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Joint Committee on Human Rights

Legislative Scrutiny: Sixth Progress Report

Thirteenth Report of Session 2006-07

Report, together with formal minutes and appendices

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Joint Committee on Human Rights

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

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

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Publications

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

Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Bill Sinton (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Committee Specialists), Jackie Recardo (Committee Assistant), Suzanne Moezzi (Committee Secretary) and Robert Long (Senior Office Clerk).

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Contents

Report

Summary

The Joint Committee on Human Rights examines the human rights implications of all Government and private bills, and selected pre-and post-legislative documents, in accordance with the new legislative scrutiny sifting system which it adopted at the start of Session 2006-07. A full explanation of the Committee's scrutiny procedures is given in the Committee's Twenty-third Report of Session 2005-06, The Committee's Future Working Practices, HL Paper 239 / HC1575.

This is the Committee's Sixth Legislative Scrutiny Progress Report of this Session. In this Report the Committee draws the attention of both Houses to some human rights compatibility concerns which in its view arise from the UK Borders Bill. The Report also comments on correspondence received on the Local Government and Public Involvement in Health Bill, and publishes without comment correspondence received from Ministers on the Concessionary Bus Travel Bill and the Corporate Manslaughter and Corporate Homicide Bill, on which the Committee has previously reported this Session, and the Pensions Bill. In addition, the Report records the Committee's view that the Finance Bill and the Northern Ireland (St. Andrews Agreement) (No.2) Bill do not raise human rights issues of sufficient significance to warrant further scrutiny.

UK Borders Bill

The main purpose of the Bill is to implement aspects of the Home Office's review of the immigration system and thus help underpin the new Border and Immigration Agency. The Committee accepts that increasing border security is a legitimate aim which may even be required by human rights law. (paragraphs 1.1-1.5).

The Bill would grant Immigration Officers new powers to detain, search and seize: this is a significant step for which the Committee would expect to see clear evidence of the need. The wider role envisaged for Immigration Officers looks to the Committee like a general policing function. It recommends that the Bill should be amended to provide that the relevant PACE Codes of Practice should apply and that training should cover the contents of these Codes (paragraphs 1.6-1.19).

In the absence of detailed provisions, the Committee finds it impossible to assess the compatibility of the proposed biometric registration scheme for non-EEA nationals with the right to respect for private life in Article 8 ECHR. In its view the introduction of the biometric immigration document would give rise to concern about *de facto* racial profiling. It seems highly likely that members of minority ethnic communities in the UK would be disproportionately required to prove their immigration status. In the Committee's view, to be lawful it will be vital that race plays no part in the profiles used by the government to decide the order in which it phases implementation of the biometric immigration document (paragraphs 1.20-1.29).

The Bill's provisions on automatic deportation of foreigners convicted of criminal offences appear to the Committee to give rise to a risk of prolonged post-sentence immigration detention. It recommends that to avoid this risk the Bill should be amended to lay down a specific time frame within which the Secretary of State must decide whether a deportation

order is required (paragraphs 1.30-1.35).

The Committee welcomes the Bill's provision for asylum seekers to receive subsistence support pending final determination of their claim and recommends other amendments to help ensure that asylum seekers, including asylum seeking children, are not subjected to inhumane and degrading treatment but are treated with common humanity (paragraphs 1.36-1.38).

The Committee welcomes the Bill's extension of the scope of existing human trafficking offences, but recommends amendments to improve protection for trafficking victims. It is disappointed at the lack of a clear timetable for implementing the Government's Action Plan on Trafficking but welcomes the Minister's offer to provide regular updates (paragraphs 1.39-1.41).

Bills drawn to the special attention of both Houses

Government Bills

1 UK Borders Bill

Date introduced to House of Commons	25 January 2007
Date introduced to House of Lords	10 May 2007
Current Bill Number	HL Bill 68
Previous Reports	None

Background

1.1 This is a Government Bill introduced into the House of Commons on 25 January 2007 and, following its passage through the Commons, into the House of Lords on 10 May 2007. Baroness Scotland has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998. The Explanatory Notes accompanying the Bill set out the Government's view of the Bill's compatibility with the Convention rights at paragraphs 168-209.

1.2 The main purpose of the Bill is to implement aspects of the Home Office's Review *Fair, Effective, Transparent and Trusted: Rebuilding Confidence in our Immigration System* (July 2006). Pursuant to our commitment in our *Future Working Practices Report* to undertake more pre-legislative scrutiny work,[1] we considered the Review document in the autumn of 2006 and we took evidence on certain aspects of it from Baroness Scotland, Minister of State at the Home Office, on 30 October 2006.[2]

1.3 The Bill is described by the Government as part of a package of measures to underpin the Border and Immigration Agency which includes new powers and exploitation of identity technology, in particular to tackle illegal working.

1.4 On our preliminary consideration of the Bill we identified a number of potentially significant human rights issues concerning (1) immigration officers' powers to detain, search and seize (2) biometric registration of persons subject to immigration control (3) the deportation of foreigners convicted of criminal offences (4) reversal of the burden of proof and (5) power to search for evidence of nationality. We wrote to the Home Secretary on 13 March 2007 in relation to these issues, asking for a fuller explanation of the Government's view that certain provisions in the Bill are human rights compatible.[3] The Minister responded by letter dated 27 April 2007 enclosing a detailed memorandum from the Home Office in response to our questions.[4] We are grateful to the Minister for his full response. We have also been assisted in our consideration of the Bill by a number of parliamentary briefings with which we have been provided and we are grateful to the

[1] Twenty-third Report of Session 2005-06, *The Committee's Future Working Practices*, HL Paper 239/HC 1575 at paras 57 and 77.

[2] Thirty-second Report of Session 2005-06, *The Human Rights Act: the DCA and Home Office Reviews*, HL Paper 278/HC1716, Ev1-19.

[3] Appendix 1a.

[4] Appendix 1b.

organisations who provided us with this material.[5] In light of that material and the Government's response to our questions we now report to both Houses in relation to the most significant human rights issues which in our view the Bill raises.

1.5 **We recognise that it is well established in international human rights law that states have the right to control the entry, residence and expulsion of foreign nationals.[6] However, the right is not unlimited.[7] They are also under a positive obligation, in certain circumstances, to take positive steps to protect individuals' human rights from the harm which may be done to them by, for example, criminals, terrorists or people traffickers from other countries. We therefore accept that increasing border security is not only a legitimate aim recognised in human rights law but may even be required by human rights law where it can be shown that current controls are inadequate to protect human rights. Our task is to subject such measures to careful scrutiny to ensure that the necessity for measures which interfere or potentially interfere with human rights has been demonstrated, that they satisfy the basic requirements of legality and that any interferences with fundamental rights to which they might give rise are likely to be proportionate.**

(1) Immigration Officers' powers to detain, search and seize

1.6 The Bill enables the Secretary of State to designate Immigration Officers as having the power to detain an individual at a port if the officer thinks that the individual may be liable to arrest by a constable without a warrant,[8] or is subject to a warrant for arrest.[9] The officer must arrange for a constable to attend as soon as is reasonably practicable,[10] and the individual may not be detained for longer than three hours.[11] The officer has power to search the detained individual for, and to retain, anything that might be used to assist escape or to cause physical injury, and can use reasonable force. The officer must retain anything found on a search which the officer thinks may be evidence of the commission of an offence, and when the constable arrives must deliver to the constable both the individual and anything retained on a search. The Bill makes it an offence to abscond from such detention, and to assault or obstruct an immigration officer exercising any of these powers. The Secretary of State may only designate officers who he or she thinks are fit and proper for the purpose and "suitably trained".[12] Such designation can be revoked by the Secretary of State.[13]

1.7 The Explanatory Notes to the Bill accept that the new power of detention pending the arrival of a police constable engages the right to liberty in Article 5 ECHR, but state that the

[5] We have considered parliamentary briefing material from Animate Project, Bail for Immigration Detainees, the Foreign National Prisoners' Network, the Immigration Law Practitioners Association, the Joint Council for the Welfare of Immigrants, JUSTICE, Liberty, the Northern Ireland Human Rights Commission, the Refugee Children's Consortium, the Refugee Council and Universities UK.

[6] See eg. *Chahal v UK* (1996) 23 EHRR 413 at para. 73.

[7] See e.g., *East African Asians v. United Kingdom* (1973) 3 EHRR 76, E Com HR *and R. (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1. It is important to note that the UK has not signed Protocol No. 4 to the ECHR which guarantees, amongst other things, the right to freedom of movement.

[8] Under s. 24(1), (2) or (3) of the Police and Criminal Evidence Act 1984 ("PACE") and Northern Ireland equivalent.

[9] Clauses 1 and 2.

[10] Clause 2(2)(a).

[11] Clause 2(3).

[12] Clause 1(2).

[13] Clause 1(3)(b).

Government considers that its use will be "in accordance with a procedure prescribed by law" as required by Article 5, because "the new power is set out in legislation which specifies when it can be exercised and the limitations on its use."[14] Article 5(1)(f) ECHR permits "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition", in other words, immigration detention, but the Government does not seek to rely on this exception in Article 5. The Explanatory Notes state that the detention falls within the permitted exception in Article 5(1)(c) ECHR (detention for the purpose of bringing the person before the competent legal authority on reasonable suspicion of having committed an offence or when reasonably considered necessary to prevent his committing an offence or fleeing having done so) and may also fall within Article 5(1)(a) where there is an outstanding warrant for arrest.[15]

1.8 The Explanatory Notes also accept that the powers of immigration officers to search individuals and to seize anything that might be used to assist escape or to cause physical injury, or which the immigration officer thinks may be evidence of the commission of an offence, have the potential to interfere with the right to respect for private life in Article 8 ECHR and the right to peaceful enjoyment of possessions in Article 1 Protocol 1.[16] However they state that any interference with those rights can be justified, because the powers pursue the legitimate aim of protecting public safety, the economic well-being of the country and/or the prevention of disorder or crime and are proportionate. The explanation given is that the power to search is for specific and limited purposes and will be carried out by Immigration Officers who the Secretary of State has concluded are capable of, properly trained for and fit and proper to exercise the powers.

