House of Lords
House of Commons

Joint Committee on Human Rights

The Committee's Future Working Practices

Twenty-third Report of Session 2005-06

HL Paper 239
HC 1575

House of Lords
House of Commons

Joint Committee on Human Rights

The Committee's Future Working Practices

Twenty–third Report of Session 2005–06

Report, together with formal minutes and appendices

Ordered by The House of Lords to be printed 24 July 2006
Ordered by The House of Commons to be printed 24 July 2006

HL Paper 239
HC 1575
Published on 4 August 2006 by authority of the House of Lords and the House of Commons London: The Stationery Office Limited
£0.00

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.

Current Membership

HOUSE OF LORDS	HOUSE OF COMMONS
Lord Bowness	Mr Douglas Carswell MP (Conservative, *Harwich*)
Lord Campbell of Alloway	Mary Creagh MP (Labour, *Wakefield)*
Lord Judd	Mr Andrew Dismore MP (Labour, *Hendon*) (Chairman)
Lord Lester of Herne Hill	Nia Griffith MP (Labour, *Llanelli*)
Lord Plant of Highfield	Dr Evan Harris MP (Liberal Democrat, *Oxford West & Abingdon*)
Baroness Stern	Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)

Powers

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

Publications

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

Current Staff

The current staff of the Committee are: Nick Walker (Commons Clerk), Ed Lock (Lords Clerk), Murray Hunt (Legal Adviser), Jackie Recardo (Committee Assistant), Pam Morris (Committee Secretary) and Tes Stranger (Senior Office Clerk).

Contacts

All correspondence should be addressed to The Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2467; the Committee's e-mail address is jchr@parliament.uk.

Contents

Report

Page

Summary 3

1 Introduction 5

2 Our proposals 8
The options in the Klug report 8
Option A 8
Option B 8
Option C 9
Legislative scrutiny 11
The scope of scrutiny 13
Which bills raise sufficiently significant issues: the threshold of significance 13
The sifting process 14
Post-sift scrutiny 16
Freestanding reports on individual bills 18
Other work 18
Pre-legislative scrutiny 19
Post-legislative scrutiny 20
Declarations of incompatibility, monitoring of Strasbourg judgments and remedial orders 20
Scrutiny of compliance with UN human rights treaties 22
Scrutiny of human rights treaties pre-ratification 23
Urgent and thematic inquiries 23
Implementation of the Human Rights Act and human rights institutions 24
Committee resources 25
Conclusions 25
Legislative scrutiny 25
Pre- and post-legislative scrutiny 26
Declarations of incompatibility, monitoring of Strasbourg judgments and remedial orders 26
Scrutiny of compliance with UN human rights treaties 27
Scrutiny of human rights treaties pre-ratification 27
Other inquiries 27
Implementation of the Human Rights Act and human rights institutions 27
Organisation of work 27

Annex 29

Formal Minutes 30

Appendices **32**

Appendix 1: Klug Report with Tables 1-8 and Appendices 1-4 32

Appendix 2 : Correspondence from The Lord Brabazon of Tara DL, Chairman of Committees, House of Lords 109

Appendix 3 : DCA Table of Declarations of Incompatibility made under section 4 of the Human Rights Act 1998 111

Appendix 4: Recent correspondence received in relation to declarations of incompatibility 119

Reports from the Joint Committee on Human Rights in this Parliament **122**

Summary

In this Report, the Committee sets out how it intends to fulfil, over the remainder of this Parliament, its terms of reference to consider "matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)".

The Committee appointed a specialist adviser, Francesca Klug, Professorial Research Fellow at the Centre for the Study of Human Rights at the LSE, to assist it in its examination of its working practices. Professor Klug reported her findings to the Committee in early July, and after consideration of her report, which is published as an Appendix to this one, the Committee has decided to model its future working practices on one of the three options which she presented to it, with some modifications and elaborations.

In this Report the Committee accordingly sets out a strategic declaration of intent for the way in which it will carry out its work for the remainder of this Parliament.

The Committee intends to maintain its predecessors' undertaking to scrutinise all Government and private bills introduced into Parliament for their human rights implications. It will seek however to focus its scrutiny on the most significant human rights issues raised by bills in order to enhance its ability to alert both Houses to them in a timely way. To this end it will implement a new sifting procedure, to be carried out by its Legal Adviser under the Chairman's delegated authority according to certain criteria to establish the significance of human rights issues raised by a bill. This procedure is set out in detail in paragraphs 27 to 49 of the Report, and summarised in the flowchart annexed to it. The Committee's Reports on bills will be shorter and more focused, and the Committee intends more regularly to reach a view on issues of proportionality which may arise (paragraph 47). The Committee will scrutinise private Members' bills only on an *ad hoc* basis, and normally only if they both raise issues of major human rights significance and appear likely to become law (paragraph 26). The Committee also re-emphasises the importance of a substantial improvement in the quality and consistency of the information which the Government provides to Parliament on the human rights implications of bills at the time of their introduction (paragraph 41).

With the reduction in the Committee's overall work on legislative scrutiny brought about by this sifting process, the Committee intends to expand other areas of its work. These will include—

- more pre-legislative scrutiny work, in order to draw the attention of Parliament and the Government to any potential pitfalls in relation to a proposed policy course (paragraphs 55 and 56)
- more post-legislative scrutiny work, to assess whether the implementation of legislation has produced unwelcome human rights implications (paragraph 57)
- a development of work on monitoring declarations of incompatibility made by UK courts and on implementation of Strasbourg judgments against the UK finding a breach of human rights (paragraphs 58 to 63)
- continuation of scrutiny of UK compliance with UN human rights treaties, but not necessarily by binding the Committee's work to the Concluding Observations issued by the UN treaty bodies (paragraphs 64 to 67)

- continuation of scrutiny of human rights treaties entered into by the UK before they are ratified, if they raise any significant issues of which Parliament should be made aware (paragraph 68)
- introduction of categories of inquiry work on major unexpected developments and significant human rights issues of national concern, seeking to inquire into subjects where the Committee can make an important and useful contribution to parliamentary and public debate, along with a continuation of work on thematic inquiries such as the previous Committee's inquiry into deaths in custody (paragraphs 69 to 72)
- continuation and development of work on the implementation of the Human Rights Act, including the holding of regular evidence sessions with the Human Rights Minister, and the continuation of interest in the work of human rights institutions with in the UK, including primarily the Commission for Equality and Human Rights.

In its scrutiny work the Committee will also seek, where appropriate, to place its examination of bills or other documents such as Green and White Papers within a wider policy context (paragraph 51).

The Committee recognizes that in its inquiry work it will need to be rigorous in asking itself whether by intervening in a particular debate it can genuinely add value by virtue of its expertise in human rights and the nature of the investigations it can conduct (paragraph 71).

In organising its work, the Committee will not accord priority to any type of work over others, while noting that its legislative scrutiny work, because of its continuous nature and the fact that it only has value insofar as it is achieved in good time to inform particular parliamentary debates, falls into a rather different category from other work (paragraph 77).

Finally the Committee notes that it will need to make choices and prioritise in the course of its work (paragraph 78), and that, although it recognizes that it will not be possible for it to pursue all its proposed strands of work simultaneously, and possibly not even over the course of one parliamentary Session, it fully intends to explore the full range of work involved over the remainder of the Parliament as a whole (paragraph 79).

1 Introduction

1. The most important strategic question facing us on our establishment as the Joint Committee on Human Rights in the current Parliament, in July last year, was how we should interpret the terms of reference accorded us by both Houses in order to fulfil them in the most effective way over the course of the Parliament.

2. Our terms of reference[1] prescribe certain mandatory requirements for us to consider and report on remedial orders. Other than that, they are permissive and broad, allowing us to consider "matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)".

3. Over the course of the 2001–2005 Parliament our predecessor Committee developed and put into effect working priorities and practices in accordance with its own interpretation of those terms of reference. That Committee provided a full and helpful account of its work, and the principles which had guided that work, in its final Report of the Parliament, *The Work of the Committee in the 2001–2005 Parliament*.[2] In that Report it also provided a number of suggestions, based on its own experience, for how its successor Committee might wish to fulfil its terms of reference. We are grateful to our predecessors for providing this record of their work, and we have taken full account of their suggestions.

4. We nevertheless took an early decision to examine afresh, and with an open mind, the principles which had governed our predecessors' working methods and those which we would adopt for the remainder of this Parliament. The main question facing us as part of this exercise was the extent to which we would follow our predecessors' example in seeking to scrutinise all bills introduced into Parliament for their human rights implications, principally in relation to their compatibility with the Convention rights as defined by the Human Rights Act 1998, in order to report their views to both Houses.

5. Our predecessors' early decision to undertake such comprehensive legislative scrutiny was one which had profound effects on their work throughout the course of the Parliament, with attendant advantages and disadvantages. Broadly speaking, it gave them a distinctive parliamentary role of advising both Houses in carrying out their prime function of legislation. The advice provided by the Committee through legislative scrutiny was swiftly recognized, both within Parliament and Government and more widely, to be authoritative and impartial. Some have argued that it is the seriousness of this legislative scrutiny work which led to the Committee's views being highly-regarded when it turned its attention to other subjects.

6. At the same time, the workload involved in comprehensive legislative scrutiny prevented the Committee, with its finite time and resources, from undertaking much proactive policy-orientated work which could have helped to shape the human rights agenda within and outside Parliament. It did carry out important and influential inquiries into subjects such as the case for a Human Rights Commission[3] and for a Children's Commissioner for

1 House of Commons Standing Order No. 152B; House of Lords Order of Appointment, 19 July 2005

2 Nineteenth Report of Session 2004-05, *The Work of the Committee in the 2001–2005 Parliament*, HL Paper 112, HC 552

3 Sixth Report of Session 2002–03, *The Case for a Human Rights Commission*, HL Paper 67-I, HC 489-I

England,[4] into the meaning of "public authority" in the Human Rights Act,[5] and into the human rights aspects of the serious problem of deaths in custody.[6] It also sought to report on UK compliance with a number of UN human rights treaties,[7] and, less formally, to monitor the Government's performance in responding to declarations of incompatibility made by UK courts and to judgments against the UK made in Strasbourg.[8] However, if the Committee had not committed itself to scrutinising all primary legislation, it could have undertaken more of these other types of work, or expanded further into areas of scrutiny work such as pre-legislative or post-legislative scrutiny. There have also been criticisms that the Committee's focus on legislative scrutiny work has made it of less relevance to the more political environment of the House of Commons, both because of the nature of that work and because most major Government bills start in that House, with the consequence that in a lot of cases the Committee's Reports on those bills have not been published in time to influence debate there. There is also concern that our relative lack of work on pre-legislative scrutiny and public policy generally has meant that we have missed or reduced the opportunity to influence Government policy at a stage when—given the realities of the parliamentary system—a shift in policy is more likely to occur.

7. It is against this background that we decided we should formally examine our working practices in a considered and evidence-based manner before arriving at conclusions. In November 2005 we agreed broad terms of reference for this exercise and also decided to appoint a specialist adviser to examine the matter from an independent expert yet detached perspective in order to provide us with material on which we could base decisions. The terms of reference which we announced were as follows:

> Taking into account suggestions made by the JCHR in the previous Parliament in its Nineteenth Report of Session 2004–05, the Committee will be considering how it can best fulfil its terms of reference over the course of this Parliament. Amongst the main matters it will be considering are—
>
> - the balance to be struck between its legislative scrutiny work, other scrutiny work such as that related to international treaties, and more thematic, policy-orientated work
>
> - the priorities, procedures and working practices which it will seek to employ in undertaking each kind of work, including whether the emphasis of its legislative scrutiny work should be changed to focus to a greater extent on pre-legislative scrutiny (e.g. Green and White Papers and draft bills) and/or post-legislative scrutiny (e.g. delegated legislation, statutory guidance and codes of practice).[9]

8. On 1 February 2006 we appointed Francesca Klug, Professorial Research Fellow at the LSE's Centre for the Study of Human Rights, as a specialist adviser to work on these questions and propose strategic options for us to consider. Professor Klug's report , which

4 Ninth Report of Session 2002–03, *The Case for a Children's Commissioner for England*, HL Paper 96, HC 666

5 Seventh Report of Session 2003–04, *The Meaning of Public Authority under the Human Rights Act*, HL Paper 39, HC 382

6 Third Report of Session 2004–05, *Deaths in Custody*, HL Paper 15, HC 137

7 For a summary of these reports see Nineteenth Report of Session 2004–05, op. cit.

8 Nineteenth Report of Session 2004–05, op.cit.

9 Press notice No. 11 of Session 2005–06, 11 November 2005

she presented to us in early July, is published as an Appendix to this Report.[10] We are indebted to her for agreeing to take on this work and for producing such a well-researched and well-informed report. It includes a wealth of useful information, views and analysis. We also record our gratitude to Professor Klug's research assistant Helen Wildbore for the extensive work she carried out in preparation of the report.

9. It is now just over a year since we were set up at the start of this Parliament. Over that period, pending the outcome of our examination of our working practices, we have been operating in practical terms in roughly the same way as our predecessors. However, there are some important differences which deserve explanation.

10. Unlike our predecessors, we have not formally accorded priority of any kind to legislative scrutiny work over other work, and while we have continued to scrutinise and report on nearly all Government bills, and have scrutinised some private bills on request from the Lord Chairman of Committees in the House of Lords,[11] we have not committed ourselves to report on all bills. For those bills which we have scrutinised we have sought to report as early as possible in the parliamentary process, taking into account our work on other matters, but we have not set ourselves any targets for the stages in the parliamentary process by which we will aim to report, such as the "second reading in the second House" target adopted by our predecessors. Moreover, during this Session we have not scrutinised any private Members' bills. In respect of private Members' bills originating in the Commons, we would scrutinise them if they appeared likely to become law and raised significant human rights issues. In respect of bills originating in the Lords we would place less emphasis on whether they were likely to become law, and consider scrutinising them on an *ad hoc* basis depending on their human rights significance and representations received.

11. In the remainder of this Report we do not exhaustively reconsider all the issues covered so clearly by Professor Klug's report. Our Report is intended to set out a strategic statement of intent of the way we will seek to fulfil that limb of our terms of reference under which we consider matters relating to human rights in the UK and report on them to Parliament. That statement of intent will be subject to refinement and elaboration over time.

10 Appendix 1

11 Appendix 2

2 Our proposals

The options in the Klug report

12. In the concluding section of her report, Professor Klug put forward 3 potential options for future working practices for us to consider in the context of the research, reflections and comments contained in the rest of her report. These options are as follows:

Option A

— Provide a comprehensive 'bill scrutiny service,' to both Houses of Parliament as the major purpose of the Committee.

— Ensure that all government and private bills meet the 2nd reading target as a matter of first priority.

— Scrutinise all private Members' bills (PMBs) which a) receive 2nd reading in either house b) elicit considerable public interest c) at the specific request of the bill sponsor.

— Only call witnesses or examine wider evidence in a handful of bills of exceptional significance

— Scrutinise treaty monitoring body reports and government responses to these.

— Monitor government compliance with European Court of Human Rights decisions and extend this to Declarations of Incompatibility issued by domestic courts

— Only occasion call ministers as witnesses for specific purposes, provided this does not incapacitate the 2nd reading target.

— Scrutinise draft bills where possible but only scrutinise other pre-legislative policy documents or White Papers on an exceptional basis and not at the expense of meeting the 2nd reading target.

— Continue to press Government to provide a Human Rights Memorandum or more detailed Explanatory Notes on s19 statements that accompany each bill.

Option B

— Only scrutinise published government bills and only on an exceptional basis, usually where they are of major human rights significance. No longer consider that the purpose of the committee is to provide a 'bill service' on any kind of bill.

— Conduct regular 'thematic enquiries' on human rights issues of relevance to the wider public, using the approach and techniques associated with departmental select committees.

— Seek to raise the profile of the Committee by conducting enquiries on significant human rights issues of national concern. Examples in the current session might have included reviewing allegations about the UK's role in so-called 'extraordinary

renditions' or the implications of introducing the equivalent of 'Megan's Law' into the UK.

— Ensure there is sufficient 'slack' to be able to respond rapidly to major unexpected developments, such as conducting a review into claims that the Probation Service or Parole Board are becoming 'distracted' by human rights concerns or into the operation of the HRA within public services more generally, in the context of the government's wider review.

— Conduct pre- and post- legislative enquiries at the time where they are most likely to be of influence, for example into the implications of extending detention without full trial beyond 28 days or into the effects of the Government's 'Respect Agenda' on young people in specific localities, after the Police and Justice Bill has come into force.

Option C

— Retain the intention to scrutinise and report on all Government Bills which raise "significant human rights issues," and all private bills whenever feasible, in the context of the role allotted to Parliament in the scheme of the Human Rights Act,

— Only scrutinise PMBs on an exceptional basis, and only if they have a serious chance of becoming law or are of major national significance.

— Revisit the definition of "significant" human rights to elaborate further on the criteria used to decide significance, which may be expanded to include government obligations to 'protect' rights as well as refraining from breaching them. Committee members to engage with this process as an opportunity to reassess meaning and scope of human rights.

— Delegate to the legal adviser the responsibility to develop a system for sifting *all* Government Bills to determine if a) they reach the new 'significance' threshold b) they reflect a 'pattern of incompatibility' threshold which the legal advisor will draw up based on past patterns of repeated incompatibility.

— Only report on Bills which meet these two sets of criteria to the Committee and to the House and no longer spend Committee time on Bills that do not raise a 'significance' or 'pattern of incompatibility' issue.

— Frontload the timetable so that the legal adviser and Committee decide whether a Bill is sufficiently 'significant' (based on criteria above) to be reported to the House within 2-3 weeks of publication.

— Try to ensure that each Bill is reported in its own freestanding report wherever possible, to increase accessibility and comprehension for MPs and Peers.

— Consider the case for the Committee carrying out its *own* assessment of compatibility, in its own 'less technical voice' *when appropriate*—in particular where proportionality considerations apply—based on the examination of witnesses and evidence, rather than necessarily determine 'risk of incompatibility' by 'second guessing' the courts.

— Use the additional time freed from streamlining bill scrutiny for considering some or all of the following functions *when appropriate*

(i) reporting on all Declarations of Incompatibility issued by the domestic courts, advising parliament on whether, and if so how, the government should respond to them

(ii) Conduct pre- and post -legislative enquiries at the time where they are most likely to be of influence (see option B).

(iii) Continue to carry out 'scrutiny enquiries,' where appropriate, of the sort that have been piloted this year on counter terrorism and torture, where Bill scrutiny can be conducted in a wider policy context.

— Hold regular sessions with the Human Rights minister and staff on the implementation of the Human Rights Act and other related human rights issues

— Ensure there is sufficient 'slack' to be able to respond rapidly to major unexpected developments and seek to raise the profile of the Committee by conducting enquiries on significant human rights issues of national concern (see option B).

— Continue to monitor treaty body reports and Strasbourg decisions if there is capacity to do so.

— Continue to press Government to provide a Human Rights Memorandum (see option A).

13. Adoption of Option A would involve almost exclusive concentration on legislative scrutiny, maintenance of the previous Committee's practice of inquiring into the Concluding Observations of UN treaty monitoring bodies, and a development and systematisation of the previous Committee's work in monitoring declarations of incompatibility and adverse Strasbourg judgments, and the Government's response to those. Unlike our own practice hitherto, or that of our predecessor Committee, it would involve exclusion of all other types of work from our programme.

14. Option B would substantially reduce our work on scrutiny of bills presented to Parliament, restricting it to a small number of Government bills. In place of this work we would conduct more inquiries into significant and urgent matters of national human rights significance and expand pre-and post legislative scrutiny, while continuing to undertake thematic inquiries, such as that undertaken by our predecessors into deaths in custody or our current inquiry into human trafficking.

15. Option C involves a less radical reduction in legislative scrutiny work than that contained in Option B, effected by the introduction of a sifting system which would still cover all Government bills and private bills introduced to Parliament but would reduce the number of Bills considered and reported on substantively by the Committee. This reduction would permit an expansion in the other types of work set out in Option C. allowing us greater flexibility to determine the relative priority to be accorded to different elements of our work.

16. We have considered these Options and have decided that, subject to further elaboration and prioritisation, Option C broadly represents the most balanced and effective way for us to operate over the rest of this Parliament. The main differences with the working practices of the previous Committee are—

- a focusing of legislative scrutiny work to ensure that our resources are used in order to enhance our ability to alert both Houses in a timely way to the most significant human rights issues raised by bills, rather than trying to provide an exhaustive analysis of every bill which engages human rights, although we will subject each bill to an adequate degree of scrutiny to ensure we report properly on matters of human rights significance
- an extension of work on declarations of incompatibility
- an extension of work on pre-legislative scrutiny in order to draw attention to the human rights implications of policy as it is under development
- an extension of work on post-legislative scrutiny in order to assess whether the implementation of legislation has produced unwelcome human rights implications
- an extension of work on what Professor Klug describes as "scrutiny" inquiries, such as that we have undertaken this Session into counter-terrorism policy and human rights, where the provisions of a bill or other document such as a Green or White Paper are examined against human rights standards but in the context of wider policy questions
- introduction of categories of inquiry on human rights matters which are urgent or of major national significance.

17. We now consider in more detail the different elements of Option C.

Legislative scrutiny

18. Under this heading we consider scrutiny of primary legislation. Pre-legislative and post-legislative scrutiny, and other forms of scrutiny, monitoring and inquiry work, are considered separately below (paragraphs 51 to 77).

