



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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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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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.

and to increase the transparency of the Government's response to court judgments finding breaches of human rights.

13. This change in our practice was inspired by work in the Netherlands, where the parliamentary Justice Committee receives a report from the Government Agent to the ECtHR on an annual basis. This report covers cases against the Netherlands over the past 12 months and their implications for domestic law. It also covers cases against other Contracting Parties that may have implications for domestic law, practice and policy. It is presented by Government to both houses of the Netherlands Parliament and subsequently examined by the Justice Committee, including through oral evidence.²⁰

14. 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.

²⁰A similar practice operates in Switzerland. For further information on scrutiny of the implementation of judgments of the ECtHR, see *Ms Bemelmans-Vidéc, 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/ASPIAPFeaturesManager/defaultArtSiteView.asp?ID=783> (Last accessed 10 July 2008).

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.

58. **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, proportionality 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.**

59. The Government's first consultation on the issue of prisoners' voting rights was launched almost a year after the Government had announced it and over two years after the judgment of the Grand Chamber. This consultation made it clear that the Government considered that the right to vote should not be extended to all prisoners and that, in its view, the franchise was strongly connected to the concept of 'good' citizenship. The Government has refused to publish the responses to this consultation and now proposes further debate, without a timetable for action.

60. In July 2007, the Government's *Governance of Britain* Green Paper heralded the launch of a wide range of initiatives to reinvigorate the UK's constitutional arrangements.⁶⁷ These have included: a consultation on voting at weekends;⁶⁸ a wider review of voting systems;⁶⁹ a high level review on the notion of citizenship⁷⁰ and a national review of citizen engagement. None of the papers in the *Governance of Britain* series published so far has mentioned the issue of prisoners' voting rights.

61. We note that in the three years which have passed since the decision of the Grand Chamber in *Hirst*, a number of European States have taken steps to address the issue of prisoners' voting rights. In 2006, Ireland passed legislation to enable all prisoners to vote by post in the constituency where they would ordinarily live if they were not in prison.⁷¹ In the same year, Cyprus, which also previously had a blanket ban on voting for prisoners, passed legislation to provide for full enfranchisement of its prison population.⁷²

62. Against this background, 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. 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

⁶⁷ Cm 7170, July 2007.

⁶⁸ Consultation Paper CP/13/08, June 2008.

⁶⁹ Cm 7304, January 2008.

⁷⁰ Goldsmith Review, *Citizenship: Our Common Bond*, March 2008.

⁷¹ Electoral Amendment Act 2006 (<http://www.oireachtas.ie/documents/bills28/acts/2006/a3306.pdf>) (Last accessed 15 July 2008).

⁷² Section 2, Civil Registry (Amendment) Act 2006 (Law 13(I)/2006) (In force February 2006).

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.

Corporal punishment of children (*A v UK*)

72. In our last two reports, we have commented on the case of *A v UK*, one of the longest standing judgments against the United Kingdom subject to the supervision of the Committee of Ministers. In this case, the European Court of Human Rights held that the defence of reasonable chastisement, which provided certain adults with a defence against actual bodily harm (ABH) of a child, was in breach of the right of children to be free from inhuman or degrading treatment and punishment (as guaranteed by Article 3 ECHR).⁸⁴ It is the Government's view that this breach has been remedied. The law has been changed to limit the defence of reasonable punishment in cases involving allegations of common assault, a lesser charge than ABH. The Government's view is that this defence, together with Charging Guidance issued by the CPS on the distinction between common assault and ABH is adequate to provide an effective deterrent against future breaches of the rights of children under Article 3 ECHR. Our predecessor Committee concluded that after the introduction of this, more limited, defence in Section 58 Children Act 2004, there would be "no present incompatibility" with Article 3 ECHR. However, in that Report, our predecessor Committee also concluded that the compromise in Section 58 was likely to be incompatible with the requirements of the UN Convention on the Rights of the Child as interpreted by the Committee on the Rights of the Child.⁸⁵ Against this background, it observed that "there is a risk that in a future case the ECtHR will find that the continued availability of the reasonable chastisement defence to the offence of common assault is in breach of a child's right to dignity and personal integrity under Article 3, their right to physical integrity under Article 8 and/or their right not to be discriminated against compared to adults in relation to their enjoyment of those rights on the grounds of their age."⁸⁶

73. In our last Report we repeated our conclusion that, although, in principle Section 58 Children Act 2004 may provide a remedy for the breach identified in *A v UK*, it was important to consider how the provisions were operating in practice.⁸⁷

Since our last Report:

- The Government has published the outcome of its review of Section 58 of the Children Act 2004 and the outcome of the research project proposed by the Crown Prosecution Service (CPS) on the operation of that Act (the CPS Research Project).⁸⁸
- The Secretariat of the Committee of Ministers has restated its view that Section 58 of the Children Act 2004 conforms, in principle, with the requirements of the Convention and its case law. However: "given the vulnerability of the victims,

⁸⁴ *A v UK*, App. No. 25599/94, Judgment 23 September 1998.

⁸⁵ Nineteenth Report of Session 2003-04, *Children Bill*, HL Paper 161/HC 537, paragraph 143. See also Twelfth Report of Session 2003-04, *Scrutiny of Bills: Fifth Progress Report*, HL Paper 93/HC 603, paragraphs 1.1-1.35.

⁸⁶ Nineteenth Report of Session 2003-04, *Children Bill*, HL Paper 161/HC 537, paragraph 143.

⁸⁷ Second Monitoring Report, paragraphs 98 -99

⁸⁸ Respectively (1) Cm 7232, Review of Section 58 of the Children Act 2004, Department for Children, Schools and Families, October 2007 ; and (2) Reasonable Chastisement – Research Report Case sampling exercise examining the useage of the reasonable chastisement defence, Crown Prosecution Service, July 2007; <http://www.cps.gov.uk/Publications/research/chastisement.html#05> (Last accessed 16 July 2008).

doubts exist as to whether the change in legislation is sufficient on its own to ensure effective deterrence”.⁸⁹

- The Secretariat continues to have doubts about the effectiveness of the law in both Northern Ireland and Scotland. In Northern Ireland, it considers that the question of effective deterrence remains an issue, as in England and Wales. They have requested further information on the application of the law in Scotland, on “justifiable assault”. In Scotland, an assault may be justifiable if it meets a number of criteria, including the duration and frequency of the punishment, its purpose, the child’s age and its effect. Punishment may never be justified where it involves a blow to the head, shaking or the use of an implement.⁹⁰
- The Committee of Ministers last considered this case on 18 September 2008. The Secretariat advised the Committee that “the outcome of the Government’s review of section 58 suggests that the legal position on physical punishment remains difficult to understand for parents and those working with children and parents....a clear understanding of the limits of the defence of physical punishment is required to ensure effective deterrence.” In their conclusions, they advised that their current assessment of the compatibility of Section 58 with the ECHR “is strictly within the limit of the European Court’s present judgment”. They advised that although they could not speculate as to the approach of the ECtHR to a similar case heard today:

[S]tates have an obligation to take general measures to prevent further similar violations. In this context it should be underlined that the European Court has repeatedly stressed that the Convention is a living instrument and that in interpreting its provisions, the European Court must have regard to the changing conditions within a respondent State and within Contracting States generally and respond to any evolving convergence as to the standards to be achieved. In this respect the ratification of the UN Convention on the Rights of the Child by all member states of the Council of Europe (including the United Kingdom), which requires states to protect children from all forms of physical or mental violence (Art 19)...might suggest an evolving convergence”⁹¹

This advice is consistent with the conclusions of our predecessor Committee.

- The Committee of Ministers’ Deputies decided to note “with satisfaction the changes in the legislative framework made following this judgment and the wide range of accompanying awareness-raising measures”.⁹² However, further consideration of this case by the Committee of Ministers has been delayed until 2009 in order to await the outcome of a decision of the Court of Appeal in a

⁸⁹ 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).

⁹⁰ 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).

⁹¹ CM/Inf/DH (2008) 34. Available on the Committee of Ministers website, (Last accessed 7 October 2008).

⁹² CM/Del/Dec (2008) 1035, 22 September 2008. Available on the Committee of Ministers website (Last accessed 7 October 2008).

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.]

Written Evidence

1: Letter from Michael Wills MP to the Chair, 14 August 2007

Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights

I am grateful to the Joint Committee on Human Rights for considering the Government's response to court judgments finding breaches of human rights.

I am writing to respond to the JCHR's recommendations about specific judgments. I will respond separately to your broader recommendations about the way in which the Government implements judgments once I have considered the matter further.

Keegan v UK (App. No. 29967/02)

We recommend that the Government specifically draw the attention of all police forces to the judgment in Keegan v UK, pointing out that they now risk liability in damages if they negligently use their power to enter and search premises.

We recommend that the Government take the opportunity to remind police forces of the importance of compliance with the relevant provisions of PACE and the relevant PACE Codes of Practice.

The Government thanks the Committee for their recommendation. We have now drafted a letter regarding the Keegan judgment, which will be circulated to the Chief Officers of Police in England and Wales and copied to Chairs of Police Authorities. I have enclosed a draft copy of that letter.

Wainwright v UK (App. No. 12350/04)

We note that the amended policy on searches, dealing with the issues raised in this case, was not expected until April 2007, some time after the decisions of the ECtHR. Officials at the Ministry of Justice have recently informed us that this policy has not yet been published. We regret this delay and hope to receive a draft copy as soon as one is available.

I regret the delay in publishing the amended policy on searches. However I am pleased to inform the Committee that the trade unions are currently being consulted on final drafts and it is proposed that the amended policy will be published on 15 August. I have enclosed the documents that make up the amended policy on searches with this letter. They comprise:

- A Prison Service Instruction detailing amendments made to searching policy. Wainwright v UK is mentioned in section 4.
- A document entitled 'searching and the law' which provides general advice about searching.

- A full search form and guidance to be provided to visitors if it is directed that they will be full searched under firearms and/or drugs legislation and/or the Police and Criminal Evidence Act. This is a new form for the National Security Framework.
- Full search guidance and procedures which now emphasises to staff the need to correctly follow procedures.
- A document setting out the powers to search.

Although the enclosed documents are drafts, it is not envisaged that there will be any substantial changes before publication. Once published, the documents will be available to all prisons as part of the Prison Service National Security Framework which is published on the Prison Service internal Intranet.

Martin v UK (App. No. 40426/98)

We consider that it is likely that the amendments to the Service Discipline Acts since 1994 meet the structural reasons for the breach of Article 6 ECHR identified in Martin. However, we do not share the Government's confidence that, provided the composition of the Court is adequate, trials of civilians in a military context, pursuant to either the existing Service Discipline Acts or the Armed Forces Act 2006, will not give rise to a risk of incompatibility with Article 6 ECHR in future. We look forward to receiving further details about the Government's proposals in draft as soon as they are available.

The British armed forces are expeditionary in nature, often operating in remote or hostile parts of the world, including in "failed states" or in international waters where no local system of law exists. Wherever they are in the world, members of the armed forces are subject to the Naval Discipline Act 1957, the Army Act 1955 or the Air Force Act 1955 (collectively known as the "service discipline Acts" or "SDAs"). Under the 2006 Act this will be termed, "subject to service law". In addition, through the operation of the SDAs, servicemen are always subject to the law of England and Wales. This provides all members of the armed forces with the protection of our domestic law and ensures that they may always be dealt with by a system that is ECHR compliant, regardless of how any local system of law operates.

For those civilians that accompany or work with our armed forces outside the United Kingdom the same protection is extended to them by making them subject to the SDAs, and by extension to the law of England and Wales. Under the 2006 Act they are termed "civilians subject to service discipline" (which for the sake of brevity will be used below). This means that these civilians are assured of an ECHR compliant system of law, and one in which, for the majority of civilians subject to service discipline, proceedings will be conducted in their own language and will be familiar to them as their own domestic law.

In the Government's view it is inappropriate to allow the unusual circumstances of the Martin case to detract from the overall benefit of providing that accompanying civilians are subject to service discipline and may therefore be dealt with by courts operating in the service context. The Martin case involved an 18 year old defendant (17 at the time of the offence) who was on trial for a murder committed in Germany. He was returned to Germany from the UK to face court-martial after his father had left the Army. As the charge was one of murder, and the defendant a UK citizen, the domestic courts of England

and Wales had extra-territorial jurisdiction and so the case could have been dealt with by an English civil court. The court-martial was held in Germany which has an ECHR compliant system of law, and so it could alternatively have been tried in the German courts if the German authorities had been requested to, and had, accepted jurisdiction over the case.

However, it is very rare for civilians subject to service discipline to be charged with murder (and indeed, the UK courts would only have jurisdiction over UK citizens, and not all civilians subject to service discipline are UK citizens). The majority of offences with which a civilian will be charged are of a much less serious nature and are offences over which the UK domestic courts have no jurisdiction because there is no extra-territorial dimension to the offences, even if the civilian is a UK citizen. In the absence of a suitable alternative jurisdiction (such as is offered by the military justice system), a civilian who committed such an offence would therefore have to be dealt with by the local courts, assuming a local system of law existed.

Whilst a consequence of making civilians subject to service discipline is the ability to court-martial them, it does mean that if a civilian commits an offence in, for example, a country that does not have an ECHR compliant system of law and where punishments can include beatings, maiming or death, we can afford them the protection of an ECHR compliant system and deal with them in the military justice system. The Government considers that this operates to the benefit of civilians subject to service discipline.

Amendment of the Service Discipline Acts

As the Government explained in the Information Note prepared for the Committee of Ministers, dated 28th February 2007, it is our intention to bring forward three new sets of Courts-Martial Rules under the SDAs towards the end of this year. These Rules will include provision for courts-martial boards to be comprised entirely of civilians when a defendant is a civilian. To pave the way for this the SDAs have already been amended to remove the restriction on the number of civilians who were permitted to sit as board members. The amendments were made in SI 2007/1859 (The Armed Forces (Alignment of Service Discipline Acts) Order 2007) and came into force on the 28th June 2007 following approval of the Order by both Houses of Parliament.

Composition of a court-martial board

The Government accepts that where a defendant is a civilian the "default" position should be that the court-martial board is made up entirely of civilians. Although noting the Committee's reservations, the Government has considered this very carefully and is of the view that this, together with the presence of a civilian judge advocate, means that such a court-martial should not then be characterised as a "military court". The fact that courts-martial are established under armed forces legislation should not detract from the fact that when civilians are tried they will substantively be civilian courts.

