



House of Lords
House of Commons
Joint Committee on
Human Rights

**Monitoring the
Government's
Response to Human
Rights Judgments:
Annual Report 2008**

Thirty-first Report of Session 2007-08



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*Report, together with formal minutes and
written evidence*

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Joint Committee on Human Rights

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

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

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

Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Rebecca Neal (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Committee Specialists), James Clarke (Committee Assistant), Emily Gregory (Commons Secretary), John Porter (Chief Office Clerk) and John Turner (Lords Secretary).

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Contents

Report	<i>Page</i>
Summary	5
1 Introduction	7
Structure and acknowledgements	7
2 Developments during 2007-08	8
Our last Report	8
The Government response	10
Our evolving approach to human rights judgments	11
3 The increasing importance of national implementation measures	13
Recent work of the Committee of Ministers	13
Scrutiny by the Parliamentary Assembly of the Council of Europe	15
Annual Report on the Execution of Judgments	15
4 Issues monitored by the Committee	18
Recent judgments against the United Kingdom	18
Access to artificial insemination (Dickson v UK)	18
Controlling Membership of Trade Unions (ASLEF v UK)	21
Issues previously monitored	22
Prisoners' voting rights (Hirst v UK)	22
Delays in implementation	27
Investigations of the use of lethal force (McKerr, Jordan, Finucane, Kelly, Shanaghan, Kelly and McShane v UK)	27
Security of tenure for Gypsies and Travellers (Connors v UK)	29
Corporal punishment of children (A v UK)	30
5 Declarations of Incompatibility	35
Introduction	35
Is a declaration of incompatibility an effective remedy?	35
Issues previously monitored by the Committee	36
Discrimination in access to social housing (Morris v Westminster City Council)	36
Religious discrimination in sham marriages regime (Baiai v Secretary of State for the Home Department)	39
Nationality discrimination in early release of prisoners (Clift and Hindawi v Secretary of State for the Home Department)	42
Prisoners' voting rights (Smith v Electoral Registration Officer)	43
6 Obstacles to Effective Implementation	44
Repetitive cases	44
Gender discrimination in widow's benefits	45
Discrimination in access to state pensions for citizens resident overseas	46

Conclusions and Recommendations	48
Formal Minutes	54
Written Evidence	55
1: Letter from Michael Wills MP to the Chair, 14 August 2007	55
2: Letter from the Chairman to Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, 5 June 2008	64
3: Letter to the Rt Hon Jacqui Smith MP, Home Secretary, 28 March 2008	66
4: Letter from Paul Goggins MP, Minister of State for Northern Ireland, 10 April 2008	66
5: Letter to Rt Hon John Hutton MP, Secretary of State for Business, Enterprise and Regulatory Reform, 28 January 2008	67
6: Letter to Chairman from the Rt Hon John Hutton MP, Secretary of State for Business, Enterprise and Regulatory Reform, 30 April	67
7: Letter from the Chairman to Rt Hon David Hanson MP, Minister of State, Minister of Justice, 9 January 2008	69
8: Letter from Rt Hon David Hanson MP, Minister of State, Ministry of Justice, 19 January 2008	70
9: Letter from the Chairman to Rt Hon David Hanson MP, Minister of State, Ministry of Justice, 27 May 2008	70
10: Letter to the Chairman from Rt Hon David Hanson MP, Minister of State, Ministry of Justice, 9 June 2008	71
11: Letter from the Chairman to Rt Hon David Hanson MP, Minister of State, Ministry of Justice, 18 June 2008	72
12: Letter from the Chair to Michael Wills MP, Minister of State, Ministry of Justice, 20 September 2007	74
13: Letter from Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice, 11 October 2007	75
14: Letter from the Char to Bridget Prentice MP, Parliamentary Under Secretary of State for Justice	76
15: Letter from Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice, 11 April 2008	77

16: Note to Committee of Ministers from the Ministry of Justice, 14 March 2008	78
17: Memorandum from British Irish Rights Watch, 18 June 2008	80
18: Letter from British Irish Rights Watch to Chairman, 12 October 2007	84
19: Memorandum from Dame Mary Marsh, Director and Chief Executive, National Society for the Prevention of Cruelty to Children, 4 July 2008	86
20: Memorandum from the Children's Commissioner for England, 4 July 2008	90
21: Letter from the Chair to Rt Hon Jack Straw, Secretary of State for Justice and Lord Chancellor, 27 May 2008	90
22: Letter from Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, 5 June 2008	91
23: Letter from Baroness Andrews OBE, Parliamentary Under Secretary of State, Department of Communities and Local Government	92
24: Letter from the Chairman to Baroness Andrews, Parliamentary Under Secretary of State, Department of Communities and Local Government, 7 July 2008	93
25: Letter from Liam Byrne MP, Minister of State, Home Office, 8 August 2008	95
26: Letter to Liam Byrne MP, Minister of State, Home Office, 28 March 2008	96
27: Letter to the Chairman from Liam Byrne MP, Minister of State, Home Office, 28 May 2008	97
28: ECtHR Statistics: Rule 49 applications and the UK	97
29: Letter to Rt Hon James Purnell MP, Secretary of State for Work and Pensions, 28 March 2008	98
30: Letter from Stephen Timms, Minister of State, Department for Work and Pensions, 25 April 2008	100
31: Letter to Chairman from Steven Timms MP, Minister of State, Department for Work and Pensions, 8 May 2008	102
Reports from the Joint Committee on Human Rights in this Parliament	103

Summary

Parliament, as well as the judiciary, has a central role in protecting human rights in the United Kingdom. Although our domestic courts may declare a particular statutory provision incompatible with the individual rights protected by the European Convention on Human Rights (ECHR), Parliament must decide whether it agrees there is an incompatibility and, if so, how to remedy it. Where the European Court of Human Rights (ECtHR) identifies that the United Kingdom is in breach of the ECHR, the UK is under an obligation to provide a remedy for that breach but it has some discretion as to how to amend its law, policy or practice. Parliament has a significant role in monitoring the Government's response to individual judgments and the steps which Governments take to meet the United Kingdom's obligations under the ECHR, more generally (paragraphs 4 – 6).

We anticipate this Report facilitating wider Parliamentary scrutiny on declarations of incompatibility and judgments from the ECtHR. This is our second report on this issue, which we have committed to produce on an regular basis.

We are disappointed that the Government has not yet responded to many of our recommendations made over a year ago. These recommendations were intended to ensure that the Government's approach to adverse human rights judgments was transparent and effective, allowing Parliament and the wider public to play a role in the process of complying with the United Kingdom's human rights obligations. We ask the Government to respond to these recommendations before the end of this Parliamentary Session (paragraph 9).

Our overall conclusion is that the Government should take a consistent and transparent approach across departments to the way in which it responds to declarations of incompatibility and judgments from the ECtHR. We repeat our recommendation of last year that the Ministry of Justice should coordinate the Government's responses to adverse human rights judgments.

In this year's Report we again consider a number of issues which arise from outstanding judgments. These include access to artificial insemination for prisoners and their partners; controlling membership of trade unions; prisoners' voting rights; investigations into cases involving the use of lethal force; security of tenure for Gypsies and Travellers and the corporal punishment of children. In respect of a number of issues we criticise ongoing delay in respect of the Government's response to a breach of individual rights, for example, in respect of prisoners' voting rights (paragraphs 47-61). In others we ask the Government to provide further information on their position (see, for example, paragraphs 63-68). We praise the approach of the Department for Business, Enterprise and Regulatory Reform in respect of the judgment of the ECtHR in *ASLEF v UK* and the rights of unions in respect of their membership and the right of freedom of association (paragraphs 70-79).

1 Introduction

1. Parliament has a significant role to play in ensuring that judgments of the European Court of Human Rights (ECtHR) are effectively implemented.¹ This is our second annual Report bringing together our monitoring work in relation to both judgments of the ECtHR and declarations of incompatibility made by UK courts under the Human Rights Act 1998 (HRA). We hope it will assist Parliament in considering the implications of adverse human rights judgments and the effectiveness of the Government's responses to them.

Structure and acknowledgements

2. In this Report we provide Parliament with the product of our monitoring work over the past 12 months. In Chapter 2, we review developments over the past year in the way we approach our scrutiny of the Government's work. In Chapter 3, we summarise some of the most important developments at the Council of Europe, emphasising the increasingly important role envisaged for domestic implementation of the ECHR and noting the role envisaged for domestic Parliaments. In Chapter 4, we present our analysis of implementation measures that may be required by recent judgments of the ECtHR and note progress made in relation to issues we considered in our last Report, including cases outstanding and affected by unacceptable delay. In Chapter 5, we note that there have been no final declarations of incompatibility since the publication of our last Report. We also report on the Government's approach to declarations of incompatibility, including progress on issues considered in our last Report. In Chapter 6, we consider structural barriers to the effective and swift response to human rights judgments by Government. We publish with this Report our recent correspondence with Government and other submissions we have received.

3. We are grateful to the Registry staff of the ECtHR, the staff of the Department for the Execution of Judgments at the Secretariat of the Committee of Ministers, the staff of the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe (PACE), and the Commissioner for Human Rights, who met with our Committee Specialists when they visited Strasbourg in Spring 2008. This was a helpful, informative visit that provided us with a timely update on the work of the Court, the Department for the Execution of Judgments and PACE.

¹ Sixteenth Report of Session 2006-07, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, HL Paper 128/HC 728 ("Second Monitoring Report").

2 Developments during 2007-08

Our last Report

4. The Convention system is founded on the principle of subsidiarity: it is for Contracting States in the first instance to decide how best to give effect to Convention rights in their domestic legal system and to choose how to give effect to decisions of the ECtHR, subject to supervision by the Committee of Ministers of the Council of Europe. In our last Report, we explained:

- The UK has undertaken to give effect to the ECHR and to give effect to the judgments of the ECtHR. The UK must abide by ECtHR judgments by:
 - (1) putting an end to the breach identified by the Court (the obligation of cessation);
 - (2) preventing any further violations in the future (the obligation of non-repetition);
 - (3) repairing the damage caused to the individual (the obligation of reparation);
 - (4) paying to an individual applicant any award of just satisfaction made by the ECtHR (the obligation to make just satisfaction).
- While in other jurisdictions with constitutional bills of rights, the courts may be the single source of interpretation of individual rights in domestic law, in the UK, the Human Rights Act 1998 (“HRA”) reserves an important role for Parliament in deciding how to give effect to Convention rights.
- This is particularly important in the light of recent case law of our domestic courts which indicates that they will take a conservative approach to their obligations under the HRA. Our domestic courts are bound by precedent to give effect to domestic decisions of any higher court despite any directly conflicting decisions of the ECtHR.² This places an important duty of vigilance on parliamentarians to scrutinise the Government’s response to those judgments that may require new legislation in order to correct a breach of individual rights in our domestic legal system.³

5. In our Report, we also outlined our methodology:

- We only report to Parliament in relation to issues arising out of court judgments which have become “final”, that is judgments where there is no further appeal to a higher court;

² The rules of precedent mean that the lower courts in England and Wales are bound by earlier decisions of the higher courts on the same issues. Under these rules, judgments of the House of Lords have greatest weight. In the Second Monitoring Report, we explained that the House of Lords have confirmed that even where there is a directly conflicting judgment of the ECtHR on a question of human rights law, courts in England and Wales must generally apply the binding conclusions of the earlier House of Lords decision. See Second Monitoring Report, paragraphs 9 – 13.

³ Second Monitoring Report, paragraphs 4 – 13.

- Our scrutiny focuses on two questions: (1) what changes in law, policy or practice are required to bring the breach to an end and to stop it happening again? and (2) is the overall system of remedies adequate to ensure that the individual receives reparation for the wrong?⁴
- We engage the Government throughout the year in correspondence on a number of different issues where either the ECtHR or our domestic courts have found any law, policy or practices to be in breach of human rights. We continue to publish this correspondence on our website and have invited members of the public and civil society to submit evidence to the Committee on the Government's performance.⁵

6. We also made a number of recommendations designed to improve the UK's domestic mechanisms for the implementation of judgments finding breaches of human rights:

- We called on the Ministry of Justice to adopt a central coordinating role in Government to ensure the effective and efficient implementation of adverse human rights judgments.⁶
- We recommended that the Ministry of Justice create a database on the implementation of outstanding ECtHR judgments against the UK, similar to its database on domestic declarations of incompatibility.⁷
- Information notes provided to the Committee of Ministers should routinely be copied to us.⁸
- The Government should adopt a much clearer policy on systematically responding to declarations of incompatibility made by our domestic courts, including implementing the recommendations made by us and our predecessors, on the timetable for responding to these judgments.⁹
- It should also make greater use of remedial orders and should ensure that any legislative solution proposed by Government makes the necessary provision for a remedy for those applicants already adversely affected by the incompatible provisions.¹⁰

⁴ For further information on our methodology, see Second Monitoring Report, paras 16 – 19.

⁵ JCHR Press Notice (2007-08) No. 42;
http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchrpn070842.cfm

⁶ Second Monitoring Report, paragraphs 26 – 28.

⁷ Ibid, paragraph 27.

⁸ Ibid, paragraph 29.

⁹ Full details of this timetable can be found in the Second Monitoring Report, paras 155 – 163.

¹⁰ Ibid, paragraphs 118 – 119. The Human Rights Act 1998 makes provision for new legislative measures, Remedial Orders, which allow the Government to bring forward secondary legislation in order to provide a remedy for any breach of Convention rights identified by either a Declaration of Incompatibility or a decision of the ECtHR (Section 10, Schedule 2). For further information on remedial orders, see Seventh Report of 2001-02, *The Making of Remedial Orders*, HL 53/HC 473.

