanatory Notes state that "it is possible" that this provision may engage Articles 8 and 10 of the Convention, but assert that the clause "is considered to be capable of being exercised compatibly with the rights set out in the Convention."³² The Notes say nothing more about the reasons for introducing the provision, other than that it is being introduced "following comments made by the court in a recent case (*Ken Livingstone v the Standards Board for England*)".³³

There was nothing in the judgment of the High Court, in that case which suggested that in the court's view the current restriction should be removed. On the contrary, Collins J. made clear that in his view the link between the conduct in question and his membership of the authority was necessary: "it is important that the flamboyant, the eccentric, the positively committed – one who is labelled in the somewhat old fashioned terminology, a character – should not be subjected to a Code of Conduct which covers his behaviour when not performing his functions as a member of a relevant authority."

The Committee would be grateful if you could:

(a) explain the Government's reasons for introducing the change;

(b) and provide a more detailed explanation of why, in the Government's view, the interference with the Article 8 and 10 ECHR rights of local authority members is justified.

I would be grateful for your response by 5 February 2007.

³² EN paras 330 and 467.

³³ EN para. 467.

Appendix 2: Letter dated 12 March 2007 from the Rt Hon Alistair Darling MP, Secretary of State for Trade and Industry, Department of Trade and Industry re Consumers, Estate Agents and Redress Bill

The Committee reported on the Bill in its report *Legislative Scrutiny: First Progress Report (Second Report of Session 2006-07)* published on 30 January 2007. The report drew Parliament's attention to three areas of the Bill where it had reservations about compatibility with Article 8. We have considered the Committee's report and hope that it will find the Government's further views helpful. I remain of the view that the Bill is compatible with Article 6.

Compatibility of redress schemes under the Bill with Article 6(2) ECHR

The Committee asks (paragraph 4.14) that the Secretary of State provide the Committee with draft copies of the orders requiring suppliers and estate agents to belong to approved redress schemes as soon as they are available. I confirm that these drafts will be provided to the Committee together with other relevant documents, such as criteria established for the approval of redress schemes.

Grounds for prohibiting an estate agent from practising (clause 55(2))

The Committee questioned the amendments to the Estate Agents Act 1979 (EAA) to permit the OFT to consider the fitness of an estate agent who has "committed" (rather than been convicted of) an offence involving fraud, dishonesty or violence. This formulation is similar to that contained in section 25 of the Consumer Credit Act 1974 (CCA) (setting out matters the OFT must have regard to when assessing fitness to hold a consumer credit licence). The policy behind the EAA amendment is to enable the OFT to consider banning agents as unfit where there is evidence that the agent has committed an offence but has not been prosecuted. The reason for this is that many enforcement authorities commonly apply sanctions other than prosecution for acts of misconduct relevant to an estate agent's fitness. In the absence of a conviction, the OFT may currently have no 'trigger' under the EM to take fitness action against the agent.

The Committee concluded as follows (paragraphs 4.19 to 4.21):

Where the Government seeks to rely on legislative precedents to support their conclusion that a Bill is compatible with ECHR rights, we ask that the Minister explain the underlying reason the Govt believes that the precedent is itself compatible with the UK'S HR obligations. We draw this to the attention of both Houses. [...]

[...]In so far as the decision of the OFT adjudicator is expressly based upon the guilt of defendant or an accused of an offence where they have not been convicted by a criminal court or voluntarily accepted a police caution, it is our view that there is a significant risk that actions and statements of the OFT, acting on its powers both this Bill and section 25 of the CCA 1974, will breach Article 6(2) ECHR³⁴. We draw this to the attention of both Houses [...]

³⁴ "Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law."

We consider that, in order to remove the risk of incompatibility with Article 6(2) ECHR, clause 54(2)³⁵ should be amended to remove any reference to an individual having “committed” an offence. We consider that the policy objectives behind the proposed change could be achieved without any risk of incompatibility if the powers of the OFT were extended to include a power to consider fitness to practice with reference to improper conduct (which might incorporate evidence gathered in the course of an investigation by trading standards officers, or by the Financial Services Authority). We draw this to the attention of both Houses.

We have given careful consideration to the Committee’s observations but our view remains that clause 55(2) (and section 25 CCA) are compatible with Article 6. The Committee is concerned with the way in which the power will be exercised and does not appear to be of the view that the provision itself is incompatible or that the power is incapable of being exercised compatibly.

As a public authority, the OFT is obliged to act in a way that is compatible with Convention rights when assessing the fitness of an estate agent to practise.³⁶ Furthermore the anticipated exercise of the power by the OFT would not trigger Article 6(2). That provision is engaged where the individual has been “charged with a criminal offence.” Determination of a person’s fitness to practise as an estate agent (or to hold a consumer credit licence) does not itself give rise to a criminal charge. The fact that the OFT is satisfied that the agent had committed an offence is instead the evidential threshold to trigger the start of an investigation into whether the agent is unfit to operate. The Committee accepts that evidence gathered in the course of another investigation might influence the OFT’s assessment and there is Strasbourg (and domestic) authority³⁷ indicating that evidence which has been (or could have been) used in the context of a criminal investigation can also be used in civil proceedings.