Standing/Service Civilian Court

With regard to the Standing Civilian Court (and Service Civilian Court under the 2006 Act), that has similar powers to a magistrates' court in England and Wales and is presided over by a civilian judge advocate with no other members. It is therefore substantively the same as a magistrates' court in England Wales that is presided over by a District Judge. The Government is therefore of the opinion that it should not be characterised as a "military court".

Mixed or military boards

The composition of a court-martial board will be decided upon by the court administration officer ("CAO"). The CAO (who is currently a civilian), is independent of the chain of command and the prosecuting authorities. His decision upon the composition of a court-martial board at the trial of a civilian will be susceptible to judicial review. It is not the MoD's intention to set out in legislation or guidance what they consider would be "exceptional circumstances" that might point to a mixed or military board being appropriate when a civilian is to be court-martialled. The CAO will be informed that, as a result of the judgment in Martin, when any civilian is to be court-martialled the board should be made up entirely of civilians unless there are "exceptional circumstances". However, if the CAO considers that "exceptional circumstances" might exist that might make the inclusion on the board of one or more military members appropriate, he will be able to seek legal advice.

If considering whether "exceptional circumstances" might exist, each case would have to be considered on its own facts and in the light of any judicial decisions. Therefore the development of any general guidance is currently inappropriate. However, to provide an example of where it might be appropriate to move away from the "default" position of an all civilian board is when an ex-serviceman is brought back for the trial of an offence that he is alleged to have committed whilst in armed forces. Indeed in such a case the defendant might prefer to be tried by a mixed or military board as the alleged offence might have an operational context that members of the armed forces would better be able to understand than civilians. The number of possible variations of circumstances is such, however, that the Government does not propose to make it a rule that an ex-serviceman would always (or even usually) be tried by a mixed or military board.

The Committee has noted that the example the minister gave in a previous response (of a contractor accused of a crime, but working in a dangerous area where an inadequate number of civilians are available to form a Court), appears to be based on the same utilitarian arguments that Martin brought into doubt.

Again, it must be stressed that the Government is not saying that the example given suggests that a mixed or military board would be appropriate, simply that it might be. The Government is clear that many hurdles would have to be overcome to demonstrate that the given situation constituted "exceptional circumstances". For example, if the services wished to conduct a court-martial in that situation they would have to be able to demonstrate why it was necessary to hold the court-martial in that place rather than in a less dangerous area. Witness availability would not necessarily be conclusive in this regard as the services would have to be able to demonstrate that the witness could not give evidence in another place;

that he could not give evidence by a video link; that he could not give agreed written evidence; and that his evidence was vital to the case and could not be dispensed with. If these high hurdles could be overcome, the services would then need to be able to demonstrate why the court-martial had to be held so quickly that civilians could not be flown in to sit as board members, and the efforts that had been made to get civilians to where the court-martial was being held.

We hope that it is clear, therefore, that the Government is keenly aware of the need to avoid a simple utilitarian approach to "exceptional circumstances". The Government is clear that, as a result of the Martin judgment, very exceptional circumstances would have to exist to justify anything other than an all civilian board for a civilian defendant.

Hirst v UK (App. No. 74025/01)

We consider that the time taken to publish the Government's consultation paper and the time proposed for consultation is disproportionate.

As the JCHR acknowledges the enfranchisement of prisoners is a difficult and contentious issue. The Government needs to consider carefully and thoroughly how to implement the judgment before putting proposals before Parliament. The Government is currently considering the responses prior to deciding how to take this issue forward in the second stage consultation paper.

We recommend that the Government bring forward a solution as soon as possible, preferably in the form of an urgent Remedial Order. We strongly recommend that the Government publish a draft Remedial Order as part of its second stage of consultation. We would be disappointed if a legislative solution were not in force in adequate time to allow the necessary preparations to be made for the next general election.

The Government has previously stated that it believes a full and proper debate needs to take place, both through the consultation process and in Parliament. A Remedial Order would remove the opportunity for Parliament to have a full and frank debate on this issue, therefore the Government does not believe that a Remedial Order is the best course of action.

Blackstock v UK (App. No. 59512/00)

We recommend that the Ministry of Justice consider introducing a more effective mechanism to monitor the time taken to effect these transfers, taking into account each stage of the decision making and transfer process.

The Ministry of Justice has expanded the prisoner transfer database. The Population Management Section are now centrally collating information recording when prisoners are registered to move, when they are moved and to which establishment.

We look forward to receiving further information from the Ministry of Justice on the potential impact of prison overcrowding on the transfer of prisoners in due course and on whether "arrangements" introduced by the Home Office have led to more speedy transfers.

The arrangements introduced by the Home Office are set out in Prison Service Instruction (PSI) 2006-026. I enclose a copy of the PSI with this letter. The PSI can also be accessed from HM Prison Service website at:

http://psi.hmprisonservice.gov.uk/PSI_2006_26_transfer_allocation_lifers.doc

Prior to the introduction of this PSI, holding prisons were required to negotiate the allocation of lifers with receiving prisons on an individual basis. This meant the holding prison not only had to identify the prison where the appropriate programmes were available, but also to contact a number of prisons to find out whether they actually had space for the prisoner at the required time. Under PSI 26/2006, holding establishments now only have to identify three suitable allocations, and the actual allocation is arranged centrally by the Population Management Section who arrange the transfer as soon as a vacancy is identified.

The PSI was designed to balance the need to ensure that allocation decisions took place on a properly informed basis with the need of a prisoner to be properly allocated. However, as the Committee is aware, population pressures in the prison estate generally have increased since the PSI was introduced. At present, these wider pressures make it difficult to assess accurately how effective the allocation arrangements in PSI 26/2006 have been in terms of increasing the speed with which appropriate transfers are made.

We recommend the Ministry of Justice reconsider whether, in cases where there has been significant delay leading to a risk of incompatibility with the right to liberty, consideration should be given to our proposal that where the circumstances of an individual case justify a reduction, the time the affected prisoner is required to spend in a lower category prison before release on licence could be reduced.

The time that each lifer spends in a lower category prison has to be determined by the time it takes to adequately assess the risk of harm that the prisoner poses to the public in that environment, not by some pre-determined directive. It would not be reasonable or practicable to expect staff in lower category establishments to take short-cuts in their risk assessment procedures because it has taken longer than expected for the transfer to their establishment to take place.

In any event, it is not within the competence of the Secretary of State for Justice to determine how long a lifer may spend in a certain category of prison prior to his or her release. Release is always a matter for the Parole Board. As part of its assessment of whether someone is of a sufficiently low risk to warrant release, the Board will take into account all relevant factors, which may include the amount of time that a lifer has spent in a lower category of prison. It is not open to, nor would it be desirable for, the Secretary of State to require that the Board place greater, or lesser, emphasis on the amount of time spent in different categories of prison for the purposes of its assessment of risk. That would compromise the Board's status as an independent body with the principal features of a court for the purposes of Article 5(4)). Further it would hamper the Board's ability to make a full and unfettered assessment of the risk to the public created by release of a particular prisoner, which is its overriding duty.

Hooper v UK (App. No. 423178/98)

We consider that the quality of the Guidance would have been improved by the inclusion of such clear, practical information on the need to ensure the right of the defendant to participate effectively in the decision to bind-over.

Part III.31.5 of the Practice Direction expressly states that there is a "requirement under section 53 to hear evidence and the parties before making any order. This practice should be applied to all cases in the magistrates' court and the Crown Court where the court is considering imposing a binding over order." The Practice Direction further states that "The court should give the individual who would be subject to the order and the prosecutor the opportunity to make representations, both as to the making of the order and as to its terms. The court should also hear any admissible evidence the parties wish to call and which has not already been heard in the proceedings." The Government therefore considers that the right of the defendant to participate effectively in the decision to bind over is adequately covered by the Practice Direction.

The Committee may wish to note that although the Government can propose a Practice Direction, and the Lord Chancellor's agreement is normally required, the power to make practice directions as to the practice and procedure of the criminal courts under section 74 of the Courts Act 2003 is exercised by the President of the Queen's Bench Division.

Roche v UK (App. No. 32555/96)

We consider that the Internal Guidance issued by the Department will significantly reduce the risk of any incompatibility with Article 8 ECHR in processing requests for information of the type considered in Roche v UK. We regret that this Guidance has not been made publicly available, even if only in a redacted form to protect any legal advice provided to the Department. We are concerned that a copy of this internal guidance may not have been provided to the Committee of Ministers for the purposes of their supervision of this judgment's implementation. We recommend that the Government provide the Committee of Ministers with a full copy if one has not already been provided.

The Government has provided the Committee of Ministers with information within the framework of the Action Plan and the Secretariat have indicated that the information is very positive. As the JCHR is aware, the Committee of Ministers have been informed of the contents of the internal guidance. The Secretariat to the Committee have not requested a copy, although they could have done so, and in the circumstances the Government has not provided one. We will do so if requested.

The only outstanding question on general measures relates to an epidemiological survey begun in 2003 and the appeals procedure. The UK Delegation to the Council of Europe are in contact with the Secretariat regarding these points.

Yetkinserkerci v UK (App. No. 71841/01)

We look forward to receiving regular updates on the average, mean and longest times taken to deal with criminal appeals and look forward to further progress in this regard.

The Committee is aware that statistics at each stage (county court, the High Court and the House of Lords) are collected separately. However the Ministry of Justice will collate statistics after a reasonable period of time has elapsed so the Committee can compare the results with the statistics provided in the Lord Chancellors letter of 14 March.

A v UK (App. No. 25599/94)

We welcome the research project currently being undertaken by the CPS on the application of the Children Act 2004 and look forward to receiving the results as soon as they are available. We consider that the results of the CPS research project could help inform the views of those participating in the review. We hope that the conduct of the review will not prevent the publication of the results of the CPS research project as soon as they are available.

I am pleased to inform the Committee that the CPS has now completed their research project on reasonable chastisement. I enclose a copy of that research report with this letter. A summary of the report has been published and is available on the CPS website at:

<http://www.cps.gov.uk/publications/research/index.html>

The Government still expects the section 58 review to report in autumn. The consultation, which will form part of that review, is available online at:

<http://www.dfes.gov.uk/consultations/conDetails.cfm?consultationId=1494>.

Connors v UK (App. No. 66746/01)

We look forward to receiving a copy of the Government's consultation paper on the rights and responsibilities of Gypsies and Travellers. However, we consider that any further delay in the implementation of the judgment in Connors is unacceptable. We recommend that the Government reconsider using a remedial order to provide a remedy in this case.

The Government agrees with the Committee that the issues raised by the Connors judgment should be resolved at the earliest opportunity. That is why it is our intention to implement the judgment in the Housing and Regeneration Bill, which has been included in the Government's consultation on the draft legislative programme for the next session of Parliament. We remain of the view that including measures in this Bill is a more effective use of Parliamentary time than taking forward a separate remedial order.

We also welcome the Committee's recognition of the steps we have taken to ensure that local authorities are aware of the Connors judgment and its implications for gypsies and travellers living on local authority sites. In advance of legislation being enacted, our draft site management guidance recommends that authorities avoid asserting a right to summary possession, and encourages them to provide additional protection to licensees. Such protection might mean the inclusion of express terms in licence agreements providing additional protection from eviction, or setting up an appeals panel so that licensees can challenge a local authority's decision to terminate a licence.

JT v UK (App. No. 26494/95)

We deeply regret the Government's decision not to pursue an urgent Remedial Order to implement the judgment in JT v UK, as it had originally indicated. We consider that the current provisions of the Mental Health Bill are adequate to meet the terms of JT v UK. We have, however, raised concerns that these provisions raise additional human rights concerns and create a further risk of incompatibility with the Convention.

We note the Committee's regret over the time taken to take legislation to correct the incompatibility in respect of the appointment and removal of nearest relatives under the Mental Health Act 1983. The circumstances of this case were unusual because of the interaction with the Government's proposals for wider reform of mental health legislation.

Having initially explored the use of a remedial order, the Government concluded that the complexity of the issue was such that using the Mental Health Bill it was then planning would provide a more effective way forward. In the event, the Bill was not introduced as quickly as expected. As the Committee notes, the solution adopted in the rather different Mental Health Bill eventually introduced, was much simpler than had originally been under consideration. However, the necessary legislation has now completed its passage through Parliament. The Government welcomes the Committee's conclusion that it adequately addresses the incompatibility identified in JT v UK.

The Government has noted the Committee's further reservations but remains of the view expressed in response to the Committee's Fourth Report of this Session, which made it clear that the Government does not share the Committee's anxieties.

HL v UK (App. No. 45508/99)

We are concerned that the proposals now before Parliament do not yet provide an effective and enduring solution for detention which is incompatible with Article 5 ECHR.

The Government has considered the report of the JCHR and we remain of the view that the safeguards added to the Mental Capacity Act 2005 by the Mental Health Bill are compatible with the ECHR.

R (on the application of Sylvianne Pierrette Morris) v Westminster City Council and the First Secretary of State

R (Gabaj) v First Secretary of State

We are concerned that the Government does not collect statistics on the Housing Act 1996. We recommend that where a legislative provision has been 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.

In light of the Court's focus on the rights of the principal applicant for housing assistance, who will usually be a parent, or a person providing support for the dependant non-national, we do not share the Government's confidence that the

proposal identified by the Minister will remedy the incompatibility identified by the Court of Appeal in Morris.

We are concerned about the significant delay in taking a decision on how to remedy the Convention incompatibility identified in these cases. We recommend that the Government now provide us with a detailed draft of their proposed remedy, together with detailed reasons for their view that treating the immigration status of dependent children or other dependants as relevant to the priority status of an applicant for housing assistance is compatible with Articles 8 and 14 ECHR.

The Government has noted the Committee's concerns; we are continuing work to refine the proposal to ensure that the housing provisions are compatible with the ECHR.

I am unable to provide the Committee with any further detailed draft of the proposed remedy at this stage as discussions within Government are still ongoing. However I will write to the Committee to update you with progress as soon as another draft is agreed.

Although I regret the delay in implementing a remedy to address the incompatibility of section 185(4), the intention is that Government will be in a position to lay a draft Remedial Order when Parliament reconvenes in the autumn to remedy this incompatibility.