1.9 The Explanatory Notes do not, however, contain any more detailed explanation of the *necessity* for the new powers to detain, search and seize. We therefore asked the Minister for a more detailed explanation of why these new powers for immigration officers are required. The Government's response is that the new powers are necessary in order to strengthen border security.[17] At present, immigration officers have only limited powers to intervene against those involved in criminality, limited to those who commit offences under the Immigration Acts and are of interest to the police. They cannot intervene in respect of individuals who are the subject of a warrant for arrest or otherwise liable to arrest by a police constable. The new powers "will ensure that those subject to arrest by the police do not evade intervention simply because a police officer is not in the immediate vicinity."[18]

1.10 **We note that the Government has not provided any evidence that this problem exists or, if it does, of the scale of the problem. We accept that increasing border security is a legitimate aim capable in principle of justifying interferences with human rights, but the necessity for new powers to interfere with human rights should be clearly demonstrated by reference to cogent evidence. Conferring police powers, including powers to deprive of liberty and to interfere with other Convention rights, on officials who are not police officers and for purposes which do not relate to those officials'**

[14] EN para. 171.

[15] EN para. 171.

[16] EN para. 172.

[17] Memorandum from the Home Office, Appendix 1b, at para. 3.

[18] *ibid* at para. 7.

primary purpose is a significant step and we would expect to see clear and convincing evidence of the need to take such a step. We draw this matter to the attention of each House.

1.11 The power of a constable to arrest under s. 24 of PACE is closely regulated by Code G of the PACE Codes of Practice.[19] This Code prescribes a number of important requirements regulating the way in which the power is exercised, concerning, for example, the information to be given to a person on arrest, and the making of a record of the reasons for arrest. Police powers to search and seize are also subjected to rigorous controls contained in the relevant PACE code of practice (Code A). The Bill makes no provision for either these Codes or any other code of practice to apply to the exercise of the proposed new powers to detain, search and seize. We therefore asked the Government for more information about the limitations on the new power of immigration officers to detain, search and seize, including whether the relevant PACE Code of Practice will apply and, if not, whether equivalent requirements will apply.

1.12 In response, the Government points to the fact that the power to detain may only be exercised in the circumstances specified in the Bill and only by immigration officers designated by the Secretary of State for this purpose.[20] Only officers who the Secretary of State thinks are fit and proper for the purpose and who are suitably trained can be designated, and designation can be revoked at any time if the officer fails to perform to the required standard. The Government also points out that the three hour period is a maximum: it is anticipated that in most cases detention will be for much less than three hours.[21]

1.13 The PACE Codes of Practice will not apply, because the Government does not believe that it is necessary for immigration officers exercising the new power of detention to be subject to those codes.[22] The Government says that whether immigration officers should be subject to PACE codes of practice depends on the functions that they are undertaking. When exercising certain specified powers under the Immigration Acts, including powers to arrest, question, search or take fingerprints from a person, to enter and search premises or to seize property found on a person or premises, immigration officers must already have regard to the PACE codes of practice and Northern Ireland equivalents.[23] However, the Government argues that there is no need for the PACE Codes to apply to the new powers for immigration officers under the Bill because it is not intended that officers will take on the substantive tasks of a constable, such as questioning, arrest, investigation or specific evidence collection. The new powers are being provided to support the police at the border by enabling designated immigration officers to detain individuals pending the arrival of a police officer, and to search and retain any items that an individual may use to assist escape or to cause physical injury to him or herself or to another person. No questioning or investigation will occur during this period and it will be for the police constable, when they arrive, to make all substantive enquiries about the person and to decide whether they should be arrested. The Government points out that immigration officers' existing powers

[19] *Code of Practice for the Statutory Power of Arrest by Police Officers.*

[20] Memorandum from the Home Office, Appendix 1b, at para. 8.

[21] *ibid* at para. 9.

[22] *ibid* at para. 10.

[23] Section 145 Immigration and Asylum Act 1999 and the Immigration (PACE Codes of Practice) Direction.

to detain for immigration reasons[24] are not subject to PACE codes, nor are the powers of Authorised Search Officers to search and seize.[25]

1.14 Instead of the PACE Codes of Practice, designated immigration officers will be required to follow "Standard Operating Procedures" which will be drafted in conjunction with police colleagues and will provide a clear framework within which officers will be expected to operate. These procedures will, for example, set out when it is appropriate for officers to use the powers of detention and what the limitations are when exercising them, and give detailed instructions on the processes that officers must follow, including when searching individuals.[26]

1.15 We accept that immigration officers' existing powers to detain, search and seize for immigration purposes are not subject to the PACE Codes of Practice. **We note, however, that on the Government's own account the very purpose of conferring the new powers on immigration officers by the Bill is to provide them with powers which are exercisable in connection with criminal offences other than immigration offences. Such a role, in support of the police, appears to us to be in the nature of a general policing function and we therefore think it is appropriate that the PACE Codes of Practice should apply to regulate the use of these powers to detain, search and seize, in view of their impact upon Convention rights.** We note that the Standard Operating Procedures which it is said will regulate the exercise of the powers have yet to be drawn up and will not be subjected to any parliamentary scrutiny, nor to any requirement that they be publicly accessible.

1.16 **We are therefore concerned about the Government's reliance on Standard Operating Procedures on a number of counts: whether they will be sufficiently accessible by the public to satisfy the principle of legal certainty; whether they will receive sufficient public scrutiny when being devised; and whether their content will be sufficient to make it unlikely that the powers will be used in a way which interferes with the various Convention rights affected. We therefore recommend that the Bill be amended to provide that the relevant PACE Codes of Practice apply to the new powers of immigration officers to detain, search and seize pending the arrival of a police constable.**

1.17 The Explanatory Notes also do not elaborate on what is meant by "suitably trained".[27] We therefore asked the Minister what training an immigration officer will receive in order to be eligible for designation by the Secretary of State as having the additional powers of detention, search and seizure.

1.18 The Government replied that specific training requirements are under development, but that the training will be "similar in many respects to the training that is currently given to immigration officers who exercise powers of arrest under the Immigration Acts", although it will be tailored to the specific detention functions that designated officers will be exercising.[28] Those functions are treated by the Government as being quite distinct from

[24] Under Schedule 2 of the Immigration Act 1971.

[25] Under s. 40 of the Immigration, Asylum and Nationality Act 2006.

[26] *ibid* at paras 14 and 20.

[27] Clause 1(2)(b).

[28] Memorandum from the Home Office, Appendix 1b, at para. 15.

the function of arrest, which will be carried out by a police constable. The Government has offered to make the detail of the training schedule available when it is developed.

1.19 **We welcome the Government's offer to make the detail of the training schedule available when it is developed and we look forward to receiving it in due course. However, we have concerns about the Government's distinction between detention for up to three hours pending the arrival of a police constable on the one hand and arrest on the other. The new power to detain is only exercisable by an immigration officer if he or she thinks that the person concerned may be liable to arrest by a police constable or is subject to a warrant of arrest. These grounds for exercise of the new power require the immigration officer to acquire a specialism beyond his or her existing expertise in relation to immigration offences. As we have made clear above, we regard it as clearly being in the nature of a policing function. For the same reasons as we have stated above for our view that the PACE Codes of Practice should apply, in our view immigration officers should receive appropriate training reflecting the nature of this new function, including in the detail of the relevant Codes of Practice.**

(2) Biometric registration of persons subject to immigration control

1.20 The Bill enables the Secretary of State to make regulations requiring a person subject to immigration control to apply for the issue of a "biometric immigration document"[29] – a document recording information about his or her external physical characteristics, including fingerprints and features of the iris or any other part of the eye. A "person subject to immigration control" means a person who requires leave to enter or remain in the UK, whether or not leave has been given. Regulations may require a biometric immigration document to be used for specified immigration purposes, in connection with specified immigration procedures or "in specified circumstances where a question arises about a person's status in relation to nationality or immigration."[30] The Regulations must make provision about the use and retention of such biometric information by the Secretary of State,[31] and may permit "the use of information for specified purposes which do not relate to immigration".[32]

1.21 As the Explanatory Notes acknowledge, these provisions are likely to be an interference with the right to respect for private life, but in the Government's view the interference is justified and proportionate.[33] The Notes say that the proposals will be "in accordance with the law" because the provisions will be set out in primary and secondary legislation, and the intention is to ensure that the requirements of the regulations are formulated with sufficient precision so that their ambit is absolutely clear, accessible and foreseeable. The proposed powers are said to be necessary for the maintenance of immigration control by ensuring the integrity of documents which are evidence of a person's immigration status, and which are used to combat illegal working. They are therefore necessary for the economic well-being of the country and the prevention of crime. The Government also believes that requiring those who wish to be in the UK to

[29] Cl. 5(1)(a).

[30] Cl. 5(1)(b)(iii).

[31] Cl. 8(1).

[32] Cl. 8(2).

[33] EN para. 173.

have a secure, reliable biometric immigration document as evidence of their status is a proportionate way of achieving those objectives.

1.22 This part of the Bill contains extremely open-ended powers capable of being exercised in ways which interfere with Article 8 rights, but there is very little detail on the face of the Bill enabling us to assess the likely compatibility of the new powers with Article 8 and no draft regulations have been published alongside the Bill.[34] We therefore wrote to the Minister asking for more details about the Government's precise intentions.

1.23 In its response the Government states that it wishes to reassure us that both the proposals about biometric registration in the Bill and any secondary legislation and powers provided will be compatible with Article 8 ECHR, but the detail of the Regulations is still to be finalised. The Government's main objective is to ensure that all those who are subject to immigration control have a secure biometric immigration document ("BID)" which confirms their immigration status and identity. The intention is that production of the BID will only be required in specified situations where immigration status needs to be established. It will link in to the national identity scheme and will enable other government departments, as well as employers and other government agencies, to realise the benefits, for example by simplifying the process of establishing whether a person is eligible for employment or state benefits. The Government believes that this will substantially reduce fraud through the use of multiple identities and fraudulently obtaining a national insurance number.