- We urged the Ministry of Justice to produce clear guidance on declarations of incompatibility and remedial orders and expressed our willingness to scrutinise draft guidance.¹¹
- Where a legislative provision is declared incompatible with the Convention, the Government should closely monitor the application of that provision and its potential impact on individuals affected by its continuation in force. We recommended that these monitoring arrangements should include the collection of relevant statistics on the impact of incompatible statutory provisions.¹²
- We recommended that the Ministry of Justice should provide us with copies of any ECtHR judgment against the UK within one month and any declaration of incompatibility within 14 days. They should inform us of the results of any appeal or hearing by the Grand Chamber of the ECtHR within one month of the decision of the final appeal court or the Grand Chamber.
- Once a judgment has become final, the Ministry of Justice should write to us to explain any measures the Government considers necessary to comply with the judgment and whether the Government intends to use the remedial order process.
- We recommended that the Government should aim to make a detailed decision on how to respond to a judgment of the ECtHR within three months and a declaration of incompatibility within six months.
- In complex cases, we recognise that the Government might need more time to consult with relevant stakeholders or to formulate an effective solution. However, an explanation for any delay should be provided within the timetables proposed.¹³

The Government response

7. In August 2007, Michael Wills MP, the Minister for Human Rights provided us with the Government response to our conclusions and recommendations on the issues considered in our last Report.¹⁴ We publish this response with this Report and we consider it in more detail in Chapters 4 and 5, below. In that letter, the Minister also explained that the Government would respond separately to our “broader recommendations about the way in which the Government implements judgments” once he had considered the matter further.¹⁵

8. Over 12 months since the publication of our last report, we have received no further substantive response from the Government to our systemic recommendations. In our Annual Report on our work, we criticised this delay, which then stood at five months.¹⁶ In

¹¹ Ibid, paragraph 121.

¹² Ibid paragraph 129.

¹³ Ibid, paragraphs 156 – 161.

¹⁴ Written Ev 1. A number of letters and memoranda are appended as evidence to this report. We refer to each of these documents as ‘Written Ev’.

¹⁵ Ibid.

¹⁶ Sixth Report of Session 2007-08, *The Work of the Committee in 2007 and the State of Human Rights in the UK*, HL Paper 38/HC 270, paragraphs 65 – 66.

response to that Report, the Minister explained that formulating the Government's reply to those recommendations was not straightforward:

[A]s my officials have explained in some detail to the Committee secretariat, the Committee in that report made some exceptionally wide-ranging suggestions as to the organisation of Government business. I would very much like to respond substantively to the Committee's recommendations, rather than simply noting the Committee's views and I would hope the Committee would welcome this desire to respond more substantively than is sometimes the case. However, it is taking quite some time to investigate the possibilities in this area, and the extent to which the Committee's recommendations would be possible and effective. In particular, in relation to the judgments of the European Court of Human Rights, we are bound to respect the timescales and requirements of the Committee of Ministers, which supervises the implementation of such judgments. While we will obviously consider your suggestions, our obligations in this respect must be our primary consideration.

Therefore, while I could send to the Committee for the sake of form a further response covering these remaining recommendations, doing so without substantively engaging with the Committee's opinions would satisfy neither me nor, I suspect, you.¹⁷

9. We understand that an informed response requires coordination across Government and input from several departments. However, a delay of over one year in replying to these recommendations is unacceptable. The Government should provide us with a substantive response as soon as possible and certainly before the end of the current parliamentary session.

Our evolving approach to human rights judgments

10. Over the past 12 months, we have sought to enhance our scrutiny of the Government's responses to human rights judgments and to ensure that it is more accessible to parliamentarians. For example, we have recommended a number of amendments to Government Bills to remedy breaches of individual rights identified by the courts.¹⁸ We consider these amendments to the Housing and Regeneration Bill and the Employment Bill in detail, below, in Chapters 4 and 5.

11. We have written to Government Departments in relation to a number of judgments and declarations of incompatibility and encouraged them to respond within the framework set out in our previous Report.

12. We have also asked the Ministry of Justice and the Foreign and Commonwealth Office to submit to us a general report on their work in this area over the past 12 months.¹⁹ We hoped to encourage the Government to make a more proactive contribution to our work

¹⁷ Eighteenth Report of Session 2007-08, *Government Response to the Committee's Sixth Report of Session 2007-08: The Work of the Committee in 2007 and the State of Human Rights in the UK*, HL Paper 103/HC 526, Appendix, paragraph 19.

¹⁸ See for example, Seventeenth Report of Session 2007-08, *Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills*, HL Paper 95/HC 501, paragraphs 2.34 – 2.37.; Declaration of incompatibility made in the case of *Morris v Westminster City Council* [2005] EWCA Civ 1184.

¹⁹ Written Ev 2.

3 The increasing importance of national implementation measures

15. In our previous reports on this issue, we have highlighted the increasing importance of effective and efficient domestic measures to protect Convention rights.²¹ Over the past 12 months, the institutions of the Council of Europe have all taken further steps to emphasise the responsibility of individual States to protect rights within their jurisdiction, in order to reduce reliance on the supervision of the ECtHR. This responsibility can only be discharged effectively through consistent and prompt Government responses to judgments of both domestic courts and the ECtHR.²² Three developments are particularly worthy of note:

- The recent work of the Committee of Ministers;
- Scrutiny by the Parliamentary Assembly of the Council of Europe (PACE); and
- The Annual Report on the Execution of Judgments.

Recent work of the Committee of Ministers

16. In February 2008, the Committee of Ministers, (the main political force of the Council of Europe, made up of relevant Foreign Ministers from each Contracting Party),²³ adopted a new Recommendation, calling on States to ensure the effectiveness of their mechanisms for the rapid implementation of judgments of the ECtHR.²⁴ The Committee of Ministers is responsible for the supervision of all judgments of the ECtHR, against all States who are party to the ECHR. At the end of 2007, there were 6,248 cases subject to the supervision of the Committee of Ministers.²⁵ This case-load emphasises the importance of effective domestic mechanisms to respond to judgments of the ECtHR. The Committee's latest Recommendation recognises the role that Parliaments can play in implementing judgments and calls on States to take a number of steps to create better mechanisms for

²¹ Second Monitoring Report, Chapter 2, Annex 1.

²² The Swedish Presidency of the Committee of Ministers opened with a colloquy on increasing the effectiveness of domestic implementation of the ECHR. A number of speakers, including the Earl of Onslow, a member of our Committee, focused on increasing the effectiveness of domestic implementation of Strasbourg judgments, through legislative scrutiny and changes to administrative policy and practice. The papers presented at the Colloquy are available on the Council of Europe website.

²³ Further information on the role played by the Committee of Ministers in the supervision of the implementation of judgments of the ECtHR can be found on the Council of Europe website. In short, Once the Court's final judgment has been transmitted to the Committee of Ministers (Article 46 (2) of the Convention), the latter invites the respondent state to inform it of the steps taken to pay the amounts awarded by the Court in respect of just satisfaction and, where appropriate, of the individual and general measures taken to abide by the judgment. Once it has received this information, the Committee examines it closely, together with advice from the Department for the Execution of Judgments in the Directorate General for Human Rights at the Council of Europe, which acts as its Secretariat. After establishing that the state concerned has taken all the necessary measures to abide by the judgment, the Committee adopts a resolution concluding that its functions under Article 46(2) of the Convention have been exercised.

²⁴ Recommendation CM/Rec (2008) 2 of the Committee of Ministers on efficient domestic capacity for rapid execution of the judgments of the European Court of Human Rights. The Statute of the Council of Europe empowers the Committee to make recommendations on matters for which the Committee has agreed "a common policy". Recommendations are not binding on Member States, but the Committee has the power to ask member governments to provide information on what they have done to meet the recommendation.

²⁵ Council of Europe, Committee of Ministers, *Supervision of the Execution of Judgments of the European Court of Human Rights: First Annual Report (2007)*, March 2008, Appendix 2, paragraph 2.1.

responding to adverse judgments. One suggestion is that States appoint a co-ordinator of national responses to ECtHR judgments.²⁶

17. We considered a similar recommendation made by PACE in our last report. We criticised the former Lord Chancellor's rejection of this PACE recommendation and called upon the Government to create a formal coordinating role for the Ministry of Justice.²⁷

18. We have asked the Lord Chancellor to explain what Government has done or intends to do to implement the latest Recommendation of the Committee of Ministers,²⁸ but have not yet received a response. **We recommend, again, that the Ministry of Justice should adopt a coordinating role in relation to the Government's response to adverse human rights judgments, including judgments of the European Court of Human Rights. This would be a positive step towards compliance with the recent Recommendation of the Committee of Ministers.**

19. The Committee of Ministers Recommendation also provides that States should, as appropriate, keep Parliaments informed of the "situation concerning execution of judgments and the measures being taken in this regard".²⁹ We welcome this recognition by the Committee of Ministers that Parliaments must be kept informed of the steps that Governments intend to take to meet their obligations under the ECHR. The Legal Affairs and Human Rights Committee of PACE is disappointed by this Recommendation and considers that it does not go far enough. It urges members of national parliaments to play a more proactive role in the scrutiny of the execution of judgments.³⁰

20. As we have explained previously, the UK's parliamentary model of human rights protection requires Parliament to be an active partner in ensuring that the ECHR is implemented in the UK. It is Parliament that must decide whether Government proposals remedy an incompatibility identified by the courts. Under our standing orders, we have a formal role in informing Parliament about each remedial order proposed by the Government under the HRA.³¹ Against this background, we consider that the Government should do much more to keep Parliament properly informed of its work in this area. Such information must be timely and must enable Parliament to scrutinise the need for change, including the need for any remedial order. **We reiterate our previous recommendations that Government should keep us informed in a timely way of all adverse human rights judgments and their proposals for any legislative or other solutions.**

²⁶ Ibid, Article 1.

²⁷ Second Monitoring Report, paragraphs 25 – 27.

²⁸ Written Ev 2.

²⁹ Recommendation CM/Rec (2008) 2 of the Committee of Ministers on efficient domestic capacity for rapid execution of the judgments of the European Court of Human Rights, Article 9.

³⁰ Ms Bemelmans-Videc, Rapporteur of PACE Legal Affairs and Human Rights Committee, *The Effectiveness of the Convention at a Domestic Level: the Parliamentary Dimension, Stockholm Colloquy, 9-10 June 2008*, <http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=783> (Last accessed 10 July 2008).

³¹ For example, House of Commons Standing Orders, Order 152B (2007 Edition).

Scrutiny by the Parliamentary Assembly of the Council of Europe

21. The Parliamentary Assembly of the Council of Europe (PACE) is increasingly involved in monitoring the work of national parliaments towards the effective implementation of judgments of the ECtHR.³² Although responsibility for supervising the execution of judgments lies with the Committee of Ministers, PACE has set a number of criteria against which it has decided to examine domestic compliance with ECtHR judgments, principally by means of the regular reports of the Legal Affairs and Human Rights Committee. PACE has called upon national parliaments to play an increasingly significant role in ensuring that judgments are given effect at national level.³³

22. The Committee Rapporteur on these issues has recently praised the work of the JCHR on ECtHR judgments as “a very valuable contribution” and a good example of how to monitor the work of national governments towards the effective implementation of judgments of the ECtHR.³⁴ The United Kingdom is included in his short-list of countries which he may scrutinise in his next Report, due in late 2009. There are outstanding judgments against each of these countries which have not been given effect and which cause concern. The UK Delegation to the Parliamentary Assembly was given an opportunity to respond to the Rapporteur's concerns, and his proposed approach to the Committee's next Report, by early September 2008.³⁵

23. We look forward to assessing the Government's reaction to the work of the Parliamentary Assembly of the Council of Europe and its scrutiny of the execution of judgments of the European Court of Human Rights by the United Kingdom. We encourage the Government to engage positively with the new Rapporteur and intend to scrutinise the UK Parliamentary Delegation response to his introductory memorandum.

Annual Report on the Execution of Judgments

24. In March 2008, the Committee of Ministers published its first Annual Report on the Supervision of the Execution of Judgments of the European Court of Human Rights.³⁶ This helpful new document is designed to increase transparency and includes a review of the work of the Committee of Ministers during 2007. It includes a useful series of statistics on state performance on the execution of judgments and an issue-by-issue discussion of cases considered during the year. We suggest that some minor changes, such as an executive summary and a state-by-state review of cases monitored during the year would increase the accessibility and utility of the Annual Report and would make it more user friendly for stakeholders in Contracting States.

³² See for example, Ms Bemelmans-Videc, Rapporteur of PACE Legal Affairs and Human Rights Committee, *The Effectiveness of the Convention at a Domestic Level: the Parliamentary Dimension, Stockholm Colloquy, 9-10 June 2008*, <http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=783> (Last accessed 10 July 2008).

³³ Resolution 1516 (2006).

³⁴ AS/Jur 2008 24, Introductory Memorandum of the Rapporteur, Mr Christos Pourgourides, 26 May 2008, paragraph 23. This repeats earlier similar praise by PACE in 2006; See Second Monitoring Report, Annex 1.

³⁵ *Ibid*, paragraphs 106 – 115. At the time of publication, the Committee had not yet received a copy of this response.

³⁶ Council of Europe, Committee of Ministers, *Supervision of the Execution of Judgments of the European Court of Human Rights: First Annual Report (2007)*, March 2008.

25. The figures for the UK appear to present a relatively positive picture of the Government's approach to the execution of judgments of the European Court of Human Rights. For example:

- In 2007, the Committee of Ministers noted that a significant number of cases against the UK had been discharged from substantive scrutiny, either by way of final resolution or by indicating that a final resolution was awaited (12% of all cases awaiting final resolution in 2007 were cases against the UK);
- The Committee of Ministers closed 28 cases against the United Kingdom during 2007; and³⁷
- The UK made payment in cases where just satisfaction was awarded within the appropriate deadline in 96% of cases.

26. It is encouraging to note that the proportion of new cases against the United Kingdom examined in 2007 was relatively low, and that the majority of new cases raised questions about isolated breaches of the Convention (these are cases thought by the Committee of Ministers' Secretariat to be linked closely to the individual circumstances of a case and raising no new systemic problems). **We are encouraged that the statistics prepared by the Committee of Ministers appear to show that the United Kingdom takes a relatively positive approach to its Convention obligation to implement the judgments of the European Court of Human Rights.**

27. However, the picture is not entirely positive. At the end of 2007, there were 30 UK cases subject to the supervision of the Committee of Ministers (excluding those which had been closed, pending a final resolution). Although this represents a tiny proportion of the work of the Committee of Ministers (0.55% of its current workload), half of these are leading cases that raise new systemic issues. In those 15 cases, the Government may need to reform domestic law, practice or policy to remove a breach of the Convention that has a continuing effect on the rights of people in the United Kingdom.