2: Letter from the Chairman to Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, 5 June 2008

Monitoring the Government's Response to Human Rights Judgements Finding Breaches of Human Rights

In our recent report on Monitoring the Government's Response to Human Rights Judgements Finding Breaches of Human Rights, my Committee agreed to continue its work scrutinising the Government's responses to judgments against the United Kingdom by European Court of Human Rights and declarations of incompatibility made under Section 4 HRA 1998 (2006-07, Sixteenth Report of Sessions 2006-07, paras 155-163). In that Report, we confirmed our commitment to taking a more systematic approach to our work in this area and to producing regular reports on any significant issues.

In August 2007, we received the first part of the Government's response to that Report, responding to our recommendations in respect of individual cases. In our Annual Report, published in January, we express our concern about the outstanding element of the Government's response to our recommendations on the mechanisms for responding to adverse human rights judgements in Government, which was then over 5 months late. In the Government's response to that Report, Michael Wills MP explained:

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 that 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 judgements 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 judgements. 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.

The Committee is currently preparing for the publication of its next report on this issue, which we expect to consider before the long summer recess. **We would like to give you an opportunity to submit written evidence on the Government's work on the implementation of judgments over the past year. In particular, we would welcome any of the following.**

- **The Government's outstanding response to the systemic recommendations in our last report**
- **Comments or information on the Government's general work on adverse human rights judgements, either from the European Court of Human Rights or the domestic courts, since June 2007. In particular, we would be grateful if you could outline any steps which the UK Government have taken to meet the Recommendation of the Committee of Ministers on efficient domestic capacity for rapid execution on judgements of European Courts of Human Rights (CM(2008)2), adopted in February of this year;**
- **Submissions on progress in respect of any of the cases considered in our last Report, including any updated information provided to the Committee of Ministers;**
- **A brief report on all adverse human rights judgments, either from the European Court of Human Rights or in respect of declarations**
 - **the Government's reaction to the case and any work planned to provide a response to the judgment;**
 - **If no remedial order is planned, we would be grateful for an explanation why the Government considers a remedial order is not necessary;**
 - **If the Government intends to bring forward a remedial order, we would be grateful if you could explain whether the urgent procedure will be used, and if not, why not.**

In order to assist your response, I have attached a provisional list of cases which the Committee plans to consider in its report. We have already written to individual departments in relation to a number of these cases. We plan to publish this letter, and to invite members of the public and civil society to submit evidence to us on these issues.

I have copied this letter to Michael Wills MP, and to the Secretary of State for Foreign and Commonwealth Affairs, as I understand that the Minister, or officials at the Foreign and Commonwealth Office who work closely with the Committee of Ministers on the

implementation of Strasbourg judgments, may also wish to write to the Committee on these issues.

3: Letter to the Rt Hon Jacqui Smith MP, Home Secretary, 28 March 2008

Gault v United Kingdom (App. No. 1271/05, 20 November 2007)

The Joint Committee on Human Rights is continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR).

I am writing to inquire about the Government's response to the judgment in *Gault v United Kingdom*, which became final on 20 February 2008. In *Gault*, the Court found that the reasons provided by the Court of Appeal when refusing the applicant bail pending her re-trial could not be considered "relevant and sufficient reasons for the purposes of Article 5(3)" (para. 23).

I would be grateful if you could let the Committee know:

- 1. What steps the Government has taken to bring the judgment to the attention of the judiciary and prosecuting authorities;**
- 2. Given that bail in Northern Ireland is governed by common law, whether the Government intends to legislate in this area to ensure that relevant and sufficient reasons for the refusal of bail are provided, in order to comply with Article 5(3) ECHR.**

In addition, please would you provide the Committee with any information notes that you have already submitted to the Committee of Ministers on this case, or which you submit in the future.

I would be grateful if you could reply by 11 April 2008 and if an electronic copy of your reply, in Word, could be emailed to jchr@parliament.uk.

4: Letter from Paul Goggins MP, Minister of State for Northern Ireland, 10 April 2008

Gault v. United Kindom (APP. No. 1271/105, 20 November 2007)

Thank you for your letter of 28 March addressed to Jacqui Smith. As I am responsible for Criminal Justice matters in Northern Ireland your letter was forwarded to me to reply.

I set out below my responses to your Committee's two questions.

1. The Government has brought the judgment to the attention of the Judicial Studies Board in Northern Ireland for dissemination to relevant judiciary here. I understand that the JSB has issued a circular to all Crown Court judges and Resident Magistrates drawing their attention to the Gault judgment. I am grateful for your Committee's suggestion that the judgment should also be brought to the attention of prosecuting authorities. Government

has now brought the judgment to the attention of the Public Prosecution Service of Northern Ireland with a request that it be circulated to relevant prosecutors.

2. Bail in Northern Ireland is indeed governed by common law rather than statute. The European Court of Human Rights made no criticism of the applicable common law principles, but found that in this particular case irrelevant and insufficient reasons had been given. The Government considers that drawing the terms of the judgment to the attention of the judiciary and prosecutors is a sufficient measure to deal with the findings and does not consider that legislation is necessary to deal with the findings in Gault.

An information note has been forwarded to the Committee of Ministers on this particular case, a copy of which will be forwarded electronically to the Secretary to the Joint Committee on Human Rights.¹⁵³

5: Letter to Rt Hon John Hutton MP, Secretary of State for Business, Enterprise and Regulatory Reform, 28 January 2008

Copland v United Kingdom (App. No. 62617/00, 3 April 2007)

The Joint Committee on Human Rights is continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR).

I am writing to inquire about the Government's response to the judgment in *Copland v United Kingdom*, which became final on 3 July 2007. In *Copland*, the Court found that the interception and monitoring of an employee's email, telephone and internet use at work, prior to the coming into force of the Telecommunications (Lawful Business Practice) Regulations 2000, violated Ms Copland's right to respect for her private life, as there was no domestic law regulating monitoring at the relevant time (para. 48).

I would be grateful if you could let the Committee know:

- 1. Whether the Government considers that current legislation, particularly the Lawful Business Practice Regulations 2000, satisfies the Convention requirement that the law must be sufficiently clear to give individuals an adequate indication as to the circumstances in which and conditions on which the authorities are empowered to monitor their communications;**
- 2. Whether the Government considers that current law, policy and practice satisfy the Convention requirement that the employee always be notified about possible monitoring or interception of his or her communications.**

I look forward to receiving your response by 11 February 2008.

6: Letter to Chairman from the Rt Hon John Hutton MP, Secretary of State for Business, Enterprise and Regulatory Reform, 30 April

Copland v United Kingdom (App. No. 62617/00, 3 April 2007)

¹⁵³ Not published here

Thank you for your letter of 28 January on the above subject. I apologise for the delay in responding. In your letter you asked if I could let the Committee know:

1. Whether the Government consider that current legislation, particularly the Lawful Business Practice Regulations 2000, satisfies the Convention requirement that the law must be sufficiently clear to give individuals an adequate indication as to the circumstances in which, and conditions on which, the authorities are empowered to monitor their communications.
2. Whether the Government considers that the current law, policy and practice satisfy the Convention requirement that the employee always be notified about the possible monitoring or interception his or her communications.

The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 (SI No. 2699), made under the Regulation of Investigatory Powers Act 2000, came into force 24/10/2000.

The Regulations set out the circumstances in which employers may record or monitor employee's communications (such as e-mail or telephone) without the consent of the employee or the other party to the communication. Employers are required to take reasonable steps to inform employees that their communications might be intercepted (§20).

Guidance on monitoring staff usage of technology under these regulations is available on the BERR website (<http://www.berr.gov.uk/sectors/telecoms/lawful/page10114.html>). The guidance includes the following:

- The requirement to inform staff of interceptions made under the Regulations without consent (for example by a note in staff contracts or in other readily available literature);
- For interceptions outside the scope of the Regulations, the consent of the sender and recipient is required; and
- Such consent may be obtained by inserting a clause in staff contracts and by call operators or record messages at the beginning of a call stating that calls might be monitored or recorded unless third parties objected.

The Government believes that the regulations themselves and the provisions of the related guidance satisfy the ECHR requirement to protect individuals' rights.

The Council of Europe Committee of Ministers, which is responsible under Article 46 of the EUROPEAN Convention on Human Rights for supervising execution of judgements of the European Court of Human Rights, considers that the Government has taken all measures necessary to implement the judgement. The Committee decided on 27 March 2008 that the case should be closed; this will be done in due course by way of a final resolution of the Committee.

I am copying this letter to the Michael Willis MP, Minister of State at the Ministry of Justice.

7: Letter from the Chairman to Rt Hon David Hanson MP, Minister of State, Minister of Justice, 9 January 2008

Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights: *Dickson v United Kingdom* (Grand Chamber)

The Joint Committee on Human Rights is continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR).

I am writing to ask for further information about the Government's response to the judgment of the Grand Chamber in *Dickson v United Kingdom* (App. No .44362/04, Judgment dated 4 December 2007). This case concerned the Convention compatibility of a policy by the Secretary of State on access to artificial insemination by prisoners. The Court held that the policy was incompatible with Article 8 ECHR (the right of the prisoners involved to respect for their private and family life). The Court considered that the policy placed an inordinately high "exceptionality" burden on complainants and, in the absence of any careful weighing of the competing interests by either the Secretary of State or Parliament when setting the policy, fell outside any acceptable margin of appreciation because it prevented a fair balance being struck between competing public and private interests.

In our last report, we recommended that in relation to any Grand Chamber judgment, the Government should write to us to inform us of the outcome of the case within one month of the judgment. In relation to any final judgment, including judgments of the Grand Chamber, we further recommended that the Government should write to us, providing certain information about any remedial action proposed, within three months (Sixteenth Report of Session 2006-07, paras 155 -163).

In view of the Grand Chamber's clear conclusion (para. 82) "that the policy as structured effectively excluded any real weighing of the competing individual and public interests, and prevented the required assessment of the proportionality of a restriction, in any individual case", it is clear that in order to remedy the incompatibility with the Convention identified in *Dickson*, the Policy itself will have to be changed. We would be grateful if you could tell us:

- What changes to its policy on access to artificial insemination for prisoners the Government is considering in light of the judgment, in order to ensure that in each case the Secretary of State carries out a real weighing of the competing individual and public interests and considers whether a refusal of facilities would be a proportionate interference with Article 8 ECHR?
- In view of the significance attached by the Grand Chamber to the fact that "the various competing interests were never weighed, nor were issues of proportionality ever assessed, by Parliament" (para. 83), will the Government now consider bringing forward its new policy in primary legislation (e.g. by way of amendment to the Criminal Justice and Immigration Bill), so as to afford an opportunity for full parliamentary debate?

8: Letter from Rt Hon David Hanson MP, Minister of State, Ministry of Justice, 19 January 2008

Monitoring the Government's response to court judgments finding breaches of human rights: Dickson v United Kingdom (Grand Chamber)

Thank you for your letter of 9 January 2008, in which you asked about the Government's response to the European Court of Human Rights Grand Chamber Judgment in the case of Mr and Mrs Dickson.

Since publication of the judgment in this case officials have commenced a review of the policy on prisoner access to artificial insemination. They have taken legal advice on the impact of the judgment on our current policy and will be presenting proposals for my consideration by March this year. I will make a decision on the way forward in consultation with Ministerial colleagues.

We do not think there will be a need to bring forward the reviewed policy in primary legislation. The review will, however, take account of other legislation, such as the Human Fertilisation and Embryology Bill which will be debated in the Commons later this year.

9: Letter from the Chairman to Rt Hon David Hanson MP, Minister of State, Ministry of Justice, 27 May 2008

Monitoring Human Rights Judgments: Dickson v United Kingdom

Thank you for your response to our letter asking for further information on the Government's response to the Grand Chamber judgment in *Dickson v United Kingdom* (dated 11 January 2008). In that response, you explained that the Government did not consider that any changes to primary legislation were necessary to ensure that the family rights of prisoners and their families as guaranteed by Article 8 ECHR were necessary, as the Government was undertaking a review of its policies on access to artificial insemination for prisoners. You indicated that your officials would be asking you to consider new policy in March 2008.

I would be grateful if you could:

- (a) provide us with fuller details of the review, including all stakeholders consulted and with copies of any submissions to that review from outside organisations;**
- (b) tell us what the outcome of this review has been;**
- (c) provide us with details of the Government's proposed new policy**
- (d) indicate the approximate date by which you anticipate the new policy will be in place.**

If the review has not yet been completed, I would be grateful if you could provide an explanation for this delay.

10: Letter to the Chairman from Rt Hon David Hanson MP, Minister of State, Ministry of Justice, 9 June 2008

Monitoring the Human Rights Judgments: Dickson v United Kingdom

Thank you for your letter of 27 May in which you asked for an update on the Government's response to the European Court of Human Rights Grand Chamber judgement in Dickson v UK.

The Secretary of State and I have approved a policy approach attached at Annex A. In line with the judgment we will consider each case on its individual merits, including the needs of a prisoner's partner, the welfare of the child and any information the couple think is relevant to the assessment. No one consideration will be weighed more heavily than another. This has been passed to the Committee of Ministers at the Council of Europe for consideration at their September meeting. They will decide whether these measures are compatible with the judgment and we will implement them thereafter. In the mean time, new applications are being assessed using the updated approach.

A formal consultation exercise was not undertaken as part of the policy update. Only minor amendments were required to bring the former policy into line with the judgment.

Annex A

Relevant factors in assessing applications for permission to access to artificial insemination facilities

Each case will be considered on its merits. Consent will only be given by the Secretary of State for Justice.

There is no exhaustive list of considerations. The following factors will be taken into account, as well as any other relevant information submitted by applicants:

- The welfare of any child born as a result. Evidence would therefore need to be produced to show that the arrangements for the welfare of the child and the couple's home will be satisfactory.
- Whether both parties want the procedure and medical authorities inside and outside the prison are satisfied that both parties are medically fit to proceed with AI.
- Whether the prisoner's expected release date is neither so near that delay would not be excessive nor so distant that they would be unable to assume the responsibilities of a parent.
- Information about the prisoner's offending history including an assessment of the risk of harm they present as well as other factors which suggest it would not be in the public interest to allow access to AI facilities in the particular case.
- Whether the prisoner and their partner are in a well established and stable relationship which is likely to continue after the prisoner's release.