1.24 The Government's response indicates that it expects the BID to be a highly secure card which will contain the holder's unique biometric data samples, such as fingerprints and facial image (but not DNA), and biographical information such as name, immigration status, nationality and date and place of birth. The Government points out that the information will be stored on a central database, and will be able to be retained for as long as it is used for purposes under the Immigration Acts, but will be destroyed if it is no longer of use for the purposes being sought.

1.25 **In the absence of more detail on the face of the Bill or any draft regulations prescribing important details of the proposed scheme, we find it impossible to assess the compatibility of the proposed biometric registration scheme with the right to respect for private life in Article 8 ECHR. We note, for example, that the following important details of the proposed scheme are nowhere specified:**

- **the type of biometric information which will be required to be provided;**
- **the purposes for which such information may be used, which will apparently include use for purposes which do not relate to immigration, such as access to state benefits;**
- **the extent to which the requirements apply to children under the age of 16;**

[34] Article 8 ECHR requires that interferences with the right to respect for private life must have a legal basis which is defined with sufficient precision to be accessible and to make the operation of the law in practice reasonably foreseeable. The law should also contain sufficient limitations and safeguards to ensure that the power will be exercised proportionately.

- **the length of time for which such information may be retained.**[35]

1.26 In our predecessor Committee's reports on the Identity Cards Bill, it repeatedly expressed its concerns about the potentially discriminatory impact of introducing compulsory registration for non-nationals before nationals.[36] This was in part due to the fact that compulsory registration for foreign nationals may lead to British citizens from visible minority ethnicities being subject to more frequent demands to produce an ID card or allow checks against the Register.[37] **In our view, the introduction of the biometric immigration document gives rise to the same concern about de facto racial profiling. Even though the Bill does not make it a requirement that such a document be carried, the fact that such a document exists for non-nationals and can be requested to prove entitlement to services makes it highly likely in our view that members of black and minority ethnic communities in the UK will be disproportionately required to prove their immigration status. We draw this matter to the attention of each House.**

1.27 This part of the Bill also contains a power to make the Regulations apply only to a specified class of persons subject to immigration control (e.g. to persons making a specified kind of application for immigration purposes).[38] The Explanatory Notes make clear that the requirement for those subject to immigration control to apply for a biometric immigration document will be rolled out to different categories of those subject to immigration control incrementally.[39] The Notes state that in the Department's view this different treatment is not discriminatory, or, if wrong about this, that any discrimination is justified. They say that the precise order and categories for the phases of implementation are still being developed, but they will be determined by rational criteria, such as which categories present the greatest risk to immigration control. They may also be determined by practical considerations, such as the availability of the necessary technology and resources for particular applicants. In the department's view, such an incremental implementation, according to rational criteria, is in principle compatible with Article 14 ECHR.[40]

1.28 We asked the Government to provide more information about the "rational criteria" according to which it intends to phase the implementation of this requirement, with a view to assessing whether there is a risk of discrimination which lacks objective and reasonable justification (i.e. incompatibility with Article 14 ECHR in conjunction with Article 8). The Government replied that the precise order and categories that will be introduced into the gradual roll out have yet to be finalised, and that the latest risk assessments showing where there is abuse of immigration control will be reviewed closer to the time of implementation. However, examples of the sorts of rational criteria that the Government has in mind include:

[35] The Regulations must make provision about the destruction of information obtained or recorded under the Act (clause 8(3), but a requirement to destroy information shall not apply if and in so far as the information is retained in accordance with and for the purposes of another Act (clause 8(4)).

[36] See e.g. Fifth and Eighth Reports of Session 2004-05 and First Report of Session 2005-06.

[37] First Report of 2005-06 at para. 4.14.

[38] Cl. 5(2)(a).

[39] EN paras 178 and 181.

[40] Article 14 ECHR requires states to secure the enjoyment of Convention rights without discrimination on certain grounds including nationality, unless there is an objective and reasonable justification for such a difference of treatment.

- Select applicants from within immigration categories where there is evidence of abuse of the system
- Volumes of applicants within particular immigration categories (to keep numbers manageable in the initial years)
- Impact on employers and other sponsors
- Impact on communities and individual applicant groups, and
- Operational ease of processing applicants from particular immigration categories.

1.29 **In addition to our concern, expressed above, about the danger of de facto racial profiling as a result of the introduction of a biometric registration scheme for non-EEA nationals, we are also concerned that its phased implementation gives rise to a further risk of de facto racial profiling. In the Roma Rights case, the House of Lords found the Home Office's policy of targeting Roma for pre-entry clearance at Prague airport to be inherently racially discriminatory and therefore unlawful.[41] To be lawful, it will be vital that race or ethnicity plays no part in the profiles used by the Government to decide the order in which it phases implementation of the biometric immigration document. This will require very careful scrutiny when the time comes to implement the scheme. We draw this matter to the attention of each House.**

(3) Deportation of foreigners convicted of criminal offences

1.30 The Bill gives effect to the Home Secretary's commitment in his statement of 23 May 2006 to create a "direct link" between deportation and the commission of a crime of the appropriate level of severity (described in the Bill as "automatic deportation" although in practice far from automatic).[42] It also reduces the scope for challenging such "automatic deportation" decisions through the appeals system. We subjected these proposals to pre-legislative scrutiny. We took evidence from Lord Falconer and Baroness Ashton on 30 October 2006 and commented briefly on the proposal in our report on *The Human Rights Act: the DCA and Home Office Reviews*.[43]

1.31 In our earlier report we observed that there was little, if any, scope for changing the approach to the deportation of EU and EEA nationals, which is governed by EU law,[44] and that even in relation to non-EU and non-EEA nationals Article 8 ECHR imposes a minimum requirement which prevents deportation of offenders where it is disproportionate having regard to matters such as the seriousness of their offence, their propensity to reoffend, the offender's age, their length of residence in the UK, their degree of social and cultural integration in the UK and the extent of their links with their country of origin.[45]

1.32 Most of the human rights compatibility concerns raised by us with ministers in our pre-legislative scrutiny exercise have been met in the Bill. The exceptions to the making of

[41] *R. (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1.

[42] Clauses 31-38.

[43] Thirty-second Report of Session 2005-06, at paras 126-134.

[44] *ibid* at para. 133.

[45] *ibid* at para. 134.

an automatic deportation order include where deportation would be in breach of the Human Rights Act 1998 or the Refugee Convention.[46] When deciding whether or not he or she must make an "automatic" deportation order, it follows that the Secretary of State must consider whether removal would be in breach of any ECHR rights, including Article 8, and the Refugee Convention. A person in respect of whom an automatic deportation order is made who makes an arguable human rights claim will also continue to enjoy a right of appeal on those grounds from within the UK against the making of the deportation order.

1.33 On our preliminary consideration of the Bill we identified a potential human rights compatibility concern arising from the potentially retrospective operation of the new deportation provisions. The Bill provides that the provisions on automatic deportations may be applied to people convicted of offences before the Bill becomes law who are in custody at the date the Act comes into force.[47] The Explanatory Notes state that this is human rights compatible either because deportation is not a "penalty" within the meaning of Article 7 ECHR (prohibition on retrospective penalties) or there is no retrospectivity because any person liable to automatic deportation under the Bill was also liable to discretionary deportation at the time they were convicted.

1.34 We wrote to the Minister asking for a more detailed explanation as to why in the Government's view this provision does not have retrospective effect. In response the Minister said that any person who would fall within the Bill's provisions on automatic deportation is *currently* capable of being deported under the existing power to deport on the ground that their deportation is conducive to the public good. In light of this explanation we accept that the provision in question does not have retrospective effect. However, the Minister's answer does raise the obvious question as to why it is necessary to legislate at all on this subject if the powers already exist. As HM Chief Inspector of Prisons reported in her thematic report on *Foreign National Prisoners*, the failure to consider many foreign national prisoners leaving prison for deportation "was not because of a gap in legislation or powers. It was an acute symptom of the chronic failure of two services to develop and implement effective policies and strategies."[48]

1.35 We have one human rights compatibility concern about the provisions in the Bill concerning the automatic deportation of foreign national prisoners. **The provisions do appear to us to give rise to a risk of prolonged post-sentence immigration detention, potentially in breach of the right to liberty in Article 5 ECHR.** This is because the Bill provides that a person who has already served a period of imprisonment may be detained under the authority of the Secretary of State while the Secretary of State considers whether he must make an automatic deportation order and pending the making of such an order where he or she decides that such an order must be made.[49] The Secretary of State has a wholly open-ended discretion as to the timing of such an order.[50] HM's Inspectorate of Prisons, in its work on foreign national prisoners, has found that a number of foreign nationals have been held in prisons and immigration removal centres far past their sentence expiry dates, awaiting a decision on whether or not they will be deported.[51] Such

[46] Clause 32(1) and (2).

[47] Clause 58(6)(d)(i).

[48] HM Inspectorate of Prisons , *Foreign national prisoners: a thematic review* (November 2006).

[49] Clause 35(1).

[50] Clause 33(1): an automatic deportation order is to be made "… at a time chosen by the Secretary of State".