Furthermore the OFT’s assessment would not be sufficiently linked to a criminal charge so as to fall within scope of Article 6(2). The matters which the amendment is intended to enable the OFT to consider do not involve *criminal proceedings* at all. For example, there may be evidence of an offence having been committed but the authorities do not wish to prosecute or the individual may have voluntarily accepted a police caution (accepted by the Committee at paragraph 4.20 as not breaching Article 6(2)). In such cases the individual has not been “charged with a criminal offence”.

Nor would any investigation by the OFT necessarily give rise to any imputation of criminal liability so as to fall within scope of Article 6(2). We accept the Committee’s argument that it would in theory be possible for the OFT (if acting ill-advisedly) to make statements which could be construed as imputing criminal liability. However, section 3(1) of the EAA does not require OFT to make any public pronouncement to be made. It is simply a provision setting out the prerequisite for an investigation to be commenced by the OFT. Any assessment made by the OFT which led to an order under section 3(2) of the EAA prohibiting a person from engaging in estate agency work would be quite separate from any determination that the trigger condition had been met.

³⁵ Clause 55(2) in the Commons Introduction print.

³⁶ Section 6, Human Rights Act 1998.

³⁷ For example: *Y v Norway*, App No 56568/00, Judgment 11 February 2003; *Ringvold v Norway*, App No 34964/97, Judgment 11 February 2003; *Leeds City Council v Hussain* [2002] EWHC 1145.

The cases of *O. v. Norway*³⁸ and *Y. v. Norway*,³⁹ to which the Committee drew attention, were part of a series of linked cases. The decision in the further linked case of *Ringvold v. Norway*⁴⁰ is of particular relevance. The fact that a person has not been prosecuted for a “trigger” offence should not deprive the public of the opportunity for there to be a fair consideration of a person’s fitness to act as an estate agent, any more than the applicant in *Ringvold* should have been given automatic immunity from liability in civil proceedings for compensation after being acquitted of a criminal offence.

In conclusion we consider that the duty on the OFT to act in compliance with Convention rights in taking a decision on an estate agent’s fitness, is a sufficient safeguard to avoid the risk of breaching Article 6(2). Furthermore there are inherent safeguards in the process such as the requirement to give notice of the reasons for the proposed ban, the right of an oral hearing and the right to appeal against the ban to ensure that the overall procedure is compliant with Article 6.

The Committee has suggested as an alternative that the powers of the OFT be extended to enable it to consider improper conduct when determining fitness to practise. We do not believe that the alternative wording achieves the desired policy objective. The aim of the amendment to the EAA is to provide a specific trigger for a full OFT investigation into an agent’s fitness which is less restrictive than currently provided. If an expression such as “improper conduct” were used it would be difficult in practice to determine when the threshold for the trigger had been met. For example, there is a risk that the expression might be construed narrowly to mean “improper conduct in the course of estate agency work”. In that case, the expression would not cover offences involving fraud or dishonesty or violence committed by the agent outside of work. The policy as set out in the amendment is that such offences should be able to be considered in determining an agent’s fitness to practise.

Alternatively “improper conduct” might be construed as allowing the OFT to take account of virtually anything when considering an agent’s fitness to practise, effectively rendering the other existing triggers under section 3 of the EAA redundant. Such scope to consider fitness would be equivalent to that available under section 25 of the OCA. Whilst such a wide scope might be appropriate for a positive licensing system such as that which exists in respect of consumer credit, we do not consider it appropriate in respect of a ‘negative licensing’ system such as exists for estate agents. The Government’s position remains that it does not see the need to introduce positive licensing for estate agents.

Modification of Licence Conditions: Access to Court

The Committee considered (paragraphs 4.28) that unless there was a right of appeal from decisions on the modification of payment condition in licences there remained a risk of incompatibility with article 6(1). We would like to clarify the process that will be involved in modifying licence conditions and in determining the amounts payable by a licensee. The system that the Bill will put in place will operate in essentially the same way as the existing system introduced by section 8 of the Utilities Act 2000.

³⁸ *O v Norway*, App No 29327/95, Judgment 11 February 2003.

³⁹ *Y v Norway*, App No 56568/00, Judgment 11 February 2003.

⁴⁰ *Ringvold v Norway*, App No 34964/97, Judgment 11 February 2003.

The licence conditions inserted under the Bill for the recovery of relevant proportions of the costs of the new National Consumer Council will not contain actual figures for the amount payable by the licensee. Instead they will provide for the payment by the licensee of the proportion of the costs attributable to that licensee in accordance with a methodology established by the regulator. These existing methodologies used by Of gem, Postcomm and Ofwat were drawn up after consultation with the licensees and others likely to be affected. In respect of Ofwat, for example, the total costs are recovered from licensees in proportion to their turnover: a system which has been unchanged for a number of years having been consulted on in 1998. Each of these regulators has made provision for the amounts paid by licensees to be reconciled with the actual spend (whether under or over). We are confident therefore that the amounts which a licensee will be asked to pay will be determined under well-established principles which have been consulted upon. These principles contain clear and transparent criteria by which the amount payable by a licensee can be determined. In the case of Royal mail which currently pays the entire cost of Postwatch the system will differ in that it will in future only be paying the relevant proportion of the costs of the new Council.

We have made enquiries of the three regulators concerned and are informed that there have been no legal challenges to either the recovery principles or the amounts which licensees have been required to pay. However if a licensee wished to challenge his payment he could do so either by challenging the cost recovery principles by judicial review (if he considered them unreasonable for example), or by challenging the determination of the amount due made on the basis of the cost recovery principles. In the case of the latter the amount could be challenged by the licensee in the civil courts on the basis that the amounts were not correctly due. In these circumstances we are satisfied that it not necessary to make provision for either an independent appeals tribunal or for a right of appeal to an existing court or tribunal.