- Whether the provision of AI facilities and/or the continuation of assisted conception treatment is the only means by which conception is likely to occur.

11: Letter from the Chairman to Rt Hon David Hanson MP, Minister of State, Ministry of Justice, 18 June 2008

Monitoring Human Rights Judgements: Dickson v United Kingdom

Thank you for your response to our letter asking for further information on the Government's response to the Grand Chamber judgement in *Dickson v United Kingdom* (dated 9 June 2008). In that letter you helpfully enclosed the details of the new policy approach which the Secretary of State proposes to adopt to meet the judgement in *Dickson v UK*.

(a) Application of the New Policy Approach

I would be grateful if you could provide us with some further details about the practical implementation of this new policy.

1. Please provide statistics on the number of applications by prisoner for access to assisted reproduction services considered since the decision in this case. In particular:

- **The number of applications considered under (a) the old policy and (b) the new policy approach;**
- **The number of applications granted and refused under (a) the old policy and (b) the new policy approach**

2. What steps, if any have been taken to ensure that prisoners and those responsible for implementing the new policy approach are aware of the changes outlines in your letter to my Committee?

(b) Operation of the New Policy Approach

The new policy approach makes clear that each case must be considered on its merits. It makes no reference to permission being reserved to exceptional circumstances, but the power to consent to treatment of prisoners remains with the Secretary of State. The Secretary of State will apply his discretion, but will take into account a number of factors identified in your revised policy and any information provided by the applicant. The Grand Chamber of the European Court of Human Rights considered that the application of the Secretary of State's earlier policy approach was too restrictive to allow for adequate consideration of the private and family life interests of individual applicants. In their decisions, the Court held that any restriction on the Convention rights of any prisoner, in this case the prisoner, in this case the prisoner's right to respect for his private and family life, must be justified, and that the justification must flow from "the necessary and inevitable consequences of imprisonment or from an adequate link between the restriction and the circumstances of the prisoner in question". Justification cannot be based solely on what would offend public opinion (paragraph 68).

3. Please explain why the Government considers that there are adequate safeguards in place to ensure that the new policy approach will not be applied in a way that restricts

access to artificial insemination for prisoners and their partners to cases where exceptional circumstances exist.

It is clear that under existing law on access to assisted reproduction, all individuals or couples seeking fertility treatment will be subject to an assessment to safeguard the welfare of any child born as a result of their treatment. The HFEA currently advises that this assessment may include questions about:

- Any previous convictions related to harming children
- Contact with social services over the care of existing children
- Serious violence or discord within the family
- Serious drug or alcohol abuse
- Serious mental or physical conditions
- Any risk to the child of inheriting a serious medical condition¹⁵⁴

This is a test which has recently been revisited by the Government in their Human Fertilisation and Embryology Bill.

4. Please explain why the Government considers that it is appropriate in the case of prisoners seeking access to fertility services for the Secretary of State to take the decision on whether the welfare of any child born as a result of treatment is properly safeguarded, rather than an individual licensed provider of fertility services, subject to regulation and oversight by the Human Fertilisation and Embryology Authority (HFEA)?

5. Why does the Government consider that the treatment of prisoners and their partners should not be grounded in statute by amendment to the Human Fertilisation and Embryology Bill currently proceeding through Parliament?

I would be grateful if you could provide us with further information on the proposed list of factors which the Secretary of State will take into account when considering access to treatment.

The list of factors proposed includes an assessment of the risk posed by an individual applicant and any 'other factors' which 'suggest it would not be in the public interest to allow access to AI facilities in the particular case'. This appears to be incredibly broad, particularly in light of the conclusion of the European Court of Human Rights that pure matters of public opinion, or public confidence, should not lead to the automatic forfeiture of rights by individual prisoners.

6. I would be grateful if you could explain:

- **Other than the risk to child welfare posed by the applicants, what factors does the Government consider might be relevant to the question of whether it is in the public interest to prevent an individual prisoner accessing AI facilities?**

¹⁵⁴ http://www.hfea.gov.uk/docs/welfare_of_the_child_final_nov06.pdf See section 13, Human Fertilisation and Embryology Act 1990

- The new policy approach makes it clear that no one listed factor will be given priority over another in determining how the Secretary of State will approach his decision. This means that the fact that an individual prisoner and his partner may have no other means of conceiving a child will carry equal weight as the presence of any other public interest factor which “suggests” that it would not be in the public interest to allow access to artificial insemination. **How does the Secretary of State propose to weigh these unidentified ‘public interest’ factors against the private and family life rights of individual prisoners and their partners?**

The Secretary of State proposes to consider the stability and likely longevity of the relationship between the prisoner and his partner and the length of sentence which an individual prisoner is yet to serve. The Grand Chamber of the European Court of Human Rights cautioned against this approach, noting that although the welfare of the child must be a relevant consideration in determining whether to permit access to AI facilities, this should not go so far as to prevent parents who wish to conceive from doing so where one applicant remains at liberty and capable of taking care of their child until such time as her partner were released (paragraph 76).

7. What matters does the Secretary of State propose to consider in order to determine whether an individual prisoner’s release date is “so distant that they would be unable to assume the responsibilities of a parent”?

8. What matters does the Secretary of State propose to consider in order to determine whether an individual applicant is in a “well established and stable relationship which is likely to continue after the prisoner’s release”?

9. If these matters are to carry the same weight as the fact that a prisoner and his partner may have no other opportunity to conceive, does the Government accept that this policy may be applied in a way which is inconsistent with the guidance of the Grand Chamber of the European Court of Human Rights?

12: Letter from the Chair to Michael Wills MP, Minister of State, Ministry of Justice, 20 September 2007

Monitoring the Government’s Response to Court Judgments Finding Breaches of Human Rights: *Hirst v United Kingdom*

Thank you for your letter dated 14 August 2007 enclosing the Government’s response to my Committee’s recommendations in its report on court judgments finding breaches of human rights.¹⁵⁵ I look forward to receiving your separate response to our broader recommendations on the mechanisms for the implementation of these judgments.

I note the Government’s response to my Committee’s recommendations on the implementation of the Grand Chamber’s judgment in *Hirst v United Kingdom*.

In our Report, we indicated our view that the delay in implementation of the judgment in *Hirst v UK* was disproportionate. The timetable provided to us by Lord Falconer, in his letter dated 27 March 2007, envisaged that the consideration of responses to Phase 1 of the

¹⁵⁵ Sixteenth Report of Session 2006-07; HL Paper 128/HC 728

DCA Consultation on the Voting Rights of Convicted Prisoners would be completed between April – June 2007 and that the Phase 2 consultation document would be published in June 2007. This timetable left a question mark over whether or not the Government would be able to ensure that the reforming measures necessary would be in place by May 2008.

It is clear from your response that the timetable for implementation has shifted again and that the Government are currently considering their position. I would be grateful if you could:

- Provide us with an up to date timetable for the implementation of the judgment in *Hirst v UK*;
- Confirm that the Government intends to publish the responses received during Phase 1 of the consultation in full, in order to inform public and parliamentary debate; and
- Provide us with a copy of the proposed Phase 2 Consultation Document, in draft, if possible.

I would also be grateful if you could confirm that the Government are taking into account the declaration of incompatibility made by the Court of Session in William Smith and the judgment of the Grand Chamber in *Hirst v UK* when planning the timetable for the next election.

As expressed in our Report, my Committee would be disappointed if any general election were to proceed in the absence of reform to meet the incompatibility with the ECHR due to the blanket ban on prisoners' voting.

I would be grateful for your response by 4 October 2007.

13: Letter from Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice, 11 October 2007

Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights: *Hirst v United Kingdom*

Thank you for your letter of 20 September to Michael Wills concerning the Government's response to the European Court of Human Rights judgment on the *Hirst v United Kingdom* case. I am responding as Minister responsible for electoral administration. I apologise for the delay in my response.

In your letter you ask for an up to date timetable for the implementation of the judgment in the *Hirst v UK* case. We are still considering and analysing the responses from the first consultation process. I will write to you outlining a clearer timetable once the analysis of the responses has been completed.

The phase two consultation paper will include a summary of the responses received during the first stage of the consultation process. I am more than happy to make the individual responses available to the Committee, once the phase 2 consultation paper has been finalised.

You also ask for an advance copy of the phase two consultation document. The paper has not been completed yet but I am happy to send you a copy once it has reached the final stages of its preparation.

14: Letter from the Char to Bridget Prentice MP, Parliamentary Under Secretary of State for Justice

Hirst v United Kingdom (App No 74025/01, Judgment of 6 October 2005)

In September 2007, we asked for an updated timetable for the Government's response to the judgment of the Grand Chamber of the European Court of Human Rights in *Hirst v United Kingdom*. In our report *Monitoring the Government's Response to Court Judgments finding Breaches of Human Rights*, we criticised the disproportionate time proposed for consultation on this issue and recommended that a solution be brought forward as soon as possible, if possible by remedial order.¹⁵⁶

In your response dated 11 October 2007, you informed us that the Government was "still considering and analysing the responses from the first consultation process." You indicated that the Government intended to proceed with a two-stage consultation on the voting rights of prisoners and that a copy of the Government's second consultation and the responses to the first stage consultation would be provided to the Committee in due course.

We note that the Government has since submitted a "Revised Action Plan" to the Committee of Ministers. In our Report, we asked that the Government provide us with the Information Notes prepared by the Government for the Committee of Ministers. We have not yet received any information of this type from the Government.

1. I would be grateful if you could provide us with a copy of the latest information provided by the Government to the Committee of Ministers on the implementation of Hirst v United Kingdom, including any Revised Action Plan.

The Council of Europe website indicates:

If a second consultation period is required, it would take place from July to September 2007. If legislation is chosen as the method of executing the judgment, the introduction of draft legislation would take place from May 2008 onwards, with its timing being subject to parliamentary business.

This suggests that the Government is no longer certain that a second stage of consultation on this issue is necessary.

2. I would be grateful if you could tell us whether the Government intends to publish a further, Phase 2, consultation on the voting rights of convicted prisoners?

3. If so:

¹⁵⁶ Sixteenth Report of Session 2006/07, HL Paper 128/HC 728, paras 67-79

- a. **Please explain why there has been such significant delay in publishing responses to the first consultation and any further consultation document; and**
- b. **Provide us with a copy of the Phase 2 consultation document, if necessary, in draft;**
- c. **If this document is not yet ready, please provide a full timetable for publication.**

4. If not, please explain why the Government now considers further consultation is unnecessary.

The judgment of the Grand Chamber was clear. The current blanket ban on prisoner voting in s.3, Representation of the People Act 1983 is in breach of the Convention. The Government accepted this assessment in its first stage consultation. It is, in our view, clear that some form of legislative solution is necessary, whether by primary legislation or remedial order. This view is supported by the declaration of the Court of Session in *William Smith* that this provision is incompatible with the Convention.

5. I would be grateful if you could explain why information collated by the Committee of Ministers indicates that the Government is considering whether legislation should be “chosen as the method of executing the judgment.”

6. Does the Government consider that the judgment in *Hirst v UK* can be implemented without amending s.3 Representation of the People Act 1983 either by primary legislation or remedial order?

We note that the Government proposes that if legislation is necessary, draft legislation will be produced “from May 2008” onwards. This reflects the timetable which the Minister provided to us over a year ago, which anticipated that a Phase 2 consultation would be published in January 2008, with draft legislation being prepared during February – April 2008.

7. I would be grateful if you could provide us with an up to date timetable for any proposed draft legislation or remedial order on this issue.

8. Against this new timetable, does the Government expect their response to be in place before the next general election?

9. If not, please give reasons for the delay.

I would be grateful if you could reply by 11 April 2008 and if an electronic copy of your reply, in Word, could be emailed to jchr@parliament.uk.

15: Letter from Bridget Prentice MP, Parliamentary Under Secretary of State, Ministry of Justice, 11 April 2008

***Hirst v United Kingdom* (App No 74025/01, Judgment of 6 October 2005)**

Thank you for your letter of 28 March 2008 about the steps the Government is taking to implement the *Hirst* Judgment. You have sought an update on a number of issues

including the Government's plan for a second stage consultation; whether that is still required and whether the judgment can be implemented without amending s.3 of the Representation of People Act 1983.

As you will no doubt be aware the Governance of Britain Green Paper had 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 the 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 would be implemented. As the revised implementation plan has not yet been finalised it would not be appropriate for me to pre-empt any decisions that may be taken. However, I will write to you again in due course, providing full answers to the questions that you have raised in your letter.

I am extremely sorry that I can't be more helpful at this stage.

16: Note to Committee of Ministers from the Ministry of Justice, 14 March 2008

Hirst (No.2) v. United Kingdom

Note To Committee Of Ministers

1. The Government remains committed to taking appropriate steps to implement the judgment in *Hirst (No.2) v. United Kingdom*. As the Grand Chamber emphasised at paragraph 82 of its judgment, the margin of appreciation afforded to member states in this regard, while not all-embracing, remains wide. The Government carefully notes too the observation at paragraph 82 of the judgment that in the Court's view there has not been a "substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote".
2. In the light of those two factors, and of the fundamental importance in constitutional as well as human rights terms of the right to exercise the vote, the Government wishes to proceed in a way which ensures that it is compliant with human rights norms but also the United Kingdom's constitutional practice and the notion of British citizenship. The Government has previously submitted to the Committee of Ministers a timetable based on a "two stage" consultation process aimed at establishing the views of the public, electoral administrators and others on how the franchise should be extended and on the wealth of detailed questions about how this would be achieved in practical terms. The first consultation exercise concluded in March 2007. However, since that point the context for the debate about the rights and responsibilities of citizenship, and in particular the exercise of the franchise, in the United Kingdom has changed very significantly.
3. In July 2007 the Government published *The Governance of Britain*, a Green Paper setting out a range of proposals to reinvigorate democracy and rebuild public trust and engagement in politics. The text of the document is available at <http://www.official->

documents.gov.uk/document/cm71/7170/7170.asp. At the core of the Green Paper is a proposal for a national debate on citizenship, and the rights and responsibilities that attach to the concept of being a citizen. The Government committed to taking action to ensure a clearer definition and understanding of the rights and responsibilities that attach to British citizenship:

“But if there has been considerable advance in recent years in terms of the legal process of applying for citizenship, less attention has been paid to the nature of what it means to be a British citizen. There is a general lack of clarity about the rights and responsibilities that come with being granted British citizenship. The current entitlements and responsibilities are complex and confusing, and offer weak incentives to become British for long-term residents of other nationalities.