[51] HM Inspectorate of Prisons , *Foreign national prisoners: A follow-up report* (January 2007).

prolonged post-sentence detention carries a high risk of breach of the right to liberty in Article 5 ECHR. **We recommend that in order to avoid the risk of foreign national prisoners spending long periods in detention after expiry of their sentence in breach of Article 5 ECHR, clause 33(1) of the Bill be amended to lay down a specific time frame within which the Secretary of State must decide whether or not he is required to make a deportation order. The aim should be for the Secretary of State to make that decision as early as possible following a foreign national prisoner's commencement of his or her sentence of imprisonment.**

(4) Support for asylum seekers

1.36 The Bill contains an important human rights enhancing provision which ensures that failed asylum seekers do not suffer destitution by being ineligible for support pending the outcome of their appeal against the refusal of asylum. Clause 17 of the Bill provides that a person whose claim for asylum has been refused and who is pursuing an appeal against an immigration decision will remain an "asylum seeker" for the purposes of asylum support legislation.[52] The effect is that until their appeal is determined they will be eligible for support on the same basis as asylum seekers who have not yet received a decision on their claim. The provision is to be treated as always having had effect[53] and the Bill provides that this provision comes into force on the day on which the Act is passed.[54]

1.37 **We welcome this provision as an important recognition of the right of asylum seekers to receive subsistence support pending the final determination of their claim. In our recent report on The Treatment of Asylum Seekers we reported that we had been persuaded by the evidence that the Government has been practising a deliberate policy of destitution in relation to asylum seekers and that such deliberate use of inhumane treatment is unacceptable.[55] Refused asylum seekers pursuing an appeal receive no support as the law is currently interpreted and we welcome the Government's recognition that such destitution is unacceptable. However, we made a number of other recommendations for legislative changes at the earliest opportunity to end the deliberate use of destitution as an instrument of policy. In our view the present Bill provides such an opportunity to implement some of these proposals. We therefore recommend that, to reduce the risk of asylum seekers being subjected to inhuman and degrading treatment contrary to Article 3 ECHR, and to ensure that they are treated with common humanity as the common law requires, the Bill be amended to provide for, for example:**

- **the repeal of s. 55 of the Nationality, Immigration and Asylum Act 2002[56]**
- **the repeal of s. 9 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004[57]**

[52] Section 4, Part VI and Schedule 3 of the Nationality, Immigration and Asylum Act 2002.

[53] Clause 17(4).

[54] Clause 58(1).

[55] Tenth Report of Session 2006-07, HL Paper 81-I/HC 60-I, at para. 120.

[56] *ibid*. at para. 92.

[57] *ibid* at para. 97.

- **the extension of support under s. 95 of the Immigration and Asylum Act 1999 to refused asylum seekers and the repeal of the voucher scheme in s. 4 of that Act.**[58]

1.38 In our inquiry into the Treatment of Asylum Seekers we also received evidence showing that asylum seeking children suffer a lower level of protection in relation to a range of rights compared to other children.[59] We considered that one way of attempting to redress this unequal protection of the human rights of asylum seeking children was to extend the duty contained in s. 11 of the Children Act 2004, which requires public bodies to have regard to the need to safeguard and promote the welfare of children when discharging their functions and providing services, so that it includes authorities providing support for asylum seekers, the Immigration Service and Immigration Removal Centres. We consider this Bill to be an opportunity to implement this recommendation. **We recommend that the Bill be amended by the addition of a new clause extending the duty in s. 11 of the Children Act 2004 to those providing welfare and support services to asylum seeking children, including the National Asylum Support Service, the Immigration Service and Immigration Removal Centres.**

(5) Human trafficking

1.39 The Bill contains one provision[60] designed to strengthen the law against people trafficking by extending the scope of the criminal offences of trafficking people for exploitation.[61] According to the Explanatory Notes, the Bill amends these offences to ensure that acts committed after a person has arrived in the UK but before they have entered the UK are covered and removes the limitations on the territorial application of the offences to ensure that facilitating arrival or entry into the UK of a person for the purposes of exploitation, regardless of where the facilitation took place and irrespective of the nationality of the facilitator, are caught by the offences.[62]

1.40 **We welcome the Bill's extension of the scope of the existing trafficking offences, which implements one of the proposals in the Government's UK Action Plan on Trafficking of Human Beings. We are disappointed, however, that the opportunity has not been taken in this Bill to introduce more effective protection for the victims of trafficking. In our recent report on Human Trafficking, we concluded that the current level of protection provided to trafficking victims is far from adequate from a human rights perspective.**[63] **We are grateful to the Government for its positive response to our recommendation to sign the Council of Europe Convention on Action against Trafficking in Human Beings, and its publication of the UK Action Plan on Trafficking. We think it is important, however, that our recommendations are considered as a whole and not cherry-picked by the Government. We made a number of recommendations about improving the legislative framework for protecting trafficking victims, and in our view the current Bill provides an opportunity to make some of these**

[58] *ibid* at para. 110

[59] *ibid* at paras 180-182.

[60] Clause 30.

[61] Contained in s. 4 of the Asylum and Immigration Act (Treatment of Claimants etc.) Act 2004 and ss. 57 to 59 of the Sexual Offences Act 2003.

[62] In immigration law a person does not "enter" the UK until they are given leave to do so and entry may therefore take place some time after physical arrival.

[63] Twenty-sixth Report of Session 2005-06, HL Paper 245-I/HC1127-I, at para. 197.

improvements. In particular, we recommend that the Bill be amended to improve protection for trafficking victims by providing, for example, that:

- **where there are reasonable grounds to believe that a person is a victim of trafficking that person shall not be removed from the UK until the process for identifying whether they are such a victim is complete;**
- **a recovery and reflection period of 3 months should be granted to a person who has been identified as being a victim of trafficking, during which time no immigration enforcement measures shall be taken against them; and**
- **renewable residence permits of up to 6 months' duration be granted to victims of trafficking.**

1.41 We also find disappointing the lack of a clear timetable for implementing the Government's Action Plan on Trafficking and implementing all the requirements of the Convention against Trafficking. **We welcome the Minister's offer during the Report stage debate on the Bill[64] to provide us with regular updates on the timetable and the Government's progress against that timetable.**

[64] HC Deb 9 May 2007 col. 229.

2 Local Government and Public Involvement in Health Bill

Date introduced to House of Commons	12 December 2006
Date introduced to House of Lords	
Current Bill Number	HC 77
Previous Reports	11th Report of 2006-07

2.1 We reported on this Bill in our Eleventh Report of 2006-07 in which we recommended that, in order to minimise the risk of incompatibility with members' rights to privacy and freedom of expression under Articles 8 and 10 ECHR, the Bill should be amended to provide on its face that private conduct shall be within the scope of the code of conduct only where it results in a criminal conviction which is relevant to the member's official duties. The reasoning leading up to that recommendation is contained in our report.

2.2 Since the publication of our report we have received a response from the Minister, in a letter dated 26 April 2007, to our letter of 23 January 2007 asking for an explanation of the Government's view that the proposed extension of the remit of the code of conduct for local authority members in the Bill is compatible with Articles 8 and 10 ECHR. The Government's policy is that the remit of the code should include some matters in members' private lives, but only such conduct as has resulted in a criminal conviction. It argues that the proposed restriction to private conduct which has resulted in a criminal conviction means that in practice the proposed provision will not give rise to incompatibilities with Articles 8 and 10 ECHR.

2.3 We note that although the Government's position is that the code of conduct should not cover a councillor's private life unless that conduct has resulted in a criminal conviction, the Bill as presently drafted neither states the basic principle that private conduct should not be covered by the code nor defines the exception to this principle where private conduct has resulted in a criminal conviction. Instead, the Bill provides for the code, and the principles on which it is based, to apply to a member "at all times", and it is merely the Minister's "current intention" to confine the code to private conduct which has resulted in a criminal conviction. In our view, not only is there a serious mismatch between the Government's stated intention and the provisions of the Bill as presently drafted, but the breadth of the power in the Bill to regulate members' private conduct itself gives rise to Article 8 and 10 ECHR compatibility concerns because of the uncertainty it creates about the private conduct, including speech, which is or might be covered.

2.4 We therefore recommend the following specific amendments to the Bill to give effect to our recommendation in our earlier Report.

Amendment 1

Page 97, line 10 [Clause 141], leave out 'principles which are to apply at all times to a person who is a member or co-opted member' and insert 'the principle that the conduct of a member or co-opted member in their private capacity is not covered by this Part of this Act except where it has resulted in a criminal conviction which is directly relevant to the performance of the official functions of the member or co-opted member'.

2.5 The purpose of this amendment is to state the basic principle that the code of conduct should not cover a member's private conduct unless that conduct has resulted in a criminal conviction. The Government accepts this principle. The amendment accepts the Government's position that some private conduct should be covered by the code but makes explicit the limitation to conduct which has resulted in a criminal conviction (a limitation accepted by the Government but not stated on the face of the Bill or the statute being amended). The amendment goes further than the Government's position, however, by including the further limitation that the criminal conviction must be directly relevant to the performance of the member's official functions.

Amendments 2 and 3

Page 97, line 14 [Clause 141], leave out 'at all times to a person who is a member or co-opted member' and insert 'to the conduct of a member or co-opted member in their private capacity where that conduct has resulted in a criminal conviction which is directly relevant to the performance of the official functions of the member or co-opted member'.

Page 97, line 19 [Clause 141], leave out 'at all times to a person who is a member or co-opted member' and insert 'to the conduct of a member or co-opted member in their private capacity where that conduct has resulted in a criminal conviction which is directly relevant to the performance of the official functions of the member or co-opted member'.

2.6 The purpose of these two amendments is to empower the making of the exception to the principle introduced by the first amendment that private conduct is not covered by the code of conduct. It authorises the making of such an exception subject to the two limitations on its scope explained above (the first but not the second of which the Government accepts).

Amendments 4 and 5

Page 22, line 5, after "Bill" insert "and".

Page 22, line 6, leave out "and the Local Government and Public Involvement in Health Bill".

2.6 In our view if the principle stated in Amendment 1 above is included in the Local Government Act 2000 it is not necessary to delete clause 141(4), which removes the words "in performing his functions" from s. 52 of that Act.

3 Other Bills

3.1 We publish with this Report, without comment, correspondence we have received from Ministers on the Concessionary Bus Travel Bill[65] and the Corporate Manslaughter and Corporate Homicide Bill,[66] on which we have reported previously this Session, and the Pensions Bill.[67]

[65] Appendix 2.