19. After consideration of the best means of introducing a more focused system of legislative scrutiny, we have drawn up a set of proposals for a sifting and scrutiny system, based upon the principles set out in Option C, which we intend to introduce from the beginning of Session 2006–07. We emphasise that the purpose of this new system is to build on and develop the methods of the previous Committee in scrutinising legislation in order to alert both Houses of Parliament to occasions on which there was a risk that they would legislate in a manner incompatible with the Convention rights, or with rights in other international human rights treaties to which the UK is a party, as well as to inform Parliament of other human rights matters raised by legislation, including whether legislation was likely to enhance the promotion and protection of human rights in the UK, or was missing an opportunity to do so. The proposed new system is designed to introduce a more effective method of prioritising the most significant human rights issues, as well as

to improve the accessibility, timeliness and overall value of the legislative scrutiny work of the Committee.

20. In order to streamline legislative scrutiny, we have given consideration to four main matters.

21. Firstly, the scope of legislative scrutiny, and whether it should continue to cover comprehensively all Government bills, private bills and private Members' bills.

22. Secondly, we have reconsidered how to define a "significant human rights issue" with a view to setting a new and higher threshold of significance which a bill must cross to merit being drawn to Parliament's attention. The intended effect of this raising of the threshold is that we will report substantively both on fewer bills and on fewer points in relation to the bills we do report on. It is at this stage difficult to estimate with any precision what the effect of this redefinition will be on the number of bills, or provisions of bills, which we will draw to the attention of both Houses. However, in her report Professor Klug points out that the proportion of Government Bills which we and our predecessors have drawn to the attention of both Houses has grown since the start of the 2001–2005 Parliament.[12] It is not clear whether this is mainly because we have become more scrupulous or because Government legislation has become more likely to present potential human rights problems, or both.

23. Thirdly, we propose to introduce a process for sifting bills which ensures that all Government and private bills are initially scrutinised by our Legal Adviser, but only those which cross the significance threshold will be subjected to full scrutiny by him and then considered by us. This will mean that our available time for legislative scrutiny is mainly spent scrutinising significant human rights issues rather than considering which bills to prioritise or scrutinising issues which are not sufficiently significant. Comprehensive coverage of bills will therefore continue at staff level, but we will actively consider fewer bills, so enabling us to focus on the most significant issues involved in scrutiny and on the other functions which we decide to prioritise.

24. Fourthly, we have agreed a procedure and associated timetable for scrutiny of those bills which do cross the significance threshold, enabling us to report substantively to Parliament as early as possible in a bill's passage through Parliament, ideally while it is still in the first House, to maximise the impact of our reports. Such early reporting would be earlier than we have been able to achieve in this Session. We stress that the timetable, as set out in this Report, is informal and provisional. We will operate it from the beginning of next Session on an experimental basis before deciding whether to publish formal targets for the timing of our Reports on bills. Our ability to keep to the new timetable will depend on whether replies to letters to Ministers are received within the periods that we will request and on the allocation of resources. We nevertheless believe that it will be helpful to Members of both Houses to indicate in this Report the timetable which we will be seeking to meet during this experimental period from the beginning of next Session.

12 Appendix 1, Table 2

The scope of scrutiny

25. We accept the proposal in Professor Klug's Option C that we should continue to scrutinise all Government bills, reporting on those which raise significant human rights issues. Option C also suggested applying such scrutiny to private bills "whenever feasible". The correspondence we have received this Session from the Lord Chairman of Committees in the House of Lords[13] stressed the importance to that House of the continuation of comprehensive scrutiny of the human rights implications of private bills. We consider it will be feasible for us to continue to scrutinise all private bills through the new sifting procedure.

26. We also agree with the proposal in Option C that we should no longer seek to scrutinise private Members' bills comprehensively. This Session we have not been able to consider any private Members' bills, and in our view any attempt to maintain the principle of comprehensive scrutiny of such bills would be an inefficient use of our resources. However, we reserve the option of scrutinising private Members' bills on an *ad hoc* basis, but normally only if they both raise issues of major human rights significance and appear likely to become law. As this judgment can often only be made some time after the introduction of each bill, it follows that any scrutiny of private Members' bills which we undertake in future will be done on an *ad hoc* basis and will not be done through the proposed sifting process. In deciding whether to scrutinise any private Member's bill we would of course take due account of any request for us to do so.

Which bills raise sufficiently significant issues: the threshold of significance

27. The current approach which we adopt to determining the significance of human rights issues raised by a bill is to apply the following criteria:[14]

- how important is the right affected?
- how serious is the interference?
- how strong is the justification for the interference?
- how many people are likely to be affected by it?
- how vulnerable are the affected people?

28. Such criteria may also be applied to missed opportunities to promote and protect human rights in the UK (see paragraphs 19 above and 29 below for further discussion of this). These criteria will remain central to any assessment of whether an issue raised by a bill is a significant human rights issue. To them we propose to add the criterion "the extent to which the State's most significant positive obligations are engaged".

29. In addition to these primary criteria of human rights significance, other considerations will be relevant to the assessment of significance to be applied at the sifting stage. These include the following:[15]

13 See Appendix 2

14 See Nineteenth Report of Session 2004-05, op. cit., para. 47

- whether the issue is one on which the European Court of Human Rights or one of the higher courts in the UK has recently given a judgment
- the broad political or public impact of the bill, including the extent to which it has attracted public and media attention (provided always that the bill engages human rights)
- the extent to which reputable NGOs or other interested parties have made representations about the Bill
- the particular interests or expertise of the members of the Committee and the degree to which the Committee can add value to the scrutiny which the bill might receive from other committees
- the completeness of the Explanatory Notes or Human Rights Memoranda (if the Government agrees to provide these) accompanying the Bill (it is more likely to be necessary to ask questions of the Minister, e.g. about the justification for any interference with a right, if the Explanatory Notes or Human Rights Memoranda do not provide this information)
- the extent to which the bill furthers the promotion or protection of human rights, or could have contained provision to that effect but does not
- whether the issue is one on which the Committee has previously reported, particularly if there is a clear pattern of incompatibility, i.e. if reports from us and our predecessors have repeatedly raised the same incompatibility issues and the Government does not appear to have addressed them (we will seek in the first place to identify the most frequently raised incompatibilities or potential incompatibilities in bills since the Committee's inception).

The sifting process

30. In devising our own sifting process we have taken into account the sifting mechanism employed by the European Union Committee of the House of Lords, which scrutinises EU legislation. One of that Committee's tasks is "to consider European Union documents". These documents are deposited in Parliament by the Government along with an Explanatory Memorandum, prepared by the relevant Department, which sets out the Government's view on a number of key areas, including the policy implications of the proposal. More than 1,000 such documents are deposited in Parliament each year.

31. The Lords EU Committee has delegated to its Chairman the task of conducting a sift of all the documents formally deposited for scrutiny. This sift is done on a weekly basis while the House is sitting and occasionally during recess periods. In practice what happens is that the Committee's Legal Adviser examines each document and its Explanatory Memorandum and decides whether it should be referred to one of the EU sub-committees

15 Some of these factors draw on the account of the factors regarded as relevant by the Legal Adviser to the House of Lords EU Committee when conducting the initial sift for that Committee: C.S. Kerse, "Parliamentary Scrutiny in the United Kingdom Parliament and the Changing Role of National Parliaments in European Union Affairs." (Dublin, 2005).See also the list set out in Appendix 3 of the EU Committee's Annual Report 2003: 44th Report of Session 2002–03, HL 191

or the select committee itself for examination or "cleared from scrutiny". The Legal Adviser consults fully with the Clerks of the Select Committee and all the sub-committees during the sifting process. Both the Select Committee Clerk and the Legal Adviser then meet with the Chair to advise him.

32. About two-thirds of all deposited documents are cleared from scrutiny at this initial sift stage. A Sub-Committee is not precluded from examining a document which has been cleared on the sift.

33. The EU Committee's view is that its sift process generally works well.[16] It describes the purpose of the sift as being to ensure that the time of members of the Sub-Committees is spent on those issues which merit their attention and to which they can add value.

34. We propose to introduce a similar sifting process for our own legislative scrutiny, by delegating to our Chairman the task of sifting bills for significance, in accordance with the criteria set out above. Under this procedure in practice the Legal Adviser would aim, on a weekly basis, to measure all new Government and private bills adequately and consistently against the agreed criteria of significance, and decide whether, in his view, the bill crosses the threshold of significance and should therefore be referred to the Committee for examination or cleared from scrutiny.

35. This initial sifting exercise will be a less intense scrutiny than the scrutiny given at a later stage to those bills which cross the threshold, or which has been applied hitherto to all bills. However, we consider it is vital that at least an adequate amount of consideration is given to each bill by our Legal Adviser, in order to minimise the risk of missing significant human rights issues. Therefore, during particularly busy periods, such as in the weeks following the Queen's Speech, it may not be possible for bills to be sifted in the week after they are published, and it may be necessary for some bills to be rolled over to the following week's sift, but the target should remain for all bills to be sifted as soon as possible after their publication, and if possible within a week.

36. After each sift, our Legal Adviser will produce a list of bills which in his view do not cross the threshold. He will also produce a preliminary analysis on each bill which in his view does cross the threshold advising the Committee which human rights issues arise and covering subsequent action which the Committee might take, such as questions which could be posed in a letter to the Minister.

37. After review of the outcome of the sift by the Chairman, the product of the sift will therefore be a list of bills which it is proposed should not be subject to further examination by the Committee ("cleared from scrutiny") and a preliminary analysis from the Legal Adviser in relation to any Bills which in his view raise significant human rights issues. The Chairman may decide to refer to the Committee any bill which the Legal Adviser has "cleared". If the Chairman disagrees with the Legal Adviser's view that any Bill crosses either threshold, the Legal Adviser's Preliminary Note will be referred to the Committee for it to decide.

16 House of Lords European Union Select Committee, First Report of Session 2002–03, *Review of Scrutiny of European Legislation*, HL Paper 15, para. 57

38. On receipt of the product of the sift members of the Committee will be able to question why a particular bill has been cleared from scrutiny on the sift. The fact that a bill has been "cleared from scrutiny" also would not necessarily preclude its examination by the Committee at a later stage if it appeared in the course of its passage through Parliament that it did in fact raise significant human rights issues. The Committee will also be able to question whether an issue raised by a bill really is a significant human rights issue according to its agreed criteria.

39. Where we consider a bill crossed the significance threshold, we will consider alerting parliamentarians and civil society groups via our webpages to the issues which we consider to be significant in human rights terms and which we will therefore be scrutinising more closely.

40. The sifting process described above will not be confined to bills, and in the light of experience we will consider extending it to include other documents which we may wish to scrutinise, such as draft bills, White Papers, Green Papers, Action Plans, regulations, guidance, etc. which raise human rights issues, as part of our intention to expand our pre- and post-legislative scrutiny (see paragraphs 55 to 57 below).

41. For the sifting system to function best there will need to be some improvement in the quality of the treatment of the human rights implications of Explanatory Notes or a Human Rights Memorandum accompanying every Bill. The House of Lords EU Committee has stressed that "the provision of proper Explanatory Memoranda is absolutely essential to the effective functioning of the sift system".[17] The variable quality of Explanatory Notes accompanying Bills makes it difficult to predict in advance how long a thorough initial sift will take. **We have asked the Government to consider ways of substantially improving the quality and consistency of the information which they provide to Parliament on the human rights implications of bills at the time of their introduction, and we re-emphasise here that we consider that such an improvement is essential if we are to conduct our work effectively in the remainder of this Parliament, both on legislative scrutiny and by extension on other work**.

42. In addition, it is difficult to tell in advance how thoroughly it will be possible to scrutinise bills, on the initial sift, the week they are published. However, allowing time for preparation and circulation of the result of each sift, we would aim to consider the result of the sift as it applies to each bill within two weeks of the publication of that bill. In busy weeks some bills may be given less detailed attention on the initial sift (albeit still of an adequate standard to minimise the risk of missing significant human rights issues). In the light of experience it may be necessary to set a less ambitious timetable for the initial sift, and for us to accept that our eventual reports will therefore be later in the course of a bill's passage than the informal and provisional timetable we set out below (see paragraph 45).

Post-sift scrutiny

43. The process described above concerns only the initial sift of bills. We have also considered the subsequent procedure which we will follow in the case of those bills which the sift process identifies as crossing the threshold for examination and possible report to

17 House of Lords European Union Select Committee, First Report of Session 2002–03, op. cit., para. 58

both Houses. Our objective at this stage is to report to Parliament as early as possible in a bill's passage through Parliament. The previous Committee sought to present its final views on a bill before it had reached the stage of second reading in the second House. We have carefully considered how to express our own target timetables for reporting in the context of the new sifting system, and we consider that when we finally decide upon them we should express them in terms of time elapsed since a bill's publication rather than in terms of a particular stage in a bill's passage. However, any targets adopted would obviously need to be operated sufficiently flexibly to enable faster moving bills to be prioritised, with the aim of reporting on every bill before it has left the first House.

44. In order to meet these targets, we would aim to give detailed consideration, on the basis of advice from our Legal Adviser, to those bills raising significant human rights issues as soon as possible after our consideration of the product of the sift. As part of this consideration we will decide whether or not we need to write to the Minister (or the promoters in the case of private bills) for further information to arrive at a final view on the bill, or whether we should arrange to take oral evidence instead.

45. Where we decide to write to the Minister (or promoters) in relation to a bill, the letter will be published on our webpages and will be self-explanatory of the concerns which we are raising, so making it less necessary to continue our present practice of publishing reports containing our "provisional views" on a bill. We will ask for responses within two weeks, following which we will seek to agree a Report relating to the bill. Provided responses are received within the requested deadline, on such a timetable, it should be possible for us to publish a full Report on a bill raising significant human rights issues while the bill is still in the first House, and sufficiently early to be of value to that House. Ideally, and subject to the allocation of resources, this would mean a timetable of reporting within approximately 8 to 10 weeks of a bill's publication. This is the informal and provisional timetable we will aim to meet from the beginning of next Session, in respect of those bills on which we do not take oral evidence. For bills which appear likely to be passed by the first House within this period we will aim to report before the bill has left that House. If we do not receive responses to letters within the deadlines we request then we may report to both Houses on the basis of the information we have available.

46. Where we do decide to take oral evidence in relation to a bill, for example because one or more of the significant human rights issues it raises require the determination of certain factual questions in order for us to be in a position to take a view on compatibility, we will aim to publish a Report within about three weeks of the date of taking the evidence.

47. We intend our eventual Reports on bills to be shorter and more focused than they have been in the past, less expository of the relevant law and more focused on the particular question or issue which the relevant law throws up, although we still consider it important for our Reports to explain the relevant law sufficiently to enable non-lawyers to understand our conclusions. In particular, we intend more regularly to reach a view on issues of proportionality which may arise as part of the consideration of the human rights compatibility of a bill's provisions. Our Reports will also focus on the most significant issues raised by the bill, rather than exhaustively on all the issues raised by a bill. We will give further consideration to Professor Klug's advice that we should more explicitly express our conclusions on compatibility questions in our own voice, rather than, as she puts it , "second-guessing" the view which courts might take in future cases.

48. We stress again that the timetables we have set out in the paragraphs above in terms of the time between publication of a bill and consideration of the product of the sift relating to that bill (2 weeks), and of publication of a Report on a bill crossing the sift threshold (8 to 10 weeks, or before the bill has left the first House if sooner), are informal and provisional and subject to the allocation of resources. We will revisit them after an experimental period and consider at that time whether to agree and publish formal targets.

49. A flowchart showing how the proposed new system would work in outline is attached to this Report as an Annex.

Freestanding reports on individual bills

50. As part of Option C, Professor Klug suggested that we should try to ensure that each bill is reported in its own freestanding report wherever possible, to increase accessibility and comprehension for MPs and Peers. We are conscious that our use of scrutiny progress Reports, normally covering several bills, does not make it easy for Members of either House, or indeed outside organisations, to follow our work on the bills in which they are particularly interested, even though our webpages now contain links to Reports and ministerial correspondence organised by bill and each of our progress reports also contains a list of which Reports deal with each individual bill. Progress reports are an expedient we have adopted since there has been no other sensible way of dealing with the number of bills on which we have reported. They also entail substantially lower printing costs in comparison with a practice of reporting on individual bills. To some extent we consider that problems of the accessibility of our legislative scrutiny work may diminish under the new system we propose above, notably in the elimination of a two-stage process for reporting on certain bills, and a reduction in the number of bills reported on. Fewer, shorter reports and less frequent publication of provisional views will, however, reduce printing costs, although much will depend on the number of bills on which we report under the new system. We will institute the practice of using freestanding reports more frequently to report our substantive views on major Government bills, wherever feasible. We will evaluate the effectiveness and efficiency of so doing.

Other work

51. We do not envisage a strict compartmentalisation between our future legislative scrutiny work, as described above, and the other scrutiny, monitoring and inquiry work we intend to undertake. As Professor Klug has noted,[18] in our continuing inquiry this Session into counter-terrorism policy and human rights we have pioneered a new method of examining Government policy and legislation, placing our scrutiny of legislation, in this case the Terrorism Bill, within a wider policy context. In this way we have scrutinised in a pro-active way, seeking to propose human rights compatible ways forward for the Government in relation to the dilemmas it faces, while at the same time continuing to focus on the human rights implications of the legislation actually introduced by the Government. Also this Session our pre-legislative scrutiny of the Schools White Paper[19] fed into our legislative scrutiny of the Education and Inspections Bill when it was published,

18 Appendix 1, paras. 6.10, 13.20

19 Ninth Report of Session 2005–06, *Schools White Paper*, HL Paper 113, HC 887

and similarly our pre-legislative scrutiny of the Respect Action Plan fed into our legislative scrutiny of the Police and Justice Bill.[20]

52. Moreover, the various types of inquiry we may undertake in the future are unlikely to fit neatly into any of the categories described in Option C. The inquiry we have recently announced into the treatment of asylum seekers, while in one sense a "thematic" inquiry, contains an important element of post-legislative scrutiny, revisiting legislative provisions affecting the treatment of asylum seekers on which we and our predecessor Committee expressed concern when the relevant bills were passing through Parliament.

53. Option C as put forward by Professor Klug does not include "thematic" inquiries, such as that which our predecessor Committee undertook into deaths in custody. Though there may be considerable overlap between inquiries into urgent and important issues of national concern and our thematic work as we have understood it up to now—deaths in custody clearly is such an issue—we consider that it is important that we retain the intention to undertake the close and detailed examination of major human rights related policy areas which has been the hallmark of our thematic work. We consider this matter further in relation to other types of inquiry in paragraphs 69 to 72 below.

54. Before briefly considering the various types of non-legislative scrutiny work contained in Option C, with our modifications, we emphasise that we will need to be rigorously selective in taking on such work. We will need to ensure that our inquiries are firmly grounded in human rights law, principles and policy, both in terms of fulfilling our own terms of reference and in order to ensure that we do not trespass unduly on the domain of other parliamentary committees, whether they be committees scrutinising draft bills or examining the expenditure, administration and policy of individual government Departments. In addition, we cannot undertake to provide anything like comprehensive monitoring of all human rights issues arising within Government, public authorities generally or wider society.

Pre-legislative scrutiny

55. By pre-legislative scrutiny we mean the examination of the human rights implications of Government policy before it is set out in the text of primary legislation, as well as examination of policy under development which may not need to be implemented by primary legislation. We see the purpose of such work as being to draw the attention of Parliament and the Government at an early stage to potential human rights pitfalls in relation to a proposed policy course. If our pre-legislative scrutiny work is successful we would expect to see a reduction in the number of human rights compatibility problems in any ensuing primary legislation. This would essentially cover Green Papers, White Papers and draft bills. On occasions it might even encompass announcements of intention by Government Ministers before publication of any document containing written proposals. As noted above, we do not plan to attempt comprehensive scrutiny of such policy and draft legislation: we will confine ourselves to those proposals which raise the most significant human rights issues, and it is probable that we will subject such pre-legislative material to the sifting process proposed for primary legislation.

20 Twentieth Report of Session 2005–06, *Legislative Scrutiny: Tenth Progress Report*, HL Paper 186, HC 1138

56. If we achieve the main aim of our pre-legislative scrutiny work by reducing the number of compatibility problems in primary legislation, this would be an extremely valuable result, which is why we are keen to devote time and effort on this area. We will evaluate the impact of such work. We are conscious that draft bills are already subject to close and comprehensive scrutiny, normally by *ad hoc* Joint Committees or by existing parliamentary committees. In this context, we will give further consideration to whether our input into human rights scrutiny of draft legislation would best be achieved by conveying our views to the primary scrutiny committee or by scrutinising draft bills ourselves and publishing independent reports. One possibility is that we keep open the option of reporting selectively on the most significant human rights issues raised by draft bills.

Post-legislative scrutiny

57. We understand post-legislative scrutiny in the context of our work to be an attempt to assess whether the implementation of legislation has produced unwelcome human rights implications. These could take the form of legislation causing direct breaches of human rights, whether or not reflected in court judgments, including declarations of incompatibility. They could also take the form of legislation intended to promote or protect human rights not fully providing the intended benefits. In both cases our post-legislative scrutiny would take account of the views which we and our predecessor Committee had expressed at the time of scrutinising the legislation itself during its passage through Parliament, including in particular any warnings we had given about risks of incompatibility. In this respect we also draw attention to the fact that in numerous legislative scrutiny reports we have suspended judgment on compatibility issues because of the lack of detail in bills, only fleshed out later in delegated legislation, codes of practice or guidance. In future, as part of our legislative scrutiny, we will seek to draw attention to those particularly significant points arising from bills where we would intend, where possible, to return to consider their operation in practice as part of an expansion of our legislative scrutiny work. In carrying out this work, we will continue to co-operate informally with the Joint Committee on Statutory Instruments to ensure there is no duplication and to help provide a holistic service to Parliament. As with pre-legislative scrutiny work, it is probable that we would apply the sifting process in deciding what post-legislative scrutiny to undertake, except in cases where such post-legislative scrutiny forms an integral part of other wider inquiries. We recognize that there is potentially an enormous amount of post-legislative scrutiny work which we could in theory undertake, and will seek initially to approach the task cautiously and incrementally.