Appendix 3: Letter dated 21 February 2007 from the Rt Hon Baroness Ashton of Upholland, Parliamentary Under Secretary of State, Department for Constitutional Affairs re Tribunals, Courts and Enforcement Bill

I am writing in response to the publication of the Joint Committee on Human Rights' Second and Fifth Reports of this Session, in which the Committee drew the attention of both Houses to the Tribunals, Courts and Enforcement Bill. I am very grateful for the scrutiny which the Committee has given this to this Bill.

I would like to pick up on two specific areas from the reports, relating to Parts 3 and 6 of the Bill and explain why, having given careful consideration to the points which have been made, we feel that it is appropriate for the Bill to proceed, without further amendment to these Parts.

PART 3: ENFORCEMENT BY TAKING CONTROL OF GOODS

Second Report

Paragraph 6.38

The debtor will be able to challenge the existence of the debt and the appropriateness of the remedy before Commercial Rent Arrears Recovery (CRAR) is executed. Under clause 73 of the current draft of the Bill, the court may, on application by the tenant, make an order setting aside a notice of enforcement or make an order that no further step be taken (in relation to the rent claimed) under CRAR without further order. The tenant will have time to exercise his right of access to the court by virtue of the requirement, to be set in regulations, for the landlord to give 14 days' notice that he is going to take control of goods. This 14 day period is longer in relation to CRAR in recognition of the fact that this is a non-court based remedy.

As you point out in the Report, safeguards are in place to protect debtors' rights by virtue of the minimum amount of rent that will have to be due before goods can be taken into control, thereby providing further protection for the debtor.

The safeguards in Schedule 12, which provides for a scheme which is designed to enable creditors to recover goods, whilst providing safeguards for debtors, many of which you refer to in your reports, will also apply to landlords exercising CRAR. The tenant or any third party will also have the right to claim damages for any wrongful exercise of CRAR.

Paragraph 6.41

We note your concerns that if the sum of minimum rent for CRAR is set too low this may render the process incompatible with Article 1, Protocol I of the ECHR and Article 8 of the ECHR. The minimum amount of rent that will need to be outstanding for CRAR to be exercised will be determined after due consultation and we will take on board your concerns regarding the risk of a possible incompatibility with ECHR. This amount will be set out in the regulations.

Fifth Report

Paragraphs 2.6 and 2.7

The Report comments that there is no provision within the Bill for a regulatory scheme for enforcement agents as outlined in the White Paper *Effective Enforcement*. You acknowledge in your Report that this Department and the Home Office has published a joint consultation paper entitled *Regulation of Enforcement Agents* (CP 2/07, published on 30 January 2007), which explores a number of options for regulation of enforcement agents. This consultation paper includes a preferred option of regulation by the Security Industry Authority.

Regulation by the Security Industry Authority of all enforcement agents who are not Crown employees would not require primary legislation. Provision can instead be made by way of an Affirmative Order under Schedule 2 to the Private Security Industry Act 2001. Therefore, provision need not be on the face of this, or indeed any other, Bill if that is the avenue we choose to go down as a result of this consultation exercise.

I agree that a clear regulatory framework for enforcement agents would be a valuable additional safeguard for the Convention rights of debtors and third parties- and it is by the method outlined above we hope to achieve this. Therefore, we consider that this scheme will assist in protecting debtors' rights including those under Article 8 ECHR.

Paragraphs 2.8 to 2.11

I agree that the conditions that will be placed on applicants for certification will provide valuable safeguards for debtors and third parties, and that adequate supervision of those exercising those powers will ensure that they do so in a proportionate manner.

However, I must reiterate that I believe the details of the conditions enforcement agents must meet before being granted a certificate should remain in regulations rather than on the face of the Bill, for reasons of flexibility.

The qualifications that may be required, or the training that should be undergone, may change over time. The level of the security bond will almost certainly change at fairly regular intervals. The system of checking criminal records may change, for example, in terms of the level of scrutiny required, what should be disclosed and how the checks are carried out. It would be impractical to find a legislative slot to effect what may be minor changes to the requirements that applicants for certification have to meet every time such a change needs to be made. For these reasons, I remain of the belief that regulations are the correct place for these safeguards rather than on the face of the Bill. The inclusion of these safeguards in regulations does not mean that they will carry less weight and be of less effect than if they were included on the face of the Bill. The safeguards will carry the same weight and force in law as they would if they were included on the face of the Bill.

Paragraphs 2.12 and 2.13

You acknowledge in your Report that the Bill was amended at Report Stage in the House of Lords, to place an obligation on the Lord Chancellor to make regulations on the detail of the proposed certification scheme.

I do not believe it to be necessary, however, for it to be stated on the face of the Bill that no certificate will be issued unless the applicant successfully satisfies all the criteria for appointment. This should be obvious to those judges who will oversee the application process – although such a direction can be contained in guidance issued to judges when the new system is implemented, if it was thought to be necessary and could be specified on the application form itself.

It is our intention that the court should have the power to determine complaints about certificated enforcement agents. There are a number of ways in which enforcement agents can be held to account. Regulations under clause 59 provide for a complaints procedure to be established. Under this procedure, a court may decide to suspend or cancel a licence if it finds that the complaint has merit. It is also our intention that the court should have the power to award compensation.