28. It is also disappointing to note that the United Kingdom is one of the top ten States for delay in respect of leading cases where such measures are necessary. The most disappointing statistic to emerge from the Report is that the United Kingdom has the highest proportion of leading cases waiting for an acceptable resolution for longer than five years.³⁸ Only Italy and Turkey have a higher number of leading cases outstanding for longer than five years.³⁹ **Delays of upwards of five years in resolving the most significant breaches of the European Convention are unacceptable unless extremely convincing**

³⁷ Council of Europe, Committee of Ministers, *Supervision of the Execution of Judgments of the European Court of Human Rights: First Annual Report (2007)*, March 2008, Appendix 2, Statistics. The Secretariat guidance identifies three types of cases: Leading cases, Clone or repetitive cases and Isolated cases. Leading cases refer to those which reveal a new systemic or general problem which requires the adoption of new general measures. Clone or repetitive cases relate to a systemic or general problem already raised before the Committee of Ministers. Isolated cases are other cases which do not fall into either of these categories, where the violation is linked only to the specific circumstances of the case.

³⁸ Leading cases are cases which the Committee of Ministers describe as 'cases which reveal a new systemic/general problem in a respondent state and which thus require the adoption of new general measures. Of the 15 leading cases against the UK which are waiting for a satisfactory conclusion, 8 of those cases have been subject to the supervision of the Committee of Ministers for longer than 5 years (53%).

³⁹ Italy has 17 leading cases pending for over five years and Turkey has 11. This is respectively 45% of the leading cases pending in respect of Italy and 13% pending against Turkey.

justification for the delay can be provided. We call on the Government to publish its response to the Annual Report of the Committee of Ministers on the Supervision of the Execution of Judgments of the European Court of Human Rights. In that reply, we recommend that the Government explain the reasons for any delay in relation to the introduction of general measures in each of the cases which have been subject to the supervision of the Committee of Ministers for longer than five years.

4 Issues monitored by the Committee

Recent judgments against the United Kingdom

29. The ECtHR figures for January 2007 to December 2007 record 1,363 cases pending against the United Kingdom. During the same period, 403 applications were declared inadmissible or struck off the Court's list. There were adverse judgments, finding at least one violation of the Convention, in 19 cases. The largest proportion of these cases involved violations of the right to enjoy respect for Convention rights without discrimination (Article 14 ECHR). The second largest concerned the lack of an effective investigation in cases engaging the right to life (Article 2 ECHR).⁴⁰

30. Over the course of the past year, we have considered issues arising from a number of judgments of the ECtHR between February 2007 and February 2008. In June 2008, we wrote to the Lord Chancellor and the Secretary of State for Foreign Affairs indicating that we intended to examine six groups of cases in further detail.⁴¹ In each of these cases, our initial consideration indicated that some change in law, policy or practice might be needed to avoid the risk of further breaches of the Convention in future. We published a press notice which highlighted each of these issues. We consider a number of these issues in detail below.

31. We exchanged correspondence with the Government on two further issues; reasons for decisions on bail and compatibility with the right to liberty, and monitoring of employee communications.⁴² We publish this correspondence for completeness. We do not consider that further general measures are necessary in relation to either of these issues.⁴³

Access to artificial insemination (*Dickson v UK*)

32. The issue of access to artificial insemination where one of the parties seeking such access is a serving prisoner was raised by the case of *Dickson v UK*.⁴⁴ The applicants in this case were Mr and Mrs Dickson, a prisoner and his wife, who sought access to artificial insemination. Without access to this treatment, the applicants would be unable to conceive a child. The applicants applied to the Secretary of State for permission for Mrs Dickson to receive treatment by artificial insemination. They were refused permission and applied for judicial review of the decision. This application was unanimously rejected by the Court of Appeal in September 2004. The Applicants then applied to the ECtHR. They argued that the policy of the Secretary of State on access to artificial insemination was incompatible with their right to respect for their private and family life, as protected by Article 8 ECHR. The policy of the Secretary of State was to refuse permission unless there were exceptional circumstances. The Chamber rejected their claim, noting that there was

⁴⁰ These figures are available from the Registry of the Court; <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+Reports/> (Last accessed 14 July 2008). We consider these issues in more detail, in Chapters 5 and 4, respectively.

⁴¹ Written Ev 2

⁴² Respectively, issues in the cases of *Gault v United Kingdom* App No 1271/05/05, Judgment dated 20 November 2007 and *Copland v United Kingdom*, App No 2617/00, Judgment dated 3 April 2007.

⁴³ Written Ev 3, 4, 5 and 6.

⁴⁴ *Dickson v United Kingdom*, App. No. 44362/04, Judgment 4 December 2007.

no blanket ban in place and that the member state had a broad margin of appreciation in this area. It concluded that the Secretary of State had given consideration to the detailed facts in this case and was responding to the legitimate need to maintain public confidence in the penal system and to protect the welfare of any child conceived. In the circumstances, it considered that there had been no breach of the applicants' rights to respect for their private lives.

33. The Grand Chamber of the ECtHR reversed this decision. It concluded that the policy applied by the Secretary of State placed an inordinately high "exceptionality" burden on the applicants and, in the absence of any careful weighing up of the competing interests in the case, either by the Secretary of State or by Parliament, it was in breach of their right to respect for their private and family life (Article 8 ECHR). The Chamber noted:

[A] person retains his or her Convention rights on imprisonment so that any restriction on those rights must be justified in each individual case. This justification can flow, *inter alia*, from the necessary and inevitable consequences of imprisonment...or from an adequate link between the restriction and the circumstances of the prisoner in question. However, it cannot be based solely on what would offend public opinion.⁴⁵

34. The Government proposed three justifications for the policy: (a) that losing the opportunity to reproduce was an inevitable and necessary consequence of imprisonment; (b) that public confidence in the prison system would be undermined if the punitive and deterrent elements of a sentence would be undermined by allowing prisoners guilty of serious offences to conceive; and (c) that the absence of a parent for a long time could have a negative impact on a child conceived and on society as a whole.

35. The Grand Chamber rejected the first of these justifications outright. The inability to reproduce may be a consequence of imprisonment, but it is not an inevitable consequence. It considered the second justification and reiterated that there is no place in the Convention system for forfeiture of rights solely based on what might offend public opinion. As to the third justification, the Grand Chamber accepted that the welfare of any child conceived would be a legitimate consideration. However, consideration of the welfare of any child should not "go so far" as to prevent parents "who so wish" from attempting to conceive, especially where one parent is at liberty and able to provide care until such time as the other parent would be released from prison.⁴⁶

36. So, the Grand Chamber considered that the "exceptionality" requirements of this policy was in breach of the Convention as it set the bar for the applicants so high that the Secretary of State could never effectively consider the proportionality of any decision to refuse access to artificial insemination. This approach was in breach of the applicants' right to respect for their private lives. In addition, the Grand Chamber was critical of the majority of the public interest arguments proposed by the Government in this case.

37. We wrote to the Minister on 9 January 2008, drawing attention to the judgment. We asked the Minister to explain what policy changes the Government was considering in the light of the judgment. We also asked whether, given the significance attached by the Grand

⁴⁵ Judgment, paragraph 68.

⁴⁶ *Ibid*, paragraphs 73 – 76.

Chamber to the assessment by Parliament of the fairness of the policy, the Government was proposing to resolve the judgment through the introduction of amendments to the Criminal Justice and Immigration Bill.⁴⁷ The Minister explained that the Government intended to consider new policy proposals in March 2008, around four months after the Grand Chamber judgment.⁴⁸ He did not consider that any legislative changes were necessary, but told us that the Government would take into account any changes made to the broader law on assisted fertility services in the Human Fertilisation and Embryology Bill.

38. In late May 2008, we again wrote to the Minister, to ask for further information about the Government's review of this policy, including whether any consultation had taken place and whether the outcome of that consultation would be published.⁴⁹ The Minister responded on 9 June 2008.⁵⁰ He explained that no consultation had taken place, but that he and the Secretary of State had concluded that "only minor amendments were required to bring the former policy into line with the judgment". The Minister enclosed details of the new policy approach. The discretion to authorise access to artificial insemination for prisoners will remain with the Secretary of State. Permission will not be limited to exceptional circumstances, but the Secretary of State will be free to take into account any factors or considerations which he considers relevant. The policy states that each case will be considered on its merits and no single factor will be weighed more heavily than another. We were provided with a non-exhaustive list, which included:

- The welfare of the child;
- The wishes, consent and medical fitness of both parties;
- The reasonableness of any delay, taking into account the prisoner's release date and his ability to assume parental responsibilities;
- Information about the offending history of the prisoner, including any risk of harm and "other factors which suggest it would not be in the public interest" to permit him to access artificial insemination facilities;
- "Whether the prisoner and his partner are in a well established and stable relationship which is likely to continue after the prisoner's release"; and
- Whether the provision of artificial insemination facilities are the only means by which conception is likely to occur.

39. This list of considerations follows existing policy. The only significant change in policy appears to be the removal of the express statement that permission for artificial insemination will only be granted in "exceptional circumstances". A number of the considerations listed appear to be based directly on public interest arguments which the Grand Chamber considered would be illegitimate or unjustifiable if applied too broadly.

⁴⁷ Written Ev 7.

⁴⁸ Written Ev 8.

⁴⁹ Written Ev 9.

⁵⁰ Written Ev 10.

40. It is clear that the Government must change its policy in response to this case. Any new policy will need to strike a fair balance between a legitimate public interest and the private interest of individual applicants, and will need to avoid placing an unreasonable burden of exceptionality on the applicants. We are concerned that the considerations identified are so broad that they allow the Secretary of State to give significant weight to considerations which the Grand Chamber counselled against. It will be essential that the policy is applied in a way which is consistent with the Convention scheme identified by the Grand Chamber. In each case where access is refused, the Secretary of State must identify a clear, legitimate public interest which the Secretary of State considers justifies the refusal of an individual request. In our view, after the guidance of the Grand Chamber, a refusal which is based solely on a broad public interest in maintaining confidence in the penal system is likely to be in breach of the Convention. Similarly, we are concerned that a refusal which is based solely on the length of an individual prisoners' sentence, the type of offence committed or the strength of his or her relationship with the other parent would lead to a risk of a further breach of Article 8 ECHR.

41. We have asked the Minister for further information on the steps that have been taken to publicise this proposed new policy approach, and on how it, and the previous policy, have been applied. We have also raised several questions about Convention compatibility and the application of this new policy approach in practice.

42. We have also asked the Secretary of State to explain why he is the most appropriate person to take these decisions. In other cases involving access to fertility treatment and the assessment of a child's welfare, decisions about access are taken by a licensed provider of fertility services, subject to the oversight of the Human Fertilisation and Embryology Authority.⁵¹ Although this issue was not raised before the Grand Chamber, the Grand Chamber noted that this policy had never been considered by Parliament. At present, a new Human Fertilisation and Embryology Bill is being considered in the UK. We asked the Minister whether this Bill might be an opportunity to consider this issue in a wider statutory context, to aid transparency and to provide an opportunity for debate. As explained above, the Minister told us that the Government did not consider a legislative response to this judgment was necessary.

43. We do not share the Government's confidence that the minor changes to existing policy agreed so far will be adequate to eliminate the risk of a further finding of a breach of the right to respect for private and family life of prisoners and their partners by the ECtHR. We have not yet received a reply to our questions and we look forward to receiving the Minister's response to our request for further information.

Controlling Membership of Trade Unions (ASLEF v UK)

44. In the *ASLEF* case, the European Court of Human Rights upheld ASLEF's complaint that UK law was in breach of the right to freedom of association in Article 11 ECHR, because it had prevented the union from expelling a member for his membership of the British National Party, even though the objectives of that organisation were inimical to those of the union.⁵² After Government consultation on the reforms necessary to resolve

⁵¹ Written Ev 11.

⁵² *ASLEF v UK*, App. No. 11002/05, Judgment 27 February 2007.

this breach of the Convention, the Employment Bill (currently before Parliament) included a provision to remove entirely this limitation on the power of Trade Unions to control their membership. In our Report on the Bill, we expressed concern that this approach went too far in that it might allow a trade union to abuse a dominant position, to the detriment of individual applicants or members. We proposed an amendment to the Bill to reflect an important caveat in the Court's judgment, designed to protect individual Trade Union members or applicants for membership. One of our members, Lord Lester of Herne Hill QC, proposed an amendment with an alternative formulation, designed to achieve broadly the same result.⁵³

45. The Government brought forward its own amendments, designed to incorporate similar safeguards to those we had advocated at Third Reading of the Employment Bill in the House of Lords.⁵⁴ These provisions provide marginally narrower protection for individual rights than the amendment that we proposed. However, they incorporate valuable additional safeguards to allow a balance to be struck between the legitimate interests of trade unions in controlling their membership and the right of individuals where they have been excluded without a fair hearing or in circumstances that would result in exceptional hardship. **Although the right to freedom of association confers on Trade Unions the broad general power to control membership, the judgment of the ECtHR in *ASLEF* is qualified by an exception to that rule based on the need to balance the right of the individual member to be treated fairly and not to suffer exceptional hardship as a result of exclusion.** We welcome the Government's decision to include in the Employment Bill additional safeguards to reflect the individual right to freedom of association and to protect individuals from abuse of a dominant position by a particular Trade Union. **The positive and consultative approach of the Department of Trade and Industry, and its successor, the Department for Business, Enterprise and Regulatory Reform, to providing a speedy and effective response to the judgment in *ASLEF* is a commendable example for other Government departments to follow.**

Issues previously monitored

46. In this section, we follow up progress made in dealing with the issues raised by judgments considered in our last Report. We do not propose to set out the facts in each of these cases at any length; this section should be read together with our previous Report.