Declarations of incompatibility, monitoring of Strasbourg judgments and remedial orders

58. Professor Klug considers that we should seek to undertake more work in relation to declarations of incompatibility issued by the domestic courts under s.4 HRA. We and our predecessors have generally considered this subject from the perspective of the possibility of a declaration of incompatibility resulting in a remedial order: we are required to report to both Houses on such orders. In fact there have only been three remedial orders since the HRA came into effect, two of them arising from adverse Strasbourg judgments and one from a declaration of incompatibility. In general the Government has preferred to remedy

incompatibilities by means of primary legislation, and has a reasonably good record in doing so, though in some cases there have been relatively long delays. The position in relation to all declarations of incompatibility is set out in a table published on the website of the Department of Constitutional Affairs.[21]

59. Our predecessor Committee set out what it thought should be the factors taken into account by Ministers in deciding whether to make remedial orders and in choosing between the urgent and non-urgent remedial order procedure.[22] It also formulated a series of recommendations to Ministers about the steps they should take to inform the Committee about their intentions in response to declarations of incompatibility and adverse Strasbourg judgments, and in taking final decisions on the matters arising, with proposed timetables.[23]

60. In response the Government accepted the spirit of the Committee's recommendations, though it was unwilling to be held to the Committee's proposed deadlines.[24] In practice there has been considerable variability in the provision by the Government of the information requested. We append to this Report recent correspondence received in relation to declarations of incompatibility.[25]

61. We agree with the thrust of Professor Klug's argument that, given the central role of Parliament in deciding how to respond to declarations of incompatibility under the scheme of the Human Rights Act, we should be more proactive in relation to declarations of incompatibility, both in terms of pressing the Government to take action and, in appropriate cases, recommending what action should be taken.

62. We have already decided in this Parliament to produce more regular progress reports examining the implementation of Strasbourg judgments, and have published one such Report.[26] We consider that it makes sense to integrate our scrutiny and monitoring of adverse Strasbourg judgments, whether or not they may potentially give rise to remedial orders, with enhanced scrutiny of declarations of incompatibility. For those on the receiving end of a breach of human rights it is immaterial whether the judgment to that effect comes from a UK court or from Strasbourg.

63. This will result in a further development of our monitoring systems by means of progress reports drawing attention to unremedied declarations of incompatibility as well as unimplemented Strasbourg judgments and, where appropriate, recommending the general measures appropriate to prevent a repetition of the violation and commenting on the adequacy of the remedial avenues available for those concerned. These reports could also be used in appropriate cases for us to seek to promote the more active role for Parliament in relation to declarations of incompatibility advocated by Professor Klug in her report. For this system to function effectively we again draw the Government's attention to their undertakings to keep us fully informed about action taken, or proposed to be taken, in

21 Appendix 3

22 Seventh Report of Session 2001–02, *Making of Remedial Orders*, HL Paper 58, HC 473

23 Ibid., Annex C

24 Nineteenth Report of Session 2004–05, op. cit., Appendix 2

25 Appendix 4

26 Thirteenth Report of Session 2004–05, *Implementation of Strasbourg Judgments: First Progress Report*, HL Paper 133, HC 954

response to declarations of incompatibility and to Strasbourg judgments that rights have been violated, as set out in the letter of 8 July 2002 to the then Chair of the Committee from the then Human Rights Minister Yvette Cooper MP.[27]

Scrutiny of compliance with UN human rights treaties

64. Under Option C Professor Klug describes our inquiry of this Session into UK compliance with the UN Convention against Torture (UNCAT) as a "scrutiny inquiry", of the sort which we should continue to carry out, yet one of the further proposals of Option C is that we should "continue to monitor treaty body reports …. if there is capacity to do so". We ourselves would place our inquiry into UNCAT firmly in the sequence of inquiries initiated by our predecessor Committee into the implementation in the UK of the provisions of individual UN human rights treaties. Like our predecessors we took as our starting point in this inquiry the Concluding Observations on the UK issued by the monitoring body following its examination of the UK's periodic report, and sought to obtain evidence on the range of administrative, legislative and policy areas where concern had been expressed.

65. The advantage of this methodology is that it provides a clear timetable for our treaty monitoring work, as well as a structured framework on which to pursue our inquiries in the form of the relevant UN Committee's Concluding Observations. It also serves a wider purpose of directing domestic parliamentary and public attention to the extent to which the Government's policy is in accordance with the provisions of those human rights treaties by which the Government is bound in international law, stimulating debate about the treaties themselves and the human rights principles which they embody. By focusing attention on the implications of each of these treaties in each reporting round we would also hope proactively to influence the Government in its policy stance as it prepares to submit its next periodic report to the monitoring body.

66. There is a case to be made that taking Concluding Observations as our starting point could potentially have a restrictive effect, confining our consideration to those points raised by the UN treaty body. In the case of our inquiry in the current Session into UNCAT we were not prevented from extending our terms of reference in order to encompass the issue of "extraordinary renditions", which arose after we had begun our inquiry. As Professor Klug has pointed out, however, the subject of extraordinary renditions has been cited as an issue of current public interest which we might have considered in its own right rather than through the lens of treaty scrutiny.[28]

67. We consider that continuation of a programme of scrutiny of the implementation of the provisions of international human rights treaties in the UK will remain an important part of our work. However we would not wish to commit ourselves to reporting on each set of Concluding Observations, or necessarily to tie ourselves to their coverage by inquiring specifically into them beyond live and relevant issues. Another option we might well prefer to adopt would be to inquire into the general policy area covered by a set of Observations, such as torture or children's rights. However, following our experience this Session in our inquiry into UNCAT, in cases where we were to base ourselves closely on a set of

27 Nineteenth Report of Session 2004–05, op. cit., Appendix 2

28 Appendix 1, para. 13.19

Concluding Observations, we would intend to revert to the practice of focusing closely on the Concluding Observations and taking a limited amount of oral evidence, from a Minister and possibly a small number of interested organisations. This would give us greater flexibility to respond to urgent human rights matters which arise outside the context of those Concluding Observations.

Scrutiny of human rights treaties pre-ratification

68. Option C omits a category of scrutiny work which our predecessors undertook in relation to Protocol No. 14 of the ECHR, namely the examination of a human rights treaty after signature and laying before Parliament but before it has been ratified by the Government. We consider that such scrutiny is important in order to increase parliamentary understanding and involvement in the ratification process, thereby enhancing to some degree the democratic legitimacy and accountability of treaties entered into by the Government. We propose to adopt our predecessors' suggestion that we seek to report on all such treaties before they are ratified as part of our future working practices, if they raise any significant issues of which Parliament should be made aware.[29]

Urgent and thematic inquiries

69. Option C recommends that we should factor into our working practices and programme the capacity to respond rapidly to major unexpected developments and should conduct inquiries into significant human rights issues of national concern. For the sake of brevity, we would classify these two types of inquiry, between which there is much overlap, as "urgent inquiries". Examples of major unexpected developments given by Professor Klug include claims that the Probation Service or Parole Board are becoming "distracted" by human rights concerns, or the operation of the Human Rights Act within public services more generally. Examples of significant human rights issues of national concern would be the subject of extraordinary renditions, or the implications of introducing the equivalent of "Megan's Law" into the UK.

70. The definitions put forward by Professor Klug also overlap with the concept of "thematic inquiries" and with the work undertaken by our predecessors into the implementation of the Human Rights Act. We fully accept that we should seek to be able, within our programme, to respond and inquire into the sorts of developments on which Professor Klug, and others cited in her report, consider that we could make an important and useful contribution to parliamentary and public debate.

71. Ultimately it matters little how exactly such inquiries are characterised or described. In each case the precise timing and speed of any action we take will depend both on the nature of a particular issue and on the other priorities which already form part of our forward work programme. In order to arrive at conclusions on the operation of the HRA in public authorities, for example, it would probably be necessary to take a substantial amount of evidence in an inquiry which could last some time. In other cases it should be possible for us to react more swiftly and report on discrete issues, provided again that, as far as possible, we had taken a proportionate amount of evidence on the subject in question and taken into account the views of all directly interested parties. Parliamentary

29 Nineteenth Report of Session 2004–05, op. cit.

committees do not in general have the luxury which some others possess of responding immediately to the latest headline or ministerial announcement, and it is important that, in declaring the intention to become more responsive to important human rights developments as they occur, we do not create false expectations that there will be an immediate and authoritative "JCHR view" on such developments. We think that in relation to this proposed strand of our work it will be particularly important that we are rigorous in asking ourselves whether by intervening in a particular debate we can genuinely add value by virtue of both our collective expertise in human rights and the nature of the investigation we can conduct as a Joint Select Committee.

72. We also note in the context of this general inquiry work that the Commission for Equality and Human Rights (CEHR), when it is established, will have the power to conduct inquiries. It remains to be seen how exactly it will exercise this power: Professor Klug suggests that the type of inquiries which the CEHR will conduct will be similar to the "thematic inquiries" undertaken by us.[30] We will clearly have to take into account the work of the CEHR in the future when determining the mix of our inquiry work, and may need to review our working methods again once the Commission is operating. One possible method of dovetailing our work with that of the CEHR would be for us to "pick up" some inquiry work undertaken by the Commission in order ourselves to highlight the most important human rights issues arising.

Implementation of the Human Rights Act and human rights institutions

73. Option C proposes that we hold regular sessions with the Human Rights Minister and officials on the implementation of the Human Rights Act and other related issues. This is something which our predecessor Committees sought to do and we ourselves took evidence from the then Human Rights Minister, Rt Hon Harriet Harman QC MP, on 16 January this year.[31] We agree that such sessions to explore Government thinking on human rights policy and the implementation of the Human Rights Act should be a regular feature of our work, and will seek to hold such sessions on a regular basis.

74. An important feature of our predecessors' work was its continuing interest in those institutions within the UK which have an important function in relation to the promotion and protection of human rights. Through its inquiries and recommendations that Committee was instrumental in the establishment of the Commission for Equality and Human Rights and the Children's Commissioner for England.[32] It also took a close interest in the work of the Northern Ireland Human Rights Commission.[33] Although in formal parliamentary terms these and other UK human rights institutions are accountable to the Commons departmental select committees which have oversight of their sponsoring Government Departments, we intend to continue this strand of work in the future. In the autumn, for example, we intend to hold a one-off evidence session with the UK's four Commissioners for Children and Young People to ask them their views on the most

30 Appendix 1, para. 13.21

31 Minutes of Evidence, Monday 16 January 2006, HL Paper 143, HC 830-i of Session 2005-06

32 Summarised in Nineteenth Report of Session 2004–05, op. cit.

33 Notably in its Fourteenth Report of Session 2002–03, *Work of the Northern Ireland Human Rights Commission*, HL Paper 132, HC 142

significant current human rights issues currently affecting children as well about the adequacy of their powers and resources for carrying out their functions.

75. As we have noted above, the forthcoming establishment of the CEHR may have important implications for the nature of our work in the future. To reflect the bringing together of responsibilities for human rights and equalities within one body, we have proposed that our own terms of reference be amended to include responsibility for considering "equalities" as well as human rights, to enable us unequivocally to consider all aspects of the CEHR's work. This proposal, which is not intended to dilute our focus on human rights, is currently under consideration, and will require approval by both Houses. Whether or not it comes into effect, we will take a close interest in the work of the CEHR. This is likely to involve, at the minimum, an annual session of oral evidence with the Chairman and/or the Chief Executive of the Commission.

Committee resources

76. Professor Klug advised us that the effectiveness and timeliness of both our current scrutiny work and that of the workload proposed in Option C (and, we judge, the variation of that workload set out in this report) are negatively affected by the constraint of staff time available for scrutiny work. This is reflected in the text of Option C of her report by references to "as appropriate" or "if there is capacity to do so". This constraint has in turn an impact on other work and leads to a situation where non-scrutiny work negatively affects the scrutiny work. The effectiveness and timeliness of the future work of the Committee is critically dependent on this issue being resolved.

Conclusions

77. We now summarise the essential points relating to each of the different elements we intend to include in our forward work programme for the remainder of this Parliament. The range of work which would be involved is ambitious, and we therefore conclude this Report with some reflections on the overall principles we will apply to the organisation of our work.

Legislative scrutiny

- We will continue to scrutinise all Government bills and private bills for their human rights implications in accordance with a new sifting and scrutiny process. We will scrutinise private Members' bills only on an *ad hoc* basis, but normally only if they both raise issues of major human rights significance and appear likely to become law.

- We will delegate to our Chairman and through him to our Legal Adviser the task of sifting all Government and private bills on publication, and relevant private Members' bills at the appropriate stage, to determine whether their provisions meet a raised threshold of human rights significance, applying the criteria set out in paragraphs 27 to 29 above, with the aim of the Committee considering the result of the sift in relation to each bill within 2 weeks of a bill's publication.

- In relation to those bills which we decide merit further scrutiny, as soon as possible, on the basis of advice from our Legal Adviser, we will consider whether there is a need to seek written or oral evidence on a bill before arriving at conclusions on it.

- We will seek to report to both Houses our conclusions on each bill which we scrutinise further before the bill has left the first House and at as early a stage as possible in order to be of value in the first House. Ideally, and subject to the allocation of resources, this would mean a timetable of reporting within 8 to 10 weeks after publication of the bill.

- The timetables associated with the proposed new sifting process which we have set out are informal and provisional. We will revisit them after an experimental period and consider at that time whether to publish formal targets. We also re-emphasise the importance of a substantial improvement in the quality and consistency of the information which the Government provides to Parliament on the human rights implications of bills at the time of their introduction.

- We intend our eventual Reports on bills to focus on the most significant human rights issues raised by a bill, rather than exhaustively on all the human rights issues raised by a bill. We will give further consideration to the question of whether we should more explicitly express our conclusions on compatibility questions in our own voice, rather than "second-guessing" the view which courts might take in future cases. The number of bills on which we ultimately report is likely to be substantially fewer than in the past, so we intend to make greater use of freestanding reports on individual bills, enhancing the accessibility of our legislative scrutiny work to parliamentarians and others.

Pre- and post-legislative scrutiny

- We intend to undertake more work on pre-legislative scrutiny, examining the human rights implications of consultation papers, Green Papers, White Papers and draft bills in particular. We also intend to undertake more work on post-legislative scrutiny, for example on implementation of primary legislation through regulations or guidance, or on whether the implementation of legislation has produced unwelcome human rights implications. In both cases it is probable that we would subject relevant documents to our proposed sifting process for primary legislation.

Declarations of incompatibility, monitoring of Strasbourg judgments and remedial orders

- We intend to integrate our scrutiny and monitoring of adverse Strasbourg judgments, whether or not they may potentially give rise to remedial orders, with enhanced scrutiny of declarations of incompatibility. This will result in progress reports drawing attention to unremedied declarations of incompatibility as well as unimplemented Strasbourg judgments and, where appropriate, recommending measures which should be taken to prevent repetition of the violation and commenting on the adequacy of avenues for remedy.

Scrutiny of compliance with UN human rights treaties

- We consider that continuation of a programme of scrutiny of the implementation in the UK of the provisions of international human rights treaties will remain an important part of our work. When we undertake such work we would intend to focus closely on the Concluding Observations of the relevant treaty body and take a limited amount of oral evidence.

Scrutiny of human rights treaties pre-ratification

- We propose to adopt our predecessor Committee's suggestion that we seek to report to Parliament on all human rights treaties before they are ratified if they raise any significant issues of which Parliament should be made aware.

Other inquiries

- We intend to undertake other inquiries, including "scrutiny" inquiries, placing examination of the human rights implications of a policy proposal or bill within a wider policy context, inquiries such as those we have in the past characterised as "thematic" inquiries, and inquiries into major unexpected developments or significant human rights issues of national concern. We will clearly have to take into account the work of the Commission for Equality and Human Rights in the future when determining the mix of our inquiry work

Implementation of the Human Rights Act and human rights institutions

- We intend to hold regular evidence sessions with the Human Rights Minister to explore Government thinking on human rights policy and the implementation of the Human Rights Act. We also intend to continue to take an interest in those institutions within the UK primarily concerned with human rights. In relation to the Commission for Equality and Human Rights this is likely to involve, at the minimum, an annual session of oral evidence with the Chairman and/or the Chief Executive of the Commission.

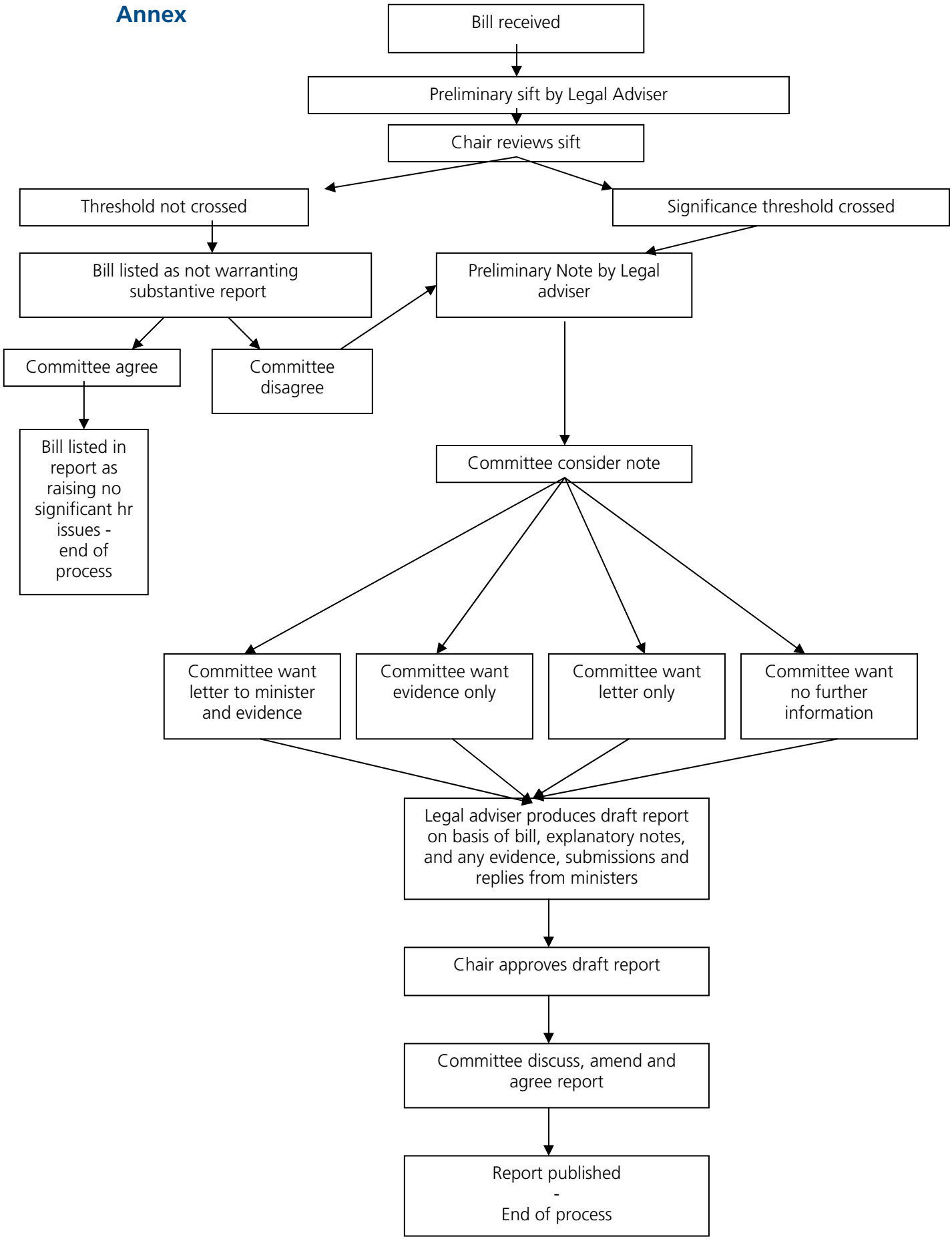
Organisation of work

78. In this Report we have spelt out the types of work we will seek to include in our work programme during the future course of this Parliament. All our work is important and we have not sought to attribute degrees of importance to the different types of work undertaken. Nevertheless legislative scrutiny is a fundamentally important element of our remit and falls into a different category since it only has value in so far as it is achieved in good time to inform both Houses of Parliament during the passage of bills through Parliament. This must be taken into account, together with due consideration of the resources and time available, when establishing the priorities for our work programme. While our different types of work as described above may all serve rather different purposes, we see them all as contributing to our overall objective of enhancing consideration of human rights matters within Parliament and in wider political and public debate.

79. We have set out above (paragraph 76) the implications for staffing requirement that Professor Klug's report has signalled. It will not be possible for us to undertake as much work as we or others might wish under the various categories described in this Report. We recognise that we will have to make choices and prioritise in the course of our work.

80. We also stress that we do not consider it will be possible for us to be engaged in all our envisaged strands of work simultaneously. With the exception of our continuous legislative scrutiny work, the menu of work options which we have presented in this Report is not one which we can guarantee to cover even in the course of one parliamentary Session, but we fully intend to explore the full range of work involved over the course of the remainder of the Parliament as a whole.