An aggrieved person may also bring proceedings under paragraph 66 of Schedule 12 for a breach of that Schedule.

The criminal courts will be able to deal with any allegations of criminal behaviour, including assault and offences created under clause 58 and paragraph 68 of Schedule 12.

Paragraphs 2.14 and 2.15

I agree that where a certificate has expired or been suspended or cancelled on the order of a judge investigating a complaint against an enforcement agent, it would be inappropriate for that person to continue to act as an enforcement agent unless and until they obtained a new certificate or their certificate ceased to be suspended. This would undermine the purpose of certification, and is exactly the sort of thing we had in mind when the powers to modify or supplement Schedule 12 were drafted. Clause 59(2) of the Bill requires the Lord Chancellor to make regulations about certificates. These regulations may in particular include provision about complaints against holders of certificates, about suspension and cancellation of certificates and provision to modify or supplement Schedule 12 for cases where a certificate is suspended or cancelled or expires.

However, I do believe that the enforcement agent should be able to take onto the premises with him third parties to assist in the exercise of their powers, and that indeed those third parties may carry out the functions of an enforcement agent, so long as they do it in the presence of and under the direction of the enforcement agent. The personal responsibility and liability of the enforcement agent for the actions of those assisting him should ensure that those actions are carried out lawfully and proportionately.

The concept of personal liability and responsibility for the actions of others assisting in this way is not a new one – it already works successfully in, for example, the existing High Court enforcement regime, where the High Court Enforcement Officer is personally responsible and liable for the actions of those who assist him in enforcing High Court writs. This model has proven to be successful in ensuring that the actions taken by those assisting are lawful and proportionate, and I am content that this will also be the case in other areas of enforcement under the proposed new regime.

Paragraphs 2.16 and 2.17

I do not believe it to be necessary to amend the Bill as recommended at paragraph 2.16 of your Report. This is because paragraph 14, and specifically paragraph 14(6), of Schedule 12 already makes it clear what premises are to be considered ‘relevant’, and entry without a warrant will be limited to these premises.

On paragraph 2.17, it is the Department’s intention to issue detailed guidance outlining the powers of enforcement agents under the new regime, including powers of entry, forced entry and re-entry. I do not believe it to be necessary to state that statutory guidance will be issued on the face of the Bill. As to whether it would be necessary to set out anywhere, for example in guidance, what evidence would be needed to form a reasonable belief, I believe that the definition of “relevant premises” within paragraph 14(6) of Schedule 12 is sufficiently precise to give protection to the public, whilst containing the appropriate degree of latitude to enable an enforcement agent to exercise his judgment where necessary. It would not be possible to define all the evidence upon which a reasonable belief could be formed, as the circumstances will differ according to the case. Each case will have to be treated individually and on its merits.

Paragraph 2.19

As you may now be aware, proposed Report Stage amendments on the powers of re-entry from both the Government and the Opposition were withdrawn, with a promise to look again at this issue and return to it at a future date.

We need to achieve a balance here. A balance must be drawn between the risk to the debtor's rights that forced re-entry into residential premises could entail and the risk of the debtor's goods being removed on the first visit if the enforcement agent suspects that a future attempt at peaceable re-entry may be rebuffed.

At present, I am considering options as to how to proceed on this matter. Whilst I believe there should be provisions on the face of the Bill allowing for re-entry, as I said at Report, I do believe those powers should be restricted in some way. Regulations made under paragraph 24(1) could impose restrictions on that right to protect vulnerable debtors in domestic premises. I believe this would safeguard the right to respect for private life and home, as guaranteed by Article 8 of ECHR.

Paragraph 2.20-21

Whilst I note the Committee's concerns, I believe that for the sake of flexibility, the correct place to have these minimum conditions is in regulations. This is because circumstances could change in the future. If it is felt at a later date that the minimum conditions should be amended or the number of minimum conditions that will need to be met should be increased, it will be much easier and straightforward to make these changes if they are in regulations rather than on the face of the Bill.

Paragraph 2.22

I agree that the authorisation of the use of force, even if only in a restraining capacity, is a serious matter that requires clear conditions and close Parliamentary scrutiny. That is why I agreed to the regulation making powers at paragraphs 24(2) and 31(5) of Schedule 12 (regarding use of force against the person) being subject to the affirmative resolution procedure, to ensure that they get the suitable level of Parliamentary scrutiny. Government amendments in this regard were moved at Grand Committee. This will therefore ensure that the regulations contain the appropriate level of protection in relation to the physical integrity of the debtor, and that they are phrased in such a way that it is clear that the powers concerned are only to be used as a restraining measure to enable the enforcement agent to go about his lawful duties without threat of physical interference or harm.

With regard to the use of force, Schedule 12 is quite specific at paragraph 27(2) that those taken onto the premises by the enforcement agent to assist may assist him in exercising any power, including the use of force. We will clarify in regulations under paragraph 24(2) that anyone being taken onto the premises by the enforcement agent to assist in the process of taking control of goods will not be permitted to use force against persons. Therefore, a locksmith for example would only be permitted to use force to open a door in order to gain entry to the premises but would not be permitted to use force against persons. It would only be the fully trained and qualified enforcement agent who will be permitted to use powers of force against the person which we have made clear elsewhere would be for restraining purposes only.