Under current arrangements there are many areas where the entitlement to rights is not aligned with citizenship. For example, British citizens forfeit their voting rights after a prolonged period of absence from the UK, while qualifying Commonwealth and Irish nationals are able to vote in all elections and EU citizens may vote in local and European elections. The basis on which rights are conferred varies, some depending on residence and others on contribution. A number of rights stem from EU citizenship but few if any are available uniquely to British citizens. Similarly, the position in relation to responsibilities is not clear-cut.

The Government believes that in order to ensure that there is a common bond between all types of citizen in the UK, whether born in the country or naturalised, it is important that there is more widespread agreement and understanding around the nature of the rights and responsibilities that come with citizenship. A clearer understanding of the common core of rights and responsibilities that go with British citizenship will help build our sense of shared identity and social cohesion. The Government has therefore asked Lord Goldsmith to carry out a review of citizenship, looking both at legal aspects and other issues including civic participation and social responsibility.”

4. The Goldsmith Review was published on 11 March 2008

(<http://www.justice.gov.uk/reviews/citizenship.htm>). It concluded that:

“If citizenship should be seen as the package of rights and responsibilities which demonstrate the tie between a person and a country, the present scheme falls short of that ideal. Hence the report proposes the following measures to enhance the meaning and significance of citizenship....Only citizens should have the fullest rights to political participation – and so the right to vote of others should be phased out while retaining the rights of EU citizens living in the UK and Irish citizens who have Irish citizenship by connection to Northern Ireland subject to practical issues discussed in the report.”

5. The Government is considering how to take forward the recommendations in Lord Goldsmith's report. The Government is also exploring the idea of a “Bill of Rights and Responsibilities” that, as noted in *The Governance of Britain*, “could provide explicit recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others. It would build on the basic principles of the

Human Rights Act, but make explicit the way in which a democratic society's rights have to be balanced by obligations." Both of these exercises will stimulate further debate on the exercise of the right to vote and the linkage with the rights and responsibilities of the citizen.

6. The British Government remains committed to carrying out a second, more detailed public consultation on how voting rights might be granted to serving prisoners, and how far those rights should be extended. The Government acknowledges that there has been a delay to the timetable originally envisaged for the conduct of that consultation, which was originally intended to take place in November 2007-February 2008. However, we consider it essential that changes to the law to extend the franchise to those held in custody are considered in the context of the wider development of policy on the franchise and the rights that attach to British citizenship, in order that reform in this fundamental area can proceed in a holistic way.

7. The Government therefore intends to submit further information to the Committee of Ministers shortly on the form and timing of that further consultation in the light of the wider debate which is now taking place. The standard period for formal Government consultation documents is 12 weeks, although the overall consultation process could last for longer depending on the form of the consultation. Following consideration of the outcome of consultation, legislation to implement the Government's final approach will be brought forward as soon as Parliamentary time allows.

17: Memorandum from British Irish Rights Watch, 18 June 2008

Submission to the Joint Committee on Human Rights on Monitoring the Government's Response to Human Rights Judgments

1. British Irish RIGHTS WATCH (BIRW) is an independent non-governmental organisation and registered charity that monitors the human rights dimension of the conflict and the peace process in Northern Ireland. Our services are available to anyone whose human rights have been affected by the conflict, regardless of religious, political or community affiliations, and we take no position on the eventual outcome of the peace process.

2. We welcome this opportunity to respond to the Joint Committee on Human Rights' (JCHR) consultation on Monitoring the Government's Response to Human Rights Judgments.

3. This submission addresses two specific issues raised in the JCHR's call for evidence – investigations of the use of lethal force and delay in such investigations – and some of the general issues identified by the JCHR. We would argue that the government's consistent failure to implement human rights judgments, especially those of the European Court of Human Rights, has ramifications for many others cases, including those that have not resulted in human rights judgments themselves, and cases where there have been, or not been, public or other inquiries.

4. Given the word limit for submissions and the fact that the JCHR is well aware of the relevant judgments, we will not weary the Committee with a recital of what it already knows.

5. In our view, there are a number of reasons why the UK government's record on delivering Article 2-compliant investigations into the use of lethal force – particularly but not exclusively where agents of the state have been implicated in a death – is so poor.

6. The first of these is a deeply-imbedded and very long-standing culture of official secrecy. Despite the Human Rights Act and the Freedom of Information Act, the government, the civil service, and other organs of the state – especially the intelligence services, the armed forces, and the police – have not yet abandoned their first instinct whenever a death occurs for which they may have some responsibility, which is to close ranks and to cover up the truth. To give just one example, the Secretary of State has strongly resisted attempts by the family of Robert Hamill to make the Director of Public Prosecutions a full participant in the Robert Hamill Inquiry. Very recently the Divisional Court in Belfast ruled that the Secretary of State had not addressed the issue of the public interest correctly, thus vindicating the family, whose only desire is to establish the truth about the murder of their loved one. This legal row has significantly delayed the commencement of substantive hearings by the Inquiry.

7. This knee-jerk response in favour of secrecy means that reactions to specific cases lead to the adoption of policies and legislation which affect all cases, with the ultimate, circular outcome that official secrecy becomes yet more entrenched. For example, the government's implacable resistance to an Article 2-compliant investigation into the murder of Patrick Finucane was one of the main drivers for their decision to abolish public inquiries and to replace them with the Inquiries Act, which, as the JCHR has recognised, is incapable of delivering an Article 2-compliant investigation, particularly where agents of the state are involved. Equally, the government's apparent reluctance to be open about the death of Jean Charles de Menezes seems to be behind the inclusion in the Counter Terrorism Bill 2008 of proposals to give the Secretary of State powers to order and inquest without a jury and to appoint someone other than a coroner to conduct an inquest, and to limit disclosure at inquests.

8. Another impediment to Article 2-compliant investigations has been the conservative attitude taken towards the European Convention on Human Rights (ECHR) by the courts. In March 2004 the House of Lords held in the McKerr case that the ECHR had not been incorporated into domestic law. The Human Rights Act 1998, which came into force on 2nd October 2000, merely gave effect to Convention rights in domestic law. Cases arising from incidents which occurred before that date could not vindicate their Convention rights before the domestic courts. Furthermore, claims arising from the procedural rights stemming from Article 2, such as the right to an effective investigation, even if they arose after October 2000, could not engage Human Rights Act protection if the death happened before that date. In July 2005 the English Court of Appeal found in Hurst that the requirement of s. 3 of the Human Rights Act 1998 to read and give effect to all legislation, so far as possible, in a way that is compatible with the Convention rights listed in the Act whenever that legislation may have been enacted, means that public bodies must have regard to Article 2 (which protects the right to life) and other Convention rights even where the death occurred prior to the Human Rights Act's coming into force. The court held that the ruling in McKerr in the House of Lords, was concerned only with the retrospectivity of domestic rights created by the Human Rights Act and cannot exclude international Convention rights. In January 2007 Hurst went to the House of Lords, who held, in a majority decision, that McKerr was right and Hurst was wrong, primarily

because if Hurst were right then the meaning of the term "Convention right" would have to be given different meanings in different sections of the Human Rights Act. These decisions have created a most unfortunate twin-track system, which means that deaths arising after October 2000 are entitled to an Article 2-compliant investigation, but deaths arising before that date are not. Cases falling into the latter group have no other redress than to make an application to the European Court of Human Rights, where they are very likely to fall foul of the Court's refusal to rule on repetitive cases.

9. The delays involved for those seeking Article 2-compliant investigations are intolerable. To take the six cases still under consideration by the Committee of Ministers, the European Court of Human Rights ruled in August 2001 that there had not been an effective investigation into the deaths of Jordan, McKerr, Kelly & Others, or Shanaghan. In August 2002 the Court delivered a similar judgment in the case of McShane, and again in October 2003 in the case of Finucane. The victims in McKerr were killed on 11th November 1982. Those in Kelly and Others died on 8th May 1987. Patrick Finucane was murdered on 12th February 1989. Patrick Shanaghan was killed on 12th August 1991. Pearse Jordan was shot on 25th November 1992. Dermot McShane died on 8th May 1996. None of these families has yet enjoyed an effective investigation, for which they have been waiting for between 26 and 12 years. It is now nearly seven years since the European Court of Human Rights made the first four of its rulings. The United Kingdom's continuing failure to provide an Article 2-compliant investigation into these six cases has added unacceptably to the trauma and frustration the families have endured.

10. Furthermore, these cases are just six amongst many more. There are around 50 contentious cases in Northern Ireland still awaiting inquests, sometimes many years after the death.

11. Perhaps the victims who have suffered the longest delay in Northern Ireland are those of Bloody Sunday. The deaths occurred on 20th January 1972. Thirty six years and two public inquiries later, the victims are still waiting for the verdict on those terrible events, which did so much to deepen the conflict in Northern Ireland. The last day on which the second Bloody Sunday Inquiry heard any evidence was on 27th January 2005, although most evidence had been heard by June 2004. No date is yet set for the publication of the Bloody Sunday Inquiry's report.

12. The case of Patrick Finucane not only demonstrates delay – in his case, over 19 years – but also illustrates bad faith on the part of the government. Notwithstanding the judgment of the European Court in October 2003, nor the recommendation by Judge Cory in the same month for an independent judicial inquiry into the murder, the UK government has failed to honour the cast-iron commitment it gave in the 2001 Weston Park Agreement to deliver such an inquiry. Indeed, the government has recently admitted to the family that in the autumn of 2006 it stopped all preparations for an inquiry under the Inquiries Act because of the family's statement that it would not co-operate with such an inquiry. This decision flies in the face of the European Court's ruling in Jordan et al that:

“Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.”¹⁵⁷

and that:

“The authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin.”¹⁵⁸

This view was reiterated in the Finucane judgment.¹⁵⁹ There is substantial evidence that MI5, the army, and the police were all implicated in this lawyer's murder, as is clearly set out in the Cory Report. The government's intransigent refusal to hold an Article 2-compliant investigation is shameful. As the years ebb away, no fewer than seven relevant witnesses have died: Brian Nelson, an army intelligence agent centrally involved in the case; William Stobie, a Special Branch informer who supplied the weapons; Mark Barr, also thought to have played a part in the murder; former Secretary of State Mo Mowlam, who inaugurated the Stevens 3 investigation; UDA leaders Tommy Lyttle and Andy Tyrie; and Sammy Duddy, who helped to target Patrick Finucane for murder.

13. The UK has flagrantly ignored the Court's injunction that the state must act of its own motion and not leave it up to victims to take the initiative. A string of judicial reviews have followed the Court's 2001 judgment, all brought by the victims. Two of them, McKerr and Jordan, have gone all the way to the House of Lords. Despite this very lengthy and, in terms of the public purse, expensive trail of litigation, the UK has yet to implement the Court's judgments by providing an effective, Article 2-complaint investigation.

14. Nor has the UK provided the “satisfactory and convincing explanation” prescribed by the Court in cases where it has exclusive or substantial knowledge of the facts. Indeed, it has become evident that, even when the government sets up an inquiry into a death, agents of the state have deliberately set out to frustrate those inquiries. For instance, the Billy Wright Inquiry has already encountered serious obstruction from members of former members of the Northern Ireland Prison Service, who destroyed 800 files on prisoners, including that on Billy Wright, and the Police Service of Northern Ireland (PSNI), about whose failure to disclose information the Inquiry produced an Interim Report in January 2008. In June 2008 the Rosemary Nelson Inquiry indicated that it was still seeking significant amounts of disclosure from the PSNI. Certain documents vital to the Bloody Sunday Inquiry's deliberations were never produced in evidence. Such obstruction by agents of the state of state-inaugurated inquiries must call into question both the degree of commitment on the part of the state to establishing the truth by providing effective, Article 2-complaint investigations, and the ability of the state to control the actions of its own agents so that, if its commitment is genuine, it can deliver such investigations.

15. In its long-drawn-out discussions with the Committee of Ministers regarding implementation of the Court's judgments, the UK has put forward a number of mechanisms which it claims that, taken as a package, can deliver an effective investigation. These are examined briefly below.

¹⁵⁷ Jordan. Paragraph 103

¹⁵⁸ Ibid, paragraph 105

¹⁵⁹ Paragraph 67

16. One of these is the office of the Police Ombudsman. The first point to be made here is that the Police Ombudsman was created before the Court's judgments were delivered, so his office can hardly be described as a means of implementation. Secondly, since the Police Ombudsman employs former Northern Ireland police officers as investigators, it cannot be said to fully meet the requirement of independence set out in *Jordan* et al. Since MI5 has taken over responsibility for international counter-terrorism in Northern Ireland, activities which would previously have come under the scrutiny of the Police Ombudsman now come under no independent scrutiny at all.

17. The PSNI's Historical Enquiries Team also fails the test of independence, as it is the police investigating themselves.

18. Inquests are unable to provide effective investigations in deaths arising before October 2000 because of the impact of *McKerr* and *Hurst*. Furthermore, although the fundamental review of inquests carried out by team led by Tom Luce included Northern Ireland, the Inquiries Bill 2006, intended to implement its recommendations, only applies to England and Wales. There is every likelihood that the Bill will eventually be applied to Northern Ireland, but without taking into account of any of the recommendations specific to Northern Ireland, which has a large backlog of contentious inquests arising partly from the fact that for many years during the conflict the scope of inquests was extremely limited and partly from the failure of the UK to implement the rulings of the European Court. If the provisions regarding inquests contained in the Counter Terrorism Bill 2008 are passed, then the ability of inquests to provide an effective investigation will be severely eroded.

19. Another mechanism included in the UK's package was the Inquiries Act 2005. We have already commented on the inadequacies of the Act above.

20. BIRW believe that there are only three viable mechanisms for supplying effective, Article-2 compliant investigations. The first is effective, human rights-compliant policing, which relies more heavily on factual evidence than on intelligence and is properly accountable to, and reflective of, the community it serves. The second is a fully human rights-compliant system of inquests, which applies equally to all deaths, whenever they occurred. The third, which is a necessary failsafe for those cases which are failed by the justice system, is a truly independent public inquiry mechanism which is fully human rights-compliant. These are the fundamental building blocks for ensuring that, wherever possible, human rights violations are avoided in the first place and that the machinery is in place to allow for the prompt and full implementation of human rights judgments.