Annex


Bill received
Preliminary sift by Legal Adviser
Chair reviews sift
Threshold not crossed
Significance threshold crossed
Bill listed as not warranting substantive report
Preliminary Note by Legal adviser
Committee agree
Committee disagree
Bill listed in report as raising no significant hr issues - end of process
Committee consider note
Committee want letter to minister and evidence
Committee want evidence only
Committee want letter only
Committee want no further information
Legal adviser produces draft report on basis of bill, explanatory notes, and any evidence, submissions and replies from ministers
Chair approves draft report
Committee discuss, amend and agree report
Report published - End of process

Formal Minutes

Monday 24 July 2006

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness
Lord Campbell of Alloway
Lord Judd
Lord Lester of Herne Hill
Baroness Stern

Mr Douglas Carswell MP
Nia Griffith MP
Dr Evan Harris MP

* * * * *

Draft Report [The Committee's Future Working Practices], proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 77 read and agreed to.

Paragraph 78 read, as follows:

". In this Report we have spelt out the types of work we will seek to include in our work programme during the future course of this Parliament. We have consciously avoided according priority to any type of work over others. In the sense that legislative scrutiny will be a continuous element of our work, and only has value insofar as it is achieved in good time to inform particular parliamentary debates, it may fall into a rather different category from our other work, but we do not intend to accord it a declared priority over and above that other work, as we regard all our work as being of importance. While our different types of work as described above may all serve rather different purposes, we see them all as contributing to our overall objective of enhancing consideration of human rights matters within Parliament and in wider political and public debate."

Amendment proposed, in line 2, to leave out from "Parliament." to "While" in line 7 and insert the words "All our work is important and we have not sought to attribute degrees of importance to the different types of work undertaken. Nevertheless legislative scrutiny is a fundamentally important element of our remit and falls into a different category since it only has value in so far as it is achieved in good time to inform both Houses of Parliament during the passage of bills through Parliament. This must be taken into account, together with due consideration of the resources and time available, when establishing the priorities for our work programme."—(*Lord Bowness.*)

Question proposed, That the Amendment be made.

Amendment proposed to the proposed Amendment, in line 6, to leave out from the second "Parliament." to the end of line 8 and insert the words "We will take the necessity of fulfilling the legislative scrutiny work we have set out above into account, together with due consideration of the resources and time available to us according to the advice of the Clerks when establishing the priorities for our work programme. We will undertake other work only on the basis of a majority view of the Committee."—(*Lord Campbell of Alloway.*)

Question put, That the Amendment to the proposed Amendment be made.

The Committee divided.

Content, 1	Not Content, 6
Lord Campbell of Alloway	Mr Andrew Dismore MP Nia Griffith MP Dr Evan Harris MP Lord Judd Lord Lester of Herne Hill Baroness Stern

Proposed Amendment made.

Paragraph, as amended, agreed to.

Paragraphs 79 and 80 read and agreed to.

Summary read and agreed to.

Annex (Legislative scrutiny flow chart) read and agreed to.

Resolved, That the Report, as amended, be the Twenty-third Report of the Committee to each House. —(*The Chairman.*)

Several Papers were ordered to be appended to the Report.

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

* * * * *

[Adjourned till Friday 22 September at 2.00 pm.

Appendices

Appendix 1: Klug Report with Tables 1-8 and Appendices 1-4

REPORT ON THE WORKING PRACTICES OF THE JCHR, FRANCESCA KLUG, PROFESSORIAL RESEARCH FELLOW, CENTRE FOR THE STUDY OF HUMAN RIGHTS, LSE

RESEARCH ASSISTANCE AND TABLES BY HELEN WILDBORE, RESEARCH ASSISTANT TO FRANCESCA KLUG, CENTRE FOR THE STUDY OF HUMAN RIGHTS, LSE

1. Background to the report
2. The Scheme of the HRA
3. Nature and purpose of Human Rights
4. Background to Establishment of JCHR
5. The role of select committees
6. Working Practices of the JCHR
7 Evaluation and Assessments of Working Practices
8. Policy and legislative formation and holding the executive to account
9. Informing and influencing parliamentary debates and affecting legislative outcomes
10 Monitoring and informing the implementation of the HRA: government officials and the general public
11 Challenges and Difficulties posed by Current Working Practices: opinions and suggestions
12 What kind of human rights scrutiny?
13. Conclusions
14. Options and Recommendations

Tables

Table 1 - Draft Bills reported on by the JCHR by session
Table 2 – Number of Bills considered by the JCHR per session
Table 3 – Number of Private Bills published per session
Table 4 – Analysis of JCHR references in Hansard for session 2005-06
Table 5 – Amendments made as a result of JCHR reports, with annex
Table 6 – Number of Government bills reported on by the JCHR before the second reading in the second House
Table 7 – Courts referring to JCHR reports
Table 8 – New Zealand Legislation Advisory Committee 'Guidelines On Process & Content Of Legislation'

Appendices

Appendix 1 – Interviews and Visits
Appendix 2 – Terms of Reference of JCHR
Appendix 3 – Core Tasks for Select Committees
Appendix 4 – Scrutiny Committees

1. Background to the report

1.1 At the end of last year the Committee decided to undertake an examination of its working practices, to consider:

- the balance to be struck between its legislative scrutiny work, other scrutiny work such as that related to international treaties, and more thematic, policy-orientated work

- the priorities, procedures and working practices which it will seek to employ in undertaking each kind of work, including whether the emphasis of its legislative scrutiny work should be changed to focus to a greater extent on pre-legislative scrutiny (e.g. Green and White Papers and draft bills) and/or post-legislative scrutiny (e.g. delegated legislation, statutory guidance and codes of practice).

1.2 A decision was taken in November 2005 to appoint an independent, external specialist advisor to assist with this review. I was appointed on a part-time basis in February 20061 and began the review (on a one day a week basis) in March. (See **Appendix 1** for interviews and visits).

1.3 **The Standing Orders/Orders of Reference of the JCHR are very broad (Appendix 2**; hereafter referred to as terms of reference). **They do not state or imply that it is the responsibility of the Committee to scrutinise legislation other than Remedial Orders laid under Schedule 2 to the Human Rights Act (HRA). The Committee is required to "consider matters relating to human rights in the UK** (excluding consideration of individual cases)." No definition of human rights is given, but a direct link to the HRA is made through the responsibility given to the Committee to consider proposals for 'remedial orders' under the Act.

1.4 **To meaningfully review the working practices of the Committee it is essential, in my view, to briefly consider the nature and purpose of both the Human Rights Act (HRA) and human rights more generally, as the only two objects of enquiry specifically mentioned in the Committee's terms of reference**. All references to the HRA and human rights below are intended to assist the Committee in its examination of its appropriate tasks and responsibilities. They aim to clarify the explicit role for Parliament envisaged in the scheme of the HRA and the broad and values-based nature of human rights.

2. The scheme of the HRA

2.1 The origins of the JCHR can be traced to the introduction of the HRA in 1998 and the development of a (then) unique model for incorporating[2] the European Convention on Human Rights (ECHR) into UK law in the years that preceded this. The distinguishing feature of this model, which the then Home Secretary, Jack Straw, labelled 'the British model',[3] was that it worked with the grain of British constitutional traditions in envisaging a significant role for Parliament.

2.2 The most unique and most commented upon aspect of the HRA is that whilst it is intended to operate as a 'higher law,' to which all other laws and policies must confirm where "possible," the Act does not allow courts to strike down statutes in the manner of judicially entrenched Bills of Rights4. In so far as the HRA allows courts to review and

1 Committee formal minute, meeting of 1 February 2006

2 Or more precisely " to give further effect to rights and freedoms guaranteed under the ECHR." HRA 1998, Preamble.

3 Used in speeches and conversations.

4 For example, Canada, Germany, USA, South Africa.

"declare incompatible" Acts of Parliament, it refines the British constitutional doctrine of 'parliamentary sovereignty,' but it clearly does not overturn it[5]. In explaining the intention behind the Act, Jack Straw stressed that:

> "Having decided that we should incorporate the Convention, the *most fundamental question* that we faced was how to do that in a *manner that strengthened, and did not undermine, the sovereignty of parliament*.[6]"

His answer to that question lay in finding a **specific role for parliament in the "operation and development of the rights in the Bill ..."[7] The origins of the JCHR can be traced to that explicit parliamentary role.**

Distinguishing Features of HRA

Jack Straw described the HRA as " the first Bill of Rights this country has seen for three centuries.[8]" Dominic Grieve, now Shadow Attorney General, whilst calling for a bill of rights, said, "I see this Bill as a beginning.[9]"

2.3 The main distinguishing features of the HRA can be summarised as follows:

— It is the only domestic statute (excluding the European Communities Act) that is determinative of future legislation and policy as well as past. It is in this sense a 'higher law.'

— Public authorities, including the courts, are explicitly prohibited from acting incompatibly with the rights in the HRA (unless required to do so by 'incompatible' primary legislation).

— The courts must interpret primary and secondary legislation compatibly with Convention rights "so far as it is possible to do so[10]"

— The courts are not empowered to overturn Acts of Parliament but may declare them "incompatible" with Convention rights where it is not "possible" to interpret them compatibly.

— Subordinate legislation can be struck down unless primary legislation prevents this[11].

— **Although the domestic courts have to "take account" of ECHR jurisprudence they are not bound to do so and it is open to the courts to develop their own case law.**

5 "Parliamentary sovereignty means that Parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes. In enacting legislation, Parliament is making decisions about important matters of public policy. The authority to make those decisions derives from a democratic mandate. Members of Parliament in the House of Commons possess such a mandate because they are elected, accountable and representative." *Rights Brought Home, the Human Rights Bill,* Cmnd 3782, October 1997.

6 306 HC 771 (February 15 1998). My emphases

7 314 HC 1141 (June 24 1998)

8 *Speech,* IPPR, 13 January 2000

9 382 HC (16 Feb 1998)

10 "Convention rights," is defined by HRA s1(1) as ECHR Articles 2-12 and 14 plus Protocol 1, Articles 1-3 and Protocol 6 Articles 1 and 2.

11 Either in terms or because it is not 'possible' to interpret the relevant primary legislation compatibly with Convention rights and the subordinate legislation reflects this.

Role of Parliament in Scheme of HRA

2.4 **Unlike many Bills of Rights or equivalent, the scheme of the HRA directly engages parliament**. This intention was stated *in terms* from the outset.

a) The White Paper that accompanied the Human Rights Bill, *Bringing Rights Home,* reiterated that "Parliament itself should play a leading role in protecting the rights which are at the heart of Parliamentary Democracy.[12]"

b) Jack Straw, Home Secretary, in piloting the Human Rights Bill stated that "Parliament and the judiciary must engage in a serious dialogue about the operation and development of the rights in the Bill…this dialogue is the only way in which we can ensure the legislation is a living development that assists our citizens".[13]

c) Lord Irvine remarked in 2002, two years after the HRA came into force, that the Act represents a "new and dynamic co-operative endeavour…between the Executive, the Judiciary and Parliament; *one in which each works in its respective constitutional sphere.*[14]"

2.5 The role of parliament in the scheme of the HRA is particularly reflected in the following provisions of the Act:

a) Section 19, which requires Ministers to make a *"Statement of compatibility"* before introducing a Bill, or, where this is not possible, indicate that the government nevertheless wishes the House to proceed with the Bill

b) Sections 3 & 4 which require the courts to interpret legislation compatibly with Convention rights, but allow Parliament to decide how to proceed when they are unable to do so. In practice, therefore:

- Following a "declaration of incompatibility" by the courts under s4, it is a decision of Parliament to decide whether, and if so how, to proceed. It is open to the Government, acting through Parliament, to proceed through a "Remedial Order" where "there are compelling reasons" to do so[15].
- It is also open to the Parliament to disagree with the courts that a provision is incompatible with the rights in the HRA and to decide that the legislation in question should remain in force or be amended in a way which is different to that suggested by the domestic courts, leaving it to the Strasbourg court to determine otherwise.

2.6 The distinguishing features of the HRA, in which parliament has the 'final say' on legislation, have attracted considerable academic and legal comment. The Committee's current Legal Adviser Murray Hunt considers that the HRA *is a unique 'parliamentary* model' of human rights protection. A number of academic commentators have referred to

12 Para 3.6.

13 314 HC (June 24 1988) 1141.

14 My emphasis. Hansard, 18 Dec 2002, Volume 642, Column 694.

15 HRA s10. All such references to 'Parliament' are made in the context of the 'British constitution' where most legislation is initiated by Government, of course.

the HRA as a 'dialogue model' engaging the courts, government and parliament in human rights protection.[16]

2.7 The scheme of the HRA has also given rise to significant interest and commentary abroad, especially in other common law Commonwealth countries. There is particular interest in the greater democratic legitimacy of the 'dialogue model' in which Parliament has a direct role in the scheme of human rights protection, and the courts have no powers to strike down legislation.17

2.8 Recent media and political comment have suggested that the courts have de facto powers to disallow primary legislation[18]. This is not the case. As the Home Secretary said in a Written Statement on the day that the House of Lords made a Declaration that s23 of the Anti-Terrorism Crime and Security Act (ATCSA) was incompatible with Articles 5 and 14 of the ECHR, **"It is ultimately for Parliament to decide whether and how we should amend the law.[19]"**

2.9 Legal commentators also sometimes suggest that the courts have what amounts to de facto strike down powers. Were parliament to disagree with, or ignore, a Declaration of Incompatibility the European Court of Human Rights would be very likely to confirm the domestic court's original judgement, it is argued20. However this is not an assumption that can automatically be made. There are many circumstances in which the European Court might apply its '**doctrine of a margin of appreciation**' instead. Based on the hypothesis that "the national authorities have direct democratic legitimation and are…in principle better placed than an international court to evaluate local needs and conditions21" because of "their direct and continuous contact with the vital forces of their countries," the European Court frequently takes the view that **national authorities, which can include parliament** as well as domestic courts, governments and decision makers, are **"in a better position than the international judge to give an opinion**."[22] The application of this doctrine of subsidiarity depends on the context. **It is particularly likely to be applied where there is no European-wide common standard at stake or where the courts are required to determine the necessary limitations on rights, particularly in relation to social, economic or moral issues, and sometimes national security.[23] In practice this can apply to a considerable number of issues and cases.**

16 See Francesca Klug and Keir Starmer, *Standing Back from the HRA: how effective is it five years on?* [2005] P.L. 722; Richard Clayton, *Judicial Deference and Democratic Dialogue, the legitimacy of judicial intervention under the HRA 1998* [2004] P.L. 33;Danny Nicol, *The Human Rights Act and the Politicians* (2004) 24(3) Legal Studies 452; Francesca Klug, *The Human Rights Act: a 'third way' or 'third wave' Bill of Rights?* [2001] E.H.R.L.R. 361. Also Janet Hiebert, *Parliament and the Human Rights Act: Can the JCHR facilitate a culture of rights?"* (2006) 4(1) International Journal of Constitutional Law 1.

17 The HRA has started to be emulated. The Australian Capital Territory (ACT) passed a Human Rights Act in March 2004 modelled largely on the British HRA and the state of Victoria has just introduced a "'Charter of Human Rights and Responsibilities" which is also based on the British model.

18 Even the Prime Minister suggested the courts have the power to strike down legislation in his email correspondence with the Observer journalist Henry Porter. See 'Britain's liberties: The great debate', The Observer, 23 April, 2006.

19 Hansard, HC 16 December 2004 col 151.

20 See Richard Clayton and Hugh Tomlinson, *The law of human rights*, Oxford University Press, 2000, at 4.45.

21 *Hatton v UK,* (2003) 37 EHRR, 611.

22 *Handyside v UK* (1976) 1 EHRR, 737.

23 Howard Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Kluwer, 1996.

3 Nature and purpose of human rights

3.1 **The nature, and in particular the *purpose*, of human rights is absolutely crucial, most informed commentators would agree, to the question of how to understand and interpret them**. Lord Hope, in a case decided before the HRA came into force, acknowledged that "a generous and *purposive* construction" will need to be given to "issues raised" under the HRA[24].

3.2 Douglas Carswell has suggested that the committee has failed to establish a sufficiently overlapping consensus on the importance and meaning of human rights. Richard Shepherd has suggested that "in a narrow sense the fundamental rights to which Parliament has directed our attention are the "Convention rights" as defined by the Human Rights Act 1998" although they "do not provide an exhaustive definition of the international human rights provisions relevant to the UK.[25]"

3.3 Although the phrase human rights did not come into common use until after the second world war, most academic and legal commentators trace the idea of fundamental or inalienable rights to the philosophers and political movements of the Enlightenment. The drafters of the 1948 Universal Declaration of Human Rights cited the Magna Carta and the 1689 English Bill of Rights as part of their heritage.

3.4 Although mainly scrutinising legislation for compliance with the rights in the European Convention on Human Rights, and (much less frequently) other major international human rights instruments like the Convention on the Rights of the Child, the Committee has drawn on a range of sources of human rights in its work over time, including the Magna Carta and traditional common law rights[26].

3.5 Regardless of which treaty or bill of rights human rights are sourced from, their ethical and values-driven nature is one that almost all legal and academic commentators agree on. In other words, **human rights law is best understood as the legal expression of a set of values which precedes the law, influences and moulds it.**

3.6 In the case of the ECHR, its preamble provides the clearest guide to its *purpose* which has been further amplified by the case law of the European Court of Human Rights. From this it is possible to infer that the prime objects of the ECHR are:

a) The protection of human rights, traced to the 1948 Universal Declaration of Human Rights[27]

b) The maintenance and promotion of "the ideas and values of a democratic society" in line with "the general spirit of the Convention[28]"

c) The promotion of freedom and the rule of law[29].

3.7 Professor Andrew Clapham has suggested that the dual purpose of Convention rights are the protection of dignity and democracy[30].

24 *R (Kebilene) v DPP* [1999] 3 WLR 972.

25 *The Case for a Human Rights Commission,* Alternative Draft Report, 3 March 2003.

26 See, for example, *Report on Criminal Justice Bill,* 2002-3,HL 40, HC 374; *Counter terrorism policy and human rights: draft prevention of Terrorism Act 2005(continuance in force of s1-9) Order 2006,* para 168.

27 *Soering v UK*(1989) 112 EHRR 439; ECHR *preamble*

28 *Kjeldsen Busk Madson and Peterson v Belgium* (1979-80) 1 EHRR 711, at para 53; ECHR *preamble*

29 *Golder v UK* (1975) 1 EHRR 524, para 34; ECHR *preamble.*

HRA as a statement of values and principles

3.8 Former law lord, Lord Browne-Wilkinson, suggested before the HRA came into force that **"In large part the Convention is a code of the moral principles which underlie the common law"** but "there has hitherto been no attempt to formulate those judicial moral views in a code of any kind… As these moral questions come before the courts in Convention cases the courts will be required to give moral answers to the moral questions".[31]

3.9 Lord Rogers, commenting three years after the HRA came into force, suggested that "**Convention rights are to be seen as an expression of fundamental *principles* rather than a set of mere rules".**[32]

3.10 Some of the main principles and values underlining the human rights in the HRA can be traced from the following key interpretations of their *purpose*:

i) Some rights , notably the right to freedom of conscience and the right to be free from slavery and torture are expressed in absolute terms. Most are qualified or limited to some degree[33]. In interpreting rights in the Human Rights Act it is necessary to "determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[34]**"** There is "inherent in the whole of the Convention …*a search for balance between the rights of the individual and the wider rights of the society*…neither enjoying an absolute right to prevail over the other.[35]**"**

ii) The intention is to guarantee rights "which are *practical and effective"* not rights that are "theoretical or illusory".[36]**"**

iii) The ECHR should be applied as a '*living instrument*' and human rights should be interpreted in the light of 'present day conditions.[37]**'**

iv) *Human rights principles may require government to take positive steps to achieve greater equality or public safety*, for example[38]. This duty is strictest where fundamental rights, like the right to life or freedom from torture or from discrimination, are at stake . *A purely negative conception of rights is not compatible with the object and purpose of the Convention*[39].

v) This doctrine of 'positive obligations' does not just apply to the actions or decisions of state authorities. "Sometimes positive measures [need] to be taken [by the state] even in the sphere of relations between individuals,[40]**"** to address

---

30 *Human Rights in the Private Sphere,* Clarendon, 1993.

31 Lord Browne-Wilkinson, "The impact on judicial reasoning", in *The Impact of the Human Rights Bill on English Law,* Clarendon, 1998, pp21-23.

32 *Wilson v First Country Trust Ltd (no 2)* [2003] UKHL 40, para 181.

33 See note 51.

34 *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35 para 69.

35 Lord Bingham, *Leeds City Council v Price and others*, [2006] UKHL 10.

36 *Artico v Italy* (1980) 2 EHRR 1 (my emphasis).

37 E.g in *Tryer v UK* (1981) 2 EHRR 1 and *Marckx v Belgium* (1979-80) 2 EHRR 330.

38 *Re Parsons,* [2003] NICA 20; *R (Price) v Carmarthenshire CC* [2003] EWHC (Admin) 42 .

39 *R (L and others) v Manchester City Council* [2001] EWHC (Admin) 707; *R (Price) v Carmarthenshire CC*, ibid.

40 *Platform Arzte fur das Leben v Austria,* (1988) 13 EHRR 204, para 32

inequalities in the private sphere, or protect individual privacy from intrusions by others, for example.

vi) Any restrictions on rights *must* be *proportionate* and *necessary* in a democratic society[41]. Provided a restriction genuinely pursues one of the aims set out in the Article itself, and does so in a proportionate way, it can be legitimate[42]. [All emphases are mine].