[66] Appendix 3.

[67] Appendices 5a and 5b.

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

Government Bills

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

- Finance Bill
- Northern Ireland (St. Andrews Agreement) (No. 2) Bill

Formal Minutes

Monday 14 May 2007

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Fraser of Carmyllie
Lord Judd
Lord Lester of Herne Hill
The Earl of Onslow
Lord Plant of Highfield
Baroness Stern
Dr Evan Harris MP

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Draft Report [Legislative Scrutiny: Sixth Progress Report], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 3.2 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Thirteenth 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.

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[Adjourned till Monday 21 May at 3.30pm.

Appendices

Appendix 1a: Letter dated 13 March 2007 from the Chairman to The Rt Hon Dr John Reid MP, Secretary of State for the Home Department, re UK Borders Bill

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

(1) Immigration Officers' powers to detain, search and seize

The Bill enables the Secretary of State to designate Immigration Officers as having the power to detain an individual at a port if the officer thinks that the individual may be liable to arrest by a constable without a warrant, or is subject to a warrant for arrest. The Secretary of State may only designate officers who he or she thinks are fit and proper for the purpose and "suitably trained".

The Explanatory Notes accept that the power of detention engages the right to liberty in Article 5 ECHR, but consider that it is "in accordance with a procedure prescribed by law" as required by Article 5, because the power is set out in legislation which specifies when it can be exercised and the limitations on its use, and the detention falls within the permitted exception in Article 5(1)(c) and may also fall within Article 5(1)(a) where there is an outstanding warrant for arrest. However, the Notes do not contain any explanation of the necessity for the new power to detain.

Q1: Please provide a more detailed explanation of why the new powers to detain, search and seize in clauses 1 and 2 of the Bill are required.

The power of a constable to arrest under s. 24 of PACE is closely regulated by Code G of the PACE Codes of Practice.[68] This Code prescribes a number of important requirements regulating the way in which the powers is exercised, concerning, for example, the information to be given to a person on arrest, and the making of a record of the reasons for arrest. The Bill makes no provision for either this Code or any other code of practice to apply to the exercise of the proposed new power to detain.

Q2: Please provide more information about the limitations on the new power of immigration officers to detain.

Q3: Will the relevant PACE Code of Practice apply?

Q4:If not, why not, and will equivalent requirements apply?

The Explanatory Notes also do not elaborate on what is meant by "suitably trained".

[68] *Code of Practice for the Statutory Power of Arrest by Police Officers.*

Q5: What training will an immigration officer receive in order to be eligible for designation by the Secretary of State as having the additional powers of detention, search and seizure?

The Explanatory Notes acknowledge that the powers to search and seize engage Article 8 and Article 1 Protocol 1 ECHR, but in the Department's view any such interference can be justified. This is because, according to the Notes, the power is for specific and limited purposes, pursues the legitimate aims of public safety, the economic well-being of the country, and the prevention of disorder or crime, and will only be carried out by officers who the Secretary of State has concluded are properly trained and are fit and proper to exercise such powers.

Q6: Will these powers to search and seize be subjected to as rigorous controls as those contained in the PACE codes of practice in relation to the equivalent police powers (Code A)?

(2) Biometric registration of persons subject to immigration control

The Bill enables the Secretary of State to make regulations requiring a person subject to immigration control to apply for the issue of a "biometric immigration document" – a document recording information about his external physical characteristics, including fingerprints and features of the iris or any other part of the eye. A "person subject to immigration control" means a person who requires leave to enter or remain in the UK, whether or not leave has been given. Regulations may require a biometric immigration document to be used for specified immigration purposes, in connection with specified immigration procedures or "in specified circumstances where a question arises about a person's status in relation to nationality or immigration." The Regulations must make provision about the use and retention of such biometric information by the Secretary of State, and may permit "the use of information for specified purposes which do not relate to immigration".

As the Explanatory Notes, acknowledge, these provisions are likely to be an interference with the right to respect for private life, but in the Government' view the interference is justified and proportionate. The Notes say that the proposals will be "in accordance with the law" because the provisions will be set out in primary and secondary legislation, and the intention is to ensure that the requirements of the regulations are formulated with sufficient precision so that their ambit is absolutely clear, accessible and foreseeable. The proposed powers are said to be necessary for the maintenance of immigration control by ensuring the integrity of documents which are evidence of a person's immigration status, and which are used to combat illegal working. They are therefore necessary for the economic well-being of the country and the prevention of crime. The Government also believes that requiring those who wish to be in the UK to have a secure, reliable biometric immigration document as evidence of their status is a proportionate way of achieving those objectives.

The Committee notes that this part of the Bill contains extremely open-ended powers capable of being exercised in ways which interfere with Article 8 rights, but there is very little detail on the face of the Bill, or in the Explanatory Notes, to enable it to assess likely compatibility with Article 8.

Q7: Please provide more details about the Government's precise intentions with a view to enabling the Committee to assessing the likely compatibility of the new powers with Article 8 ECHR.

This part of the Bill also contains a power to make the Regulations apply only to a specified class of persons subject to immigration control (e.g. to persons making a specified kind of application for immigration purposes). The Explanatory Notes make clear that the requirement for those subject to immigration control to apply for a biometric immigration document will be rolled out to different categories of those subject to immigration control incrementally. The Notes state that in the Department's view this different treatment is not discriminatory, or, if wrong about this, that any discrimination is justified. It says that the precise order and categories for the phases of implementation are still being developed, but they will be determined by rational criteria, such as which categories present the greatest risk to immigration control. They may also be determined by practical considerations, such as the availability of the necessary technology and resources for particular applicants. In the department's view, such an incremental implementation, according to rational criteria, is in principle compatible with Article 14 ECHR.

Q8: Please provide more information about the "rational criteria" according to which the Government intends to phase the implementation of this requirement.

(3) Deportation of foreign criminals

The Bill gives effect to the Home Secretary's commitment in his statement of 23 May 2006 to create a direct link between deportation and the commission of a crime of the appropriate level of severity. The Committee notes that the Bill provides that the provisions on automatic deportations may be applied to people convicted of offences before the Bill becomes law. The Government argues that this is human rights compatible either because deportation is not a "penalty" within the meaning of Article 7 ECHR (prohibition on retrospective penalties) or there is no retrospectivity because any person liable to automatic deportation under the Bill was also liable to discretionary deportation at the time they were convicted.

Q9: Please provide a more detailed explanation of why, in the Government's view, the provision in Clause 44 does not have retrospective effect.

(4) Reverse onus

The information sharing provisions of the Bill include a reverse onus provision in the statutory defence to the offence of wrongful disclosure of confidential information in clause 38(3).

Q10: Please explain why in the Government's view the reverse onus provision in clause 38(3) is compatible with the presumption of innocence in Article 6(2) ECHR.

Search for evidence of nationality

The Bill includes in clause 40(1)(a) a widely drafted power for an immigration officer or constable to search for evidence of nationality where an individual has been arrested on suspicion of the commission of an offence and the officer or constable "suspects that the individual may not be a British citizen."

Q11: Please explain what safeguards will apply to ensure that the exercise of this power does not involve an undue risk of discrimination against visible minorities.

I would be grateful for your response to these questions by 27 March 2007.

Appendix 1b: Letter dated 27 April 2007 from Liam Byrne MP, Minister of State, Home Office, re UK Borders Bill

Thank you for your letter to the Home Secretary dated 13th March which coved the Joint Committee on Human Right's initial examination of the Bill. I am responding as the Bill Minister. There has been some confusion between our officials concerning the receipt of that letter, and I apologise that this has caused my response to be delayed. My officials agreed a revised deadline of 27th April for sending the Government response to you. I enclose a memorandum which addresses your questions raised in the letter.

1. This memorandum is submitted by the Home Office in response to the questions raised in respect of the UK Borders Bill by the Joint Committee on Human Rights in the Chairman's letter dated 13th March 2007.

2. The Home Secretary made a statement under section 19(1)(a) of the Human Rights Act 1998 when the Bill was introduced in the House of Commons, indicating that in his view, the provisions of the Bill are compatible with the Convention rights. He believes that, where the Convention rights are engaged, the proposals are a balanced and proportionate response to a pressing social need and that the judgements he has made about the balance to be struck between competing rights and responsibilities can be objectively justified.

(1) Immigration officers' powers to detain, search and seize

Q1: Please provide a more detailed explanation of why the new powers to detain, search and seize in clauses 1 and 2 of the Bill are required.

3. Strengthening border security is central to the delivery of the government's 5 year strategy for asylum and immigration "Controlling our borders: Making Migration work for Britain". It is also an important feature of part of the counter terrorism strategy "CONTEST" which is managed at official level by the work of the Official Committee on Domestic and International Terrorism TIDO (Protect). This theme is continued in the IND Review 2006 (*Fair, effective, transparent and trusted: Rebuilding confidence in our immigration system*) which makes it clear that our priority is to toughen our borders, prevent abuse of our immigration laws and manage migration to benefit the UK. Strengthening border controls is the first objective in delivering this agenda and we need to work in collaboration with all the agencies responsible for securing our borders to deliver this objective.

4. At present, immigration officers have only limited powers to intervene against those who are involved in criminality (under section 14 of the Asylum and immigration (Treatment of Claimants etc) Act 2004), limited to those who commit offences under the Immigration Acts, and are of interest to the police.

5. In those circumstances where a police officer is not in attendance, the provisions in clauses 1 and 2 will ensure that designated immigration officers at the border are able to

exercise a primary intervention capability in respect of individuals who are the subject of a warrant for arrest, or who may otherwise be liable to arrest by a police constable. The detaining immigration officer will then be obliged to have a constable attend as soon as reasonably practicable to decide whether to arrest, deal with the substantive aspects of the case and to progress any criminal investigation.