18: Letter from British Irish Rights Watch to Chairman, 12 October 2007

We write in response to the publication by the Joint Committee on Human Rights of the report *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*.

As you are no doubt aware, British Irish Rights Watch (BIRW) is an independent non-governmental organisation that monitors the human rights dimension of the conflict and the peace process in Northern Ireland. Our services are available to anyone whose human rights have been affected by the conflict, regardless of religious, political or community

affiliations, and we take no position on the eventual constitutional outcome of the peace process.

We welcome the role of the Joint Committee on Human Rights in monitoring the Government's response to judgments from the European Court of Human Rights. In particular, we were interested to read the Joint Committee's findings in relation to the UK Government's failure to implement measures to effectively execute the judgments received in six cases relating to Northern Ireland: *McKerr, Jordan, Kelly & Ors, Shanaghan, McShane and Finucane*.

BIRW is concerned at the sluggishness shown by the UK Government in providing proper national-level redress where there has been a violation of the European Convention. We agree that the implementation of judgments would benefit from a more centralised and coordinated approach and believe that this role could be provided by the new Ministry of Justice. We also agree with the JCHR's recommendation that the Government's response to the remedying of breaches should be considered with more urgency in future.

With regard to the failure to implement judgments relating to cases from Northern Ireland we note that the Committee of Ministers passed a further interim resolution on the cases of *McKerr and Ors*, concerning the right to an effective Article 2 compliant investigation. The Committee urged the United Kingdom to "achieve concrete and visible progress"¹⁶⁰ in the investigations into these cases and decided to continue to monitor the UK's implementation of these judgments at regular meetings until they are resolved.

As noted by the Joint Committee on Human Rights, in January 2007, the House of Lords considered in the cases of *Hirst, Jordan and McCaughey* the issue of whether deaths prior to the coming into force of the Human Rights Act were eligible for an inquest under Article 2, and then, what the nature of that inquest should be. BIRW had previously argued, in a third party intervention in the case of *McKerr*, that a twin-track system would develop if deaths occurring before October 2000 were treated differently from those arising after the Human Rights Act came into force. The House of Lords held that *McKerr* was right and *Hirst* was wrong; the result is that an inquest into a death, which occurred prior to the Human Rights Act, can only determine "by what means" a person met his or her death, while inquests held after the incorporation of the Act can consider "in what circumstances" the death came about. In the case of *McCaughy*, it was decided that where the death occurred prior to the Human Rights Act, unless a Public Interest Immunity certificate applied, the police must disclose all relevant material to the coroner.

The problems within the coronial system in Northern Ireland cannot be underestimated. The publication of the Luce Review into Death Certification and Investigation in England, Wales and Northern Ireland found a system in disarray, with the power of the coroner being extremely limited, and permitting only an examination of the direct cause of a person's death, rather than the circumstances surrounding their death. BIRW remain consistently disappointed by the Government's failure to acknowledge and implement the

¹⁶⁰ Interim Resolution CM/ResDH(2007)73, Action of the Security Forces in Northern Ireland, (Case of *McKerr* against the United Kingdom and five similar cases), Measures taken or envisaged to ensure compliance with the judgments of the European Court of Human Rights in the cases against the United Kingdom listed in Appendix III, Adopted by the Committee of Ministers, 6 June 2007

Luce review recommendations and the fact that Northern Ireland has been excluded from draft legislation to reform the coronial system.

We welcome the continued scrutiny provided by the Joint Committee on Human Rights on these issues and ask that the Joint Committee encourages the Government to respond to the European Court's judgments more promptly. As set out in our previous submission to the Joint Committee, urgent reform is needed of the mechanisms tasked with providing families with answers regarding the death of their loved ones.

19: Memorandum from Dame Mary Marsh, Director and Chief Executive, National Society for the Prevention of Cruelty to Children, 4 July 2008

Monitoring the Government's response to Human Rights Judgments - with reference to supervision of execution of the "A v UK" judgment of the European Court

1. The NSPCC is the UK's leading child protection charity and the only non-governmental organisation with statutory child protection powers.
2. It is more than 13 years since a young English boy, "A", made his application to the European Court, and almost 10 years since the Committee of Ministers started to supervise execution of the judgment A v UK (September 23 1998). This period represents more than half the childhood of a whole generation of the UK's 13½ million children. I am sure the Joint Committee shares our concern at the delay in effective execution of this landmark judgment for children.
3. Following the release of the judgment, in 1998, we called a meeting of child protection, professional and other organisations to discuss how best to work for effective legal protection for children in compliance with human rights standards, in the light of A v UK. As a result, an Alliance was formed (the Children are unbeatable! Alliance) with more than 400 organisations in the children's field advocating for the complete removal of what was then termed the "reasonable chastisement" defence, to give children equal protection under the law on assault. The Alliance includes organisations representing all the elements of the UK's multi-disciplinary child protection system (for details see www.childrenareunbeatable.org.uk).
4. We are very concerned at the lack of effective execution of this judgment. Since May 2007, we have made a series of submissions, together with the Children are unbeatable! Alliance, to the Committee of Ministers - responsible for supervision of execution of the judgment. The Committee of Ministers has also received submissions from the four Children's Commissioners for the UK, and from Children First! in Scotland. We believe these provide clear evidence that the changes in legislation adopted across the UK to date are inadequate to provide the adequate protection including effective deterrence, for children's article 3 rights, required by the judgment. These submissions are in the public domain and we are making them available to the Joint Committee.
5. The legislation allows parents and certain other carers to continue to justify assaults on children, which the European Court would undoubtedly find in breach of article 3, as "reasonable punishment" or – under Scottish law – as "justifiable assault".

6. In May 2007 we wrote to the Committee of Ministers with data indicating “the shocking scale of violence against children in their homes and families, which breaches their article 3 rights and underlines the huge importance of the outcome of the Court’s judgment in *A v UK*”. This submission included information from an analysis of calls to our national child helpline, ChildLine, between 1 April 2006 and 31 March 2007. Physical abuse is the third most common reason that children call ChildLine, after bullying and family tensions. In 2006/7, ChildLine counselled 14,561 children about physical abuse. Eighty-eight per cent of these children had been assaulted by a family member (33% by mothers, 29% by fathers and 11% by both parents). Sufficient data was supplied by 5,262 of the children to record that of these callers, 52% mentioned being hit with an object, 24% experienced ‘wounding’ and 45% being bruised (see references to this and other research in the submission).

7. In October 2007, we wrote again to the Committee of Ministers, enclosing a detailed and authoritative legal Opinion. This concluded that even when considered in conjunction with the revised Charging Standard, section 58 of the Children Act 2004 cannot be said to effect compliance with the judgment and with the UK’s article 3 obligations. We emphasised in our submission: “... We do understand that member states are allowed a margin of discretion as to how they execute judgments of the Court. But we remain confident that in supervising the execution of this judgment, so fundamental to the rights of children, the Committee of Ministers will recognise that this margin must not allow states to offer children a weaker degree of protection under the criminal law – and thus weaker protection from potential breaches of article 3 – than adults. This would be a travesty of human rights and justice”.

8. In November 2007, we made a further submission to the Committee of Ministers, concerning the Review of the operation of section 58 carried out by the Department for Children, Schools and Families. We wrote: “It is a matter of regret that this review took no account of the UK’s human rights obligations, including in relation to effective execution of the European Court judgment, and that in issuing the report of the Review, the Government reiterated its commitment to maintain this inadequate legislation”. We wished to ensure that the Committee of Ministers was aware that the overwhelming majority of those who responded to the Government’s public consultation, including many professional organisations, do not consider that section 58 has in reality improved the protection of children. We enclosed the Department’s own published “overview” of consultation responses. Widely held concerns, all relevant to the supervision of execution of the *A v UK* judgment, include that the law has not deterred parents from using “unacceptable” levels of physical punishment, that it is confusing, makes it difficult to make sound judgments about potential child abuse incidents and is potentially discriminatory. We concluded: “In defending the legislative status quo, the Government appears to ignore completely the results of its own consultation and to rely only on its polling of parents. Unsurprisingly, given traditional attitudes to child-rearing in the UK, a substantial majority of parents oppose full removal of the ‘reasonable punishment’ defence to give children the same protection as adults from assaults, including from assaults which would be found to breach article 3. But we hope the Committee [of Ministers] will confirm that the state of public, or parental, opinion does not influence human rights standards, nor affect in any way the UK’s human rights obligations, including its obligation to execute effectively this nine year-old judgment”.

9. We wrote again in February 2008, with a further detailed legal Opinion, taking into account the recent Northern Ireland High Court judgment on a judicial review brought by the Children's Commissioner. The Opinion emphasises that the judgment, which is being appealed, offers no support for the UK Government's contention that current law in England, Wales and Northern Ireland adequately executes the A v UK judgment.

10. The Committee of Ministers also received a submission in February 2008 from Children 1st, the Royal Scottish Society for the Prevention of Cruelty to Children, providing detailed information on the scale of physical violence against children in Scotland. It concludes: "The information above demonstrates that many children in Scotland are suffering breaches of their rights under the European Convention because of the lack of an effective legal framework to deter degrading punishment. Our professional and considered view is that many cases never come to court because there is acceptance of degrading physical punishment as lawful chastisement. Rigorous supervision of the execution of the judgment in A v UK could have a huge impact on the care and protection of children in Scotland and the realisation of their rights in this regard".

11. In March 2008, we provided the Committee of Ministers with further legal analysis concerning new Sentencing Guidelines which came into force in March and which appear to weaken the protection of children from potential breaches of article 3. The Sentencing Guidelines Council published new sentencing guidelines for assaults generally and for assaults against children in particular.¹⁶¹ The Opinion advised:

"The difference in the approach taken in the two different sets of guidance reinforces the sense that physical punishment of children is not taken very seriously;

The guidance on assaults on children advocates an approach which can engage the 'reasonable punishment' defence - here through the sentencing (as opposed to charging) process - in cases of Actual Bodily Harm (ABH) even though it purports to apply only to common assaults; and

The guidance illustrates how treatment of a severity which could well cross the Article 3 threshold could lead to an outcome which is (for all practical purposes) deemed not to be a conviction or to require punishment.

That further reinforces the view that the UK has not properly given effect to A -v- UK."

12. International human rights standards: The European Court's A v UK judgment referred to articles 19 and 37 of the UN Convention on the Rights of the Child (UNCRC). In supervising execution of the judgment, we believe that the Committee of Ministers should take account of the relevant international human rights standards. The Committee on the Rights of the Child has told the UK Government twice, in 1995 and 2002, that the law allowing "reasonable punishment" is in breach of the UNCRC; in 2002 the Committee

¹⁶¹ <http://www.sentencing-guidelines.gov.uk/docs/Assaults%20and%20other%20offences%20against%20the%20person.pdf>

<http://sentencing-guidelines.gov.uk/docs/overarching%20principles%20assaults%20on%20children%20and%20cruelty%20to%20a%20child.pdf>

particularly criticised the Government's proposals to limit rather than to remove the "reasonable chastisement" defence, on the grounds that they "do not comply with the principles and provisions of the Convention ... particularly since they constitute a serious violation of the dignity of the child". The Committee on Economic, Social and Cultural Rights came to the same conclusion in 2002. In 2005, the European Committee of Social Rights concluded that UK law was not in compliance with article 17 of the European Social Charter because of the existence of the defence.

13. The Committee on the Rights of the Child issued its General Comment No. 8 on "The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment", which confirms the Committee's consistent interpretation of the UNCRC as requiring prohibition of all corporal punishment. The Committee states that it is issuing the General Comment "to highlight the obligation of all States parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children and to outline the legislative and other awareness-raising and educational measures that States must take".

14. The General Comment states: "Article 37 of the Convention requires States to ensure that 'no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment'. This is complemented and extended by article 19, which requires States to 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'. There is no ambiguity: 'all forms of physical or mental violence' does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them."¹⁶²

Conclusion

15. We hope that the Joint Committee will emphasise the importance and the urgency of achieving effective execution of the *A v UK* judgment throughout the UK. We believe 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 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; they have the right to, at the least, equal protection from breaches of article 3.

16. There is a parliamentary opportunity to achieve complete removal of the "reasonable punishment" defence, and thus achieve effective legislative execution of the *A v UK* judgment in England and Wales, during the remaining stages of the passage of the Children and Young Persons Bill. We hope the Joint Committee will recommend this, and similar measures in Scotland and Northern Ireland, to bring the UK into compliance with its human rights obligations.

¹⁶² Committee on the Rights of the Child, General Comment No. 8, 21 August 2006, CRC/ C/GC/8, "The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19;28, para. 2; and 37, inter alia)", paras. 2 and 18

We are making copies of all the submissions referred to above available to the Joint Committee.

20: Memorandum from the Children's Commissioner for England, 4 July 2008

Monitoring the Government's response to Human Rights Judgments - with reference to supervision of execution of the "A v UK" judgment of the European Court

I am writing to alert the Joint Committee to my deep concerns at the inadequacy of the measures taken to execute the 1998 A v UK judgment and to provide children across the UK with effective protection of their Article 3 rights.

In June 2007, the Children's Commissioners for England, Northern Ireland, Scotland and Wales made a joint submission to the Committee of Ministers of the Council of Europe, responsible for supervision of execution of the judgment, indicating our concern at the inadequate measures taken. This submission which is attached as an annex concluded:

"The Children's Commissioners for England, Northern Ireland, Scotland and Wales are of the opinion that the measures taken by the UK Government to implement the judgment of the European Court of Human Rights in the case of A v UK are not adequate to remedy the Article 3 violation, including providing effective deterrence.

"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 Commissioners for England, Northern Ireland, Scotland and Wales believe that in order to ensure that children are free from torture, inhuman or degrading treatment, as guaranteed by article 3 ECHR, the UK Government should extend to children the same rights to protection from assault as are currently enjoyed by adults. This would mean removing the defences of 'reasonable punishment' and 'justifiable assault'. This should be accompanied by a large-scale public education campaign to raise awareness of the change in law and with significant investment in promoting positive parenting and alternatives to physical punishment."

I hope that the Joint Committee will express concern not only at the lack of adequate execution, but also at the very long delay in achieving this fundamental protection for children: it is almost 10 years since this landmark judgment was issued by the Court.