3.11 **It is the values-driven nature of the HRA which has led many informed commentators to distinguish it from most other domestic legislation whose more specific provisions lend themselves to 'literal interpretation' by the courts.**

3.12 The symbolic role of the HRA as a signifier of the fundamental values and **principles of liberty, justice and tolerance, long associated with British democracy**, is frequently remarked upon. Professor Robert Blackburn described the HRA as a "major constitutional Act" providing "an **official code and moral yardstick against which to test not only the principles of the common law and parliamentary statutes but the legitimacy of government in general**.[43]"

3.13 Whist there are clearly different views on the desirability, or otherwise, of incorporating the ECHR into UK law through the HRA, virtually all informed comment recognises that the Act is distinguishable from other types of specific legislation – and comparable to a bill of rights – on the following grounds:

i) **The Act was intended to have symbolic significance**, comparable to race and equal opportunities legislation, signifying that "it is much more important than…get[ting] your rights enforced quickly and cheaply because you will not have to make the journey to Strasbourg.[44]"

ii) The **rights it upholds**, like all rights in international human rights treaties and bills of rights around the world, **are expressed in very broad terms,** which require interpretations and clarifications that are liable to evolve over time in the light of changing circumstances and experience.

iii) **Because they are so broad,** the courts have determined that the **rights in the HRA need to be interpreted in a 'purposive' way to reflect their 'general spirit,' [45] and to achieve the aims of the Act as a whole[46]. This is in contrast to the more traditional approach to statutory construction which relies on a literal interpretation of the precise words used in a statute**, still commonly associated with English 'black letter law'[47] and the interpretation of specific legislation.

41 E.g. *Handyside v UK* (1976) 1 EHRR 737; *Chassagnou and others v France* (1999) 29 EHRR 615.

42 *Chassagnou and others v France* (1999) 29 EHRR 615.

43 Prof Robert Blackburn, *A Human Rights Committee for the UK Parliament* [1998] E.H.R.L.R. 534, pp357-8.

44 Lord Williams 582 HL (November 3 1977) 1308.

45 See for e.g. *Wemhoff v Germany* (1968) 1 EHRR 55; *Golder v UK*, note 29 above; *Kjeldsen Busk Madson and Peterson v Belgium* note 28; *Kebeline,* note 24.

46 See for e.g. Reyes v The Queen [2002] AC 235; "A generous and purposive interpretation is to be given to constitutional provisions protecting human rights." Lord Bingham, para 26.

47 Defined as "the principles of law which are generally known and free from doubt or dispute," *Legal Dictionary.*

Implications of nature of human rights for role of parliament in HRA

3.14 It is the broad scope of human rights, and the ethical and philosophical issues they raise, which drive the ongoing, international debate on the legitimacy of unelected judges interpreting Bills of Rights or incorporated human rights treaties[48]. As Richard Shepherd put it in his alternative draft report on *The Case for a Human Rights Commission* "the interpretation of the scope of human rights often involves political value judgements on which there is a legitimate scope for disagreement across the political spectrum or within society.[49]"

3.15 The Courts frequently comment on the potentially political or philosophical nature of the judgements they are required to make under the HRA, particularly where social and economic issues are engaged,[50] or where the rights they interpret are not absolute, but are qualified and limited, which is the case with most, but not all, of the Convention rights[51].

3.16 The discretionary nature of many human rights adjudications is one of the factors that drove the European Court of Human Rights to develop their *doctrine of a 'margin of appreciation' to national authorities*, described above (para 2.9).[52] As a doctrine designed by a regional court conducting a supervisory role of a system for protecting rights which is supposed to operate primarily at the national level, the courts have determined that it is not appropriate to import it wholesale at the domestic level[53].

3.17 Nevertheless, in a range of judgements, the domestic courts have argued for, a "**degree of deference…due to the judgement of a democratic assembly on how a particular social problem is best tackled**. [54]" This "discretionary area of judgement" given to "the decisions of a representative legislature and democratic government," as Lord Bingham has put it[55], is more often applied where a right is qualified than where it is absolute. Policy issues concerning the allocation of resources, such as housing, are an area where, in Lord Woof's terms "the courts must treat the decisions of Parliament as to what is in the public interest with particular deference.[56]"

3.18 Lord Bingham has determined that the requirement under HRA s3 to interpret legislation compatibly with Convention rights means that the fact that legislation "represents the settled will of a democratic assembly" is not in itself "a conclusive reason for upholding it." Nevertheless "a degree of deference is due to the judgement of a democratic assembly on how a particular social problem is best tackled.[57]"

3.19 **Given the crucial role of the legislature under the scheme of the HRA, and the broad and ethical nature of human rights, a primary question for the JCHR to consider in its examination of its working practices is as follows: how can the**

48 See for e.g. Tom Campbell et al (eds), *Sceptical Essays on Human Rights,* OUP, 2001.

49 Sixth Report, Session 2002-03, para 12.

50 Lord Hoffman *R (Prolife Allliance) v BBC* [2003] HL 23, paras 75-6.

51 There are different types of restrictions on Convention rights; a) broad limitations expressly permitted under Articles 8(2), 9(2), 10(2) and 11(2); b) specific qualifications expressly permitted by Articles 2(2), 4(2), 5,12, Protocol 1, Article 1 and Protocol 6 Article 2; c) implied restrictions on the scope of the rights in Article 6 and Protocol 1 Articles 2 and 3.

52 Other factors are the role of the European Court as a 'supervisory' body of a system that operates primarily at the national level; the search for common European standards and the skills and knowledge of the relevant judges.

53 *Brown v Procurator Fiscal and Advocate General for Scotland* [2001] 1 AC 681, Privy Council.

54 *R v Lichniak,* [2002] UKHL 47.

55 *Brown.* Note 53 above.

56 *Popular Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595.

57 *R v Lichniak.* Note 54 above.

Committee most usefully assist parliament in determining how legislation should be framed, and policies developed

a) in a manner that is **not technically incompatible with the *settled* jurisprudence of the ECHR** now incorporated into our law through the HRA (**which in reality applies to a relatively narrow band of technical but fundamental principles** if the doctrines of a 'margin of appreciation' and 'discretionary area of judgement' are taken into account)

(b) but which **reflects the *purposive* nature of human rights, best understood as a set of fundamental values associated with liberal democracies,** drawn from a range of recognised domestic and international sources, **which precede the law (both case-law and statute) influences and moulds it.**

4. Background to establishment of JCHR

4.1 *Bringing Rights Home*, the consultation paper produced by the Labour Party in 1996 to foreshadow the HRA, was the first official document to propose a "new Joint Committee on Human Rights." **The rationale for the committee was to ensure that "Parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy[58]." "** In addition the Committee "would have a continuing **responsibility to monitor the operation of the Human Rights Act**.[59]**"**

4.2 The specific functions envisaged for the Committee were:

— To strengthen the parliamentary machinery on human rights.

— To monitor the operation of the new Act and other aspects of the UK's human rights obligations.

— To scrutinise legislation "identified as having an impact on human rights."

It was recognised that more work would be needed to clarify how the Committee would work in practice but that it should "have the powers of a select committee to compel witnesses to attend.[60]**"**

4.3 The White Paper*, Rights Brought Home,* which accompanied the publication of the Human Rights Bill in October 1997, picked up on this theme, reiterating the central role of Parliament in protecting rights "which are at the heart of a parliamentary democracy.[61]**"**

4.4 The White Paper noted that it was for Parliament to decide how to ensure that Parliament should play "a leading role in the protection of human rights" but suggested that "the best course would be to establish a new Parliamentary Committee with functions relating to human rights." **Alternatives canvassed were a Joint Committee on Human Rights, or discrete Committees for both houses that would meet jointly for some purposes and separately for others**[62]. It was suggested that the Committee/s could carry out the following functions:

58 *Bringing Rights Home, Labour's Plan to Incorporate the ECHR into UK Law,* Jack Straw MP and Paul Boateng MP, Labour Party, December 1996, p12.

59 Ibid.

60 Ibid p12.

61 *Rights Brought Home,* note 5 above, para 3.6.

62 Ibid.

— enquiries on a "range of human rights issues related to the Convention."

— reports "to assist the Government and Parliament in deciding what action to take".

— examine issues relating to other international obligations, such as proposals to accept new rights under other human rights treaties.

— conduct an enquiry into the purpose and operation of a Human Rights Commission.

There was *no* reference in the *White Paper* to the proposed Committee/s scrutinising legislation.

4.5 On 14 December 1998 Margaret Beckett, Leader of the House of Commons, announced the establishment of a Joint Committee on Human Rights to:

— conduct enquiries into "general human rights issues" in the UK (only).

— Scrutinise Remedial Orders

— Examine draft legislation where there is doubt about its compatibility with the ECHR

— Examine whether there is a need for a human Rights Commission to monitor the operation of the HRA[63].

This reference to 'examining draft legislation,' now one of the 'core tasks,' of select committees, was in keeping with the significance attached to pre-legislative scrutiny by the newly formed Modernisation Committee (See para 5 2). However **neither the Leader's statement, nor the Committee's Standing Orders/Orders of Reference** (hereafter referred to as terms of reference), **included the scrutiny of published Bills.**

Ministerial proposals for role of JCHR

4.6 There were **several references by ministers to the establishment of a parliamentary select committee during the passage of the Human Rights Bill, all of which were tied to the Human Rights Act**, its educational and cultural purposes and its machinery, but only one of which suggested a legislative scrutiny function: [64]

— Jack Straw, the then Home Secretary, suggested a "parliamentary Committee on human rights might" monitor progress in implementing the Act and the way in which it develops.[65]

— Lord Irvine, Lord Chancellor, suggested such a Committee might scrutinise Remedial Orders, "keep the protetion of human rights under review [and] be in the forefront of public education and consultation on human rights. It could receive written submissions and hold public hearings at a number of locations across the country.[66]"

63 Hansard, 14 December 1998, Col 604.

64 See Francesca Klug, *The Human Rights Act 1998, Pepper v. Hart and all that*, [1999] P.L. 246.

65 Hansard, 21 October 1998, Col 1366.

66 Hansard, 3 November 1997, Col 1234; 29 January 1998, Col 406.

— Lord Williams of Mostyn, suggested the government would support the establishment of a "parliamentary Committee on human rights" in that "we wish the whole new culture of human rights to infuse the parliamentary process." Reviewing the arguments for a Human Rights Commission could be one of its taks[67].

— Under-Secretary of State at the Home Department ,Mike O'Brien, was the only minister to suggest the proposed select committee "could be a Joint Committee of both Houses or a Committee of each House" and that "the Committee's function could be to scrutinise proposed legislation", as well as "to ensure that human rights are respected, to assess UK compliance with various human rights codes and to keep the Act …under constant review.[68]"

Other Proposals for a Parliamentary Human Rights Committee

4.7 In the run-up to the introduction of the HRA, and in the early days of implementation, there were a number of proposals by esteemed academics or organisations for a parliamentary committee or parliamentary scrutiny of legislation for human rights compliance[69]. **In each case the impetus was the explicit role allotted to parliament by the scheme of the HRA**.

4.8 The highly respected Constitution Unit at UCL, for example, explored three alternatives to providing a "legitimate role for Parliament in the enforcement of human rights, alongside the courts." One option proposed closely resembles the JCHR: the establishment of a Select Committee – possibly a Joint one – whose main function would be to report regularly to Parliament on human rights compliance of Bills but which would also carry out "issue-based inquiries." The report suggested that the main advantage of such a select committee over standing committees would be the power to call witnesses. It prophetically advised that "**the decision as to the balance of priorities would rest with the committee itself and would certainly need adjustment over time." [70]**

Competing Views on Purpose of a Human Rights Select Committee

4.9 From the outset there were different views on the functions and roles of a parliamentary human rights committee[71]. **Professor Robert Blackburn envisaged such a committee as primarily performing a "technical" role**, "comparing and predicting the compatibility of the law proposed with the prospect of litigation under the ECHR[72]." **However the scrutiny of government bills should not be mandatory, Blackburn argued, but "the committee should determine for itself which measures it should enquire into and report on**." In addition the Committee "might consider it worthwhile" to initiate separate special inquiries into aspects of particular importance or

67 Hansard, 5 February 1998, Col 826.

68 Hansard, 16 Feb 1998, Column 855

69 For example, Michael Ryle, *Pre-legislative Scrutiny; A prophylactic approach to human rights* [1994] P.L. 192; Francesca Klug, *A People's Charter, Liberty's Bill of Rights*, Civil Liberties Trust, 1991; David Kinley, *The ECHR: Compliance without Incorporation,* Dartmouth, 1993; Professor Robert Blackburn, Human Rights Incorporation Project, King's College London, note 43 above; Ian Bynoe and Sarah Spencer, *Mainstreaming Human Rights in Whitehall and Westminster*, IPPR, 1999; Aisling Reidy, *A Human Rights Committee for Westminster*, Constitution Unit, 1999 and *Auditing for Rights,* Developing Scrutiny Systems for Human Rights Compliance, Justice 2001.As Director of the Civil Liberties Trust, and subsequently as a Senior Research Fellow at the Human Rights Incorporation Project (HRIP) King's College Law School, I was personally involved in many of the discussions which preceded these reports and commented on or contributed to a number of the papers, including *The HRA 1998 and Parliamentary Scrutiny*, published by HRIP, IPPR, Constitution Unit et al.

70 *Human Rights Legislation,* Constitution Unit, 1996, pp69-74. My emphases.

71 The All-Party Parliamentary Human Rights Group covered only foreign affairs.

72 Note 43 above, p538.

significance to the working of the Act." Examples he gave were the courts' application of its powers under s4 (to make Declarations of Incompatibility) and citizens' access to justice.

4.10 **The Constitution Unit (**CU), on the other hand, **argued that "a technical examination" of "*clearly defined and settled* ECHR principles and standards" would add "minimum value to the process of legislative scrutiny**." Instead, in a document published after the JCHR was established, the CU **proposed** "**merits scrutiny" which involves "an examination of how the legislation has succeeded in balancing competing interests, and applying the doctrine of proportionality" which will involve a "degree of subjective assessment of policy.[73]"** It should be possible, the report concluded "to **apply both 'technical' and 'merits' scrutiny to all types of legislation"**. In addition the Committee could scrutinise other policies, focussing on cross-cutting issues concerning human rights which were not dealt with adequately by departmental select committees. "The Committee could be entitled to recommend and/or monitor changes in practice or procedure which aim to improve human rights compliance."

4.11 **A common theme of the various independent proposals for the Committee was the need to assist Parliament in providing independent scrutiny of executive policies and legislation which impact on human rights**[74]. Recognising the dominant role of the 'executive in parliament' under our constitutional system it was envisaged that a human rights select committee, in particular a Joint committee of both Houses, would **strengthen the independence of the legislature in performing its allotted functions under the HRA**. A task given greater significance by the 'deference,' or 'discretionary area of judgement,' given to parliament by the courts in the protection of human rights in many contexts. In the absence of a distinctive 'voice' for parliament, such 'deference' is in reality to the executive, not the legislature [75].

5. The role of select committees

5.1 Most select committees are departmental Select Committees. The Liaison Committee (of select committee chairs) published a set of *Core Tasks for Select Committees* in June 2002 (**Appendix 3**). These imply that the key role of select committees is to provide "independent scrutiny of government,[76]" including executive and administrative decisions. Other key select committee functions identified by academic and official reports include:

— Investigative and less partisan scrutiny of government than is associated with standing committees[77]

— Monitoring the work of central departments[78]

— Assist Parliament to "reassert real control" over government though relatively impartial advice and information[79]

73 Aisling Reidy, *A Human Rights Committee for* Westminster, note 69 above, p14.

74 See note 69 above and in particular *A People's Charter, Liberty's Bill of Rights,*1991.

75 "The sovereignty of parliament establishes, in practice, the political supremacy of the government of the day." *The Three Pillars of Liberty; political rights and freedoms in the UK,* Francesca Klug, Keir Starmer and Stuart Weir, Routledge 1996, p47.

76 *Shifting the Balance: Select Committees and the Executive,* House of Commons Liaison Committee 1st report, 1999-2000, paras 1-4. See also *Delivering a Stronger Parliament,* Conservative Party, February 2002.

77 *An Introduction to Administrative Law,* Peter Cane, Clarendon, 1992, p302-3

78 *Garner's Administrative Law*, B.L. Jones and K. Thompson, Butterworths, 1996, p125-6.

79 P Craig, *Administrative Law*, Sweet and Maxwell, 1999, p78.

— Provide informed contribution to public debate[80]

— Assist in making the political process less remote and more accessible to citizens.[81]

5.2 *The Core Tasks for Select Committees* are based on the model of departmental select committees (disregarding the generic task 10, *assist the House through producing reports which are suitable for debate and decision*). As a non-departmental select committee, some of these tasks are outside the effective remit of the JCHR (notably tasks 4 – 8). Others such as **examining Government or EU policy proposals in Green or White Papers etc and emerging policy areas, or scrutinising draft Bills, are squarely within the terms of reference of the JCHR,** provided that they relate to human rights matters in the UK[82].

Scrutiny Committees

5.3 Scrutiny is the central function of all select committees. They all scrutinise some aspects of executive output - legislation, policy or decisions. But most legislative scrutiny by departmental select committees is pre or post-legislative[83].

5.4 Pre-legislative scrutiny of draft bills used to be relatively rare and was generally carried out by a specially appointed Joint Committee or Special Standing Committee that combined the functions of select and standing committees. There has been a marked increase in draft bill pre-legislative scrutiny since 1997 and since the adoption of the *Core Tasks*, the usual assumption is that select committees will carry out this role.

5.5 It is very unusual for select committees to prioritise Bill scrutiny as their core task unless it is in their Standing Orders or terms of reference as this is seen as the legitimate role of Standing Committees. However, provided that their terms of reference are broad enough (as is the case with the JCHR) there is nothing to stop select committees from scrutinising published Bills (government, private or private members) and several do from time to time, often as part of a wider enquiry[84].

5.6 Attached is a table of **non-departmental select committees**, all of which are **formally charged with scrutinising legislation** of one form or another, including EU Directives or secondary legislation. In contrast to the JCHR[85], their **terms of reference are quite specific and the scrutiny tasks allotted to them generally precise** and, to varying degrees, quite technical (**Appendix 4**)[86].

80 *Select Committees,* House of Commons Modernisation Committee, First Report, Session 2001-02, para 57.

81 *Shifting the Balance,* note 76, paras 1-4.

82 JCHR Standing Order no 152B, (2)(a).

83 See *Issues in Law Making, Pre-Legislative Scrutiny* Hansard Society, Paper 5, July 2004; *Post-Legislative Scrutiny,* Paper 6, May 2005.

84 E.g the House of Commons Public Administration Select Committee decided to scrutinise the Legislation and Regulatory Reform Bill in the current session to evaluate the change in balance between government and parliament. Public Administration Committee, 'Legislative and Regulatory Reform Bill', Third Report 2005-06.

85 The JCHR is required to scrutinise Remedial Orders but no other legislation.

86 In fulfilling its scrutiny role, the Lords EU Scrutiny Committees often carries out substantial, in-depth enquiries, receiving witnesses and taking evidence. The Lords Constitution Committee also carries out enquiries into broad constitutional issues under its remit "to keep under review the operation of the constitution."

Joint Committees

5.7 Joint Select Committees are rare[87] although ad hoc joint committees are more common, often established to review issues of constitutional reform[88]. Many of the early proposals for a human rights committee recommended that it should be a Committee of both houses to reduce the political partisanship of Select Committees in which the governing party has the majority of members[89].

5.8 The Hansard Society has identified a number of potential advantages to Joint Committees including the range of experiences and expertise they bring, their capacity to "speak with one voice in Parliament" and the "lower degree of partisanship"[90] that should apply. However **the different roles and cultures that members of the two Houses bring to a Joint Committee can create their own challenges. Whilst Peers are unelected and primarily have an expert scrutinising role, MPs are partly accountable to their constituents for policy and legislation**.

6. Working Practices of the JCHR

6.1 The JCHR is a non-departmental select committee comprising members of both Houses of Parliament. It is the first permanent Joint Committee of both houses. In effect it was a **new creature, being a standing joint committee with an investigative remit which is extremely broad.**

6.2 **There was considerable discussion during the short life of the first Committee[91] about the interpretation the JCHR should give to its broad terms of reference and whether, and if so how, to prioritise Bill scrutiny**. **At its second meeting the Committee interpreted its terms of reference to include "a power to examine the impact of legislation and draft legislation on human rights in the UK[92]."**

6.3 There are no minutes to suggest the level of priority accorded to **Bill Scrutiny** during the first Parliament, although early JCHR reports in the second Parliament (2001-02) state that **Members in the first Parliament decided it should have a "high priority" (Minutes of Proceedings of meeting on 19 July 2001), subsequently upgraded in the second Parliament to *first* priority."(14th Report, Session 2001-02)** The Commons clerk, Nick Walker, has suggested that during the second Parliament about three quarters of the time of the Committee was spent on legislative scrutiny, although this applied more to the staff than Committee Members and probably only applied at 'peak parliamentary periods' to the Committee as a whole.

Committee members will obviously be familiar with the current and previous working practices of the JCHR which are well documented.[93] The following is a brief synthesis of

87 Others include the Joint Committee on Statutory Instruments, the Intelligence and Security Committee (technically a statutory committee, not a select committee), the Joint Committee on Tax Law Rewrite Bills, the Joint Committee on Consolidation Bills and the Joint Committee on Conventions.

88 E.g. the Joint Committee on Lords Reform established in 2002.

89 Note 69 above.

90 *Issues in Law Making, Joint Committees,* Hansard Society Paper 9, June 2006.