Prisoners' voting rights (Hirst v UK)

47. Since our last Report, we have exchanged correspondence with the Ministry of Justice on the need to implement measures in response to the decision of the Grand Chamber of the ECtHR that the blanket ban on voting by prisoners in the UK is incompatible with the right to participate in free and fair elections, as guaranteed by Article 3, Protocol 1 ECHR.⁵⁵ In our last Report, we noted that the Government intended to consider the issue of prisoners' voting rights in a two-stage consultation which was expected to be completed in

⁵³ Seventeenth Report of Session 2007-08, *Legislative Scrutiny: 1) Employment Bill, 2) Housing and Regeneration Bill, 3) Other Bills*, HL Paper 95/HC 501, paragraphs 1.1 – 1.31. Copies of our correspondence with the Government are published as appendices to that Report.

⁵⁴ HL Deb, 2 June 2008, Cols 13 – 29.

⁵⁵ *Hirst v United Kingdom*, App. No. 74025/01, Judgement 6 October 2005 (Grand Chamber).

January 2008. A legislative solution was due to follow, after May 2008. In our last Report we expressed the view that the delay in this case was already disproportionate and recommended that the Government bring forward a solution as soon as possible.⁵⁶

48. In August 2007, the Minister for Human Rights told us that the Government was considering the responses to the first stage of consultation prior to deciding how to take this issue forward. The Government does not intend to use a remedial order in this case as it argues that Parliament must have an opportunity for a full debate on the issue.⁵⁷ In September 2007, we wrote to ask the Minister for an updated timetable for the implementation of this judgment, and to confirm whether the Government intended to publish the responses to its first stage consultation.⁵⁸ We also asked the Government to take into account the need to reform the law on prisoner voting when planning the timetable for the next election.⁵⁹

49. In October 2007, Bridget Prentice MP, the Minister responsible for electoral administration, told us that she could not provide an updated timetable, but explained that the Government would write to us with a clearer timetable “once the analysis of responses has been completed”. She explained that the Government would not publish the responses to the first stage consultation, although a summary would be included in the next stage consultation document. She said she would be happy to make the individual responses available to the Committee once the next consultation paper had been finalised.⁶⁰

50. In March 2008, it became clear that since October, the Government had submitted a Revised Action Plan to the Committee of Ministers which indicated that it was undecided whether a second consultation, or a legislative solution, were necessary. The Government proposed no changes to its previous timetable, with a legislative solution still due in May 2008. **We were disappointed to learn of these developments from the Council of Europe’s own website, despite the Minister’s reassurance that we would be kept informed of further work on this issue. We expect Government to keep us informed of developments in situations where we are actively engaged in correspondence about an issue.**

51. We were surprised to read that the Government was not convinced about the need for legislative reform. The Grand Chamber judgment is clear. Section 3 of the Representation of the People Act is in breach of the Convention and legislative reform is therefore necessary. This view is supported by the declaration of incompatibility subsequently made by the Court of Session.

52. In March 2008, we wrote to the Minister asking for:

- a copy of any updated information sent to the Committee of Ministers;

⁵⁶ Second Monitoring Report, paragraphs 67 – 79.

⁵⁷ Written Ev 1.

⁵⁸ Written Ev 1.

⁵⁹ Written Ev 12.

⁶⁰ Written Ev 13.

- an explanation of whether the Government intended to produce a further, second stage consultation and for any relevant timetable (if the Government was not proceeding with the remainder of its consultation, we asked for an explanation);
- an explanation of the Government's view that the incompatibility identified by the Grand Chamber in *Hirst v UK* could be removed without legislative reform; and
- an up to date timetable for draft legislation and an explanation of whether the Government intended these reforms to be in place in time for the next general election.⁶¹

53. We are disappointed to report to both Houses that we have not yet received an answer to these questions. In April 2008, Ms Prentice explained:

As you will no doubt be aware the *Governance of Britain* Green Paper has placed a strong emphasis on the rights and responsibilities that attach to citizenship. The Government is currently considering whether this opportunity for a wide-ranging debate should also include voting rights for prisoners. Once we have made a decision on next steps, we will provide the Committee of Ministers with a revised implementation plan in time for its meeting in June 08.

The implementation of *Hirst* is a sensitive and complex issue and we need to look very carefully at what the right approach should be and how it should be implemented.⁶²

54. The Minister assured us that she would write to us in due course to provide fuller answers to our earlier questions.⁶³ Shortly before the Committee of Ministers meeting on 5-6 June 2008, we contacted the Ministry of Justice to ask when a further response would be forthcoming. We then received a copy of the information provided to the Committee of Ministers dated 14 March 2008.⁶⁴ This information makes clear that the Government now intends to include the issue of prisoners' voting rights in the discussion of the *Governance of Britain* and the rights and responsibilities attached to citizenship. The Government is not proposing a new timetable for a legislative solution and we note with concern that there are no proposals for electoral reform in the Government's draft legislative programme for 2008-09.

55. As part of the *Governance of Britain* programme, the Government expects shortly to produce a Green Paper on a Bill of Rights and Responsibilities for Britain. We have conducted an inquiry on a British Bill of Rights, investigating amongst other things, whether the language of responsibilities should necessarily be adopted in a constitutional Bill of Rights. Several of our witnesses raised concerns about whether the addition of the concept of responsibilities might be a device for Government to limit the fundamental

⁶¹ Written Ev 14.

⁶² Written Ev 15.

⁶³ Written Ev 15.

⁶⁴ Written Ev 16. At around the same time, a copy of this information was placed in the libraries of both Houses in response to a written question asked by Robert Neill MP, HC Deb, 26 June 2008, Col 477W (This deposited paper indicates that it was submitted on 11 April 2008). See also HL Deb, 6 May 2008, WA 59, WA 60. The Secretary of State for Justice has reiterated the Government's intention to consider the issue of prisoners' voting rights as part of the *Governance of Britain* process, HC Deb 10 Sep 2008, Col 1981W – 11982W and Uncorrected Transcript of Evidence to the House of Commons Justice Select Committee, 7 October 2008, QQ49 – 53, HC 1076-i.

human rights of those individuals deemed to be “undeserving”. The Minister for Human Rights has explained the Government’s view:

Rights are not contingent on discharge of responsibilities. [...], but there are consequences for people not fulfilling their responsibilities [...]. The fact that some of those consequences may actually mean that one of your rights is temporarily forfeited, if it is not the same thing, the punishment is in the law. The basic human rights say the same and so they should.⁶⁵

56. We reiterate our recent conclusion in our Report, *A Bill of Rights for the UK?*:

Human rights are rights which people enjoy by virtue of being human: they cannot be made contingent on the prior fulfillment of responsibilities,

57. In that Report, we stressed that the ECHR and other human rights instruments already provide for certain rights to be limited when justified by legitimate, competing interests.⁶⁶

The Grand Chamber has given clear guidance in this case about the balance that must be struck when removing the franchise from individual prisoners. It is worth setting out at length:

Prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention, save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention [...] Any restrictions on these other rights require to be justified although such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment [...]

There is, therefore, no question that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based on what might offend public opinion.

This standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights are imposed on an individual who has, for example, seriously abused a public position or whose conduct has threatened to undermine the rule of law or democratic foundations. [...]

The severe measure of disenfranchisement must, however, not be undertaken lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.

⁶⁵ Q487, HC 150 – vi; Evidence to the JCHR, 21 May 2008.

⁶⁶ Twenty-ninth Report of Session 2007-08, *A Bill of Rights for the UK*, HL Paper 165-I/HC 150-I, Chapter 8. See paragraphs 264 – 274.

or unwilling to address effectively within a reasonable time frame. The Government should rethink its approach.

63. We call on the Government to publish the responses to its earlier consultation and to publish proposals for reform, including a clear timetable, without further delay. A legislative solution can and should be introduced during the next parliamentary session. If the Government fails to meet this timetable, there is a significant risk that the next general election will take place in a way that fails to comply with the Convention and at least part of the prison population will be unlawfully disenfranchised.

Delays in implementation

64. We have noted, above, that there are a number of cases against the United Kingdom which have been outstanding for longer than five years. In this section, we continue our practice of reviewing progress in relation to issues where delays in implementation have been particularly unsatisfactory.

Investigations of the use of lethal force (McKerr, Jordan, Finucane, Kelly, Shanaghan, Kelly and McShane v UK)

65. In our last Report, we considered the outstanding delay in the resolution of a number of well-known cases involving the use of force by security forces in Northern Ireland. We remain concerned that the adequacy of individual measures remain in question in each of these cases.⁷³ We note that there have recently been further reports of delay in the press and criticisms have been made by the coroner in respect of delay by the Police Service of Northern Ireland (PSNI) in the *Jordan* inquest⁷⁴. **Although we do not comment on the adequacy of individual measures, we note that the potential for a public inquiry under the Inquiries Act 2005 to meet the requirements for an independent inquiry in cases engaging the right to life is currently under consideration by the Secretariat and the Committee of Ministers, particularly in the case of *Finucane*.**⁷⁵ Our predecessor Committee raised concerns about the independence of inquiries under that Act, including in respect of their independence from the executive and the ability of family members to participate in the inquiry.⁷⁶ We reiterate those concerns.

66. A number of NGOs continue to campaign for effective, independent inquiries to take place on these cases and for effective investigations into similar cases in Northern Ireland and beyond. Both Amnesty International and British Irish Rights Watch have strongly

⁷³ Second Monitoring Report, paragraphs 95-96. *McKerr v UK* App No 28883/95, Judgment 4 May 2001, *Jordan v UK* App No 24746/94, Judgment 4 May 2001, *Finucane v UK* App No 29178/95, Judgment 1 July 2003, *Shanaghan v UK* App No 37715/97, Judgment 4 May 2001, *Kelly v UK* App No 30054/96, 4 May 2001, and *McShane v UK* App No 43290/98, Judgment 28 May 2002. Progress in these cases, and operational delays in respect of inquests in Northern Ireland have recently been considered by the House of Commons Northern Ireland Affairs Committee, Third Report of Session 2007-08. *Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past*, HC 333 (7 July 2008), Chapter 4, Annex.

⁷⁴ The Irish News, 21 May 2008, "Coroner criticises police over delays in IRA man's inquest". See also Written Ev 16, Submission of British Irish Rights Watch, paragraph 9.

⁷⁵ Summary of Cases against the United Kingdom, Committee of Ministers, CM-EXEC, http://www.coe.int/t/e/human_rights/execution/03_cases/United_Kingdom_en.pdf (Last accessed 14 July 2008).

⁷⁶ Fourth Report of Session 2004-05, *Scrutiny: First Progress Report*, HL Paper 26/HC 224, paragraphs 2.12 – 2.29; Eighth Report of Session 2004-05, *Scrutiny: Fourth Progress Report*, HL Paper 60/HC 388, paragraphs 3.02 – 3.19.

criticised the Government's approach in relation to each of these cases, and draw particular attention to the case of *Finucane*.⁷⁷ British Irish Rights Watch argue that our Government's approach to Article 2 ECHR inquiries is particularly hampered by two factors: (a) an entrenched culture of Government secrecy and (b) the narrow approach of the domestic courts to cases which took place before the introduction of the Human Rights Act. We have expressed our own concerns on each of these issues.⁷⁸ **We continue to regret the delay in providing Article 2 compliant investigations in respect of each of these cases. We recommend that the Government publish a full and up to date explanation of its approach to each case, including the reasons for continuing delay.**

67. The Committee of Ministers has ended its scrutiny of a number of issues relating to the adequacy of the Government's response to these cases. These include issues in relation to the scope of inquest proceedings, the involvement of family members in inquests and the availability of legal aid. Most recently, the Committee of Ministers has ended its examination of delay in respect of inquests in Northern Ireland. We commented on this issue in our last report, regretting that delays in Northern Ireland appeared exceptional in contrast to inquests in England and Wales. **We and our predecessor Committee have stressed the importance of effective, independent inquest proceedings and other inquiries for the purposes of Article 2 ECHR, and will continue to do so. Most recently, we have raised concerns that the Government's proposals to increase the potential for closed inquests in the current Counter-Terrorism Bill will undermine the ability of inquests to provide a public inquiry of the scope and nature required by the Convention.**⁷⁹ However, in the context of our work monitoring the UK Government's response to adverse judgments of the ECtHR, we will observe the conclusions of the Committee of Ministers, who retain responsibility for enforcement of the Convention. **We will not comment, in this context, on issues which have been closed and discharged from scrutiny.**

68. The Committee of Ministers continues to scrutinise the effectiveness of the investigation of historical cases, including through the work of the Police Ombudsman and the Historical Enquiries Team. These concerns arise from conclusions of the court on the lack of independence of the police investigators dealing with the incidents in these cases and defects in the original police investigations. The Committee of Ministers intend to monitor the effectiveness of inquiries by both bodies. British Irish Rights Watch has raised concerns about the independence of these bodies and difficulties involving in securing disclosure.⁸⁰ **The Committee of Ministers is awaiting further information from the United Kingdom on the operation of both the Police Ombudsman and the Historical Enquiries Team. We call on the Government to address the concerns raised about**

⁷⁷ Written Ev 17, paragraphs 12 – 14. See also letter from Irene Khan, Secretary General, Amnesty International to Shaun Woodward MP, Secretary of State for Northern Ireland, dated 4 June 2008 (unpublished). Any unpublished papers are available for inspection in the Parliamentary Archives.

⁷⁸ For example, we have recently published our concerns about the Government's proposals to increase the possibility for closed inquests Twentieth Report of Session 2007-08, *Counter Terrorism Policy and Human Rights (Tenth Report): Counter Terrorism Bill*, HL 108/HC Paper 554, paragraphs 115-120. In our last two reports on the implementation of Strasbourg judgments, we have clearly expressed our own view that the non-retrospective application of the Human Rights Act undermines the ability of the UK courts to participate in ensuring an effective remedy for breaches of the Convention which took place prior to 2000. We have encouraged the Government to focus on these earlier cases. Second Monitoring Report, paragraphs 144 – 148.

⁷⁹ Thirtieth Report of Session 2007-08, *Counter-terrorism Policy and Human Rights (Thirteenth Report): Counter-terrorism Bill*, HL Paper 172/HC 1077, Chapter 4.

⁸⁰ Written Ev 17. See also Written Ev 18.

independence and effective disclosure in its correspondence with the Committee of Ministers. We recommend that the Government send us the latest information sent to the Committee of Ministers on each of these cases.