6. The associated powers - to be able to search the individual concerned for anything that may cause harm or assist escape and to be able to retain such items together with anything found that the immigration officer thinks may be evidence of the commission of an offence - are primarily aimed at securing the detention of the person and ensuring his or her safety, as well as that of any other person with whom the person is in contact.

7. The new powers in clauses 1 and 2 will ensure that those subject to arrest by the police do not evade intervention simply because a police officer is not in the immediate vicinity.

Q2: Please provide more information about the limitations on the new power of immigration officers to detain.

8. The power to detain under clause 2 may only be exercised in the specific circumstances specified in that clause and only by immigration officers who are designated by the Secretary of State for this purpose. The Secretary of State may only designate officers who he thinks are fit and proper for the purpose and are suitably trained. These conditions will be factored into the designation process which we will develop in collaboration with police colleagues. Designated officers will be required to follow Standard Operating Procedures. These will be drafted in conjunction with police colleagues and will provide a clear framework within which officers will be expected to operate within. Designation may be revoked at any time if an officer fails to perform to required standards.

9. Although the maximum period that an individual may be detained under these powers is three hours, the designated immigration officer will be legally obliged to arrange for a police constable to attend as soon as reasonably practicable. The three hour timeframe was identified as a reasonable maximum period during which a police officer can reach a port. It is anticipated that in most cases individuals detained under this power will be held by a designated immigration officer for much less than three hours.

Q3: Will the relevant PACE Code of Practice apply?

10. No. We do not believe that it is necessary for immigration officers exercising powers under clause 2 to be subject to PACE codes of practice.

Q4: If not, why not, and will equivalent requirements apply?

11.Whether immigration officers should be subject to PACE codes of practice will depend upon the functions that they are undertaking. In exercising certain specified powers under the Immigration Acts, including powers to arrest, question, search or take fingerprints from a person, to enter and search premises or to seize property found on a person or premises, immigration officers must have regard to the codes of practice in force under the PACE and the equivalent legislation in Northern Ireland. This requirement is set out in Section 145 of the Immigration and Asylum Act 1999 and the Immigration (PACE Codes of Practice) Direction.

12. The power to detain under clause 2 is specifically intended to support the police at the border by enabling designated immigration officers to detain individuals of interest pending the arrival of a police constable. It is not intended that officers will take on the substantive tasks of a constable, such as questioning, arrest, investigation or specific evidence collection. It will be for the constable to make all substantive enquiries about the person and to take the decision whether the person should actually be arrested. Designated immigration officers are simply requiring a person to wait for the arrival of a police officer. The designated immigration officer is under a duty to arrange for a constable to attend as soon as is reasonably practicable. No questioning or investigation will occur during this period.

13. Immigration officers' existing powers to detain for immigration reasons under Schedule 2 of the Immigration Act 1971 are not subject to PACE codes of practice – similarly, neither does the power under clause 2 need to be subject to PACE codes of practice.

14. Immigration officers exercising the power to detain under clause 2 will be required to follow Standard Operating Procedures, referred to above (paragraph 9). They will, for example, set out when it is appropriate for officers to use the powers of detention and what the limitations are when exercising them. They will also give detailed instructions on the processes that officers must follow.

Q5: What training will an immigration officer receive in order to be eligible for designation by the Secretary of State as having the additional powers of detention, search and seizure?

15. Specific training requirements are under development. The training for designated officers will be similar in many respects to the training that is currently given to immigration officers who exercise powers of arrest under the Immigration Acts. The training will be tailored, however, to the specific detention functions that designated officers will be exercising. It is important to stress that any action to *arrest* an individual detained by a designated immigration officer under the power in clause 2 will be effected by a police constable. Designated immigration officers will not be undertaking any action to arrest individuals where the sole reason for their detention is one of the reasons specified in clause 2.

16. The Home Office is content to make the detail of the training schedule available when it is developed.

Q6: Will these powers to search and seize be subjected to as rigorous controls as those contained in the PACE codes of practice in relation to the equivalent police powers (Code A)?

17. The purpose of the search provisions in clause 2 is to allow designated officers to search and retain any items that an individual may use to assist escape or to cause physical injury to him or herself or to another person. The provisions are not intended as a means of gathering evidence for investigation.

18. If however during the course of a designated officer's search he or she found anything which may be considered evidence of the commissioning of an offence, he or she would retain it and deliver it to the constable when he or she arrived.

19. The powers to search and seize mirror those which exist for Authorised Search Officers under s.40 of the Immigration, Asylum and Nationality Act 2006 and are also not subject to PACE codes of practice.

20. Standard Operating Procedures will set out the processes that immigration officers should follow when exercising the powers of detention under clause 2. This will include the processes that should be followed when searching individuals.

(2) Biometric registration of persons subject to immigration control

Q7: Please provide more details about the Government's precise intentions with a view to enabling the Committee to assessing the likely compatibility of the new powers with Article 8 ECHR.

21. The Government wishes to reassure the Committee that we consider that the proposals in the UK Borders Bill for requiring those subject to immigration control to register their biometric samples and apply for a biometric immigration document (BID) would be compatible with Article 8 of the ECHR; and that any secondary legislation and powers provided will be compatible with Article 8, although, at present, the detail of these Regulations is still to be finalised.

22. The main objective which we are intending to achieve by introducing the biometric provisions is to ensure that all those who are subject to immigration control have a secure BID which confirms their immigration status and identity. Production of the BID will only be required in specified situations where immigration status needs to be established, rather than relying on existing less secure evidence.

23. The requirement for providing biometric samples and applying for a BID forms part of our improvements to security and border control, which will link in to the national identity scheme, and will enable other government departments to realise benefits. These benefits include increased document security, by making forgery and counterfeiting more difficult, therefore reducing the number of fraudulent immigration applications and simplifying, for employers and other government agencies, the process of establishing whether a person is eligible for employment or state benefits. We expect a significant increase in the detection of illegal applicants. By taking biometric samples – and by providing a verification service to employers – we expect to significantly reduce the scope for illegal working. This will substantially reduce fraud through the use of multiple identities and fraudulently obtaining a national insurance number.

24. The Government also intends to rely on these powers to comply with an EC Regulation, currently under revision in Brussels, which will require a grant of leave for more than six months to be a uniform residence permit – in the form of a card incorporating biometric identifiers (by amending Council Regulation (EC) 1030/2002)).

25. As acknowledged in paragraph 133 of the Explanatory Notes, the Government recognises that taking biometric or other information from a person, and storing that information and requiring a BID to be used for specific immigration purposes, may be an interference in the right to respect for private life. However, we have considered, and remain of the view, that if there were any interference, we would ensure that this was necessary and proportionate.

26. Whilst the detail of the secondary legislation is still to be finalised, we expect the BID to be a highly secure card which will contain the holder's unique biometric data samples (for example, fingerprints and facial image) and biographical information (for example, name, immigration status, nationality, date and place of birth). Some of this information will appear on the face of the card, together with a facial image, whilst other information, notably some of the biometric information, will be contained in a secure microchip. The biometric samples will be collected by an authorised person, such as a specially trained contractor. The BID will only remain valid for the duration of a person's limited leave, or for a maximum of ten years (five years for those under 16 years of age). Where a person has already provided their biometrics, we would expect to use those biometrics or a copy of those biometrics without needing to take the biometrics again. We will not be collecting DNA under these provisions.

27. It will not be compulsory to carry the BID at all times. However, BID holders will need to notify the Department if their card is lost, stolen, damaged, tampered with, or destroyed. We also expect a person who is in possession of a BID without lawful authority of the person to whom it was issued, to surrender the document.

28. Information provided will be stored securely on a central database. The biometric data held on the cards will be protected by a secure international encryption system known as a Public Key Infrastructure (PKI). Searching or verifying a person's biometric details against a central database will be done through a secure communications portal. There will be a requirement to put the security keys (PKI) on the device that is making the request to be authenticated as a trusted party. The biometric data stored on the central database will be stored separately and will not be accessible through the internet : this will ensure the information is not changed nor the system corrupted. In this regard the Border and Immigration Agency will comply with all relevant legislation including the *Data Protection Act 1998* and *Human Rights Act 1988*, to ensure the safe and secure storage of personal data.

29. It is our intention that biometric data can be retained for as long as it is used for purposes under the immigration Acts. We will also use the biometric information for non-immigration purposes – such as for nationality-related purposes (i.e. to verify a person's details when they apply for British citizenship), or for uses under the Immigration Acts which relate to the prevention of crime. However, the biometric information collected under the provisions in the *UK Borders Bill* will be destroyed if it is no longer of use for the purposes being sought, and also if the person proves they are a British citizen.

30. We will ensure compliance with the provisions by:

ii. disregarding or refusing an application for a BID (for example, where the person provides incomplete information);

iii. disregarding or refusing a simultaneous application for leave, or by curtailing existing leave (for example, where a person refuses to provide biometric or other information required); and

iv. using a civil penalty regime – which would be considered after determining whether an immigration sanction would first be more appropriate, and would not be punitive or revenue-raising.

31. Where a person were liable to a civil penalty, we would issue a notice of penalty. The person would have a right to object to the notice of penalty, and, additionally, a right of appeal to the county court or sheriff. We shall be issuing a code of practice setting out these matters, which will be subject to public consultation.

32. As the Committee might recall, all subsequent Regulations being introduced as a result of these biometric powers will be subject to the affirmative resolution procedure and thereby subject to debate and scrutiny by both Houses.

Q8: Please provide more information about the "rational criteria" according to which the Government intends to phase the implementation of this requirement.

33. From 2008, we will progressively roll out BIDs to qualifying foreign nationals subject to immigration control, who are already in the UK and reapplying to stay here. We will commence the roll out by testing the biometric recording and card production processes. By 2011 we will cover all new in-country applications for permission to stay in the UK.