As I said at Report, there will be full consultation on the detail to be contained in the regulations to be made under powers detailed at paragraphs 24(2) and 31(5) of Schedule 12. Such consultation with key stakeholders will further inform the need for and scope of these powers of force against the person. It will provide the Government with a further opportunity to consider whether to proceed with these powers. If there is clearly

overwhelming resistance as a result of such consultation then it might be appropriate for the Government to reconsider its policy position on powers of force against the person when taking control of goods on premises and on highways. At this stage though we would wish to retain the flexibility to bring forward such powers in due course as we see them as an important part of the toolbox available to enforcement agents.

Paragraph 2.24

Whilst I note your comments, again, I believe that for the sake of flexibility, the correct place to have the exempt items list is in regulations – and the fact that you have provided further examples of items you feel should be on such a list would seem to support this. Examples of items that we would consider should be included on the exempt items list are set out on pages 22 and 23 of our detailed policy statement. However, this list is not exhaustive and can be added to if it is felt necessary in the future. The inclusion of this list in regulations will mean that any changes that need to be made to it can be implemented speedily.

Paragraph 2.25

Again, for reasons of flexibility and the need to react quickly to changing circumstances, it remains my belief that such powers should remain in regulations.

Paragraph 2.30-31

I believe that those protections already contained on the face of the Bill are sufficient. The enforcement agent may already be asked to prove his identity and his authority to be on the premises (paragraph 26 of Schedule 12); and he must provide notice as to what he is doing once he has entered the premises (paragraph 28 of Schedule 12). The times at which an enforcement agent may call will be contained within regulations for the sake of flexibility. As society changes, for example, what is considered a ‘reasonable’ hour may change.

PART 6: PROTECTION OF CULTURAL OBJECTS ON LOAN

Article 6- Access to Court

The Committee suggested that the Government’s assessment of the compatibility of this part with Article 6 of the Convention was largely based upon our view that it is highly unlikely that a case will arise which gives rise to a risk of Convention incompatibility. I would like to assure the Committee that this is not the case (though we do consider that this is relevant to any assessment of the proportionality of any restrictions implied by these provisions).

We accept that the guarantees of Article 6 extend to the implementation and enforcement of court decisions. However, we do not consider that the immunity given by these provisions would result in the claimant only being able to obtain a final binding decision which will remain inoperative. As noted in my letter to the Committee of 19 December 2006, though a claimant will not be able to obtain possession of the work of art itself, this will not prevent the court awarding other remedies.

In particular, where the claimant is suing in conversion [the most appropriate cause of action where the claimant wishes to recover property] damages are available as an alternative remedy (see section 3 of the Torts (Interference with Goods) Act 1977). So, for example, where a claimant has informed the borrowing museum of his title to the work, and requested its return, so that the museum has notice of his claim to the work of art, the museum could then be sued in conversion if it returns the work of art to the lender (and indeed the lender may be joined in those proceedings). If the court finds in favour of the claimant, it may award damages assessed by reference to the value of the work of art. That judgment would be fully enforceable in this jurisdiction, and would be enforceable in any other country with which the United Kingdom has an agreement for the reciprocal enforcement of judgments (in particular it would be enforceable in all member states of the European Union under Council Regulation 44/2001).

The position under these provisions can therefore be distinguished from the facts of either *Hornsby v Greece* or *Satka v Greece*, which were cited in your report. I note that in *Hornsby v Greece*, the applicants sought an authorisation to open a language school, the authorities refused to comply with a judgment in their favour by the Supreme Administrative Court that they should be given the authorisation they sought. In *Satka v Greece* the applicants' complaint concerned the fact that their land had been subject to requisitions, expropriations and restrictive classifications under planning legislation which had effectively prevented them from making any use of the land, and that, despite numerous court decisions in their favour, the state had refused to pay any compensation for this. The European Court of Human Rights held that the successive and repeated interventions of the State deprived the judgments in the applicants' favour of any effect in breach of Article 6. The judgments address the situation of a state refusing to comply with the orders of its own courts in particular cases, thus depriving the parties of effective access to those courts.

In contrast, the situation here is a proposed rule of general application limiting the application of one particular remedy in a defined class of case. Cases in the class will still be able to be litigated in full, and other remedies awarded by the courts. It does not mean that a judgment given by the court will be deprived of all effect or in any way rendered inoperative.

I note that the European Court on Human Rights has in some cases accepted that immunities may be compatible with the Convention. The Court has held that, when examining the proportionality of an immunity, its absolute nature cannot be decisive. For example, in *Al-Adsani v United Kingdom (2001)* the Court stated that measures taken by signatory States which reflected generally recognised rules of public international law on State immunity could not in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6.1. In *A v United Kingdom (2002)* the Court accepted that the absolute immunity which protects statements by MPs in Parliament from any action for defamation is compatible with Article 6.

In this case, the public policy objectives may be less weighty than those at stake in *Al Adsani* and *A*. But the proposed restriction is far less intrusive on the Article 6 right. The immunity offered by these provisions will not prevent claimants bringing their claims before the court, but, as already mentioned remove one remedy from the court in closely defined circumstances (which include the approval and publication processes for institutions described below). The court will be able to award damages, if not specific

delivery of the work of art claimed. But the judgment will be enforceable. Accordingly, we do not consider that these provisions deprive the claimant of the essence of the right of access to the court. We accept that it is a restriction on the right of access to the court, but as we have noted we consider that the restriction can be justified as one which pursues a legitimate aim, and there is a reasonable relationship of proportionality between the means employed and the aim we seek to achieve.