69. The House of Commons Northern Ireland Affairs Select Committee recently concluded an inquiry into the cost of policing the past in Northern Ireland. It noted that there are numerous pressures on policing, the Police Ombudsman and the Historical Enquiries Team. For example, a significant number of families choose not to cooperate with the Historical Enquiries Team, and in some cases there is little forensic evidence available. The Committee also raised the question of the adequacy of the resources of the Historical Enquiries Team and the impact of the workload associated with the different historic investigations on present day police work. Although some witnesses raised questions about independence, the Committee noted that none of the evidence that it had gathered suggested any actual bias on the part of the members of the Historical Enquiries Team. Despite the observations of the Commons Northern Ireland Affairs Committee, the Government will be aware that the assessment of independence for the purposes of providing an Article 2 compliant investigation includes an assessment of whether the structural arrangements for an investigation undermine the perceived independence of an investigating body.⁸¹

70. We look forward to the Government's response to the recent report of the Commons Northern Ireland Affairs Committee on the cost of policing the past in Northern Ireland. The Government should provide the Committee of Ministers with a copy of that Committee's report and its response. We urge the Ministry of Justice and the Northern Ireland Office to explain how the various pressures identified by that inquiry may impact on the functions and operational capabilities of the Police Ombudsman and the Historical Enquiries Team. The Government should also explain how this may affect information which the Government has previously provided to the Committee of Ministers in relation to these cases.

Security of tenure for Gypsies and Travellers (Connors v UK)

71. The Housing and Regeneration Bill contained the Government's proposals for a final response to the ECtHR decision that the UK's failure to offer security of tenure to residents of local authority Gypsy and Traveller sites was in breach of the right to respect for home and private life (Article 8 ECHR). We have followed this case for a significant period of time⁸² and we considered the Government's proposal in our report on the Bill. **The Government sought to extend the application of the Mobile Homes Act 1983 to residents of local authority Gypsy and Traveller sites, following a recommendation which our predecessor Committee made over four years ago. We welcomed these provisions but expressed our disappointment at the significant and unnecessary delay in resolving this issue.**⁸³

⁸¹ See for example, *Mc Shane v UK*, paragraph 120, *Finucane v UK*, paragraphs 74-76.

⁸² *Connors v UK*, (2005) 40 EHRR 9; See also Second Monitoring Report, paragraphs 100 – 103.

⁸³ Seventeenth Report of Session 2007-08, *Legislative Scrutiny: 1) Employment Bill, 2) Housing and Regeneration Bill, 3) Other Bills*, HL Paper 95/HC 501, paragraphs 2.29 – 2.33.

judicial review brought by the Children's Commissioner for Northern Ireland against the operation of the defence of reasonable punishment in Northern Ireland.⁹³

Section 58 Review

74. During the passage of the Children Act 2004, the Government committed to a review of the operation of Section 58. This review involved a public consultation and surveys of parents, children and young people. The findings of this review included:

Whilst many parents say they will not smack, a majority of parents say that smacking should not be banned outright. Many organisations however support legislation to ban smacking.

There appears to be a lack of awareness across different audiences about the scope and application of the law.

75. Contributions to the review were mixed:

- The majority of parents who responded considered that the law should allow parents to smack their children. Older parents were more likely to use physical punishment and support retaining the defence against prosecution.
- Most children thought that “smacking was out of place in modern childhood”. Children feared the emotional distress and humiliation associated with physical punishment more than physical discomfort and pain.
- A number of organisations argued in favour of a complete removal of this defence. These included a number of Local Safeguarding Children Boards, who told the review that giving positive parenting messages was difficult because “in response to the advice, parents would often cite the law allowing them to smack”.

76. The Government has decided to retain the law in its current form “in the absence of evidence it is not working satisfactorily.”⁹⁴

CPS Research Project

77. We note that the scope of this research project was limited to establishing “if the reasonable chastisement defence was being put forward by defendants after the enactment of section 58 Children Act 2004 and whether the Charging Standard was being correctly applied in those cases”. Our predecessor Committee considered the efficacy of these Charging Standards essential to its conclusion that the reasonable punishment defence could effectively remove the Convention breach identified by the Court in *A v UK*.⁹⁵ The conclusions of the CPS research include:

⁹³ CM/Del/Dec (2008) 1035, 22 September 2008. Available on the Committee of Ministers website (Last accessed 7 October 2008).

⁹⁴ Review of Section 58, paragraph 5.

⁹⁵ Nineteenth Report of Session 2003-04, paras 136-137.

- The samples reviewed were not sufficient in number to be statistically significant. The cases reviewed give an indication rather than a representative picture of how the criminal justice system has approached the defence since the enactment of Section 58;
- Despite this small sample, the Report concludes “there is evidence to suggest that there have been cases where defendants charged with common assault have been acquitted or the case was discontinued, after running the reasonable chastisement defence. Of those cases, the file review suggests that it was possible that some defendants could have been charged differently. Additionally, there is evidence to suggest that the reasonable chastisement defence may have been put forward in cases where it is not legally available”. Unfortunately the information provided in CPS case notes did not show whether in these latter cases, defendants were acquitted as a result of wrongly raising this defence. **We recommend that the CPS case notes should capture important information such as this to facilitate future research.**

A ban on corporal punishment?

78. Both the NSPCC and the Children’s Commissioners for England have told us that, in their view, Section 58 Children Act 2004 is inadequate to protect children from violence which breaches their rights under Article 3 ECHR and that these provisions (and the law in Northern Ireland and Scotland) fail to meet the obligations of the United Kingdom to implement the judgment in *A v UK*.⁹⁶ They consider that a ban on physical punishment of children is the only means to protect children effectively against breaches of Article 3 ECHR. Both NSPCC and each of the Children’s Commissioners for England, Wales, Northern Ireland and Scotland have made similar submissions to the Committee of Ministers and they have helpfully provided us with copies of their submissions and the legal advice that they have obtained from counsel.⁹⁷ They told us:

The current uncertainties in the law across the UK mean that it is unclear to parents when physical punishment would constitute inhuman or degrading treatment or punishment and thus, the law is inadequate to protect children from potential violations of their rights under Article 3 (The Children’s Commissioner for England).⁹⁸

The Section 58 Review conducted by the Government was inadequate as the Government’s conclusions are based principally on the views of parents, whose traditional attitudes towards children mean they oppose giving children equal protection to adults against assault (NSPCC).⁹⁹

It is unthinkable that the European Court would find a State’s legislation in compliance with Article 3 if it allowed adults to justify as “reasonable” common

⁹⁶ Written Ev 19 and 20.

⁹⁷ In the interests of brevity, these documents are not published with this Report. Copies are available on request from the Parliamentary Archives. The Government have provided a response to these submissions to the Committee of Ministers, but we have not yet been provided with a copy of this information.

⁹⁸ Written Ev 20.

⁹⁹ Written Ev 19.

assault on women, elderly people or adults with learning disabilities. Yet, children, as the Court has recognised, are particularly vulnerable people who face additional difficulties in seeking remedies for breaches of their rights (NSPCC).¹⁰⁰

79. In this report, we confine ourselves to consideration of the effective implementation of *A v UK*, including whether the current law in the UK provides an effective deterrence against future similar violations of Article 3 ECHR. **We recommend that the Government explain clearly how it considers that the ECtHR would approach a case brought by a child who has been punished in accordance with Section 58 Children Act 2004, applied in accordance with the appropriate Charging Guidance.** Charging Guidance is not binding on individual prosecutors, but it has so far been central to the Government's assessment that Section 58 provides adequate protection to children against inhuman and degrading punishment or treatment. The CPS review suggests that the Charging Guidance has not been applied consistently in all cases. We are concerned that we have seen no clear explanation of the Government's view on how these provisions comply with the Convention, as the ECtHR would interpret it today. Nor has the Government explained how it considers that the ECtHR would approach a case where the specific Charging Guidance on children was not applied. For example, if a domestic Court were to allow a parent successfully to raise the defence of reasonable punishment in a case where a child has incurred scrapes, grazes, minor bruises or a black eye, does the Government accept that this would lead to a significant risk of incompatibility with Article 3 ECHR?¹⁰¹

80. **Clear concerns about the operation of Section 58 Children Act 2004 arise from the Government's recent review and the research of the CPS, particularly, from the suggestion that the defence of reasonable punishment has been raised in cases of child cruelty, or other cases where it should not be available. We believe that it is necessary for the Government to demonstrate that Section 58, in the way that it operates is compatible with our obligations, and therefore, we call on the Government to explain its view that these reviews show that the law operates in a way which provides an effective deterrent against any new breaches of the right to be free from inhuman and degrading treatment or punishment. A summary of the information provided by the Government to the Committee of Ministers on this case has recently been published by the Committee of Ministers Secretariat.¹⁰² We are disappointed that the Government did not provide us directly with a copy of their submissions. We wish to receive copies of these submissions and any subsequent information notes, including on the position in Northern Ireland and Scotland.**

¹⁰⁰ Written Ev 19.

¹⁰¹ The injuries in *A v UK* included bruising to the backs of the applicant's legs, inflicted with a garden cane on more than one occasion.

¹⁰² CM/Inf/DH(2008)34 Revised Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights, 28 August 2008, published 18 September 2008.

5 Declarations of Incompatibility

Introduction

81. No new final declarations of incompatibility have been made during the past year. There have been a number of new declarations, however, which have been overturned on appeal or which are currently subject to appeal.¹⁰³

82. **In our previous reports, we praised the Ministry of Justice database on declarations of incompatibility.¹⁰⁴ This database records every declaration of incompatibility made; whether an appeal is pending; whether a declaration has been overturned on appeal and, if the Government proposes to take steps to meet an incompatibility, what progress has been made. This database, if regularly updated, can significantly increase the transparency of the Government's response to these important judgments. It is disappointing that this database does not appear to have been updated for a significant period of time: nor is it easily accessible on the new, redesigned, Ministry of Justice website. We recommend that the Ministry of Justice take steps to make it easier to find the database on their website, and that the database should be reviewed and updated on at least a quarterly basis.**

Is a declaration of incompatibility an effective remedy?

83. In our last report, we commented on the ECtHR's conclusion that, at present, a declaration of incompatibility cannot be considered an effective remedy for the purposes of the Convention.¹⁰⁵ This means that, if the only possibility for a domestic remedy is a declaration of incompatibility, an applicant may apply directly to the ECtHR for a decision rather than waiting for a decision of the domestic courts on an issue. We noted that the ECtHR had suggested that a consistent response by Government to declarations of incompatibility could change the Court's view of their effectiveness. We called on the Government to adopt our recommendations on a clear and public strategy on declarations of incompatibility, including providing guidance to Departments to ensure consistency in all cases.¹⁰⁶

84. In April 2008, the Grand Chamber confirmed that declarations of incompatibility cannot yet be considered an effective remedy. It also indicated that, in time, through ensuring consistent, speedy, legislative responses to declarations, the UK could persuade the Court that a declaration of incompatibility is an effective remedy for the purposes of the ECHR.¹⁰⁷ **These findings should encourage the Government to adopt a consistent approach to declarations of incompatibility. We again recommend that the**

¹⁰³ *Javad Nasser v Secretary of State for the Home Department* [2007] EWHC 1548 (Admin) (successful appeal by Secretary of State); *R (Wright et al) v Secretary of State for Health and Secretary of State for Education and Skills* (QBD) [2006] EWHC 2886 (Admin) (successful appeal by Secretary of State); *R (Black) v Secretary of State for Justice* [2008] EWCA Civ 359 (subject to appeal). Written Ev 21 and 22.

¹⁰⁴ Second Monitoring Report, paragraph 27.

¹⁰⁵ Second Monitoring Report, paragraphs 110 – 121. See *Burden & Burden v UK*, App No 13378/05, Judgment 12 December 2005; Judgment 29 April 2008 (Grand Chamber).

¹⁰⁶ Second Monitoring Report, paragraphs 110 – 121.

¹⁰⁷ *Burden v United Kingdom*, App. No. 13378/05, 29 April 2008 (Grand Chamber).

Government take steps to adopt an open, transparent policy. It should make clear that it aims to respond to all declarations within a set timetable and should provide clear guidance to individual Departments on the need for a prompt and effective response to every declaration of incompatibility.

Issues previously monitored by the Committee

85. In this section we consider declarations of incompatibility previously subject to scrutiny. We do not propose to set out the facts in each of these cases and this section should be read together with our previous reports.

Discrimination in access to social housing (Morris v Westminster City Council)

86. In our last Report, we considered two declarations of incompatibility in respect of Section 185(4) of the Housing Act 1996.¹⁰⁸ This provided that in any application for homelessness assistance, any dependants who were subject to immigration control should be disregarded when considering whether an applicant should be considered homeless or in priority need. Our domestic courts have twice declared that this provision was in breach of the applicants' right to respect for their private and family life without unjustified discrimination. Despite the Government's policy objectives – which were to encourage unlawful migrants to leave the country and to discourage 'benefits tourism' – the exclusions in Section 185(4) were not justifiable.¹⁰⁹

87. Since the publication of our last Report, the Government has introduced amendments to the Housing Act (and to equivalent provisions in Scotland and Northern Ireland) during the passage of the Housing and Regeneration Act 2008.¹¹⁰ After the publication of the Housing and Regeneration Bill, we wrote to the Minister to raise a number of questions, including why the Bill did not propose to remedy the incompatibility identified in these declarations. In our Report on the Bill, we criticised the Government's continued delay in reaching a decision on how to respond. We proposed an amendment to the Bill to repeal the incompatible provision to ensure that these issues were debated during the Bill's passage.¹¹¹

88. The Government introduced their own amendments to deal with this issue during the Bill's Committee Stage in the House of Lords. The Minister wrote to us on the day that these amendments were tabled to explain their intended effect (three working days before they were due to be debated).¹¹² A local authority will no longer be under a duty to disregard certain family members when assessing whether an applicant is homeless or in priority need. To this extent, the Government's amendments remove the incompatibility with the Convention identified by the Court of Appeal. However, the amended Bill

¹⁰⁸ Second Monitoring Report, paragraphs 125 – 134. See cases of *R (Morris) v Westminster City Council* [2005] EWCA Civ 1184 and *R (Gabaj) v First Secretary of State* (28 March 2006, unreported).