34. Categories of individuals who will be required to register their biometrics include:

- Students from outside the EU;
- Those seeking to settle in the UK having completed the 5 year qualifying period;
- Those applying for extensions to work permits;
- Those who volunteer to apply for a document, such as those applying for a Transfer of Conditions or No Time Limit stamp;
- Specialist groups such Working Holiday Makers and Ministers of Religion; and
- Those seeking leave on the basis of marriage to a UK citizen;

35. The precise order and categories that will be introduced into the gradual roll out have yet to be finalised. Closer to the time of implementation (and in advance of secondary regulations being made) we will review the latest risk assessments to understand where there is abuse of immigration control. Additionally, we will examine the practical implications of prioritising particular groups for early implementation. We will of course also seek legal advice on the lawfulness of our proposals, including compatibility with the Human Rights Act.

36. Examples of rational criteria that we will use to identify which groups should be prioritised for early implementation include:

- Select applicants from within immigration categories where there is evidence of abuse of the system;
- Volumes of applicants within particular immigration categories (in order to keep the numbers manageable in the initial years);
- Impact on employers and other sponsors;
- Impact on communities and individual applicant groups; and

- Operational ease of processing applicants from particular immigration categories.

(3) Deportation of foreign criminals

Q9: Please provide a more detailed explanation of why, in the Government's view, the provision in Clause 44 does not have retrospective effect.

37. Clause 44 provides that the provisions on automatic deportation may be applied to persons convicted of offences before the Bill is passed who are in custody at the time of commencement. The Government does not accept that clause 44 engages Article 7 of ECHR.

38. Persons are currently liable to deportation if the Secretary of State deems their deportation to be conducive to the public good (section 3(5) of the Immigration Act 1971). Any person who would fall within the Bill's provisions on automatic deportation is currently capable of being deported under these powers. This may be because they are recommended for deportation by a court or are otherwise considered for deportation on discretionary grounds. Therefore, even if deportation were a penalty for the purposes of article 7 (which is not accepted), it is a penalty which could be imposed now under existing legislation on the persons to whom the automatic provisions will apply.

39. The Government does not consider that the change to make the making of a deportation order mandatory in certain circumstances has the effect of imposing a heavier sentence than was applicable at the time of commission of the offence.

(4) Reverse onus

Q10: Please explain why in the Government's view the reverse onus provision in clause 38(3) is compatible with the presumption of innocence in Article 6(2) ECHR.

40. The department considers that clause 38(3) is compatible with Article 6(2) of ECHR, applying the test set out in *DPP v Sheldrake* [2004] UKHL 43. The imposition of the burden of proof on the defendant is reasonable and proportionate as the statutory code of confidentiality for taxpayer information (an integral part of which is the offence for wrongful disclosure of taxpayer information) is an important safeguard to protect the rights and freedoms of others, particularly the taxpayer's Article 8 rights.

41. It is the disclosure of the taxpayer's information which is the act which constitutes the offence and the prosecution must prove that action beyond reasonable doubt. However, we consider that the question of whether or not the defendant reasonably believed he/she had lawful authority to disclose the information or that it had already lawfully been disclosed should be relevant and that consequently this should not be a strict liability offence. Given the importance of safeguarding the taxpayer's rights and that what the defendant believed when they disclosed the relevant information is something which only the defendant has knowledge of we consider that this defence is appropriate and fair.

42. The Joint Committee on Human Rights has scrutinised a very similar provision to this clause when it reviewed the Commissioners for Revenue and Customs Bill, considered in 2005. Section 19 of that Act was used as a template for constitutes the offence and the prosecution must prove that action beyond reasonable doubt. The Department considers

that the question of whether or not the defendant reasonably believed he/she had lawful authority to disclose the information or that it had already lawfully been disclosed should be relevant and that consequently this should not be a strict liability offence. Given the importance of safeguarding the tax clause 38(3). The report produced by the Joint Human Rights Committee, in relation to the information sharing provisions of that Bill, recognised the importance of protecting taxpayer confidentiality in meeting the requirements of Article 8 of the ECHR and even suggested that HMRC should include further provisions in addition to the criminal sanction, to protect taxpayer confidentiality. Therefore the inclusion of this clause in the UK Borders Bill reflects the concerns about taxpayer confidentiality already raised in relation to the Commissioners for Revenue and Customs Bill.

(5) Search for evidence of nationality

Q11: Please explain what safeguards will apply to ensure that the exercise of this power does not involve an undue risk of discrimination against visible minorities.

43. Where a person has been arrested for a criminal offence and taken to a police station, there is a need to establish their nationality at an early stage in order to then consider whether the person is a foreign national who may be liable to deportation.

44. A custody officer must have reasonable grounds to suspect that a person may not be a British citizen, and therefore may be liable to deportation, before a search may be authorised.

45. If a person is questioned because of their racial appearance then this will amount to unlawful race discrimination. Therefore race or colour can never be the basis of the officer's "reasonable suspicion" that someone is not a British citizen.

46. The Border and Immigration Agency will provide guidance to police on what questions to ask regarding nationality to avoid inappropriate questions. Enquiries will be made to see whether information on nationality is already held elsewhere in police or immigration records before a search is authorised.

47. Where a police custody officer is not satisfied that a person's nationality can be ascertained or confirmed, it may be necessary for immigration officers to examine the person, and in combination with this for immigration or police officers to be able to search the person's premises for documents which might establish the person's nationality.

48. Safeguards are being put in place to ensure that this power is not applied disproportionately. The power to search will be authorised by a senior officer; either at least a chief immigration officer or a police inspector or above, and a written record must be made of the reason the search is authorised.

49. We will be conducting a pilot, the results of which will be published, to ensure that these powers are conducted both appropriately and proportionately.

Appendix 2: Letter dated 9 May 2007 from Gillian Merron MP, Parliamentary Under Secretary of State, Department of Transport, re Concessionary Bus Travel

I am writing in response to the Third Report of this session by the Joint Committee on Human Rights (JCHR), in respect of the Committee's views on the Concessionary Bus Travel Bill.

In the Report, the Committee explained that although it welcomed the Government's full response to its letter of the 19 December 2006, it nevertheless still had concerns about the compatibility of a certain element of the Bill with Article 6 ECHR. We have considered the Committee's observations and it will, I hope, be helpful if I set out the Government's views on the points made.

I very much agree with the Committee's view that the Bill is a human rights promoting measure and thank the Committee for its broad support here.

Following our correspondence with you, I can confirm that we have clarified the wording in the ECHR section of the Bill's Explanatory Notes so that the impression is no longer given that the reimbursement of bus operators does not engage Article 6 ECHR. This update occurred when the Bill moved from the House of Lords to the House of Commons on the 6 February, the day before the Committee's Report was published.

I have carefully considered the Committee's main point of concern in relation to the Bill (ending with paragraph 1.19 of the report), about clause 9 and the appeal arrangements should the Secretary of State centralise reimbursement of bus operators in future. However, on balance, I remain of the view that the human rights of bus operators are sufficiently protected without the need to amend the Bill as the Committee suggests.

The Committee recommended that the Secretary of State's power to take over reimbursement functions from Travel Concession Authorities be exercisable only if he makes express provision on the face of the Bill either for appeals to an independent and impartial tribunal or for an appropriate right of appeal for operators against decisions on reimbursement. I am, however, unconvinced about the usefulness of conditional wording being added to the Bill. As you know, section 6 of the Human Rights Act will require any order under clause 9 to be compatible with Convention rights. It would also be subject to the affirmative resolution procedure and so would be subject to clear parliamentary scrutiny.

I am grateful for your recognition that reference to a specific appeal body cannot at present be made, but remain of the view that an alternative reference to an 'independent and impartial tribunal' is unlikely to add much more comfort to bus operators in real terms. It would make no sense to retain the Secretary of State to hear appeals against his own decisions. Judicial review would also, in our view, be available to remedy any deficiency which might arise in the mechanism ultimately adopted, for example, if the appellate body adopted were found not to be fully independent and impartial.

As you know, and refer to, we have already amended the Bill at clause 9 in light of the Delegated Powers and Regulatory Reform Committee's report on the Bill. This amendment should provide reassurance that there *will* be an appeal mechanism, should the

centralisation power be used. In light of this amendment and my reasoning above, we remain of the view that the provisions in the Bill are compatible with Article 6 ECHR.

I hope that this letter will go some way to explaining our position in light of your recommendations. If you have any further queries, please do not hesitate to contact me.

I am copying this letter to Lord Davies of Oldham and Lord Bassam of Brighton as well as placing a copy in the Libraries of both Houses.

Appendix 3: Letter dated 31 January 2007 from Gerry Sutcliffe MP, Parliamentary Under Secretary of State, Home Office, re Corporate Manslaughter and Corporate Homicide Bill

I am writing further to my letter of 25 October about the Bill.

One of the aspects of the offence in which you were particularly interested was the proposal not to apply the offence to unincorporated bodies. As the Bill has progressed through Parliament, we have continued to keep the application of the offence under review and have come to the conclusion that some extension to unincorporated bodies would be sensible. The Government is therefore tabling amendments to this effect in the House of Lords, to be considered at Report on 5 February. I attach a copy of the letter that we have sent to peers explaining our amendments, which I thought your Committee would wish to see. These amendments, if adopted, will of course be considered by the Commons when the Bill returns following the completion of remaining stages in the Lords.

For the reasons set out in the attached letter, we have not applied the offence to all forms of unincorporated body, preferring to adopt a more cautious approach to the wide variety of bodies that are not incorporated and which are not on the whole ones to which the law of manslaughter currently applies. It will be possible under these proposals to extend the range of organisations covered by the offence by secondary legislation in due course.

I ought perhaps to clarify that it remains our view that there is no obligation under the European Convention on Human Rights to introduce an offence of corporate manslaughter, either in respect of legal persons or unincorporated bodies. However, the extension of the offence will mean that a wider range of employees and those affected by work related fatalities will receive the benefit of the Bill.