91 Which met between 31 January and 30 April 2001.

92 *Criminal Justice and Police Bill*, First Report, Session 2000-01.

93 *The Work of the Committee in the 2001-2005 Parliament*, Nineteenth Report, Session 2004-05, HL 112, HC 552. For an extremely useful summary see "Parliamentary scrutiny of human rights", in *Human Rights Law and Practice,* Lord Lester and David Pannick (eds), LexisNexis, 2004 and "The Human Rights Act and Westminster's Legislative Process", in *Parliament, Politics and Law Making,* Alex Brazier (ed), Hansard Society, 2004.

the main developments over the life of the Committee, during three parliamentary sessions, which have bearing on this review.

Working Practices in the First Parliament 2001

6.4. At the second meeting of the first Committee members "resolved that the Committee do inquire into the Scrutiny of Bills[94]" including the background to the making of 'statements of compatibility' under HRA s19. This was approached in the following way.

— It was decided that the Committee's Legal Advisor would sift *all* Bills and draw to the attention of the Chair any with implications for ECHR compatibility.

— The Chair would normally write to the Minister for clarification of the relevant s19 Statement which would be presented to the Committee alongside the Legal Advisors advice.

— **In the case of Bills raising particularly important human rights issues, the Committee might decide to mount a formal inquiry, taking evidence and reporting to both Houses**. A *special report* was published on the Criminal Justice and Police Bill which concluded that bill scrutiny was "one of the most important parts" of the Committee's terms of reference." Evidence was taken from ministers but not other sources.

6.5 It was additionally decided, alongside Bill scrutiny, **to review progress in implementing the HRA** amongst public authorities, government and the courts. This exercise was intended not only to fulfil a legitimate scrutiny purpose but also to serve as an educational process both for the Committee and the wider public.

Working Practices in the Second Parliament 2001-5: legislative scrutiny

6.6 The following working practices, developed during the course of the last parliament, still largely apply to the Committee's Scrutiny of Government Bills. Major changes are recorded below (6.8).

a) The Committee decided early on to develop two key principles that had already begun to be established during the first session: i) **comprehensive scrutiny of all Government Bills** ii) seeking detailed information from the Government on their view of the human rights compatibility of Bills where significant questions are raised[95].

b) JCHR considers itself to be **responsible to Parliament for assessing whether "section 19 statements have been properly made**," and believes this to be a "key duty.[96]"

c) **Written comments** from non governmental sources are sought "where appropriate" but **oral evidence** is more "exceptional.[97]"

d) The **main objective** of legislative scrutiny, it was decided, is to provide "advice on the human rights compatibility of proposed legislation in a timely manner" to **influence parliamentary debates on that legislation**[98].

94 *Minutes of Proceedings,* 5 Feb 2001.

95 Nineteenth Report, note 93 above, para 27.

96 *Scrutiny of Bills: Private Members Bills and Private* Bills, Fourteenth Report, Session 2001-02, para 1.

97 Nineteenth Report, note 93 above, para 46

e) A self-imposed **target was developed of reporting before the second reading in each House.** .

f) The **primary role** of the Committee was defined as **"alerting**" both Houses of **Parliament to the "risk of proceeding to legislate in a manner which will later be held by a *court* to be incompatible** with the ECHR.[99]**"**

g) A legislative provision can present a '**significant risk' 'a risk' or 'no appreciable risk' of incompatibility**. In a number of cases, no human rights issues will a rise. The criteria to determine 'significance' include:

— the importance of the right affected

— the seriousness of the interference with the right

— the strength of any justification with the interference

— the number and vulnerability of the people likely to be affected.

h) Scrutiny of most Bills are now produced in regular '**progress reports'** dealing with more than one Bill, with most Bills scrutinised in more than one report. 'Stand-alone' reports are still sometimes produced where appropriate, particularly for in-depth scrutiny reports such as on the draft Order to renew (sections 1-9) Prevention of Terrorism Act 2005.

i) A **system of prioritisation of Bills** was developed "which attempts to focus efforts on **reporting early on government bills with significant human rights implications**, rather than dealing with Bills in order of introduction."

j) During 2001-2 the Committee agreed **in principle** to extend the **principle of comprehensiveness** to **Private and Private Members Bills** (PMBs). Paying "due regard to the priority that needs to be accorded to consideration of government legislation," the Committee also decided that **resources devoted to scrutinising Private Members' Bills (PMBs) should be "proportionate"** to the likelihood of them making significant parliamentary progress. 'Ballot bills' in the Commons were given priority over other PMBs[100].

k) An initial decision was taken to consider all **Private Bills** presented to parliament using the same procedure as for Government Bills.

l) The Committee has "sought to comment as often as possible on **draft bills**" with the aim of collaborating with the specific committee to which the draft bill is allocated[101]. This sometimes involved collaboration at official level only. The number and percentage of Draft Bills reported on per session is produced in **Table 1.** The Committee itself was given responsibility for scrutiny of the Draft Gender Recognition Bill in session 2002-3 as its purpose was to remedy an ECHR incompatibility.

m) There has been no routine scrutiny of **delegated legislation** but the Committee reported on the annual renewal orders under the Anti-Terrorism Crime and

98 Ibid, para 41.

99 Ibid, para 44.

100 Fourteenth Report, note 96 above, para 4.

101 Nineteenth Report, note 93 above, para 92.

Security Act 2001 (part 4) and Orders under the Nationality, Immigration and Asylum Act 2002, the Criminal Justice Act 2003 and the Prevention of Terrorism Act 2005.

n) The Committee reported on one **Remedial Order** early in the Parliament in accordance with point 2 of its Standing Orders[102] and produced a report on the Remedial Order parliamentary process. There have only been two more Remedial Orders since, including the *Marriage Act Remedial Order* which is currently under consideration by the Committee [103].

o) Other scrutiny work is more appropriately described as **monitoring**. The Committee has from time to time monitored various aspects of the implementation of the **HRA** e.g. taking evidence from the Human Rights Minister and Human Rights Division in the DCA, monitoring government responses to **Declarations of Incompatibility** and, unusually, monitoring the definition of 'public authority' under s6 of the HRA, as developed by the *courts*.

p) Other periodic monitoring functions include the **UK Government's response to the concluding observations of UN treaty bodies** and monitoring the implementation of **European Court of Human Rights judgements** that involve the UK.

Enquiries

6.7 The JCHR has carried out three different types of enquiries. The only 'thematic enquiry' completed to date was into *Deaths in Custody* [104]. This enquiry has been described by the Committee (in its 19th report on its work in the last sessions) as taking it "into realms more usual for departmental select committees of the House of Commons.[105]" The inquiry and report are described as "one of our most important pieces of work" whose objective was to "**provide a human-rights based analysis of a thematic area of Government policy and practice**.[106]" The rationale was to counter the "**discussion of human rights matters" that "take place at a rarefied level of legal abstraction which appears removed from people's everyday experiences."** This can put "public authorities on the defensive, interpreting their principal responsibility as being to avoid infringement of the ECHR at the expense of adopting practices which will positively enhance human rights.[107]"

6.8 The 19th report recommends its successor Committee to "consider fitting similar thematic work into its programme if at all possible, taking into account the work which may be undertaken by the new CEHR.[108]"Early in the current session the Committee considered proposals for thematic enquiries made by members of the Committee and others, and embarked on a 'thematic enquiry' into **human trafficking**. This inquiry has included a consideration of whether the UK government should ratify the Council of Europe Convention on Action against Trafficking in Human Beings.

102 *Mental Health Act 1983 (Remedial) Order 2001*, Sixth Report, Session 2001-02.

103 The other was the Naval Discipline Act 1957 (Remedial) Order 2004. See 9th report of Session 2003-04.

104 *Deaths in Custody*, Third Report, Session 2004-05, HL 15, HC 137.

105 Nineteenth Report, note 93 above, para 141.

106 Ibid, paras 140 & 143.

107 Ibid, para 140.

108 Ibid, para 143.

6.9 As an extension of its role in monitoring the HRA, the JCHR has carried out three enquiries into effective human rights institutions, or, the case for them[109]. The reports on *The Case for a Human Rights Commission*[110] are widely accredited as playing a significant role in the government's decision to include human rights within the remit of the then proposed new Single Equality Body, now called the Commission for Equality and Human Rights.

6.10 Two additional enquiries have been carried out in the current session, into the **UN Convention against Torture** and into **counter terrorism policy** and human rights which, in the latter case, is still ongoing. These use many of the techniques of thematic enquiries including taking written and oral evidence from an array of witnesses and carrying out visits abroad to enquire into comparative policies and practices in other jurisdictions. Central to these enquiries has been scrutiny of compatibility by the government with UNCAT and anti-terrorism legislation respectively, but these have been scrutinised in the context of wider policy analyses and evaluation. In this respect I suggest that such enquiries might usefully be described as **scrutiny enquiries** (see below).

Recent Changes to Working Practices: approaches to Bill scrutiny

6.11 Unlike its predecessor the current Committee did not explicitly state early in its existence that legislative scrutiny will be a high priority, nor did it take precise decisions as to the comprehensiveness of nature of the scrutiny which it will undertake. Differing views about the priority, and indeed desirability, of legislative scrutiny provided the background to the commissioning of this report, of course.

6.12 Initially there were only two **categories of compatibility** presented to Members: those Bills which raised "significant" human rights issues and those which did not. Only the former were reported to parliament. Towards the end of the last parliament a third category was introduced: Bills which engage human rights issues but which are either clearly compatible or do not give rise to a significant risk of incompatibility. These are now scrutinised and reported to Parliament.

6.13 In the early part of the second parliament the Committee tended to discuss the **Legal Adviser's Notes** on a Bill prior to the draft Chair's report which was generally presented for discussion, and possible amendment, at a subsequent meeting. During the latter part of Session 2003-04, in an attempt to speed up reporting, draft report paragraphs were sometimes presented to the Committee along with a covering Note from the Legal Adviser drawing attention to any controversial sections of the report, or those which called for members to reach a view of their own, for example on the proportionality of an interference with a Convention right. The Committee tended to report its provisional views on a Bill at this stage, then return to report further, if necessary, in the light of any Government response. This had the advantage of alerting Parliament earlier to the Committee's views of the issues raised by the Bill and its provisional views in relation to those issues. During the unusually compressed legislative timetable of the pre-election Session 2004-5, this practice was adopted in relation to all but the most controversial Bills. The earlier, two report stage was then reinstated at the beginning of the current session, although as it has progressed, the format of draft report paragraphs with accompanying Legal Adviser's note has increasingly been used. In the Legal Adviser's view this is a useful way of proceeding, provided there is always the opportunity to present a separate Legal Adviser's Note on issues where there is disagreement between the Chair and the Legal Adviser, which is particularly relevant for some of the more controversial Bills

109 Including the Children's Commissioner for England and the Northern Ireland Human Rights Commission.

110 Sixth Report, Session 2002-03, HL 67-1,HC 489-1; *Commission for Equality and Human Rights: Structure, Functions and Powers*, Eleventh Report, Session 2003-04, HL 78, HC 536.

6.14 In its review report the previous Committee made suggestions for publishing **criteria for prioritisation** of bills for scrutiny.[111] Although the current Committee has not adopted them, according the Commons clerk, they are effectively applied in practice:

— First priority should be given to "emergency measures raising significant human rights compatibility questions".

— Second priority to government bills, and then amendments, raising *significant* human rights compatibility questions.

— A commitment to report on other government bills raising human rights compatibility questions is maintained.

— Private Bills raising compatibility issues should be reported before the second reading in the second House

— Account should be taken of whether the Government supports a PMB before scrutinising it.

6.15 In this Session the Committee has sought to draw more systematic attention to **matters of human rights concern which have *not* been included** in Bills and not only comment on what has been included. It has also sought to endorse legislative proposals, where appropriate, which furthered the protection or promotion of human rights rather than restrict its comments to assessing risks of incompatibility. An illustration of the former was the recommendation in the report on the Civil Partnership Bill that Article 14 required the Government to provide full pension rights for civil partners, a recommendation that was subsequently accepted. An example of the latter was the welcoming of many of the proposals in the Equality Bill as furthering human rights.

7 Evaluation and Assessments of Working Practices

7.1 **There is considerable published testimony of the authority and esteem in which JCHR reports, of all kinds, are held:**

— Professor Robert Hazel has commented that "the systematic and careful approach to scrutiny by the JCHR has helped focus the minds of ministers and officials on human rights issues.[112]"

— Roger Smith, Director of Justice, has said that "the JCHR rapidly became a major success and, in a short period of time, has carved out an important and unique role in advising Parliament on the human rights implications of Bills passing through Parliament.[113]"

— Professor Janet Hiebert, who published the first independent research into the operation of the JCHR earlier this year, has suggested that "the JCHR has assumed an important supporting role in the ambitious project of developing a culture of rights within and beyond government.[114]"

7.2 To provide an informed and systematic evaluation of the work of the Committee it is necessary to establish agreed criteria for its success. There is no single source of **success**

111 Nineteenth Report, note 93 above, para 95.

112 Robert Hazell, "*Who is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?*" [2004] P.L. 495.

113 Comment provided for this report, June 2006.

114 Janet Hiebert, "Parliament and the Human Rights Act", note 16 above, p38.

criteria for the Committee but in various documentation the Committee, or its individual staff, have suggested the following broad targets for its work, reproduced here in descending order of the priority that seems to be attached to them in the documentation:

i) provide "advice on the human rights compatibility of proposed legislation in a timely manner" **to influence parliamentary *debates* on that legislation**[115].

ii) "increase awareness within government departments that every Bill will be examined …**enhancing Parliament's influence on legislative *outcomes*[116]."**

iii) provide an incentive to the Government to carry out **rigorous compatibility scrutiny of policy proposals at departmental level**[117].

iv) "**act as a check on the executive** and "the tendency of governments to extend their powers, or the liabilities of citizens too greatly, or for unacceptable purposes at the expense of individual freedom.[118]"

v) **Infuse human rights** more productively into the **policy process**[119] amongst officials at all levels.

vi) **Evidence gathering and monitoring on** implementation of the HRA in central government, among public authorities and in the courts.[120]

vii) Influence the terms of **debate on human rights outside Parliament** as well as in[121].

7.3 Professor Hiebert has suggested that the JCHR's effectiveness should be assessed not just by its "direct influence" (such as amendments to Bills) but by its "indirect" effect on both the public and officials as part of its "central role in" the scheme of the HRA which establishes a "dialectical relationship" between the executive, legislature and judiciary[122]. For this purpose, in addition to direct criteria like those above, the JCHR should be judged for:

viii) "creating and abetting an awareness within Parliament of the implications" of rights legislation

ix) encouraging "civil society" to participate in public debate about the appropriateness or justification of government action

x) create expectations that governments should explain and justify their actions[123].

7.4 In terms of its working practices, Professor Hiebert advises that for the work of the JCHR (or any parliamentary committee) to be "taken seriously", there are four essential conditions:

115 Nineteenth Report, note 93 above, para 41.

116 Paul Evans quoted in *New Politics, New Parliament? A Review of Parliamentary Modernisation since 1997,* Alex Brazier, Mathew Flinders and Declan McHugh, Hansard Society, 2005.

117 Interviews for this report.

118 David Feldman, "*Parliamentary scrutiny of legislation and human rights*" [2002] P.L. 323, p336.

119 Nineteenth Report, note 93 above, p51.

120 Ibid, p49.

121 Ibid, p19.

122 *Parliament and the Human Rights Act*, note 16 above, p27.

123 Ibid, p37.

a) Reports must be perceived to be motivated by "principled not partisan deliberations."

b) The Committee must review bills and report to Parliament within an effective time frame.

c) The Committee must be generally independent of government.

d) It must "command the respect" of other parliamentarians[124].

7.5 Grouping all these success criteria into three categories linked to the role, and relevant core tasks of select committees more generally (discussed in para 5) the effectiveness of the JCHR can be assessed in relation to three broad targets:

— influencing policy and legislative formation and holding the executive to account;

— influencing and informing parliament and affecting legislative outcomes;

— monitoring and informing the implementation of the HRA.

8. Policy and legislative formation and holding the executive to account

8.1 David Feldman, the former legal advisor to the Committee, commented that "perhaps the most significant way in which a scrutiny committee [which is how he cast the JCHR] can be effective is to make departments aware of the matters to which they should have regard when drafting legislation.[125]" Lord Lester has suggested that because "human rights scrutiny is now systematic" by the JCHR, it is "influencing the preparation of legislation in Whitehall" as well as "the legislative process itself.[126]" Several members of the Committee, and senior staff, have expressed the view that maintaining comprehensive scrutiny of government Bills is crucial in exercising influence on policy and legislative formation. The suggestion is that because ministers know that every Bill will be scrutinised by the Committee's legal advisor, and any Bill could therefore attract adverse comment by the Committee, this impacts on the degree of scrutiny for ECHR compliance carried out by government legal advisors. In the view of Lord Lester "It is the work of the Joint Committee that has given s19 its potency".[127]

8.2 This is a difficult assertion to evaluate. There can be little doubt that the requirement to make s19 statements itself has impacted considerably on the degree of scrutiny afforded to both policy and legislation in Whitehall. The Cabinet Office Guidance to Departments requires a two-stage advice process on the compatibility of Bills: at the policy approval stage and at Bill draft stage when departmental lawyers may consult with Treasury Counsel and sometimes the Law Officers[128]. The JCHR has notably succeeded in expanding, a little, the information Government provides in its section 19 statements[129]. However the Committee has yet to persuade the Government to provide it with the free-standing Human Rights Memorandum it has requested.[130]

124 Ibid

125 Note 118 above, p346.

126 Anthony Lester, *The Human Rights Act 1998 – five years on* [2004] E.H.R.L.R. 258, p262.

127 Note 93 above, para 8.09.

128 *The Human Rights Act 1998: Guidelines for Departments,* Cabinet Office, 2000.

129 *Section 19 Statements: Revised Guidance for Departments*, DCA.

130 Nineteenth Report, note 93 above, para 78.

8.3 There is evidence that the correspondence that the JCHR enters into with ministers, in the absence of an expanded Human Rights Memorandum, has some (difficult to quantify) impact on legislative formation. In the Cabinet Office's 2004 *Guide to Legislative Procedures,* there is a section on the JCHR which affirms that the Committee "examines most, if not all, Government Bills" and "is likely to examine closely the arguments put forward by the department justifying interference with a Convention right.[131]" The Guide advises departments "to identify areas likely to concern the Committee and prepare briefings ahead of time, if possible." It suggests that "it may be helpful for Departments to volunteer a memorandum at the time of introduction informing the Committee of any human rights issues which the Bill may raise.[132]"

8.4 I interviewed a **DCA lawyer and a DCA policy official** for this report. They confirmed that departmental legal advisers were likely, when considering human rights compatibility, to include the question "How would this run by the JCHR?". DCA officials would also have this in mind if discussing s19 compatibility statements with other departments. **Risk of court challenge is obviously the more significant factor when giving advice on compatibility, but that can be "a long way off" whilst JCHR scrutiny "is more immediate"**.

8.5 In the experience of these officials, however, **once government ministers have formed a view on s19 compatibility, advised by departmental lawyers and sometimes law officers, ministers would be likely to require very persuasive reasons to alter it significantly.** The problem is not the quality of the legal advice from the JCHR, which is generally appreciated as excellent, but the timing of when it is received, which is very late in the process, even if the 2nd reading target is made. Whilst the JCHR's advice would always be considered carefully, especially if it raised new points that had not previously been considered, it would often be rather late in the day to undertake a major rethink on fundamental aspects of the draft legislation at that stage. **The earlier the advice was received, the more likely it would be to influence the policy or legislative formulation**. This was **commensurate with the views of government lawyers in a number of departments** interviewed for her ongoing research into 'parliamentary bills of rights' by Janet Hiebert[133].

8.6 It was also **consistent with comments of the former human rights minister, Harriet Harman QC**, who commented in her letter to the JCHR in March that whilst "Government lawyers will take the Committee's views seriously...in making or revising a judgment on a Bill's compatibility, Ministers are bound to look to their own legal advisers." She went on to state "**the impact the Committee has had upon Government thinking on policy development" has been "most marked by its influence" on "general arguments of polic**y...**rather than in the purely legal field**.[134]"

8.7 **DCA officials felt that the JCHR's impact might be increased if the Committee were able to influence the legislative process at a much earlier stage by commenting on policy or draft bills**. They took the view that where policy proposals were sufficiently 'mapped out' at an early stage for the JCHR to form a view on the human rights issues they raise, **the Committee's comments could be sufficiently influential to affect policy**. As an example they mentioned the Equality Bill which fell at the end of the last Parliament and was re-introduced again in this session. The DCA took on 6 of the 8 points made in the JCHR 16th report on the Equality Bill. This partly reflected

131 Para 10.28.

132 Ibid, para 10.29.

133 Discussed in an interview with me in February 2006.

134 *Letter* to the Chair, 6 March 2006.

the technical nature of some of the points, but there was also more time than usual to consider and take on board the range of points made, and this could be done without needing government amendments because there was an opportunity to revise the Bill before it was reintroduced in the next session. In this sense, they said, you could argue that the **first JCHR report on the Equality Bill was the equivalent of pre-legislative scrutiny.**[135]

8.8 The human rights minister, **Baroness Cathy Ashton**, also took the view that the JCHR was highly respected, but **would be more effective in influencing government policy were it also to review aspects of the government's agenda that clearly impact on human rights before Bill stage**[136]. Examples she cited where JCHR reports could have affected policy and legislative formation were the 'respect agenda', counter-terrorism policy and incitement to religious hatred and free speech issues. **She considers the influence of the committee would be stronger if it did not seek to present itself *only* as a technical scrutiny committee on a par with the Delegated Powers or Statutory Instruments committees whose recommendations are largely complied with**[137]. It is not that the advice of the JCHR is held in less esteem than that of these scrutiny committees, but that ministers are aware of the rather **more discretionary and controversial nature - and values-base - of many human rights assessments, which the courts themselves frequently acknowledge**. The Committee would actually speak with more authority if it were more open about this. In the human rights minister's view, one of the most effective ways of holding the executive to account is through questioning ministers and officials. She would welcome regular sessions before the Committee, alongside her officials in the DCA, examining government policy on implementing the HRA and domestic human rights policy more generally.