¹⁰⁹ See for example, *Morris*, paragraphs 45 – 54.

¹¹⁰ Housing and Regeneration Act 2008, Section 312, Schedule 14. Royal Assent was granted on 22 July 2008.

¹¹¹ Seventeenth Report of Session 2007-08, *Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills*, HL Paper 95/HC 501, paragraphs 2.34 – 2.37.

¹¹² Written Ev 23.

provides that where an applicant is assessed as being homeless or in priority need as a result of his or her relationship with a person whose immigration status is unsettled or who only has leave to remain in the UK in so far as they are not reliant on public funds, then the duty to provide accommodation, advice and assistance may be discharged by securing an offer of at least 12 months tenancy with a private landlord on a short-hold assured basis. This is in contrast to the general duty, where an offer of similar accommodation will not discharge the duty owed to the applicant by the local authority unless the applicant agrees.¹¹³

89. Introducing the amendments, the Minister explained the Government's view that these proposals "remedy the current incompatibility and set a fair balance between the interests of UK taxpayers and the rights of migrants who come to the country with no claim on public funds".¹¹⁴ She explained:

Given how entitlement to homelessness assistance works, the issue at stake is: what should happen if the applicant is eligible for assistance but the dependent child or pregnant partner is not, even if under other circumstances, the dependent child would confer entitlement to assistance. The present law states that under Section 185(4) of the 1996 Act... the whole family is currently denied housing assistance because household members who are not eligible cannot be taken into account when deciding if the applicant is homeless or in priority need...[T]he court ruled that the application of that section to British citizenship applicants is incompatible with human rights legislation because it discriminates against the British citizens who are affected – that is to say, it denies them the help that other British citizens who are not affected will get – and the discrimination is not justified.

[...]

The effect of these amendments is that Sections 185(4)...will no longer apply to applicants who are British citizens. Nor will they apply to applicants with specific rights to live in the UK – for example, Commonwealth citizens with a right to abode or with an EU treaty right to reside. [...]

However, while the Government recognize that applicants with specific rights to live in the UK must not be denied homelessness assistance, we remain concerned that dependants and other household members who are ineligible because they are here illegally or on conditions that they will have no recourse to public funds should not be able to confer priority or entitlement to long-term social housing. The amendments refer to these dependants and household members as "restricted persons" [...]¹¹⁵

90. We wrote to the Minister shortly after this debate, expressing our concern at the short notice that the Committee was given before the introduction of the amendments and their debate on the floor of the House. We expressed our concern that these provisions would continue to distinguish between applicants with priority need, offering less protection for those families who were in priority need as a result of their relationship with a family

¹¹³ Section 193 (7D), Housing Act 1996.

¹¹⁴ HL Deb, 23 June 2008, Col GC 524.

¹¹⁵ Ibid, Cols GC 522 – 525.

member who was a “restricted person”. We asked the Minister to provide us with an explanation of the Government’s view that this distinction was justified and would not lead to a further violation of the Convention.¹¹⁶

91. The Minister, Baroness Andrews, responded to our request during Report Stage in the House of Lords. She explained that it was the Government’s view that these provisions were compatible with the Convention:

The Government acknowledge that Schedule 15 will result in a difference of treatment between eligible applicants depending on their particular household circumstances. We have given this very careful consideration and are satisfied that those differences of treatment are justifiable because of the policy considerations. The Court of Appeal questioned the policy considerations underlying Section 185(4). In the court’s view, denying a person from abroad the right to be secured by a local authority would put pressure on that person to leave the country and where that person was a British citizen with a right of abode that was unjustifiable.

First, we acknowledge that British citizens who are habitually resident here and who become unintentionally homeless should be entitled to be provided with accommodation to relieve their homelessness, even where their priority need or homelessness derives from ineligible dependents or other ineligible household members. For all the reasons that I have explained, the provision of long-term social housing – it is a scarce resource which brings valuable benefits with it, including the right to buy – is another matter. We strongly believe it is justifiable policy that, as far as possible, restricted persons should not be able to convey entitlement or priority for long term social housing on another person through the operation of the homelessness legislation.¹¹⁷

92. When the Bill returned to the House of Commons, the Government was again challenged to explain why this distinction was justifiable and not likely to lead to a further breach of the Convention. The Minister promised to reflect on the point that “by trying to resolve the incompatibility on one issue, we could be creating something else”.¹¹⁸

93. In so far as these new provisions remove the exclusion in Section 185(4) of the Housing Act 1996, they remedy the clear incompatibility with the Convention identified by our domestic courts in the cases of *Morris* and *Gabaj*. However, in view of the breadth of the reasoning of the courts in those cases, we remain concerned that in so far as these provisions maintain a distinction between protection offered to those in priority need as a result of their relationship with a restricted person and others, there remains a risk that our domestic courts will also declare these provisions incompatible with Article 14, taken together with Article 8 of the Convention. As the Court of Appeal explained, justification is necessary for any such distinction. The Government must show that this distinction has a legitimate aim and that the provisions are necessary and proportionate to that aim. The Government has proposed a new policy objective for these proposals: the protection of the resources available for long term social housing. It considers that this objective provides

¹¹⁶ Written Ev 24.

¹¹⁷ HL Deb, 9 July 2008, Col 819.

¹¹⁸ HC Deb, 21 July 2008, Col 612.

clear justification for maintaining their proposed distinction, but provides no explanation for why it is the Government's view that the steps taken are proportionate for the purposes of compliance with the Convention. The Explanatory Notes which accompanied the Bill when it received Royal Assent provide no further guidance.

94. The guidance from the Court of Appeal on this issue was strongly worded and worth repeating:

Section 185 carries no self-evident justification capable of making subsection (4) a proportionate or even logical, response to the problems of benefits tourism and unlawful migration. There is certainly the beginning of an explanation in the undesirability of British nationals exercising their right of abode here for the purpose of securing accommodation for themselves together with children of theirs who are subject to immigration control. [...] The assumptions on which Section 185(4) are built are different: they are that the parent is both lawfully here and habitually resident here, and that the child, albeit subject to immigration control, is also here and dependent on the parent. To exclude such a family does not correspond with even the limited policy objective I have described.¹¹⁹

95. This suggests that the Court considers strong justification, supported by evidence, will be necessary to justify any distinction. The new provisions may have a less detrimental effect on families in these circumstances than the earlier exclusion. This may persuade the Court to give greater weight to the Government's policy concerns when considering whether the distinction is necessary and proportionate. However, these provisions still offer a less favourable degree of protection, which must be justified. **We are not persuaded that the provisions in the Housing and Regeneration Act 2008 intended to respond to the declarations of incompatibility in the cases *Morris* and *Gabaj* entirely remove the risk that our domestic courts, or the ECtHR, will find a further violation of the right to enjoy respect for private and family life without unjustified discrimination. We recommend that the Government provide a fuller explanation of its view that these provisions are necessary and proportionate and therefore, compatible with the Convention.**

Religious discrimination in sham marriages regime (Baiai v Secretary of State for the Home Department)

96. In our last report, we considered the declarations of incompatibility made in respect of the Government's Certificate of Approval Scheme for marriages involving a person subject to immigration. The provisions are incompatible with the right to marry without discrimination, in so far as they provide an exemption for marriages that take place within the Church of England.¹²⁰ A second declaration of incompatibility based on nationality discrimination and the right to marry, as guaranteed by Article 12 ECHR was recently overturned after an appeal to the House of Lords.¹²¹

¹¹⁹ *Morris*, paragraph 48.

¹²⁰ *R (Baiai) v Secretary of State for the Home Department and Another* [2006] EWHC 823. See Second Monitoring Report, paragraphs 135-137.

¹²¹ *R ((1) Mahmoud Baiai (2) Izabela Trzcinska (3) Leonard Bigoku (4) Agolli Melek Tilki) v Secretary of State for the Home Department & (1) Joint Council for the Welfare of Immigrants (2) Aire Centre (Interveners)* [2008] UKHL 53.

97. The Government has accepted that the discriminatory exemption for Church of England marriages must be removed. We wrote to the Minister during the last session to ask how the Government intended to proceed.¹²² The Minister confirmed on 8 August 2007 that it was the Government's intention to remedy the incompatibility with Article 14 ECHR "as soon as practicable" by extending the scheme to Church of England marriages.¹²³ The Minister did not consider that it was appropriate to alter the existing statutory scheme while the wider appeal to the House of Lords was ongoing. The Minister explained:

The Registrar Service and the Church of England are reluctant to introduce any new arrangements until they know the outcome of the Government's appeal. In particular they do not want to introduce additional work and administrative costs in support of a scheme which is then declared unlawful by the House of Lords.

98. The Minister also indicated that the Government was discussing a revised scheme which would also apply to the Church of England, where the certificate of approval would be obtained from the Secretary of State but approved by the registrar before the bans are read.

99. Earlier this year, we wrote again to the Minister to ask why the Government thought that administrative convenience and public cost was an appropriate justification to delay the removal of the discriminatory elements of the scheme. We also asked whether the Government considered that a separate scheme for Church of England marriages could be justified in light of the earlier declaration of incompatibility.¹²⁴

100. In his reply, the Minister argued that the declaration of incompatibility did not affect the continuing validity of the law and that, under the settlement envisaged by the HRA, there is "no obligation on the UK Border Agency to amend the COA scheme at this time."¹²⁵

101. We accept the Government analysis that the UK Border and Immigration Agency is not required to change the law in response to the declaration of incompatibility made in this case. There is no domestic legal obligation on the Government to take action. However, we are disappointed by the Government's short-sighted approach. Although in keeping with the careful constitutional settlement in the HRA 1998, failure to provide a remedy may engage the United Kingdom's international obligations. The UK has primary responsibility under the ECHR to give effect to Convention rights.¹²⁶ The continued application of a provision of domestic legislation that the UK courts have decided is incompatible with the Convention is inconsistent with our commitments to give full effect to the protection of the Convention to all people in the UK. It leads not only to the continued likelihood that people in the UK may be treated

¹²² Ibid, Appendix 41.

¹²³ Written Ev 25.

¹²⁴ Written Ev 26.

¹²⁵ Written Ev 27.

¹²⁶ Article 1 ECHR requires individual Contracting Parties to secure Convention rights for every person within their jurisdiction and Article 13 ECHR gives those individuals a right to an effective remedy for the breach of their Convention rights. The UK is bound in international law to comply with these obligations, which may be enforced by the Council of Europe Committee of Ministers.

in a way which breaches their fundamental rights but also that they will only be able to secure a remedy in Strasbourg. We repeat our previous calls to Government to provide coherent guidance to Government Departments on responding to declarations of incompatibility. This guidance should cover not only the obligations of the HRA 1998 but also the responsibilities of the UK under its international obligations.

102. The Government considered that waiting for the outcome of the House of Lords hearing was the most efficient use of public resources in this case. The Minister explained that preparatory work had been undertaken and proposals to rectify the incompatibility with Article 14 ECHR were being developed while the decision of the House of Lords was pending. Officials from the Border and Immigration Agency and the Church of England intended to work together to ensure the Convention compatibility of the new proposals, if needed. The Government has also noted that interim guidance is in place that, in the Government's view, should reduce the impact of these provisions. The Minister explained:

Following the Court of Appeal's judgment in *Baijai*, the Government has been operating an interim guidance scheme, under which there is no longer a blanket policy of refusing Certificates of Approval to any claimant. In this way, every applicant to whom the scheme applies, regardless of their immigration status, will have their individual circumstances closely scrutinized, and a certificate will only be refused if there are grounds for concluding that the proposed marriage is not genuine.¹²⁷

103. We note the Government's reference to its interim guidance on Certificates of Approval, which was designed to reduce the impact of the Certificate of Approval scheme, pending the decision of the House of Lords. However, we consider that it has no real implications for the ongoing discrimination identified by the Court of Appeal, which continues to mean those who wish to marry in a Church of England service are treated more favourably than others.

104. In cases like this, where the Government accepts part of a statutory scheme is incompatible with the Convention, but proposes to appeal against a wider declaration of incompatibility, a choice must be made about the timing of any reform. This choice must clearly strike a balance between the cost, administrative inconvenience and parliamentary time involved in removing the incompatibility and the detriment suffered by those who are affected by the ongoing application of the incompatible provisions. In our view this balance can only be struck on a case-by-case basis. In some circumstances, a breach could have so significant an effect that no degree of administrative inconvenience might justify the failure to bring forward a remedy without delay. We consider that the following factors will be relevant to the assessment of the weight to be given to the need for a speedy remedy:

- the right being infringed, the nature of the breach identified and the impact on individuals affected;
- whether the individuals affected or likely to be affected are vulnerable;
- whether the provision affects a significant number of people;

¹²⁷ Written Ev 26.

- whether delay will undermine the value of a remedy for a significant number of people;
- whether an interim administrative response is in place which removes or reduces the impact of the breach identified by the Court;
- the likely time until the final appeal is heard in the case.

105. It is unclear whether the Government took these factors into account in this case. However, when the Government explained its position to us, the appeal was expected to be heard shortly (the Government estimated May 2008) and the effect of these provisions had been modified by the Government's guidance (although this did not remove the discriminatory exclusion for Church of England marriages).

106. The Government has not explained how any proposals to create a separate scheme for the Church of England would be justifiable and compatible with Article 14 ECHR. In the light of the outcome of the Government's appeal to the House of Lords, and the continued operation of the Certificate of Approval Scheme, we expect the Government's proposals for the removal of the discriminatory exemption for Church of England marriages, together with a full explanation of their compatibility with the Convention, to be published without delay. We call on the Government to send us its proposals as soon as they are available.