We have sought to improve the proportionality of these provisions in two ways. Firstly, we have amended this part to ensure that immunity will only be afforded to those objects which are lent to exhibitions at approved institutions (which must demonstrate that they follow satisfactory procedures to establish the provenance and ownership of objects). Secondly, museums and galleries will be required to publish information identifying those objects for which they wish to have the benefit of the immunity in advance of the exhibition. This will give any potential claimant an opportunity to raise any concerns they may have in relation to a particular object.

Other Human Rights issues

I have given careful consideration to the recommendation made by the Committee that the provisions of the Bill should be amended to make it clear that where an object which would otherwise be protected forms part of the evidence in a criminal investigation, the protection given to the object will not prevent the police taking control of the object for the purposes of gathering, preserving and recording evidence. On reflection I consider that the concerns expressed by the Committee can be satisfied without the need for further amendment of the Bill. We propose to require museums and galleries to co-operate with the police as a condition of obtaining approval under the Bill. They will therefore be required to offer the police the facilities to carry out the necessary examinations of the protected object at the museum or gallery.

Further the protection given to a particular object could not give the museum or gallery power to interfere with a crime scene of which it forms part. Where a crime has been committed in part of an exhibition gallery containing protected objects, the scene of crime will not be limited to those objects, and the police will be able to take secure the area, as a crime scene, with the co-operation of the museum staff. Any museum official who interfered with the crime scene would risk prosecution for obstructing the police in the execution of their duty (as well as risking the museum's status as an approved institution).

Where the work of art is itself central to a criminal investigation, as opposed to being merely peripheral to that investigation, we are still of the view that the police's ability to carry out investigations into the object in question at the museum or gallery will be sufficient to satisfy any positive obligations they may have to investigate the object concerned.

I hope that the Committee finds this helpful.

Appendix 4a: Letter dated 8 February 2007 from Simone Aspis, United Kingdom's Disabled People's Council re Welfare Reform Bill

I read the House of Lords and House of Commons Joint Committee on Human Rights report's opinion on the Welfare Reform Bill's compatibility with the Human Rights Act

with much interest. I was interested in your observations of whether the Welfare Reform Bill provides sufficient safeguard for claimants who may be subjected to the benefit sanctions. I am writing to ask whether the committee considered a total lack of guidance on what 'good reason' for failing to participate in work related activities are, and what constitutes work related activities are could result in an ECHR Article 6 violation.

My understanding is that from any rules must be formulated with sufficient precision to enable a citizen to regulate their conduct. He must be able, if need be with appropriate advice, to foresee to a reasonable degree, the consequences which a given action may entail.

I accept to a certain degree there may be some protection (if an independent appeal is on the face of the Welfare Reform Bill) for individuals who refuse to attend a work related interview as it is clear what it's content and outcomes are together with a clear list of good reasons for failure as prescribed in regulations. However, the question remains whether failing to participate in work related activities without good reason can ever be prescribed in regulations. Similarly, the same issue arises for the work related activities definition as well where there is no guidance on what may mean in practise. Without such guidance decisions will be made in an arbitrary manner where Pathways to Work or Job Centres individual advisors will have different opinions whether any particular activity constitutes as work-related. For example two individuals on different schemes may want to undertake chess or logic puzzles as a work-related activity in order to improve one's skills for becoming a computer programmer as their chosen career aspirations. It would not be unsurprising if the advisors would have different opinions of whether chess or logic puzzles are work related activities. There is nothing that stops some advisors from only perceiving unpaid work experience whilst others will take a broader view on what work-related activities are. This leads to decisions being made in an arbitrary manner as it will be for the advisors and ultimately the tribunals to decide on a case by case basis.

It is not just what 'work related activities' are is an issue but how decisions will be made on whether a claimant failed to participate without good reason. This again leaves advisors and thereafter the tribunals to decide on a case by case basis whether the reason was good enough. Again this is likely to lead to arbitrary decisions being made and possible ECHR Article 6 violations. I would ask the question on whether imposing conditionality and benefit sanctions for participation in work-related activities can ever meet the requirement that there needs to be a degree of regulation precision in the Welfare Reform Bill for citizens to be guided on whether their actions will are lawful or not.

Please do not hesitate to contact me for further information. I would be interested in hearing from you soon.

Appendix 4b: Letter dated 19 February 2007 from Jim Murphy MP, Minister of State for Employment and Welfare Reform re Welfare Reform Bill

I am writing in response to the first report of the Joint Committee on Human Rights published on 30th January 2007. I am grateful to the Committee for its consideration of the Humans Rights obligations of the Welfare Reform Bill. I note its contents, in particular its recommendations.

The Committee made the following recommendations:

Work-related Activity: Compulsion and Convention Rights, Part I (clauses 10, 11 & 12)

Paragraph 3.27

“The Bill is amended to require any regulations made under Part I which provide for a decision to impose a sanction, based on a failure to show “good cause”, are accompanied by a right of appeal”.

I do not accept this recommendation. Any decision leading to sanctions will be subject to a right of appeal and therefore, for the reasons set out below, the recommendation is unnecessary.