8.9 **Mike O'Brien, Solicitor General** and a former human rights minister, expressed a similar view about the high quality of legal advice by the Committee but commented that "it comes too late." He took the view that **the JCHR might sometimes comment before a Bill is published, either on draft legislation where available, or on white or green papers or even policy statements. It would be possible to return to the issue once a Bill is published and scrutinise it in the light of the Committee's original advice,** he suggested. The Solicitor General advised that the Committee's influence would be greatest if it could address dilemmas facing government and parliament. "**The Human Rights Act made an important change to the way our legal system operates but it also presents a series of dilemmas which we need to find ways of resolving and the committee could help us do that.**" The prime example he gave was the implications of Article 3 for the deportation of foreign prisoners or foreign terror suspects.

8.10 **Vera Baird, QC, minister at the Department of Constitutional Affairs**, concurred with this view. She said that the focus of the Committee "needs to be closer to the agenda of the day" if it is to achieve outcomes. Speaking as a former JCHR member she suggested that "**the comprehensive principle needs to be reconsidered** to review whether it is compatible with the aim of select committee reports being accessible, timely and relevant to the current agenda." She expressed the view that **governments are more "open-minded and in need of consensus to drive changes through" at the**

135 *Equality Bill*, Sixteenth Report 2004-05; *Legislative Scrutiny: Equality Bill*, Fourth Report 2005-06.

136 Interview.

137 There are a number of obvious contrasts between the working practices of the JCHR and the JCSI. According to two committee clerks with experience of the committee, approximately 95% of Statutory Instruments reviewed by the Joint Committee are 'in order' and of those which are not, in the majority of cases the government accepts the committee's recommendations. Of the 1500 SIs reviewed in the calendar year 2004, for e.g., there were only three where the committee reported a dubious vires and in one the provision was revoked as a result. Members accept the advice of the staff in about 99% of cases and without discussion.

pre-legislative stage, and therefore are more susceptible to accepting changes to their proposal.

8.11 Current working practices involve very little emphasis on pre-legislative scrutiny. ***Table 1* shows that the Committee has never scrutinised more than 45% of draft bills in any session and have scrutinised none in the last two sessions.** However in addition to these, Committee staff have 'informally' contributed to draft bill scrutiny by other committees. The Committee has only reported on one White Paper to date.[138]

9. Informing and influencing parliamentary debates and affecting legislative outcomes

9.1 The Committee and its staff have identified **three main ways in which the work of the Committee might advise and influence parliament**. It may impact on parliamentary debates, contribute to amendments to legislation and inform and influence parliamentarians more generally. These will be evaluated in turn.

9.2 **Table 2** shows the number of Bills scrutinised by the Committee each session from 2001-2. Over 500 Bills have been considered since the Committee first met in January 2001. **The rate of productivity is impressive** and is noted in virtually all academic discussions of the role of the Committee and by almost everyone I discussed the work of the JCHR with. **In virtually every session all government bills have been considered by the Committee**. In absolute terms this has averaged at around 35 bills per session regardless of its length. In the current session, 36 out of 51 Government Bills have been considered. The rest have not yet been considered, but the session is far from complete.)

9.3 The number of Private Members Bills (PMBs) **considered has however, reduced markedly over time** down from 97 considered in 2001-2 to none, so far, in the current session.

9.4 The Committee has considered all Private Bills published since the 2001-02 session, with the exception of the current, incomplete session, where there are 6 listed as 'not yet considered' (see table 3). In 2001 the Standing Orders of both Houses were amended to require the promoters of private bills to include a "statement of opinion" as to its compatibility with Convention rights. Requests have been made for the Committee to scrutinise a number of private Bills in the current session by Lord Brabazon, Chair of the House of Lords Liaison Committee, noting that the Committee's scrutiny of a previous Bill "greatly assisted the Committee on that Bill.[139]" In a letter to the Chair of the JCHR, Andrew Dismore, **Lord Brabazon expressed the "hope" of the Liaison Committee of the House of Lords that "a comprehensive bill scrutiny service" of private as well as government bills "will be preserved**" whatever "adjustments your Committee may decide to make in the light of [its working practices] review".[140]

Impacting on debates in the Lords and Commons

9.5 Whilst the number of Bills considered by the Committee has significantly reduced over time, the number and proportion of Government Bills "drawn to the attention of both Houses of Parliament" has increased steadily from 11 (30%) in 2001-2 to 23 (64%) respectively in the last two sessions. The impact these reports have had on debate is harder to ascertain. An analysis of all references to the JCHR in both Houses of Parliament for the first 10 months of the current session (2005-6) is reproduced in **Table 4**. This shows a

138 *Schools White Paper*, Ninth Report, Session 2005-06.

139 *Letter* to Andrew Dismore from Lord Brabazon of Tara, 8 May 2006

140 *Letter* to Andrew Dismore from Lord Brabazon of Tara, 9 May 2006

considerable variation in engagement with JCHR reports between the two Houses.

9.6 There were 118 references to the JCHR by 43 Peers in the **House of Lords** during this period. According to our evaluation about 60% of the references in the House of Lords had a significant impact on the debate or bill process. Others were casual references to the Committee or its reports. Of the references in the Lords as much as a third were by JCHR members and nearly half by one party, the Liberal Democrats. There were additionally 24 references were in Grand Committee, when arguably most Bill scrutiny occurs.

9.7 In the Commons there were **only 59 references to the JCHR by just 27 MPs during the same period in 2005-6 and a quarter of these references were by JCHR members.** We estimate that 45% of these references had a significant impact on the parliamentary process - on bill scrutiny or in the debate. As would be expected, given the distribution of Parties in the Commons, most references were by Labour (64%). There were additionally 24 references in Standing Committees, where most Bills scrutiny occurs.

Affecting legislative outcomes

9.8 It is very difficult to assess the extent to which JCHR reports have been directly responsible for amendments to Bills. Even where there is a clear connection between what is proposed and an amendment, it is not always possible to assess how crucial the Committee's proposals have been or whether there were other more significant sources or reasons for the amendment. However, **Table 5** represents a minimum assessment of amendments that were either directly a result of JCHR reports or were likely to be. **Out of more than 500 Bills of all kinds considered by the JCHR since its inception, to the best of our knowledge 16 Government Bills and two Private Bills were amended as a consequence of JCHR reports, plus two draft Bills and one remedial order**. It is quite possible that this is an underestimate as there are no reliable records of this process. Conversely this might be an overestimate in that in 6 cases it is not clear whether the JCHR was a primary source of the amendment/s, or not. It is clear that the Committee had a significant impact on amendments to some Bills such as the Anti-Terrorism, Crime and Security Bill, the Civil Partnership Bill the Equality Bill, the Mental Capacity Bill and the Terrorism Bill of session 2005-06.

9.9 In order to increase its influence on the parliamentary process, the Committee established a self-imposed **target of reporting before the second reading in the second House. Table 6** records the number of Bills each year where this target has been met. **This shows that the vast majority of reports on government Bills do meet this target**, **though 11 have failed to achieve this, so far, in the current session.**

Informing and influencing members of parliament

9.10 The few (cross-party) **peers** I spoke to informally **affirmed the authority and high esteem with which JCHR reports are generally received in the House of Lords**. The priority given by the Committee to **Bill scrutiny is complimentary to the role and expertise of the House of Lords as a revising chamber.** I was reliably told that the advice of the Committee is taken very seriously by backbench peers of all parties. **It is certainly the case that peers who are members of the JCHR can find the reports extremely useful as a basis for their interventions in debates.**

9.11 The **different orientation of the Commons, as the directly elected House of MPs accountable to their constituents**, may explain the somewhat different perception of the JCHR I gleaned from the few (Labour) backbench MPs I canvassed on an informal basis. Some drew a distinction between the esteem in which the Committee's reports are held and their impact on the parliamentary process. A (non Labour) member of

the JCHR observed that "the House of Commons has never taken the Committee as seriously as the Lords" and that this applies across parties. One senior backbencher queried **whether the Committee adds value to the legal advisor and whether the Commons wouldn't benefit more from a senior legal officer reporting directly to the House on compatibility with the ECHR? Professor Hiebert**, in a paper drafted for a forthcoming international conference in Melbourne on the role of legislatures in the protection of human rights, has likewise commented "If it is important that parliament receive legal advice on compatibility issues, why not simply provide parliament with its own legal advisor?[141]" **A recurrent question that arose in the interviews she conducted for her research, she told me, was "what is the value added of the JCHR" over the legal advice it receives and transmits?**[142]. The senior clerks I spoke to both emphasised the importance of the JCHR not being seen to be staff-driven, however unfair such a perception might be, if it is to retain the significant respect and authority it currently enjoys. **The high calibre, and quality of legal advice provided by both the legal advisers the Committee has employed, was attested to by everyone I spoke to for this report.**

9.12 The Committee's **reports,** particularly those which do not take evidence or place scrutiny in a wider context, **can be difficult for some MPs to draw upon in debates on policy**, though more useful in the Committee stage of Bills or as a potential source of amendments. One MP commented that it can be **confusing and unwieldy when the same Bill is scrutinised in different reports**. Another commented on the sheer number of reports produced by the Committee which deterred him from taking too much note of them. Professor Janet Hiebert made a similar observation from her research. She said it might be a case of **"more is less" in terms of the influence the Committee can bring to bear within the House of Commons.** One backbencher made a similar point to the General Solicitor, that the authority of the Committee would benefit from it addressing 'head on' difficult issues of policy concerning fundamental human rights such as the case for and against extending detention without trial beyond 28 days for suspected terrorists or the benefits and dangers of introducing an equivalent to 'Megan's law' to protect children.

10 Monitoring and informing the implementation of the HRA: government officials and the general public

10.1 In the 19th report on the work of the Committee, the point was made that **"nearly all our work, including legislative scrutiny, could be classified under th[e] heading…the implementation of the Human Rights Act**.[143]" The point alluded to here, presumably, is that the JCHR, in origin and design, is a 'creature' of the HRA whose scheme envisaged a significant, and independent, role for parliament (see paras 2 and 4 above).

10.2 The specific work which the report reviews under this heading, however, is not the role of the JCHR, and its advice to Parliament, in the *implementation* of the Act but "evidence-gathering" and monitoring of the implementation of the Act by *other* bodies. This comes under two headings:

i) the extent to which human rights have permeated the thinking of central Government and public authorities, and have rippled out to affect the lives of members of the public, especially in their dealings with those authorities

141 Janet Hiebert, '*Governing under a Bill of Rights: What does a compliance culture entail?*', Legislatures and the Protection of Human Rights Conference, Melbourne, July 20-22 2006, p18.

142 Email correspondence, 30.6.06.

143 Nineteenth Report, note 93 above, para 133.

ii) the effect of the HRA on patterns of litigation and judicial-decision making.

10.3 The report comments that it would **not be "feasible" to monitor the impact of the HRA in a comprehensive way**. It **recommends** instead **regular sessions with the DCA human rights minister, and by extension staff from the Human Rights Division** (whilst acknowledging that formal accountability of the Division to Parliament lies with the Commons Constitutional Affairs Committee). The current Human Rights Minister, Baroness Ashton, has made a similar suggestion (see 8.8 above).

10.4 The 19th Report set itself the goal of "influence[ing] the terms of **debate on human rights *outside* Parliament** as well as in" through both "our legislative scrutiny work and our more general work.[144]" This is consistent with the role of select committees as envisaged by the House of Commons Liaison Committee in its first report[145]. I am informed that a view taken when the Committee was first established was that public consultation could be best achieved through the collection of evidence, which is part of the work of all Select Committees.

10.5 The 19th Report goes further than this. It comments that **although the Committee's legislative scrutiny is primarily aimed at Parliament, "we naturally welcome informed media coverage of, and public attention to, our report**s.[146]" The volume and nature of references to the Committee in the media is an indicator of its capacity to reach and inform the wider public. For the last couple of years the Committee staff have selectively monitored references to the JCHR which they consider to be topical, or of particular interest to members. There is a reasonably steady stream of references to the Committee's views or reports. The Guardian will often describe the JCHR as "authoritative." The current Chair of the JCHR, Andrew Dismore, has endeavoured to raise the profile of the Committee through the media, with some success. On occasion, the Committee has 'made the news', or had a significant impact on it, for example over some of its anti-terrorism reports, although it is fair to say that it is significantly less likely to do so than some departmental select committees, such as the Home Affairs or Education Select Committees. **It is notable that the Committee has played only a minor role, if at all, in public debate on some of the major debates of the day which raise significant human rights issues** such as extraordinary rendition (for which a special all-party group was formed) the Government's position in relation to British nationals and residents in Guantanamo Bay, jury trials, the 'respect agenda' and child protection. It is unclear whether what some backbench MPs have described as 'the legalistic tone' of many of the legislative scrutiny reports, is a deterrent to greater engagement with its findings by both the media and the wider public.

10.6 **The three Directors of leading domestic human rights NGOs I sought comments from for this report all commented on the 'topicality' or accessibility of the Committee's work**. Shami Chakrabarti, Director of Liberty suggested that " perhaps the JCHR could reduce the number of Bills scrutinised to conduct hearings into thematic and systemic human rights issues, such as the public protection and quasi-judicial roles of the parole board in the light of the Anthony Rice case, in an attempt to help counter media hysteria with well informed and considered analysis." Roger Smith, Director of Justice, whilst emphasising that "**We strongly support the JCHR's scrutiny of Bills, which we consider essential,**" commented that **"it makes sense for the JCHR to focus on issues of pressing concern.** In other words, **rather than do detailed human rights scrutiny of every published Bill we would welcome more cursory scrutiny of minor bills in favour of scrutiny of things like topical White**

144 Ibid, para 38.

145 *Shifting the Balance: Select Committees and the Executive,* note 76, paras 1-4.

146 Note 93 above.

Papers." Katie Ghose, Director of the British Institute of Human Rights, which provides training for housing officers and social workers in human rights principles and standards, suggested that whilst "the Committee should not lose sight of its vital legislative scrutiny role" which has produced "some outstanding contributions… making human rights a reality is not about the technicalities of law and this must be reflected in the Committee's choices." She suggested that "choosing a few Bills to scrutinise would free up time for essential inquiries. Or the Committee could combine the scrutiny role with an inquiry into, for example "the scandal of learning disabled parents whose children are removed from them without support to preserve their family life."

10.7 With regard to monitoring "judicial decision making," the Committee's **report critically evaluating domestic case law on the meaning of 'public authority' under HRA s6** has clearly been influential. NDPBs like the Disability Rights Commission and charities like Age Concern and Help the Aged, concerned that the current definition leaves many vulnerable people in private or charitable residential homes or day care unprotected by the HRA, have cited the report to press the Government to expand the definition in line with its recommendations[147]. During the course of the Equality Bill, Baroness Ashton said "the Government are committed to look for a case in which to address the issues" and look "carefully at whether we might do more to address the immediacy of the problem.[148]" The government have since intervened in a case that raises this issue[149]. **This was arguably as effective an outcome as an amendment to a government bill in response to a JCHR report**.

10.8 The Committee **reviews the Government's response to each set of concluding observations by the UN Treaty Bodies**, as a part of its remit to consider matters relating to human rights in the UK, which the committee has interpreted as extending to all internationally recognised human rights standards. T**his function provides an opportunity for parliamentary engagement with the executive-driven treaty monitoring process, although it would be far more effective if the JCHR reports were the subject of parliamentary debate.** The JCHR also monitors Government responses to adverse judgements by the European Court of Human Rights, seeking explanations of the general measures which the Government is proposing to introduce to prevent the violation from happening again, and responses and justifications from the government where these have been delayed[150].

10.9 It is interesting to note that, **despite its formal role in scrutinising Remedial Orders, which the Committee has discharged (6.6(n) above) it has not extended this responsibility to monitoring Declarations of Incompatibility (DoI) by the higher courts under HRA s4 in a timely and systematic fashion**. Although the JCHR has traced government responses to DoIs, it has not scrutinised them as and when they are made by the courts, nor systematically recommended to parliament whether, and if so how, the government should respond to them.

10.10 **The higher courts have issued 18 DoIs since the Act came into force, of which 12 are still standing**. In virtually every case these have led to changes in the law or in practice. According to the former committee specialist, there is now an "informal agreement" with government departments that they will keep the Committee informed about government responses to DoIs. Where this doesn't happen, Committee staff will prompt them. However the Committee has played no discernable role in formally advising

147 *The Meaning of Public Authority under the Human Rights Act,* Seventh Report, Session 2003-04. Katie Ghose, Director of BIHR, comments that the reports "remains a powerful influencing tool today".

148 Hansard, HL, 19 October 2005.

149 *R (Johnson and others) v London Borough of Havering* [2006] EWHC 1714.

150 *Implementation of Strasbourg Judgments: First Progress Report***,** Thirteenth Report of 2005-06.

parliament about what, if any, these changes might be or monitoring their effectiveness. Yet **the scheme of the HRA relies on an effective response from parliament to 'Declarations' by the courts that 'their' legislation is incompatible with Convention rights. This is arguably the most important means by which "parliamentary sovereignty," or more specifically, the centrality of parliament's involvement, is maintained by the Act.** As Lord Hope clarified in the case of *Shayler,* following a Declaration of Incompatibility, the "decisions as to whether…and how, to amend the offending legislation are left to Parliament".[151]

11 Challenges and Difficulties posed by Current Working Practices: opinions and suggestions

11.1 **Given the breadth of the Committee's terms of reference, it is unsurprising that there have been different, sometimes strongly held views, on the most appropriate and effective way of interpreting them**. There were many discussions of this nature in the early stages of the Committee (see 6.2). Although all the former members of the Committee I interviewed stressed the purposive and harmonious nature of the Committee in the first and second session, chaired by Jean Corston, there were some differences of orientation between members as to the appropriate balance between the Committee's three main functions as they described it – legislative scrutiny, thematic enquiries and monitoring compliance with the HRA.

11.2 **Even in May 2004 Canadian Professor Janet Hiebert noted that "tension has arisen on the JCHR as a result of the differing perspectives of members with legal and non legal backgrounds**" although committee members "did not consider this disruptive … some believe it provides a healthy dynamic to the committee's work[152]**"One former member** takes the view that a **considerable amount of legal advisor and, to a lesser but still significant degree, committee member time is used on interventions which are not early enough to make a significant difference.** She said "the scrutiny role is important but needs to be less anally retentive to have impact." She **recommended greater selectivity about what Bills to scrutinise and the extension of the scrutiny function to include green and white papers, as well as draft Bills. The challenge**, **she said, is how to maintain scrutiny of policy within a human rights framework, still guided by the legal adviser**. Even lawyers are not necessarily steeped in human rights principles and values, she suggested, and could benefit from advice and training. She said that during her time on the Committee there was a process of "self-education" in human rights by Committee members.

11.3 Another member concurred with this view about pre-legislative scrutiny and suggested that post-legislative scrutiny should be considered as well –tracking a Bill the Committee has scrutinised to see if it had the effects in practice the Committee had warned it might. **All the former members I interviewed stressed the importance of Bill scrutiny but that it was important that it was not seen as a purely paper exercise, particularly where rights needed to be balanced against each other, or where the issue is whether an interference with a Convention right is proportionate**, both of which regularly occur. For the Committee to advise parliament on proportionality issues, it was said, it is necessary to receive evidence and interrogate witnesses which is what they had done. It was possible to combine this approach with the comprehensive principle, it was suggested, by letting bills that were not controversial or did not raise human rights issues in the legal advisor's view, "going through on the nod." **It was necessary for the legal advisor to sift through all the Bills so as not to miss anything important, it was suggested, but the Committee does not need to**

151 2 WLR [2002] 754 at para 52.

152 Interviews with members and staff of the JCHR, May 2004, recorded in *Parliament and the Human Rights Act*, note 16 above, p23.

consider Bills that the legal advisor suggests don't raise significant, or any, human rights issues. One former member stressed that **for the Committee to be effective it is essential that members read all the papers and stay committed to the process**. " It is not like other select committees where you can ask a few questions and leave" she said.

11.4 In the current session, chaired by Andrew Dismore, **sharp differences of view have emerged over the focus and priorities of the Committee**. Broadly speaking, some members take the view that Bill scrutiny should remain the priority of the Committee, and that it is crucial that the comprehensive principle of scrutiny of Government bills, at the very least, be maintained. Others consider that to be effective the Committee should focus on pre or post-legislative scrutiny and increase the number of thematic enquiries it undertakes. **In the course of my interviews with them, a majority of members expressed interest in exploring a combination of these approaches, if that were possible to achieve** (para 11.8 below).