Nationality discrimination in early release of prisoners (Clift and Hindawi v Secretary of State for the Home Department)

107. In our last report, we considered the decision of the House of Lords that sections 46(1) and 50(2) of the Criminal Justice Act 1991 were incompatible with the right to enjoy liberty without unjustified discrimination.¹²⁸ Those provisions meant that foreign prisoners liable for deportation would be treated differently from other prisoners for the purposes of early release. These provisions had been repealed, but continued to have limited effect in respect of prisoners whose offences were committed before 4 April 2005. During the last session, we wrote to the Minister to ask how the Government intended to meet this continuing incompatibility with Articles 5 and 14 ECHR.¹²⁹ The Minister responded to our letter on 6 July 2007, indicating that the Government intended to take a two-pronged approach to the incompatibility. The Government would introduce an administrative process to ensure that, in practice, the Secretary of State would treat the recommendation of the Parole Board in respect of all affected prisoners as binding. Statutory provisions to formalise these arrangements were proposed in the Criminal Justice and Immigration Bill.¹³⁰ These provisions provide for a straightforward repeal of the outstanding transitional arrangements and, in our view, remove the relevant incompatibility.¹³¹ The Criminal Justice and Immigration Act 2008 received royal assent on 8 May 2008. **The declaration of incompatibility made in the joined cases of *Clift and Hindawi* involved a relatively straightforward legal problem with a comparatively simple solution. We welcome the**

¹²⁸ *R (Clift et al) v Secretary of State for the Home Department* (HL)[2006] UKHL 54.

¹²⁹ Second Monitoring Report, paragraphs 137 – 138, Appendix 42.

¹³⁰ Clause 15, HC Bill 130 (as introduced).

¹³¹ Section 27, Criminal Justice and Immigration Act 2008 (c4).

Government's decision to introduce a similarly simple and speedy remedy in the Criminal Justice and Immigration Act. We have previously cautioned against using a large Government Bill to provide a remedy for a relatively simple issue. However, in this case, the Government's proposed interim administrative arrangements ensured that the incompatible provisions of the Criminal Justice Act 1991 had no substantive effects and the timing of the Criminal Justice and Immigration Bill was opportune.

Prisoners' voting rights (Smith v Electoral Registration Officer)

108. Section 3 of the Representation of the People Act 1983 is subject to a declaration of incompatibility, in so far as it imposes a complete ban on prisoners voting.¹³² We considered this issue, above, in Chapter 3.

¹³² *William Smith v Electoral Registration Officer* [2007] CSIH XA33/o4 (24 January 2007).

6 Obstacles to Effective Implementation

109. In our last two reports, we considered several systemic obstacles to effective implementation of the ECHR in the United Kingdom. These included delays in implementation of individual and general measures in some cases, non-retrospective application of the HRA, and the inability to reopen proceedings after a judgment of the ECtHR.

110. We made a number of recommendations in our last report, designed to meet some of our concerns arising from these systemic obstacles. We registered our disappointment that the Government has failed to respond to these recommendations in Chapter 2. We remain concerned that these obstacles remain in place. We noted, for example, the continuing problem in respect of delay in a number of cases, in Chapter 4. We look forward to receiving the Government's views on these issues, but consider an additional point of note, below.

Repetitive cases

111. The President of the ECtHR, its most senior Registrar, the Group of Wise Persons appointed to consider the future of the Court, and other commentators have all recognised that an inordinate amount of the Court's time is taken up by repeat or clone cases which arise from failures to remedy a particular breach of the Convention.¹³³ For example, a significant number of pending files are cases from a small number of States where the length of proceedings before domestic courts consistently leads to breaches of the right to a fair hearing as guaranteed by Article 6 ECHR. States are encouraged to meet problems locally once a problem has been identified, in order to avoid unnecessarily diverting the resources of the ECtHR. The United Kingdom has not generally had a problem with repetitive cases. Recently, we have been concerned by three sets of cases where we are aware that a number of clone cases are pending for hearing before the Court. We discuss two of these issues below. A third issue concerns a significant number of Rule 39 applications made in respect of cases pending against the United Kingdom. Rule 39 allows the Court to order interim measures in respect of a case.¹³⁴ We understand that around 200-250 new Rule 39 applications per month are made against the UK before the ECtHR. Between January 2008 and June 2008, there were, in total, 1415 new Rule 39 applications against the UK. Although a significant number of these applications are refused, they may present a heavy burden on the resources of the ECtHR.¹³⁵

112. A significant number of these cases have been brought by Tamil asylum seekers seeking to prevent their deportation and return to Sri Lanka from the UK. This issue was

¹³³ See for example, Stockholm Colloquy, Council of Europe, "Towards stronger implementation of the European Convention of Human Rights at national level", Speeches by Jean Paul Costa and Erik Fribergh (Seminar, 9 – 11 October 2008); See also Report of the Group of Wise Persons to the Committee of Ministers on the long-term effectiveness of the European Convention on Human Rights control mechanism, as it appears in document CM(2006)203.

¹³⁴ These interim measures may include an order requiring a State to do something before a hearing takes place or may prevent the State from action. So for example, interim measures may prevent a State from deporting or extraditing an individual until the application to the ECtHR has been heard.

¹³⁵ Written Ev 28. We have been provided with statistics from the Court on the number of recent Rule 49 applications against the UK, which we publish with this Report.

recently considered in a lead case by the ECtHR and we intend to return to this issue in correspondence with the relevant Ministers.¹³⁶

Gender discrimination in widow's benefits

113. Over the past year, the largest proportion of violations against the UK was gender discrimination cases brought by widowers alleging sex discrimination in relation to their non-entitlement to widows' benefits and allowances.¹³⁷

114. These cases do not raise any questions about the need for legislative reform: the breach has already been removed. The ECtHR has settled the principle that certain widowers should be eligible for just satisfaction, or compensation, in respect of the period when they did not receive certain benefits and in others, they should receive compensation for any reasonably incurred legal expenses incurred in bringing their applications to the ECtHR. There are a significant number of widowers whose claims were rejected under the earlier scheme, in breach of their right to enjoy Convention rights without discrimination, who are now seeking compensation or reimbursement of their reasonable legal costs. The majority of the cases heard by the Court on this issue over the past year have been clone or repetitive cases. There are almost 200 outstanding communicated applications by widowers against the UK currently pending before the ECtHR.¹³⁸

115. We wrote to the Minister in March 2007, to ask for further information about the Government's approach to these cases.¹³⁹ The Minister supplied us with a full and helpful response in April 2007. He explained that although the Government had taken no steps to settle any of these cases before they reached the ECtHR, the Government had since taken steps to settle a significant number of widowers' applications. Settlement had been agreed so far in 171 cases. Another 272 cases had been examined and settlement ruled out as a result of the facts in those cases.

116. The Minister told us that it was Government policy to consider settlement of any application on a case by case basis. He went on to explain the Government's policy :

Where an application raises the same issue as an earlier case against the United Kingdom in which a violation has been found, the Government will consider proposing a friendly settlement if the application is admissible and if the Government considers that, in light of the earlier finding of a violation, the court would be very likely to find a violation on the same grounds.¹⁴⁰

¹³⁶ *N v UK* App No 26965/05, Judgment 27 May 2008 (Grand Chamber). The Fourth Section Registrar wrote to the Government on 23 October 2007 to ask whether domestic steps could be taken to reduce the flow of Rule 39 applications to the ECtHR. In response, the Government urged the ECtHR to bring forward a lead case for decision without delay. This correspondence is not published with this report, but is available from the Parliamentary Archive.

¹³⁷ We consider these statistics in Chapter 3, above. The relevant benefits are Widow's Payment and Widowed Mother's Allowance (pursuant to the Social Security and Contributions and Benefits Act 1992, the relevant provisions of which have now been repealed) and the Widow's Bereavement Allowance (pursuant to the Income and Corporation Taxes Act 1988, now abolished by the Finance Act 1999 in respect of deaths occurring after 2000).

¹³⁸ Written Ev 31.

¹³⁹ Written Ev 29.

¹⁴⁰ Written Ev 30.

117. The right of individuals to apply to the Court is a valuable right, which must be respected. However, in cases where an issue of principle has been settled by the European Court of Human Rights, and a systemic issue affecting a significant number of people identified, we would encourage the Government to take a proactive approach to domestic remedies. It is generally not in the best interests of the people affected by a breach, or of taxpayers, to require individuals to pursue a case to Strasbourg simply in order to have an international court consider questions of costs and compensation. The legal expenses incurred, the time taken to resolve these cases, and the burden on the Court all weigh heavily in favour of measures being taken at a domestic level to ensure that clone cases of this kind never reach Strasbourg.

118. **We welcome the efforts of the Government to reach settlement in cases relating to gender discrimination and widows' benefits. We encourage the Government actively to pursue friendly settlement in any outstanding clone cases where applicants are open to negotiation.**

119. **However, we recommend that the Government's approach to clone cases should be more proactive. Government policy on settlement appears to be based upon the existence of an admissible application to Strasbourg. This places the onus on the individual who has been affected by a breach which has already been identified by the ECtHR to come forward and to invest time and money in the preparation of a claim. As legal proceedings develop and costs accumulate, settlement negotiations may become more difficult.**

120. **We consider that in any similar cases in future, the Government should encourage the European Court of Human Rights to identify a batch of cases to treat as lead cases, or as pilot judgments (a development which we consider below). Where a systemic problem or a breach which may lead to a significant number of well founded applications by individuals is identified, the Government is already obliged to consider what steps are necessary to remove the breach, prevent future breaches and compensate those affected by the breach.¹⁴¹ This obligation should be approached imaginatively and include consideration of whether more innovative steps can be taken at a domestic level in order to provide a speedy remedy for those affected by the breach, if possible, in a way which avoids unnecessary public expenditure. These steps could include, for example, the creation of a well-publicised Government sponsored compensation scheme, avoiding the need for individual applicants or Government departments to incur significant legal expenses. While, after exhausting these domestic remedies, an individual must be free to take a claim to Strasbourg, these steps could help reach equitable solutions without adding unnecessarily to the list of cases pending against the UK.**

Discrimination in access to state pensions for citizens resident overseas

121. The ECtHR will soon consider whether current UK law on access to uprated state pensions for overseas residents breaches the Convention right to peaceful enjoyment of possessions without discrimination.¹⁴² Mrs Carson, a British citizen, resident in South

¹⁴¹ Article 46 ECHR. We discuss the obligation on Contracting Parties to give effect to judgments of the Court in Chapter 1, above.

¹⁴² *Jackson, Carson & Ors v United Kingdom*, App. No 42184/05 (pending).

Africa, and others, are challenging the current rules which freeze the pension entitlements of certain overseas residents, as incompatible with the Convention. Mrs Carson's argument was rejected by the House of Lords and is due to be heard shortly by the European Court of Human Rights.¹⁴³ There are a number of potential clone cases awaiting hearing after this decision. The applicants in those cases may represent hundreds of thousands of overseas pensioners (There are around 500,000 overseas residents who are affected by these provisions).¹⁴⁴

122. The European Court of Human Rights has recently opted to treat some cases as "pilot judgments". In these cases, the Court will give broad guidance to assist the State in breach of the Convention to remove a systemic problem and provide a remedy for a significant number of pending applicants. The Court has only adopted this approach in a limited number of cases, but may do so where:

- The facts of the case highlight a systemic problem which leads to a significant number of people being deprived of their Convention rights;
- This deficiency may give rise to a number of additional well-founded applications to the ECtHR;
- General measures are called for and guidance as to the type of general measures needed may be appropriate.

123. In these cases, there may be some indication that new general measures may need to apply retrospectively. In the case of pilot judgments, clone cases are often adjourned to allow the relevant State to take appropriate general measures.¹⁴⁵ In other cases, guidance has been provided without adjournment.¹⁴⁶

124. We do not wish to pre-empt the decision of the ECtHR in this or any other case. We recommend that, in cases such as these, the Government should consider urging the Court during the course of a lead case to treat it as a pilot judgment. In any event, the Court should be encouraged to give clear guidance on a suitable remedy in any case involving a significant substantive breach involving clone cases. We would hope that in any such case, procedural provision would be made to ensure that those individuals involved in clone cases are given adequate opportunity to influence the approach of the Court.

¹⁴³ *Jackson, Carson & Ors v United Kingdom*, App. No 42184/05 (pending). We understand that this claim involves around 20,000 applicants. Ms Carson's case was rejected by the House of Lords in *Carson v Secretary of State for Work and Pensions*, [2005] UKHL 37.

¹⁴⁴ PBC Deb, 25 January 2007, c113 (Pensions Bill).

¹⁴⁵ See for example, *Broniowski v Poland*, App No 31443/96, Judgment 26 June 2004.

¹⁴⁶ *Lukenda v Slovenia*, App. No. 230032/02, Judgment 6 October 2005.