21: Letter from the Chair to Rt Hon Jack Straw, Secretary of State for Justice and Lord Chancellor, 27 May 2008

Monitoring Human Rights Judgments: Declarations of Incompatibility R (Wayne Thomas Black) v Secretary of State [2008] EWCA 359

In our recent report on Monitoring Human Rights Judgments, my Committee agreed to continue its work on scrutiny of the Government's responses to declarations of

incompatibility made under Section 4 HRA 1998 (2006-07, Sixteenth Report of Session 2006 -07, paras 155 - 163).

The importance of swift and consistent Government reaction to declarations of incompatibility was highlighted recently by the Grand Chamber of the European Court of Human Rights judgment in *Burden v UK*.¹⁶³ In that case, the Court concluded that the Government's reaction to declarations of incompatibility would be key to establishing whether such declarations could be considered effective:

[I]t cannot be excluded that at some time in the future the practice of giving effect to the national courts' declarations of incompatibility by amendment of the legislation is so certain as to indicate that section 4 of the Human Rights Act is to be interpreted as imposing a binding obligation. In those circumstances, except where an effective remedy necessitated the award of damages in respect of past loss or damage caused by the alleged violation of the Convention, applicants would be required first to exhaust this remedy before making an application to the Court. This is not yet the case [...]¹⁶⁴

In February, the Court of Appeal declared that Section 35, Criminal Justice Act 1991 is incompatible with Article 5(4) ECHR in so far as it provides for the involvement of the Secretary of State in early release decisions about prisoners serving 15 years or more (paragraph 17).

I would be grateful if you would tell us:

- (a) whether there is currently any appeal pending against this decision;**
- (b) if not, whether the Government intends to amend Section 35 to remedy this incompatibility (and if not, why not);**
- (c) whether the Government plans to remove this incompatibility by way of a remedial order (and if not, why not).**

22: Letter from Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, 5 June 2008

Monitoring Human Rights Judgments: Declarations of Incompatibility: R (Wayne Thomas Black) v Secretary of State [2008]

Thank you for your letter of 27 May.

The Government is seeking to appeal to the House of Lords in Black and papers have been lodged to that effect.

I trust that this provides the information you require but if there is anything further please to write again.

¹⁶³ Application No 13378/05

¹⁶⁴ Judgment dated 28 April 2008, paras 44-45

23: Letter from Baroness Andrews OBE, Parliamentary Under Secretary of State, Department of Communities and Local Government

Housing and Regeneration Bill: Government Amendments to Part III

I am writing to give advance notice of a number of Government amendments to Part III of the Housing and Regeneration Bill, which I am tabling today.

The amendments will remedy a provision of the homelessness legislation (section 185(4) of the Housing Act 1996) which has been declared incompatible with Article 14 taken with Article 8 of the European Convention on Human Rights by the courts in the cases of *Morris v Westminster City Council* (Court of Appeal 2005) and *Gabaj v Bristol City Council* (High Court 2006). Section 185(4) applied to England and Wales. The amendments will also amend section 119(1) of the Immigration & Asylum Act 1999, which makes similar provision in respect of the homelessness legislation that applies to Scotland and Northern Ireland.

Section 185(4) of the 1996 Act and section 119(1) of the 1999 Act prohibit a housing authority from taking account of a person from abroad who is ineligible for assistance (including a dependent child) when deciding whether another eligible person (i.e. a homeless applicant) is homeless or has a priority need for accommodation.

The basis of the declaration was that section 185(4) discriminates unjustifiably against British citizens who have a dependent child or pregnant spouse because the effect is that British citizen is denied the provision of accommodation for himself and his family.

The Government is committed to remedying this incompatibility by ensuring that British citizens and EEA nationals in this situation will be entitled to accommodation. However, the Government's view is that persons from abroad who are here illegally or on the basis that they will have no recourse to public funds should not be able to convey entitlement to, or priority for, social housing on another person. Consequently, these amendments (which apply UK wide) provide that British citizens (and EEA nationals) whose application for homelessness assistance depends on household members who are here illegally or on the basis they will have no recourse to public fund will be entitled to be provided with accommodation, but the local housing authority (in England, Wales and Scotland or the Housing Executive in Northern Ireland) will be required, so far as practicable, to end the homelessness duty by arranging an offer to accommodation from a private landlord. The offer will provide that accommodation is available to the applicant for at least 12 months and the local authority will need to be satisfied that the accommodation is suitable and that it is reasonable for the applicant to accept the offer. These amendments also provide that applicants provided with accommodation on this basis (i.e. where they are owed the homelessness duty through reliance on a person who is here illegally or has leave with a condition of 'no recourse') will not attract any preference or priority for social housing as a consequence of being owed the homelessness duty.

These amendments also address a recommendation made by the Joint Committee on Human Rights (JCHR) in its recent report on the Housing and Regeneration Bill.

I hope this explanation is helpful. If you have any questions regarding these amendments, or any other issues on the Bill, please do not hesitate to contact me.

I am writing in similar terms to all Peers who have participated to date in the Lords' stages of the Housing and Regeneration Bill.

24: Letter from the Chairman to Baroness Andrews, Parliamentary Under Secretary of State, Department of Communities and Local Government, 7 July 2008

Housing and Regeneration Bill

Thank you for your letter dated 17 June 2008, giving advance notice of the Government's proposed amendments to deal with the declarations of incompatibility made in respect of Section 185(4) of the Housing Act 1996, in the cases of Morris and Gabaj.

As you are aware, this issue is one which my Committee has followed for a significant period of time. In June 2007, we called on your Department to provide us with any legislative solution the Government proposed, in draft, as soon as possible.¹⁶⁵ Against that background, it is unfortunate that we were given notice of these amendments on the day that they were due to be tabled and only three working days before they were tabled for debate in the House of Lords.

During that debate, Baroness Hamwee called upon my Committee to express its view on these clauses before this Bill leaves the House of Lords (HL Deb 23 June 2008, GC 525). Our general practice is to raise any concerns that we may have with Government before reporting those concerns to both Houses. **We would be grateful if you could provide us with the following further information about the Government's proposals for reform before the conclusion of the Report stage debate on these provisions in the House of Lords. In particular, we would be grateful for a fuller explanation of the Government's view that these proposals will be compatible with the right to enjoy respect for private and family life without unjustified discrimination on the grounds of nationality or immigration status (Article 8 and Article 14 ECHR). Lord Onslow has tabled an amendment which will allow the Minister to address our questions during Report Stage in the House of Lords.**

(a) If any explanatory notes have been prepared to accompany these amendments, including the Government's assessment that they are compatible with Convention rights, we would be grateful for a copy, and if the Government could arrange for their publication before Report stage in the House of Lords?

We have previously asked the Minister for statistics on the number of cases to which Section 185(4) has been applied since that provision was declared incompatible with the rights of British citizens to enjoy respect for private and family life without discrimination. We were informed that these types of statistics were not kept. In Grand Committee, you explained that although specific numbers are not available, "the information that we have shows that we are talking about a very small number of people". On the other hand, we

¹⁶⁵ Sixteenth Report of Session 2006-07, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, HL Paper 128/HC 728, paragraph 134

have previously reported evidence which we received from the Housing Law Practitioners Association, that Section 185(4) continued to be applied “regularly.”¹⁶⁶

(b) Please explain what information the Government has to support your statement that Section 185(4) affects a “very small number of people”. I would be grateful:

- **If copies could be provided to the Committee and published before Report stage; and**
- **If you would explain how the number of individuals affected influenced the Government's approach to this declaration of incompatibility.**

In Grand Committee, you mentioned that the JCHR had been provided with information about a previous proposal which the Government had considered in response to these judgments. That proposal would have placed a temporary duty on local authorities to secure accommodation in order to allow the family to regularise the immigration status of the member who was subject to immigration control. We expressed some concern that we had very little detail about this proposal to allow for detailed scrutiny.¹⁶⁷ In light of the breadth of the judgment in *Morris*, we did not share the Government's confidence that this proposal would remedy the incompatibility identified in that case.

Under the Government's current proposal, local authorities will no longer be under a duty to disregard family members who are subject to immigration control when assessing whether an applicant is homeless or in priority need (for the purposes of assessing the extent of that authority's duties towards the applicant). However, where an applicant for housing assistance is assessed as being homeless or in priority need as a result of his or her relationship with a person who is subject to immigration control, or who has leave to remain only 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 for that applicant an offer of at least 12 months tenancy with a private landlord on a shorthold assured basis. This is in contrast with other applicants assessed to be homeless and in priority need, where an offer of similar accommodation by a private landlord will not discharge the duty owed to the applicant by the local authority unless the applicant signs a form of waiver by which he or she accepts that the offer terminates the duty owed to him or her.¹⁶⁸

In effect, although the duty to accommodate or provide assistance and advice may now apply to this group of applicants, the duty may be discharged by providing a lesser degree of support than to homeless people in priority need whose dependants are not subject to immigration control. The Government's proposals actually create two distinct duties: one general duty and a special, more limited, duty which will apply to those whose eligibility is determined by their relationship with a family member or other dependent who is subject to immigration control.

In *Morris*, the Court of Appeal accepted that the policy aim of the Government – to avoid benefits tourism – was a legitimate one, but that in light of the family orientated aims of

¹⁶⁶ *Ibid*, Appendix 36

¹⁶⁷ *Ibid*, paragraph 132

¹⁶⁸ Section 193 (7D), Housing Act 1996

this part of the Housing Act 1996, the justification for any discrimination would need to be “very weighty” and stronger than the evidence presented by the Government.

(c) Please explain the Government's view that maintaining a distinction between those eligible for homelessness assistance as a result of their relationship with vulnerable family members or other dependents subject to immigration control and other eligible applicants is justified and compatible with the right to enjoy respect for private and family life without discrimination.

25: Letter from Liam Byrne MP, Minister of State, Home Office, 8 August 2008

Human Rights Act: Declarations of Incompatibility

You wrote to the Home Secretary on 23 January requesting an update on Government's response to the Declaration of incompatibility in *R (Baiai) v Secretary of State and Another* [2008] EWHC 823. I am sorry that you have had to wait so long for a reply but as you may be aware, the appeal in Baiai was heard in the Court of Appeal from the 30th April to 2nd May, and the judgment was not handed down until the 23rd May. Therefore, it seemed appropriate to wait until the outcome of this case in the Court of Appeal before replying to your letter. However, I acknowledge that there has been a further delay, and I apologize for any inconvenience caused.

Having lost our appeal in the Court of Appeal, the Government is now pursuing an appeal to the House of Lords. Although leave to appeal was granted this week, I am told that the case is unlikely to be heard in the House of Lords before April or May 2008.

The Government has not sought to appeal the Declaration of Incompatibility in respect of Article 14. Accordingly, we accept that we need to remedy this incompatibility as soon as practicable. To this end, the Government has entered into communications with the Church of England and the Registrar Service. For example, we are discussing with the Church of England a possible revised scheme in which those seeking Church weddings have to obtain a certificate of approval which would then be verified by a registrar before the banns are read.

However, the Government does not consider that it is appropriate to finalize the precise manner in which the scheme will be altered to extend to the Church of England until the issues surrounding the legality of the various possible schemes by the House of Lords. Similarly 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.

I acknowledge that the discrimination highlighted by the declaration of incompatibility will continue for longer as a consequence of our decision to postpone finalizing the scheme. However, in our view, it is unavoidable for reasons outlined above. Further, it is notable that, following the Court of Appeal's judgment in Baiai, the Government has been operating an interim guidance scheme, under which there is no longer a blanket policy of 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. It is hoped that this interim guidance scheme will go some way towards mitigating the discrimination identified in the declaration of incompatibility.

26: Letter to Liam Byrne MP, Minister of State, Home Office, 28 March 2008

Baiai v Secretary of State for the Home Department [2006] EWHC 823

In *Baiai*, the UK's domestic courts held that domestic provisions which required all marriages outside the Church of England to be subject to a Certificate of Approval, were incompatible with Article 14 ECHR taken with Article 9 ECHR as they made an unjustified distinction on the grounds of religion (*Baiai* case). The Government has not appealed this decision and is currently discussing extending the Certificate of Approval scheme to cover the Church of England.

In your letter dated 14 August 2007, you told us that the Government was not planning to meet the declaration of incompatibility in this case until the outcome of the Government's appeal to the House of Lords on wider issues:

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.

You went on to explain that the Government was consulting on a distinct Certificate of Approval regime for the Church of England:

We are discussing with the Church of England a possible revised scheme in which those seeking Church weddings would have to obtain a certificate of approval which would then be verified by a registrar before the banns are read.

1. The Government has accepted that the Certificate of Approval scheme is discriminatory because it excludes Church of England marriages. Why does the Government consider that administrative convenience is an appropriate reason to delay removing the ongoing discriminatory effect of these provisions?

2. Under your current proposal, it appears there will still be a difference between the rules relating to Church of England marriages and those for other marriages. If this is the case, please explain why the Government considers that this distinction will be compatible with Article 9 and Article 14 ECHR?

I would be grateful if you could reply by 11 April 2008 and if an electronic copy of your reply, in Word, could be emailed to jchr@parliament.uk.

27: Letter to the Chairman from Liam Byrne MP, Minister of State, Home Office, 28 May 2008

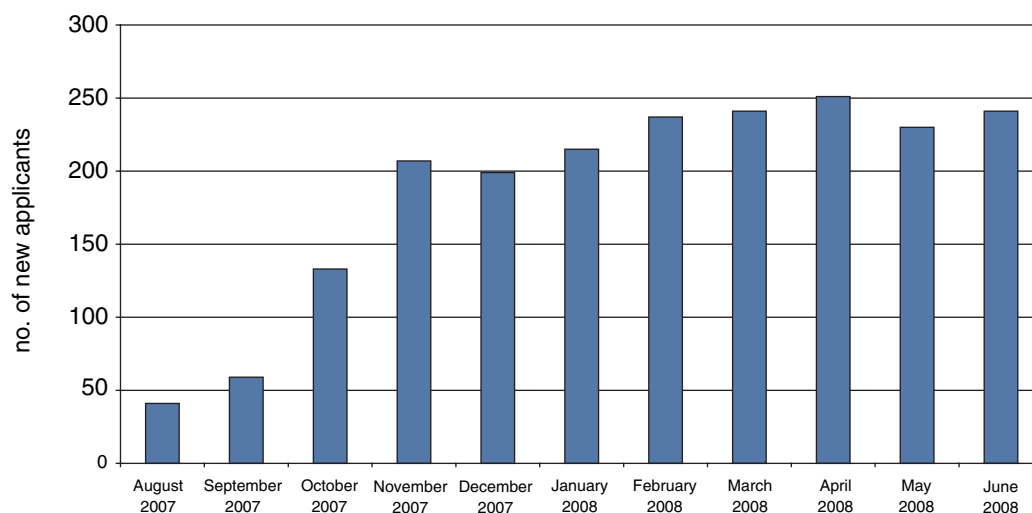
Thank you for your letter of 28 March about the implications of the case of *Baiai* [2006] EWHC 823 for the Certificate of Approval scheme.