Appendix 4: Letter from Phil Woolas MP, Minister for Local Government and Community Cohesion, re Local Government and Public Involvement in Health Bill

Thank you for your letter of 23 January to the Rt Hon Ruth Kelly, asking the Department for an explanation of the Government's view that the proposal relating to the remit of the code of conduct for local authority members included in the Local Government and Public Involvement in Health Bill is compatible with Articles 8 and 10 of the European Convention on Human Rights. I am replying in my capacity as Minister for Local Government, and apologise for the delay in replying.

I should start by saying that until last October it was the Departments view that the powers provided to the Secretary of Stats by sections 49(1) and 50(1) of the Local Government Act

2000 allowed the general principles governing the conduct of members and the provisions of the code of conduct to include behaviour by members in their private capacity- -as well as their official capacity. The general principles and the code of conduct were therefore drafted on this basis.

The Standards Board has assessed that up to last October there had been at least 70 cases were members had been accused of breaching the code of conduct at least wholly or partly as a result of their private behaviour. These included cases where members were disqualified or suspended for various periods for breaches such as downloading child pornography, bullying, assaulting or threatening people, committing benefit fraud and drink driving.

Our understanding of the remit of the code of conduct changed as a result of the judgement of the High Court in the case of the London Mayor in October last year. This judgement held that in section 52 of the Local Government Act 2000, which provides that a member must give an undertaking that he or she will comply with the code, the inclusion of the words 'in performing his functions' means the provision applies only where members are performing their function, ie not in their private capacity. The judgement referred to the fact that the legislation did not make express provision for the code to apply in a members private life and therefore cast doubt on the inclusion of behaviour in a members private life within the remit of the code of conduct. Our intention is therefore to provide in clause 131 (now 141) of the Bill the express powers to allow the code to apply to a member at all times, and so to put the law back to the position it was prior to the High Court judgement.

Our policy as embodied in the Local Government Act 2000, and which continues to be our policy, is that the remit of the code should include some matters in members' private lives. We believe that in order to give public reassurance that high standards will be followed and to underline the fact that we expect members to set an example of leadership to their communities, we consider that they should be required to abide by a code of conduct provided by Parliament even when they are not acting in their role as councillors.

The current position, under which behaviour in private life is excluded from the remit of the code unless it is directly related to the member's official role, leads to a number of anomalies which we do not consider to be acceptable. For example, an assault by a member arising from a dispute with a fellow member at a council meeting would be proscribed by the code, but an assault carried out on a member of the public in the street or the member's home would not now be likely to be covered. Behaviour by a member, including sexual offences for which the member has been convicted, will not be covered by the code if there is no direct link between the behaviour and the member's role as a councillor. We do not consider that this provides a sensible framework for ensuring public confidence that members are following high standards of conduct.

You will also wish to be aware that I gave an assurance about my current intentions on how in practice we wish to see the code of conduct applying in respect of members' private behaviour at the Bill's Committee stage on 1 March. I made it clear that my current intention is that the code should only proscribe conduct in a member's private capacity which has resulted in a criminal conviction. I believe this would achieve a sensible balance

between the need for the ethical regime to tackle serious cases of misconduct which would be of concern to the public, and to ensure a proportionate approach.

The inclusion of some conduct in private life within the remit of the code of conduct was supported by a majority of those who responded to the Standards Board's consultation on the code of conduct in 2005. The approach proposed in respect of behaviour in private life was set out in the Department's own discussion paper on conduct in local government in December 2005, and it has been supported by the Local Government Association, the main representative body for the local government world.

Whilst it could be said that in some circumstances Article 8 (right to respect for private and family life) and Article 10 (right to freedom of expression) may be engaged by clause 131 (now 141) of the Bill, we believe that in practice the clause will only ever be exercised in a way which is compatible with those rights. The rights of people to free speech and to a family life are already restricted in through a number of criminal offences. Such restrictions are considered necessary in the interests of public safety, for example, for the prevention of disorder or the protection of morals.

Since we are proposing that the code of conduct will only apply in respect of behaviour in a private capacity where there has been a criminal conviction, we are not interfering in any person's human rights to any extent which is greater than the criminal law already provides.

For the reasons indicated, we therefore consider that the proposed provision is capable of being exercised compatibly with Articles 8 and 10.

Appendix 5a: Letter from James Purnell MP, Minister of State for Pensions Reform, Department for Work and Pensions, re Pensions Bill

1. Further to my letter of 5 December, in which I outlined the human rights issues potentially arising from the Pensions Bill, I am now writing to provide you with details of an amendment which the Government intends to introduce at Commons Committee stage (currently scheduled to take place between 23 January and 8 February 2007). I write because this amendment raises further potential ECHR issues.

2. The amendment concerns clause 15 of the Bill, which deals with the abolition of contracting out for money purchase schemes.

3. From the date of abolition, contracting out for money purchase schemes will cease. Money purchase schemes that were formerly contracted out will no longer receive the contracting out rebate (which takes the form of reduced rate National Insurance Contributions and/or age-related payments to the pension scheme). From the date of abolition, members of formerly contracted-out schemes will be brought fully into the State Second Pension scheme.

4. As introduced, the Bill did not make any provision for abolishing or altering the rules in relation to protected rights. Protected rights are rights which derive from the contracting out rebate. These rights are subject to certain rules such as where funds can be invested. Members who are married or in a civil partnership must use their protected rights to

choose pension or annuity provision which will provide benefits to a surviving spouse or civil partner.

5. The Government has decided to introduce an amendment at Commons Committee stage which will give DWP power to make regulations abolishing or altering the rules relating to protected rights.

6. The reason for abolishing rules relating to protected rights is that there is a widespread view (evidenced by consultation we carried out in autumn 2006), that the rules are too complex and that their removal would result in simplification for schemes, and their members, as well as administrative savings.

7. The Government did not include provisions in the Bill simplifying the rules on protected rights because it wanted to ensure that the final decision on how to deal with protected rights was informed by the outcome of the joint Treasury/DWP review of the "Open Market Option" arrangements for the purchase of annuities which is expected to reach its conclusions at the end of the year. The review will seek to ensure that people make informed choices about their annuity type and fully understand the consequences of their choice, including the purchase of annuities that make provision for survivors. The Government therefore decided that we needed a power to deal with the rules on protected rights once the review has concluded.

ECHR issues

8. Abolition of the rules relating to protected rights may engage Article 1 of the 1st Protocol of the Convention, in that it may affect the rights of scheme members. The Government's view is that any interference with the rights of members is justified by the benefits of the simplification programme. Removing the rules relating to benefits for survivors would also produce simplification benefits.

9. Before exercising the power to remove any rights of survivors the Government will consider, in the light of the outcome of the Open Market Option review, whether the benefits of simplification outweigh any disadvantages for surviving spouses and civil partners.

Appendix 5b: Letter dated 8 May 2007 from James Purnell MP, Minister of State for Pensions Reform, Department for Work and Pensions, re Pensions Bill

1. Further to my letters of 5 December and 24 January, in which I outlined the human rights issues potentially arising from the Pensions Bill, I am now writing to inform you of an amendment which the Government introduced at Commons Report stage.

2. The amendment inserted clause 18 into the Bill, which deals with increased levels of payments under the financial assistance scheme (FAS).

3. Although this amendment potentially raises further ECHR issues, the Government considers that this measure is compatible with the Convention rights.

4. Whilst it is possible that Article 8 could be engaged on the basis that the FAS is a financial scheme that promotes or assists family life, the Government's view is that if that is

so, the measure is compatible with Article 8 on the basis that any interference is positive and does so assist family life.

5. It is unclear whether Article 1 of Protocol 1 would be engaged in relation to FAS: see *Stec*[69] and Bennet J in *Couronne*.[70]

6. In any event, we have considered any potential engagement of Article 14 read with either Article 8 or Article 1 of Protocol 1, should a comparison be attempted between people who are/are not eligible for FAS. The Government considers that the measure is compatible on the basis that any claimant would be unlikely to establish a 'status' within the meaning of Article 14, that any comparators are unlikely to be in an analogous position, and that any difference in treatment is justified.

7. The Government considers that the appeals process in relation to the FAS is Article 6 compliant.

[69] *Stec and Others v The United Kingdom* (Application nos. 65731/01and 65900/01).

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

Bills and other documents reported on by the Committee (Session 2006-07)

*indicates a Government Bill

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

BILL TITLE	*REPORT NO*
Bournemouth Borough Council Bill	2nd
Concessionary Bus Travel Bill*	**3rd**
Consolidated Fund Bill*	2nd
Consolidated Fund (Appropriation) Bill*	11th
Consumers, Estate Agents and Redress Bill*	**2nd and 11th**
Corporate Manslaughter and Corporate Homicide Bill*	**2nd**
Crossrail Bill*	2nd
Digital Switchover (Disclosure of Information) Bill*	2nd
Finance Bill*	13th
Fraud (Trials without a Jury) Bill*	**2nd**
Further Education and Training Bill*	2nd
Greater London Authority Bill*	2nd
Income Tax Bill*	2nd
Investment Exchanges and Clearing Houses Bill*	2nd
Justice and Security (Northern Ireland) Bill*	**5th**
Legal Services Bill*	**3rd**
Local Government and Public Involvement in Health Bill*	**11th and 13th**
London Local Authorities Bill	2nd
London Local Authorities and Transport for London Bill	2nd
Manchester City Council Bill	2nd
Mental Health Bill*	**4th**
National Trust (Northern Ireland) Bill	2nd
Northern Ireland (St Andrews Agreement) Bill*	2nd
Northern Ireland (St Andrews Agreement) (No. 2) Bill*	13th
Offender Management Bill*	**3rd**
Parliament (Joint Departments) Bill*	11th
Planning-Gain Supplement (Preparations) Bill*	2nd
Pensions Bill*	2nd
Serious Crime Bill	**12th**
Sexual Orientation Regulations	**6th and 11th**
Statistics and Registration Service Bill*	2nd
Tribunals, Courts and Enforcement Bill*	**2nd, 5th and 11th**
UK Borders Bill*	**13th**
Welfare Reform Bill*	**2nd and 11th**
Whitehaven Harbour Bill	2nd