As the Committee noted, the Bill amends the Social Security Act 1998 (“the Act”) so that section 8 of the Act applies to decisions in relation to entitlement to and payment of ESA. Section 12(1)(a) of the Act has the effect of providing that decisions under section 8 of the Act have a right of appeal if they are decisions made on a claim for, or on an award of, ESA. The exception is where such decisions are listed in Schedule 2 of the Act. A decision that a person has failed a requirement imposed under clause 10, 11 or 12 and not shown good cause for that failure is a decision on an award of ESA and so consequently there will be a right of appeal against that decision. No regulations will be required to achieve this.

The draft Employment and Support (Work-focused Interviews) Regulations that were provided to the Commons Committee included a right of appeal against a decision that a claimant had failed without good cause to take part in a work-focused interview (draft regulation 15(4)). However, on reviewing the draft Regulations, we decided that regulation 15(4) was superfluous and so this paragraph was removed from the draft Regulations submitted to Lords Committee.

Regulations under clauses 10, 11 and 12 will provide for a decision that a claimant has failed, without good cause, to comply with a conditionality requirement. Such a decision will lead to the imposition of a reduction in the payment of ESA. Amending the Bill to require a right of appeal from such a decision would undermine the approach taken to the application of the Act.

If we wanted to provide that there was not to be an appeal against a decision that a claimant had failed without good cause to comply with a conditionality requirement then this decision would need to be included in Schedule 2 of the Act. Paragraph 9 of Schedule 2 provides that decisions against which no appeal is to lie may be prescribed in regulations. Section 80(1)(b) of the Act provides that regulations made under paragraph 9 of Schedule 2 are subject to the affirmative resolution procedure. Consequently if we were to provide that there was no appeal right against a decision that there was a failure, without good cause, to comply with a conditionality requirement, then this would need to be agreed by Parliament

Alternatively regulations under clauses 10, 11 and 12 may provide for there to be two decisions; one that a claimant has failed to comply with a conditionality requirement and a second that the claimant has not show good cause for the failure. These decisions would

lead to the imposition of a reduction in the payment of ESA and would both be decisions on an award for benefit and so would be appealable for the reasons set out above.

The use of Social Security Information and Information Sharing (clause 40)

Paragraph 3.44

“The Bill is amended to limit the purposes for which information may be used pursuant to the provisions in Clause 40 to circumstances intended to encourage, advise or assist an individual to make a claim”.

I accept the recommendation of the Committee. I am arranging for this recommendation to be reflected in the Bill by means of a Government amendment to be brought forward in due course.

The Committee also made a request:

Housing Benefit and Anti-Social Behaviour (clause 30)

Paragraph 3.42

“We ask that the Government provide us with copies of the relevant guidance in draft when it is available”.

I will ensure that once the guidance is produced (to be ready no earlier than August 2007) a copy will be sent to the Committee for its consideration.

I am copying this letter to Lord Skelmersdale and Lord Oakeshott and I am placing a copy in the Libraries of both Houses.

Appendix 4c: Letter dated 7 March 2007 from Lord McKenzie, Parliamentary Under Secretary of State for Work and Pensions, Department for Work and Pensions re Welfare Reform Bill

I am writing to you about a further minor and consequential amendment to Clause 40 which I have tabled today for Report. A copy is enclosed for your information.

Clause 40, which deals with social security information, was amended during Lords Committee stage to address concerns raised by the Delegated Powers and Regulatory Reform Committee and the Joint Committee on Human Rights as to the scope of relevant authorities' (in particular local authorities') ability to use social security information under the clause. I wrote to you in February following the tabling of those amendments.

The Committees considered that as originally worded, the proposed new section 7B, to be inserted into the Social Security Administration Act, would enable regulations to be made that would allow relevant authorities to use information for purposes other than the declared policy intention of promoting the greater take up of social security benefits.

The substantive amendments (amendments 108A and 108B), agreed at Committee, limit the scope of the use of information powers in clause 40 to our declared policy intention of enabling relevant authorities (and in particular local authorities) to promote the greater

take up of social security benefits. However, the need for a further, purely consequential amendment has now been identified.

Subsection (3) of the clause extends to English County Council staff the same sanctions regime as applies to DWP staff and Housing Benefit staff who disclose customers' social security information unlawfully. The intention is for such disclosure by County Council staff to be a criminal offence under section 123 of the Social Security Administration Act, as it is already for DWP and Housing Benefit staff.

However, as currently worded, subsection (3) still refers to functions (performed by County Council staff) "*in connection with a purpose specified in regulations.*" Clearly, with the substantive amendment's removal of that regulation-making power, such functions would now be performed under the replacement primary power. The wording in subsection (3) therefore no longer applies as intended.

The proposed consequential amendment, to be moved at Report, replaces the reference in subsection (3) to "regulations" with a reference to the new wording on the face of the Bill. This ensures that English County Council staff will continue to be subject to the safeguards in section 123 of the Administration Act when they receive or use social security information under the proposed new section 7B of that Act.

Appendix 4d: Letter dated 13 March 2007 from Lord McKenzie, Parliamentary Under Secretary of State for Work and Pensions, Department for Work and Pensions re Welfare Reform Bill

I have today tabled further amendments to the Bill today, copies of which are enclosed for information. I thought that you would wish to know about them.

These amendments are to schedule 4, which deals with transition of existing cases to the new benefit, Employment and Support Allowance, under Part 1, clause 28, of the Bill. This schedule was amended during Commons Report and further changes are necessary to reflect fully our policy intention here as set out in the Explanatory Notes published with the Bill as brought from the House of Commons on 10 January (HL Bill 24-EN). We are not changing our policy aim regarding transition but it is quite a complex area involving the potential transfer of several different groups of existing benefit recipients to the new regime and we are ensuring that their position can be protected.