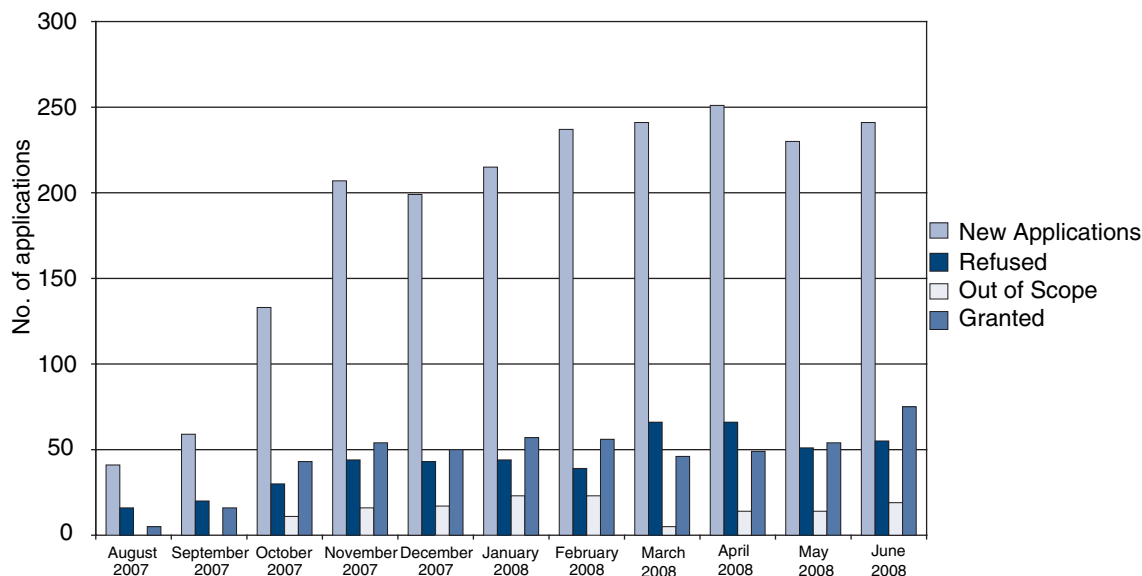
When we wrote to you on the 14th August in response to your earlier letter on this subject we set out our rationale for waiting for the outcome of the Appeal to the House of Lords. In your recent letter you raised two specific questions. Taking these in order:

1. Following the declaration of incompatibility of the COA scheme with the Human Rights Act, consideration had to be given to the timing of the amendment to the scheme. Public money must be used in order to obtain the best results from the resources that are available. Looking at all the relevant factors a decision was made that the most efficient use of resources was to postpone the final amendment of the scheme until after the House of Lords hearing. Furthermore, as you will be aware Section 4 of the Human Rights Act refers to declarations of incompatibility and subsection 6 makes clear that a declaration of this section (a) “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given” and (b) “is not binding on the parties to the proceedings in which it is made”. There is therefore no obligation on the UK Border Agency to amend to COA scheme at this time.

2. The postponement of amendment to the scheme until after to verdict is delivered from the House of Lords does not mean that preparatory work has not taken place. Changes to the caseworker guidance have been made to ensure the status of the marriage is considered as well as the immigration status of the application, We are currently in the process of constructing proposals to remedy the Article 14 breach. Discussion with the relevant officials from the Church of England have taken place and officials from the UK Border Agency recently met with them and continue to ensure that any new proposal is compatible with Article 9 and Article 14 of the ECHR. This preparatory joint work will enable the UK Border Agency and the Church of England to make more rapid progress once the House of Lords judgment is known.

28: ECtHR Statistics: Rule 49 applications and the UK





29: Letter to Rt Hon James Purnell MP, Secretary of State for Work and Pensions, 28 March 2008

Judgments against the United Kingdom concerning the non-entitlement of widowers to Widows Benefits and Allowances

The Joint Committee on Human Rights is continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights (ECtHR) finding the UK to be in breach of the European Convention on Human Rights (ECHR).

I am writing to inquire about the Government's response to the judgments relating to cases brought against the UK by widowers alleging sex discrimination in relation to their non-entitlement to widows benefits and allowances. The relevant benefits are Widow's Payment and Widowed Mother's Allowance (pursuant to the Social Security Contributions and Benefits Act 1992, the relevant provisions of which are now repealed). The relevant allowance is 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 on or after 6 April 2000). Judgments have been given against the UK in relation to these benefits and entitlements as follows:

Widow's Payment

Runkee and White v United Kingdom (App. No. 42949/98 and 53134/99, Judgment of 10 May 2007)

Widowed Mother's Allowance

Fallon v United Kingdom (App. No. 61392/00, Judgment of 20 November 2007)

The above two cases followed the judgment of the ECtHR in *Willis v United Kingdom* (App. No. 36042/97, Judgment of 11 June 2002).

Widow's Bereavement Allowance

Hobbs, Richard, Walsh and Geen v United Kingdom (App. Nos 63684/00, 63475/00, 63484/00 and 63468/00, Judgment of 14 November 2006)

This case was followed by the ECtHR in the following repetitive cases:

Cross v United Kingdom (App. No. 62776/00, Judgment of 9 October 2007)

Crilly v United Kingdom (App. No. 12895/02, Judgment of 20 November 2007)

Anderson v United Kingdom (App. No. 73652/01, Judgment of 20 November 2007)

All of the above judgments have become final. In each of these cases, the Court found the United Kingdom to have discriminated against the applicants on the grounds of sex, without objective and reasonable justification (in breach of Article 1 of Protocol 1 taken together with Article 14 ECHR).

I would be grateful if you could let the Committee know:

1. How many cases which have been lodged at the ECtHR against the UK by widowers alleging sex discrimination in relation to their non-entitlement to a benefit or allowance:

a. Remain outstanding?

b. Have been settled?

Please break down in relation to each type of benefit or allowance. For cases that have settled, please provide details of the manner and date of each such settlement.

2. How many claims by widowers alleging sex discrimination in relation to their non-entitlement to a benefit or allowance have been settled before applications were lodged at the ECtHR? Please break down in relation to each type of benefit or allowance, providing details of the manner and date of each such settlement.

3. Given that the Court followed its reasoning in *Willis* and *Hobbs* in subsequent cases raising the same issues, why did the Government choose not to settle these repetitive cases?

4. Does the Government have a policy in relation to the settlement of claims by widowers alleging sex discrimination in relation to their non-entitlement to a benefit or allowance? If so, what is it?

5. What factors does the Government take into account in deciding whether or not to seek a settlement in relation to widowers cases?

6. More generally, what is the Government's policy on settlement of repetitive cases which involve multiple applications by one or more applicants to the ECtHR in relation to the same violation(s)?

In addition, please would you provide the Committee with any information notes that you have already submitted to the Committee of Ministers on the above cases. I would be grateful if you could provide us with any further information notes which you submit in the future.

I would be grateful if you could reply by **11 April 2008** and if an electronic copy of your reply, in Word, could be emailed to jchr@parliament.uk.

30: Letter from Stephen Timms, Minister of State, Department for Work and Pensions, 25 April 2008

Thank you for your letter of 28 March to James Purnell regarding judgements in the European Court of Human Rights about widows' benefit claims by widowers.

I am sorry I was unable to meet your request for a response by 11 April. I will answer your six specific questions in which they appear in your letter.

Question 1

160 Widow's Payment and Widowed Mother's Allowance cases have settled so far: 25 were Widow's Payment only, 101 were Widowed Mother's Allowance only and 34 had Widow's payment and Widowed Mother's Allowance.

There were also 272 cases that were not due any arrears for various reasons, for example, because the qualifying conditions were not met.

All payments were made by cheque and were initially paid in August 2007. Some were subsequently returned because of various disputes – the majority of these were paid this January.

With regard to the number of Widow's Payment and Widowed Mother's Allowance cases which remain outstanding, Government solicitors have written to the court in Strasbourg and will inform the committee of the response as soon as it is received.

For the Widow's Bereavement Allowance, so far 11 cases have been settled. With regard to the number of Widow's Bereavement Allowance cases which remain outstanding, again Government solicitors are writing to the Court in Strasbourg and will inform the Committee of the response as soon as it is received.

Question 2

For the Widow's Payment and Widowed Mother's Allowance, the Department for Work and Pensions did not pay any settlements before applications were lodged at the European Court of Human Rights.

For the Widow's Bereavement Allowance, the Commissioners for HM Revenue and Customs did not pay any settlements before applications were lodged at the European Court of Human Rights.

Questions 3, 4 and 5

The Government has sought to settle all the Widow's Payment and Widowed Mother's Allowance cases to the extent that they are admissible in Strasbourg, and on the same basis as the Court in Strasbourg would have awarded just satisfaction. In a number of recent cases (*Bond* (63479/00); *Szulc* (63679/00); *Woods* (60274/00); *Fallon* (61392/00); *Williams* (63478/00)), the Court has in effect accepted the level of settlement offers made by the Government.

In respect of Widow's Bereavement Allowance the Court held in *Hobbs* that no damages were due. However it was held that Government should pay the reasonably incurred legal expenses of bringing the application to the Court and a sum of €800 was agreed.

The Government has sought to settle similar cases to the extent they are admissible in Strasbourg and the applicant actually incurred reasonable expenses in bringing their application. In two recent cases – *Crilly* (12895/02) and *Cross* (62776/00) – the Government did not agree to the settlement figures suggested by the applicants as they were unreasonable amounts in excess of the €800 agreed in *Hobbs*. The Court ordered that the Government should pay amounts that were significantly lower than the amounts suggested by the applicants, maintaining its position that costs should be reasonable and actually incurred.

Question 6

In respect of Widow's Payment, Widowed Mother's Allowance and Widow's Bereavement Allowance, the Government considers the question of possible friendly settlement of applications to the European Court of Human Rights on a case-by-case basis. 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.

Finally, with regard to your point about information notes, with regard to Widow's Payment and Widowed Mother's Allowance we have not provided any information notes to the Committee of Ministers, but we have pointed out that under legislation which entered into force in April 2001 the discrimination found by the Court in the cases concerning Widow's Payment and Widowed Mother's Allowance has now been remedied.

The same applies to the Widow's Bereavement Allowance, which has been abolished in the Finance Act 1999 and therefore did not apply to deaths that occurred on or after 6 April 2000.

**31: Letter to Chairman from Steven Timms MP, Minister of State,
Department for Work and Pensions, 8 May 2008**

I refer to my recent letter dated 25th April which I said that you would be informed of the number of cases outstanding at the European Court of Human Rights.

The Court has replied: "It would appear that there are a little less than 200 communicated widower applications still pending before the Court."

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty-First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132
Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501

Eighteenth Report	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
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554
Twenty-First Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies	HL Paper 116/HC 635
Twenty-Second Report	Government Response to the Committee's Fourteenth Report of Session 2007-08: Data Protection and Human Rights	HL Paper 125/HC 754
Twenty-Third Report	Legislative Scrutiny: Government Replies	HL Paper 126/HC 755
Twenty-Fourth Report	Counter-Terrorism Policy and Human Rights: Government Responses to the Committee's Twentieth and Twenty-first Reports of Session 2007-08 and other correspondence	HL Paper 127/HC 756
Twenty-fifth Report	Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008	HL Paper 132/HC 825
Twenty-sixth Report	Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill	HL Paper 153/HC 950
Twenty-seventh Report	The Use of Restraint in Secure Training Centres: Government Response to the Committee's Eleventh Report	HL Paper 154/HC 979
Twenty-eighth Report	UN Convention against Torture: Discrepancies in Evidence given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq	HL Paper 157/HC 527
Twenty-ninth Report	A Bill of Rights for the UK?: Volume I Report and Formal Minutes	HL Paper 165-I/HC 150-I
Twenty-ninth Report	A Bill of Rights for the UK?: Volume II Oral and Written Evidence	HL Paper 165-II/HC 150-II
Thirtieth Report	Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill	HL Paper 172/HC 1077
Thirty-first Report	Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008	HL Paper 173/HC 1078
Thirty-second Report	Scrutiny of Mental Health Legislation: Government Response to the Committee's Sixteenth Report of Session 2007-08	HL Paper/ HC 1079

Session 2006-07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350

Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human Rights Act	HL Paper 77/HC 410
Tenth Report	The Treatment of Asylum Seekers: Volume I Report and Formal Minutes	HL Paper 81-I/HC 60-I
Tenth Report	The Treatment of Asylum Seekers: Volume II Oral and Written Evidence	HL Paper 81-II/HC 60-II
Eleventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 83/HC 424
Twelfth Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 91/HC 490
Thirteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 105/HC 538
Fourteenth Report	Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)	HL Paper 106/HC 539
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 112/HC 555
Sixteenth Report	Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights	HL Paper 128/HC 728
Seventeenth Report	Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers	HL Paper 134/HC 790
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume I- Report and Formal Minutes	HL Paper 156-I/HC 378-I
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume II- Oral and Written Evidence	HL Paper 156-II/HC 378-II
Nineteenth Report	Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning	HL Paper 157/HC 394
Twentieth Report	Highly Skilled Migrants: Changes to the Immigration Rules	HL Paper 173/HC 993
Twenty-first Report	Human Trafficking: Update	HL Paper 179/HC 1056

Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the	HL Paper 104/HC 850

	Committee in the last Parliament	
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888

Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/ HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547
Twenty-third Report	The Committee's Future Working Practices	HL Paper 239/HC 1575
Twenty-fourth Report	Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention	HL Paper 240/HC 1576
Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
Twenty-sixth Report	Human trafficking	HL Paper 245-I/HC 1127-I
Twenty-seventh Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626
Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)	HL Paper 276/HC 1714
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716