Conclusions and Recommendations

1. We understand that an informed response [to our previous recommendations] requires coordination across Government and input from several departments. However, a delay of over one year in replying to recommendations is unacceptable. The Government should provide us with a substantive response [to our last Report on these issues] as soon as possible and certainly before the end of the current parliamentary session. (Paragraph 9)
2. We welcome the cooperation of the officials of the Ministry of Justice and the Foreign and Commonwealth Office. They have often been willing to pursue inquiries from our staff on an informal basis. However, we are disappointed by the Government's failure to respond to our request for a memorandum on the Government's progress over the past 12 months in dealing with adverse judgments. We call on the Minister for Human Rights and the Secretary of State for Foreign Affairs to provide us with an annual report on adverse judgments, following the model adopted in the Netherlands. (Paragraph 14)
3. We recommend, again, that the Ministry of Justice should adopt a coordinating role in relation to the Government's response to adverse human rights judgments, including judgments of the European Court of Human Rights. This would be a positive step towards compliance with the recent Recommendation of the Committee of Ministers [on effective domestic mechanisms for the implementation of judgments]. (Paragraph 18)
4. We reiterate our previous recommendations that Government should keep us informed in a timely way of all adverse human rights judgments and their proposals for any legislative or other solutions. (Paragraph 20)
5. We look forward to assessing the Government's reaction to the work of the Parliamentary Assembly of the Council of Europe and its scrutiny of the execution of judgments of the European Court of Human Rights by the United Kingdom. We encourage the Government to engage positively with the new Rapporteur and intend to scrutinise the UK Parliamentary Delegation response to his introductory memorandum. (Paragraph 23)
6. We are encouraged that the statistics prepared by the Committee of Ministers appear to show that the United Kingdom takes a relatively positive approach to its Convention obligation to implement the judgments of the European Court of Human Rights. (Paragraph 26)
7. Delays of upwards of five years in resolving the most significant breaches of the European Convention are unacceptable unless extremely convincing justification for the delay can be provided. We call on the Government to publish its response to the Annual Report of the Committee of Ministers on the Supervision of the Execution of Judgments of the European Court of Human Rights. In that reply, we recommend that the Government explain the reasons for any delay in relation to the introduction of general measures in each of the cases which have been subject to the supervision of the Committee of Ministers for longer than five years. (Paragraph 28)
8. We do not share the Government's confidence that the minor changes to existing policy [on access to artificial insemination for prisoners] agreed so far will be adequate to

eliminate the risk of a further finding of a breach of the right to respect for private and family life of prisoners and their partners by the ECtHR. We have not yet received a reply to our questions [on *Dickson v UK*] and we look forward to receiving the Minister's response to our request for further information. (Paragraph 43)

9. Although the right to freedom of association confers on Trade unions the broad general power to control membership, the judgment of the ECtHR in *ASLEF* is qualified by an exception to that rule based on the need to balance the right of the individual member to be treated fairly and not to suffer exceptional hardship as a result of exclusion. We welcome the Government's decision to include in the Employment Bill additional safeguards to reflect the individual right to freedom of association and to protect individuals from abuse of a dominant position by a particular Trade Union. The positive and consultative approach of the Department of Trade and industry, and its successor, the Department for Business Enterprise and Regulatory Reform, to providing a speedy and effective response to the judgment in *ASLEF* is a commendable example for other Government departments to follow. (Paragraph 45)

10. We were disappointed to learn of [...] developments [concerning prisoners voting rights] from the Council of Europe's own website, despite the Minister's reassurance that we would be kept informed of further work on this issue. We expect Government to keep us informed of developments in situations where we are actively engaged in correspondence about an issue. (Paragraph 50)

11. We are disappointed to report to both Houses that we have not yet received an answer to [our recent] questions [relating to prisoners voting rights]. (Paragraph 53)

12. The European Court of Human Rights has given clear guidance that individuals' fundamental human rights, including the right to vote, are not contingent on their continuing to be 'good citizens'. Interferences with those rights can only be justified in accordance with the law. When considering whether to limit an individual's right to vote, proportionally requires a clear and close link to the specific conduct of the individual concerned. The Grand Chamber implies that this link should include some connection to the stability of the electoral system, the rule of law or the democratic settlement within a state. General breaches of any vague concept of civic duty are, in our view, unlikely to meet the standard of justification envisaged by the ECtHR. (Paragraph 58)

13. The Government's change of approach and failure to set a concrete timetable for its response raises serious questions about its reluctance to deal with this issue [prisoner voting rights]. In our previous reports, we have drawn attention to a number of cases where significant delay in implementation has tarnished the otherwise good record of the United Kingdom in responding to the judgments of the European Court of Human Rights. For the most part these cases have been legally straightforward, but politically difficult. This case appears destined to join a list of long standing breaches of individual rights that the current Government, and its predecessors, have been unable or unwilling to address effectively within a reasonable time frame. The Government should rethink its approach. (Paragraph 62)

14. We call on the Government to publish the responses to its earlier consultation and to publish proposals for reform, including a clear timetable, without further delay. A

legislative solution can and should be introduced during the next parliamentary session. If the Government fails to meet this timetable, there is a significant risk that the next general election will take place in a way that fails to comply with the Convention and at least part of the prison population will be unlawfully disenfranchised. (Paragraph 63)

15. We continue to regret the delay in providing Article 2 complaint investigations in [respect of a number of] cases [relating to Northern Ireland]. We recommend that the Government publish a full and up to date explanation of its approach to each case, including the reasons for continuing delay. (Paragraph 66)

16. We and our predecessor Committee have stressed the importance of effective, independent inquest proceedings and other inquiries for the purposes of Article 2 ECHR, and will continue to do so. Most recently, we have raised concerns that the Government's proposals to increase the potential for closed inquests to provide a public inquiry of the scope and nature required by the Convention.¹⁴⁷ However, in the context of our work monitoring the UK Government's response to adverse judgments of the ECtHR, we will observe the conclusions of the Committee of Ministers, who retain responsibility for enforcement of the Convention. We will not comment, in this context, on issues which have been closed and discharged from scrutiny. (Paragraph 67)

17. The Committee of Ministers is awaiting further information from the United Kingdom on the operation of both the Police Ombudsman and the Historical Enquiries Team. We call on the Government to address the concerns raised about independence and effective disclosure [in evidence gathered by the House of Commons Northern Ireland Affairs Select Committee] in its correspondence with the Committee of Ministers. We recommend that the Government send us the latest information sent to the Committee of Ministers on each of these cases. (Paragraph 68)

18. We look forward to the Government's response to the recent report of the Commons Northern Ireland Affairs Committee on the cost of policing the past in Northern Ireland. The Government should provide the Committee of Ministers with a copy of the Committee's report and its response. We urge the Ministry of Justice and the Northern Ireland Office to explain how the various pressures identified by that inquiry may impact on the functions and operational capabilities of the Police Ombudsman and the Historical Enquiries team. The Government should also explain how this may affect information which the Government has previously provided to the Committee of Ministers in relation to these cases. (Paragraph 70)

19. The Government sought to extend the application of the Mobile Homes Act 1983 to residents of local authority Gypsy and Traveller sites, following a recommendation which our predecessor Committee made over four years ago. We welcomed these provisions but expressed our disappointment at the significant and unnecessary delay in resolving this issue.¹⁴⁸ (Paragraph 71)

¹⁴⁷ Thirtieth Report of Session 2007-08, *Counter-terrorism Policy and Human Rights (Thirteenth Report): Counter-terrorism Bill*, HL paper 172/HC 1077, Chapter 4

¹⁴⁸ Seventeenth Report of Session 2007/08, *Legislative Scrutiny 1) Employment Bill, 2) Housing and Regeneration Bill, 3) Other Bills*, HL paper 95/HC 501, paragraphs 2.29-2.33

20. We recommend that the CPS case notes should capture important information such as [whether defendants have been wrongly acquitted using the reasonable chastisement defence] to facilitate future research [on the application in practice and Section 58 of the Children's Act 2004]. (Paragraph 77)

21. We recommend that the Government explain clearly how it considers that the ECtHR would approach a case brought by a child who has been punished in accordance with Section 58 Children Act 2004, applied in accordance with the appropriate Charging Guidance. (Paragraph 79)

22. Clear concerns about the operation of Section 58 Children Act 2004 arise from the Government's recent review and the research of the CPS, particularly, from the suggestion that the defence of reasonable punishment has been raised in cases of child cruelty, or other cases where it should not be available. We believe that it is necessary for the Government to demonstrate that Section 58, in the way that it operates is compatible with our obligations, and therefore, we call on the Government to explain its view that these reviews show that the law operates in a way which provides an effective deterrent against any new breaches of the right to be free from inhuman and degrading treatment or punishment. A summary of the information provided by the Government to the Committee of Ministers on this case has recently been published by the Committee of Ministers Secretariat.¹⁴⁹ We are disappointed that the Government did not provide us directly with a copy of their submissions. We wish to receive copies of these submissions and any subsequent information notes, including on the position in Northern Ireland and Scotland. (Paragraph 80)

23. In our previous reports, we praised the Ministry of Justice database on declarations of incompatibility.¹⁵⁰ This database records every declaration of incompatibility made; whether an appeal is pending; whether a declaration has been overturned on appeal and, if the Government proposes to take steps to meet an incompatibility, what progress has been made. This database, if regularly updated, can significantly increase the transparency of the Government's response to these important judgments. It is disappointing that this database does not appear to have been updated for a significant period of time: nor is it easily accessible on the new, redesigned, Ministry of Justice website. We recommend that the Ministry of Justice take steps to make it easier to find the database on their website. We recommend that the Ministry of Justice take steps to make it easier to find the database on their website, and that the database should be reviewed and updated on at least a quarterly basis. (Paragraph 82)

24. [The findings of the Grand Chamber in *Burden v UK*] should encourage the Government to adopt a consistent approach to declarations of incompatibility. We again recommend that the Government take steps to adopt an open, transparent policy. It should make clear that it aims to respond to all declarations within a set timetable and should provide clear guidance to individual departments on the need for a prompt and effective response to every declaration of incompatibility. (Paragraph 84)

¹⁴⁹ CM/DH (2008) 34 Revised Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights, 28 August 2008, published 18 September 2008

¹⁵⁰ Second Monitoring Report, paragraph 27

25. We are not persuaded that the provisions in the Housing and Regeneration Act 2008 intended to respond to the declarations of incompatibility in the cases of *Morris* and *Gabaj* entirely remove the risk that our domestic courts, or the ECtHR, will find a further violation of the right to enjoy respect for private and family life without unjustified discrimination. We recommend that the Government provide a fuller explanation of its view that these provisions are necessary and proportionate and therefore, compatible with the Convention. (Paragraph 95)

26. We accept the Government analysis that the UK Border and Immigration Agency is not required to change the law in response to the declaration of incompatibility made in [relation to its Certificate of Approval Scheme for marriages by immigrants]. There is no domestic legal obligation on the Government to take action. However, we are disappointed by the Government's short-sighted approach. Although in keeping with the careful constitutional settlement in the HRA 1998, failure to provide a remedy may engage the United Kingdom's international obligations. The UK has primary responsibility under the ECtHR to give effect to Convention rights.¹⁵¹ The continued application of a provision of domestic legislation that the UK courts have decided is incompatible with the Convention is inconsistent with our commitments to give full effect to the protection of the Convention to all people in the UK. It leads not only to the continued likelihood that people in the UK may be treated in a way which breaches their fundamental rights but also that they will only be able to secure a remedy in Strasbourg. We repeat our previous calls to Government to provide coherent guidance to Government Departments on responding to declarations of incompatibility. This guidance should cover not only the obligations of the HRA 1998 but also the responsibilities of the UK under its international obligations. (Paragraph 101)

27. We note the Government's reference to its interim guidance on Certificates of Approval, which was designed to reduce the impact of the Certificate of Approval scheme, pending the decision of the House of Lords. However, we consider that it has no real implications for the ongoing discrimination identified by the Court of Appeal, which continues to mean those who wish to marry in a Church of England service are treated more favourably than others. (Paragraph 103)

28. The Government has not explained how any proposals to create a separate scheme for the Church of England would be justifiable and compatible with Article 14 ECHR. In the light of the outcome of the Government's appeal to the House of Lords, and the continued operation of the Certificate of Approval Scheme, we expect the Government's proposals for the removal of the discriminatory exemption for Church of England marriages, together with a full explanation of their compatibility with the Convention, to be published without delay. We call on the Government to send us its proposals as soon as they are available. (Paragraph 106)

29. The declaration of incompatibility made in the joined cases of *Clift* and *Hindawi* involved a relatively straightforward legal problem with a comparatively simple solution. We welcome the Government's decision to introduce a similarly simple and speedy remedy in the Criminal Justice and Immigration Act. We have previously cautioned

¹⁵¹ Article 1 ECHR requires individual Contracting Parties to secure Convention rights for every person within their jurisdiction and Article 13 ECHR gives those individuals a right to an effective remedy for the breach of their Convention rights. The UK is bound in international law to comply with these obligations which may be enforced by the Council of Europe Committee of Ministers.

against using a large Government Bill to provide a remedy for a relatively simple issue. However, in this case, the Government's proposed interim administrative arrangements ensured that the incompatible provisions of the Criminal Justice Act 1991 had no substantive effects and the timing of the Criminal Justice and immigration Bill was opportune. (Paragraph 107)

30. We welcome the efforts of the Government to reach settlement in cases relating to gender discrimination and widow's benefits. We encourage the Government actively to pursue friendly settlement in any outstanding clone cases where applicants are open to negotiation. (Paragraph 118)

31. We recommend that the Government's approach to clone cases should be more proactive. Government policy on settlement appears to be based upon the existence of an admissible application to Strasbourg. This places the onus on the individual who has been affected by a breach which has already been identified by the ECtHR to come forward and to invest time and money in the preparation of a claim. As legal proceedings develop and costs accumulate, settlement negotiations may become more difficult. (Paragraph 119)

32. We consider that in any similar cases in future, the Government should encourage the European Court of Human Rights to identify a batch of cases to treat as lead cases, or as pilot judgments (a development which we consider below). Where a systemic problem or a breach which may lead to a significant number of well founded applications by individuals is identified, the Government is already obliged to consider what steps are necessary to remove the breach, prevent future breaches and compensate those affected by the breach.¹⁵² This obligation should be approached imaginatively and include consideration of whether more innovative steps can be taken at a domestic level in order to provide a speedy remedy for those affected by the breach, if possible, in a way which avoids unnecessary public expenditure. These steps could include, for example, the creation of a well-publicised Government sponsored compensation scheme, avoiding the need for individual applicants or Government departments to incur significant legal expenses. While, after exhausting these domestic remedies, an individual must be free to take a claim to Strasbourg, these steps could help reach equitable solutions without adding unnecessarily to the list of cases pending against the UK. (Paragraph 120)

33. We do not wish to pre-empt the decision of the ECtHR in this or any other case. We recommend that, in cases such as these, the Government should consider urging the Court during the course of a lead case to treat it as a pilot judgment. In any event, the Court should be encouraged to give clear guidance on a suitable remedy in any case involving a significant substantive breach involving clone cases. We would hope that in any such case, procedural provision would be made to ensure that those individuals involved in close cases are given adequate opportunity to influence the approach of the Court. (Paragraph 124)

¹⁵² Article 46 ECHR. We discuss the obligation on Contracting Parties to give effect to judgments of the Court in Chapter 1, above.

Formal Minutes

Tuesday 7 October 2008

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	John Austin MP
Lord Dubs	Dr Evan Harris MP
Lord Lester of Herne Hill	Mr Virendra Sharma MP
Lord Morris of Handsworth	Mr Richard Shepherd MP
The Earl of Onslow	
Baroness Stern	

Draft Report (*Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008*) proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph. Paragraphs 1 to 124 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Thirty-first 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 Tuesday 14 October at 1.30pm.]