In its report on the Bill (HL Paper 34, HC Paper 263 30 January 2007) the Joint Committee on Human Rights made no comment or recommendations about schedule 4 or clause 28. However, I thought it was right to let you know about these amendments.

I am copying this letter to Lord Skelmersdale and Lord Oakeshott and I am placing a copy in the Libraries of both Houses. I have also written in similar terms to the chairman of the Delegated Powers and Regulatory Reform Committee.

Appendix 5: Letter dated 7 March from the Rt Hon Ruth Kelly MP, Secretary of State for Communities and Local Government and Minister for Women re Sexual Orientation Regulations

I have today published the Government's Response to the consultation "Getting Equal" and laid before Parliament Regulations to outlaw discrimination on the grounds of sexual orientation in the provision of goods, facilities, services, education, disposal and management of premises and in the exercise of public functions. Subject to Parliamentary approval, the Regulations will come into force on 30th April, 2007, at the same time as similar provisions outlawing discrimination on grounds of Religion or Belief, set out in Part 2 of the Equality Act 2006.

As you know, almost 3,000 responses were received to the Government's consultation on its proposals to outlaw discrimination in the provision of goods, facilities and services on grounds of sexual orientation in Great Britain. And, while the overwhelming majority supported the decision to legislate in this area, there was a clear divide on the issue of how the Regulations ought to balance the competing rights of individuals to hold and manifest a religious belief against the right to live free from discrimination.

I am grateful for the Joint Committee on Human Rights' consideration of this matter in its recent legislative scrutiny report on the Sexual Orientation Regulations. I have listened carefully to the many points raised on this issue, and I believe that the balance we have reached, which is in line with the Committee's conclusions in this area, is the right one. With regard to the treatment of religious organisations, the GB Regulations will mirror the approach taken in the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006. This is in turn based on the religious organisation exemption in Part 2 of the Equality Act 2006.

This approach will ensure that nobody will be required to act in a way that contravenes their core religious beliefs, but where religious organisations enter into an agreement to provide social or welfare services to the wider community, on behalf of and under contract to a public authority, the rights of lesbian, gay and bisexual people to have equal access to those services comes to the fore.

Adoption and Fostering

During the consultation process specific concerns were expressed about the application of the Regulations to the adoption and fostering sector, with the Catholic Church in particular signalling that its faith-based agencies could face closure as Catholic teaching about the foundations of family life means that its agencies would not be able to recruit and consider same-sex couples as potential adoptive parents.

For this reason, the proposed GB Regulations will provide for a transition period for voluntary adoption and fostering agencies until the end of 2008, in line with the Prime Minister's statement of 29th January. In the interim, any agency wishing to take advantage of the transitional arrangements will have to refer gay, lesbian and bi-sexual people to agencies who are able to assist.

In addition, the Prime Minister announced that he would be commissioning an ongoing independent assessment of the issues agencies would need to address in the transition period, if much valued and needed services are to be retained and developed. This will enable vital services for children to be maintained, whilst preserving the principle of non-discrimination.

Harassment

I have noted the Committee's support for the inclusion of a specific harassment provision. However, when the Government set out its proposals in for consultation last March, we were clear that the GB Regulations would not include such a provision. This is because the debate that took place in the House of Lords during the passage of Part 2 of the Equality Act regarding the inclusion of a similar provision in relation to religion or belief convinced the Government that this should be looked at in the context of the Discrimination Law Review, which will be consulted on shortly. The Committee's recommendation for the inclusion of a precise and narrowly defined harassment provision on grounds of sexual orientation will be considered as part of that process.

Education

The prohibition of discrimination on grounds of sexual orientation will apply to all schools in both the maintained and independent sectors. This will mean that schools will not be able to discriminate when:

- selecting pupils for admission;
- providing access to benefits, facilities or services in school; or,
- deciding whether to exclude a pupil.

Nor will a school be able to subject a pupil to any other detriment on grounds of sexual orientation. As in Northern Ireland, however, the GB Regulations will not affect the subjects currently taught in schools, which is a matter for the Department for Education and Skills.

You will also note that the GB regulations will include an exemption in relation to insurance that will have the same effect as provisions in the Sex Discrimination Act and regulations made under the Disability Discrimination Act. It is our intention that this particular exemption will not apply beyond the end of 2008. We will work with the insurance industry and others to ensure that if any exemption is required beyond 2008, it reflects a genuine need in the industry and is in line with industry best practice, and we will legislate accordingly.

I look forward to your support for these Regulations, which are an important step forward towards dignity, respect and fairness for all.

Bills and other documents 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
Consolidated Fund (Appropriation) Bill*	11th
Consumers, Estate Agents and Redress Bill*	2nd and 11th
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
Local Government and Public Involvement in Health Bill*	11th
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
Parliament (Joint Departments) Bill*	11th
Planning-Gain Supplement (Preparations) Bill*	2nd
Pensions Bill*	2nd
Sexual Orientation Regulations	6th and 11th
Statistics and Registration Service Bill*	2nd
Tribunals, Courts and Enforcement Bill*	2nd, 5th and 11th
Welfare Reform Bill*	2nd and 11th
Whitehaven Harbour Bill	2nd