11.5 **At one end of this spectrum of views** is the perception that the role of the JCHR is to provide "**quasi-judicial advice to both Houses**" as it is **through "such high-minded advice", that the Committee has achieved its status and authority**.

i) In the view of some members that is the **prime, if not sole, purpose of the Committee, although neither the terms of reference nor parliamentary debates which preceded its establishment, reflect this**. This perspective has been described to me as the "leit motif" of the committee by a staff member and as "an article of faith" by a former member.

ii) **The comprehensive principle is viewed as a vital way of "keeping the government on its toes**," (see para 8.1). Whilst the JCHR can influence government indirectly through parliament, the direct effect it is perceived as having through engaging directly with officials and ministers on the contents of s19 statements, can be more important. One member suggested that JCHR reports are helpful to ministers who are sympathetic to the concerns of the Committee but face difficulties in delivering.

iii) From this perspective **it is of paramount importance that the 2nd reading in the second house target be maintained** and there is considerable concern that it is becoming more difficult to meet . Spending time on trips abroad, and lengthy and numerous evidence sessions, are viewed as the prime reasons why it has been more difficult to achieve the second reading target in the current session.

iv) **Private bills should be scrutinised comprehensively** to meet stated demand (para 9.4) in particular to evaluate "statements of opinion" about compatibility with Convention rights.

v) **PMBs should also be scrutinised where possible**, but there is broad acceptance that there is little purpose in doing so if they are not likely to make any significant parliamentary progress[153]. However, where PMBs elicit significant debate, inside or outside of parliament, even if there is no chance of them passing into law, there is a view that the Committee should scrutinise them for compliance with Convention rights.

vi) **The purpose of legislative scrutiny is to point out where there is a "significant risk" of non-compliance in the view of the courts**, not to

153 One member suggested PMBs should only be scrutinised if they reach Report stage.

comments on its benefits from a human rights perspective, or otherwise[154]. One member suggested that the **role of the committee is to endorse, and where appropriate to question, the views of the legal officer, not to substitute their own perspectives for** his.

11.6 At the other end of the spectrum is the view that the **Committee appears to be almost entirely focussed on process not outcomes.**

i) Scrutinising Bills once they are published , even where the 2nd reading target is met, is likely to be effective on only a small number of occasions, as all the evidence suggests. As it is well understood that the time of maximum influence is at the policy formation stage, from this perspective It is hard to understand **why the Committee will prioritise the scrutinising of Bills which have little or no human rights implications, let alone PMBs which have no chance of passing into law, over Green or White Papers, or draft Bills**.

ii) There is **no serious and systematic attempt to evaluate the effect of Bill scrutiny**, or to carry out post-legislative reviews to monitor whether the law was implemented in the manner the Committee had predicted. **The argument that all bills have to be scrutinised to act as an incentive to Whitehall to take s19 statements seriously does not stack up as the Government doesn't know which Bills will be scrutinised by the JCHR**.

iii) Scrutinising *every* bill is pointless and there is no coherent narrative to explain why the Committee does what it does when, **with appropriate media engagement, the Committee could be a powerful voice for advancing debates about human rights in the UK.** Other Select Committees see their role as increasing awareness or engaging with the public as well as with parliament e.g. on elder abuse or the smoking ban. The main audience of the JCHR seems to be expert peers. **The JCHR should be able to engage with the public, as well as parliament on, for example, counter-terrorism policy within a human rights framework, or the respect agenda, with or without bill scrutiny**.

iv) The 'comprehensive principle' also means that there is **only time for one thematic enquiry to be conducted a session**, it appears, despite member interest in a range of possible topics (para 6.8).

v) **The 'self-imposed strait-jacket,' as one described it, which flows from an unquestioned allegiance to the 'comprehensive principle**,' plus the commitment to monitor government responses to *all* UN treaty body reports, **distorts the capacity of the Committee to be flexible like other Select Committees can be and set the agenda or respond to immediate events that have enormous implications for human rights and which are of concern to large sections of the public as a whole**. Why was it not possible for the JCHR to conduct an enquiry into allegations about ***'extraordinary renditions'***, for example, rather than attempt to address this pressing issue within the template of a response to the government's response to an UNCAT report, some members reflected? An all-party group has been set up for this purpose, when arguably JCHR is itself such a group.

vi) One legally qualified member said there is too much 'black letter law' applied to issues. Members should be carrying out proportionality exercises themselves, where

154 One member who has also had experience of the EU Select Committee made the point that the scrutiny work of the JCHR is more technical than that of the EU Committee in that the latter look at the merits of the proposal but that is not appropriate for the JCHR.

relevant, based on legal advice. **It would be perfectly possible and proper to evaluate policy within a human rights framework,** it was suggested, bringing the skills and experience of parliamentarians to bear on vexed questions of necessity and proportionality or on whether the government is discharging their positive obligations to protect fundamental rights sufficiently. There are no end of issues of national importance on which the Committee could play a unique and significant role, remarked one MP.

vii) One member suggested that by importing the judgements of the Strasbourg court into the parliamentary process, the JCHR was illegitimately helping to bypass 'the democratic process.' **It is not for parliament to simply ape the views of the courts, but to add its own perspective.**

viii) A couple of members suggested that non-legal members of the Committee were left in a passive role with the committee driven by its staff and legal experts. **Members were not sufficiently educated or empowered by the process of being on the Committee** to be able to explain, unaided, the positions the committee are taking. Another member observed that the **expectation was that the legal advice should be followed other than in exceptional situations leaving politicians wondering what their purpose was**. MPs are there to bring the concerns of their constituents to the Committee's deliberations, it was suggested, and there is little or no opportunity to do that on the Committee.

ix) **The culture of the 'expert peer' dominates proceedings,** it was said, and when MPs suggest alternative approaches, they are told 'this is the way this Committee has always operated,' closing down discussion**. Human rights are of national importance and the committee will soon be seen as irrelevant if it does not intervene more proactively** and extensively to address the **complex and difficult issues of the day**. The concerns of the Committee are "too serious to be dealt with in the pompous, narrow way they often are by the JCHR" one member commented. **Members are there to provide a 'reality check' to legal advice.**

11.7 Areas where there was **considerable common ground (although not necessarily unanimity**) include:

i) **The Committee staff are all highly professional and diligent.** They are under-resourced for the Committee's current expected output and rate of productivity.

ii) There is an argument for **less paper work and shorter papers**, where possible. The expectations on members, in order for them to participate meaningfully in the meetings of the Committee, are onerous and substantially more than on many other select committees. However it is **essential, if the JCHR is to work effectively, for members to be well prepared**.

iii) The **efficiency of the Committee would be considerably improved if the Government would provide it with the free-standing Human Rights Memorandum** it has repeatedly requested.[155]

iv) It is **essential to retain the Committee's reputation**, gained over the last session, for **non-party impartiality** and it would be preferable to minimise the number of dissenting votes or reports where possible.

155 Nineteenth Report, note 93 above, para 78.

v) It is crucial for **legal advice to be clearly presented** to members in a **manner that is accessible and which facilitates them making their own judgements where appropriate**. If the legal advisor's advice is different from the Chair's where the issue is controversial, it is essential that this is clearly signalled to committee members.

vi) It is essential that members of the Committee are given ample opportunity to feed into, or if necessary amend, the draft report before it is submitted. **The final report should reflect the views of the Committee as a whole**, if at all possible on the basis of consensus, but where that is not possible, this needs to be transparent.[156] One former member, who is also a member of the current Committee, said that in the previous session amendments were tabled in advance wherever possible and discussions tended only to take place on substantive issues. If a similar approach were adopted by the current committee it would operate on a presumption that amendments must be tabled in advance unless exceptional reasons require otherwise, saving considerable time at meetings.

vii) **Reports presented to parliament** need to be less dry and technical and **more accessible** – one peer suggested they need to be more 'discursive' where possible.

viii) Some of the current disagreements in the Committee stem as much, if not more, from **differences between the cultures and orientations of the two Houses** (para 9.10-9.11) as between Parties, although there are members from both Houses who share similar views on the priorities of the Committee.

ix) It is **essential that no members of the Committee feels that their expertise and knowledge is redundant** to the prime purpose of the JCHR **or that the Committee is dominated by the views and perspectives of the staff or legally qualified members**.

x) Problems are caused by **irregular attendance at the Committee**, and periodic absence of a quorum, with Peers more likely to turn up than MPs. This is in part because meetings are held on **Monday afternoons**, **a time that disadvantages MPs** (especially from outside London) who have constituency considerations that don't apply to peers.

11.8 A majority of members appeared to hold views somewhere between the two ends of the spectrum described above.

i) **A majority of members are convinced of the benefits of continuing to scrutinise published Bills and that legislative scrutiny should take priority over other work**. One member appeared to speak for many when he observed that "we gain our authority from examining legislation in detail…Likewise with our thematic reports. It is because of the level and quality of evidence that we have authority."

ii) **There is widespread agreement that the JCHR must not "tread on the toes of**," or become indistinguishable from, **departmental select committees.** A common concern is that if the Committee were to comment on policy it is important that it does not become indistinguishable from any other committee examining the same issues.

156 Some member are strongly of the view that there needs to be a more consensual approach to discussing and amending reports, as was characteristic of the Committee in the previous parliaments, but it is beyond the scope of this review to comment on this process.

iii) **A number of members were nevertheless persuaded, or at least open to persuasion, that the Committee could be more effective if it were to engage at the pre-legislative stage on certain key issues**, commenting on policy statements (where sufficiently specific) White Papers and draft Bills (where available) **provided it was possible to do so within a human rights framework**. There was **also interest in post-legislative scrutiny**, especially of Orders and Rules passed to regulate statutes that the Committee determined were 'over-broad[157]' but also of **how legislation operates in practice**, and whether it is compliant with the broad purpose of human rights in general, and the HRA in particular (para 3.10)[158].

iv) There was **also concern** by a majority of members that the **Committee does not intervene often enough in a timely fashion on issues where it could be of most influence because of public concern on a matter of national controversy.** Lord Judd expressed this by saying "Sometimes we shut the door after the horse has bolted in the way we approach our work. If the Committee has real significance in relation to our work in the Lord and Commons our observations of what is being said [about issues of national significance, in this case the HRA] would need to be put on record."[159]

v) **Most members** thought it important that the Committee **continue to carry out thematic enquiries and/or** [what I would call] **scrutiny enquiries like the UNCAT and counter-terrorism enquiries**.

vi) **Most members** see the JCHR as playing an important **role in** the **implementation of the HRA** and that **scrutinising the work of the Human Rights Minister and Division** are important aspects of this work that could be formalised. Some members thought it important that the **Committee play a more active role in responding to Declarations of Incompatibility**.

12 What kind of human rights scrutiny?

12.1 **Underlying a number of the difficulties and disagreements highlighted by members of the Committee are different perspectives, explicit or implied, on the nature of human rights and the role of Parliament in their implementation**. I am informed that the Committee were advised from the outset **that questions of compatibility with the ECHR can only be resolved by the courts case by case on particular sets of facts**, and that it can only offer an opinion by which the Government may or may not choose to be guided. The Committee were also advised that **even if the Committee judges rightly that a particular provision is problematic in ECHR terms, it will have the greatest difficulty in predicting how the courts may react**.

12.2 The accuracy of this is borne out in **Table 7**. This tracks all the cases where the JCHR or its reports have been cited in judgments by the higher courts up to March 2006.[160] There were 14 references altogether and in only two did the courts explicitly agree with the

157 Although such scrutiny is within the terms of reference of the JCSI, the Clerk of the Committee could only suggest about 6 reported instances in the past 5 years where the JCSI has taken up ECHR compatibility issues with Departments, and in some cases reported instruments, "for reasons connected with compatibility." Email correspondence, 20 June 2006.

158 One of the fundamental principles of interpretation applied by the European Court of Human Rights, is that Convention rights "are practical and effective" not "theoretical or illusory". Note 36 above.

159 Private meeting

160 There have been at least three cases since March where the courts have quoted JCHR reports approvingly or cited Committee reports extensively: e.g. *Re MB* [2006] EWHC 1000 (Admin), *R (Baiai and others) v Secretary of State for the Home Department* [2006] EWHC 823 (Admin) and *Secretary of State for the Home Department v JJ and others* [2006] EWHC 1623 (Admin).

JCHR report cited. In one case this was to determine that a breach of ECHR Article 8 would be 'justified' and in the other to comment upon whether a particular scheme breached the UN Convention on the Rights of the Child. In four cases the courts disagreed with the JCHR. In the other 8 cases the references either did not involve an opinion of the JCHR or they were quoting an opinion that was not at issue in this case. The disagreements do not imply that the legal advice to the Committee by the legal adviser employed during this time-frame was inaccurate, but only that **it is with the greatest difficulty that it is possible to accurately predict how the courts will react**. This is partly due to the fact that **all litigation is fact sensitive, and that the application and interpretation of legislation is not always predictable from what is written in a statute.**

12.3 There are **two even more fundamental factors** that make the **goal of accurate court prediction a very inexact 'science.'** One is the **'"discretionary area of judgement"** given to "the decisions of a representative legislature and democratic government," as Lord Bingham has put it[161] (see para 3.16). For some senior judges, like Lord Bingham and Lord Justice Laws, 'deference' to the legislature is one of the ways of resolving the 'tension' between 'parliamentary supremacy' and fundamental rights, both of which are upheld simultaneously by the HRA . As Justice Laws sees it "in some contexts the deference is nearly absolute. In others it barely exists at all[162]. **The implications of this 'doctrine,' simply put, is that the JCHR can be trying to 'predict' court judgements which in some instances may never materialise** because the courts consider that the democratically elected legislature (or decision maker) is the more appropriate body to make the relevant decision. The more the right is qualified or limited, and the further the issue is from the 'judicial sphere of competence' (which would include sentencing policy and due process issues) the more likely it is that the courts will 'defer' to the legislature, particularly if the legislature's view has been arrived at after a careful consideration and proper testing of all of the justifications put forward for the measure.

12.4 Regardless of the deference the courts will show to the executive or the legislature, judges themselves will disagree over Convention compliance, not just because of variations in the application of the law that can apply in any given case, but because of the **inherently discretionary nature of a great deal of rights adjudication which often involves the interpretation of broad, ethical values, sometimes in tension with each other**. This leads to the second factor which makes 'court prediction' a difficult, some may say inappropriate, exercise. The White Paper that heralded the 1990 New Zealand Bill of Rights put it like this: **"In a great many cases where controversial issues arise for determination, there is no "right" answer"**[163]. These factors together suggest that the **technical scrutiny** model broadly adopted by the JCHR **may be a less appropriate role for a parliamentary committee than was originally assumed**.

12.5 **There *are,* of course, issues** that are relatively clear cut and straightforward **which** can appropriately **draw on settled ECHR jurisprudence to carry out scrutiny of a relatively 'technical nature'**. Examples might include the absence of an effective appeals procedure; a reverse in the presumption of innocence; data sharing without remedies; retrospective application of legislation; ill defined discretionary powers in broadly expressed legislation and broadly defined offences lacking legal certainty. Absolute rights to freedom from torture or slavery, for example, can also be subject to precise evaluations of legal compliance[164]. But even these types of compatibility questions

161 *Brown.* Note 53 above.

162 *International Transport Roth GMBH v Secretary of State for the Home Department* [2002] 1 CMLR 52. See also Francesca Klug, *Judicial Deference under the Human Rights Act 1998* [2003] E.H.R.L.R. 125.

163 A Bill of Rights for New Zealand: A White Paper, 1985 [1984-85] I AJHR A 6 6. Presented to the House of Representatives by the Hon. Geoffrey Palmer, Minister of Justice.

164 See note 51 above.

can often involve factual issues which require the consideration of evidence, for example about the 'mischief' the measure is designed to address, and its actual impact on people in practice.

12.6 **Where rights conflict with other Convention rights, however, or are limited or qualified within the legitimate, but broad, terms set down in the Convention and other human rights treaties, the issue at stake is often not wholly, or even mainly, a matter of 'technical compliance' as such**. **It is whether such limitations meet a "pressing social need" in a democratic society and whether they have been proportionately applied**, or whether a different policy could have been pursued with similar effects but with fewer incursions on fundamental rights. **These are questions which members of parliament are, arguably, particularly well placed to consider, as the courts frequently suggest** (para.3.17). This **applies to both experts and specialists in the House of Lords and representatives of constituencies in the House of Commons whose knowledge and experience of the practical application of rights and their limitations in everyday life can, and should, be effectively used to scrutinise legislation for compatibility with human rights in such circumstances**. (See **Table 8** for an illustration of the factors involved in assessing the 'necessity' and 'proportionality' of limitations on rights, which can be used by select committees in New Zealand[165]). Moreover, **the more thorough the job that Parliament does in conscientiously reaching its own views** about compatibility after carefully considering the issues and evaluating the evidence and arguments, **the more likely it** is that its legislative judgments **will earn the deference of courts** when they are subsequently called upon to determine the same compatibility questions in litigation.[166]

12.7 An illustration of the contortions the Committee can find itself in by 'second guessing the courts,' rather than evaluating policy itself within a human rights framework, is contained within the **23rd Report on the Adoption and Children Bill in the 2001-2 session** which scrutinised an amendment to the Bill to prevent unmarried couples from adopting children together[167]. The Committee **relied on a split decision of the European Court of Human Rights, plus a judgement from the South African constitutional court,** to suggest that "**it is almost inevitable that the national courts in the United Kingdom would follow the minority opinion rather than that of the majority" in Strasbourg** to determine that it is *not* within 'the margin of appreciation' of English courts to allow discrimination in the field of adoption on the grounds of marital status or sexual orientation[168]. **The report concluded that the amended Bill "is likely to be incompatible with the rights of unmarried couples" to protection from discrimination in their capacity to adopt a child together**, relying, in part, on contested Strasbourg jurisprudence to support this conclusion[169]. What the report *could* have done instead was a) examine available evidence, or summons witnesses, to consider whether there would be any alleged harm or benefit from such adoptions to children b) use a human rights framework of law and policy to consider whether such a ban was either 'necessary' or proportionate to protect such children and c) suggest to parliament whether such a ban is a breach of human rights principles with regard to discrimination or whether such a ban is 'necessary' to protect children. This approach, in which the Committee could express its *own* view based on sound human

165 Produced by the New Zealand Legislation Advisory Committee, serviced by the Ministry of Justice. There is no parliamentary equivalent to the JCHR in New Zealand or any other jurisdiction, but NZ select committees take account of the legal advice provided by the LAC. The rights, and limitations, in the New Zealand Bill of rights are similar, but not identical, to those in the ECHR so this is produced for illustrative purposes only.

166 The European Court of Human Rights effectively made this point in *Hirst v UK* [October 2005].

167 *Adoption and Children Bill :as amended by the House of Lord on Report,* Twenty-Fourth Report, Session 2001-02. HL 177;HC 979.

168 Ibid, para 15.

169 Ibid, para 35.

rights principles, rather than second guess the courts, might resonate far more with both government and parliament. **If the domestic courts were to have taken the same position as the Strasbourg court on this, would the JCHR have felt disempowered from taking a different view? If so that is clearly outside the scheme of the HRA** which allows parliament to disagree with the courts on how legislation is interpreted and to pass new legislation which overturns the consequence of a judicial decision. If the JCHR would have carried out its own proportionality exercise the conclusion would almost certainly have been the same, but **the report could have assisted the House of Commons, in particular, to 'find its own voice' on the human rights implications of the adoption ban, an essential component of the scheme of the Human Rights Act in which parliament was intended to have a central role, independent from government** (para 2.1).

12.8 The more recent 6th **Report on the Health Bill** suggests **the beginnings of an alternative approach**[170]. It involved scrutinising the government's proposed partial ban on smoking in public places. The Committee report mainly relied on an 'admissibility decision' by the now defunct European Commission, decided seven years ago, to determine that the state was not 'required' to introduce a total ban because it fell within the state's 'margin of appreciation' to decide how to discharge its 'positive obligation' to protect the right to life[171]; in other words, that it should be a decision of parliament whether, and if so how, to proceed. This gave license to the Committee to advise parliament on the 'necessity' and 'proportionality' of the ban from a human rights perspective, rather than 'second guess' what the domestic courts might say should they be asked to determine whether such a ban breaches Convention rights. **Whilst the Health Committee looked at the health implications; the JCHR examined the human rights implications**, using evidence from the government's Regulatory Impact Assessment to assist it in determining the necessity and proportionality of the ban, and whether it would achieve its stated aim[172]. Even so, the report still 'second guessed' the courts – concluding that the interference with the private life of smokers through the ban "is in our view *likely to be upheld* as being proportionate.[173]"

12.9 **Murray Hunt**, the Committee's legal adviser, has suggested that it is **important that the Committee expresses its *own* view on compatibility rather than an estimation of the degree of risk that a court will find legislation incompatible**. He gave three reasons for this, which I reproduce in full, with his permission.

i) It is **central to the whole scheme of the HRA that parliament has a central role in the protection of human rights and is entitled to take its own view about compatibility with Convention rights**, subject only to the UK's ultimate obligation as a State to comply with Strasbourg judgements. The scheme of the Act does carefully preserve parliament's ability to reach its own interpretation of the Convention and to disagree with the interpretation of domestic courts subject to the European Court of Human Rights being the ultimate arbiter of any such disagreement.

ii) The '**degree of risk' approach presupposes that courts and lawyers have a monopoly over determining whether a legislative measure is in fact compatible with human rights**. This sends an unfortunate message. It **encourages legislators to think of human rights questions as being**

170 Sixth Report, Session 2005-06.

171 Ibid, para 1.28.

172 Effectiveness is a significant factor in proportionality and in the human rights framework more generally – it is not necessarily to limit freedoms, like the right to smoke in pubic places, if it won't protect people anyway.

173 Note 170above, para, 1.37.

technical, legal questions to which only trained lawyers have access to the answers. It therefore discourages democratic debate and deliberation about human rights compatibility when one of the virtues of the HRA is that it is premised on the view that questions of compatibility should be subject to democratic debate.

iii) The **'serious risk of incompatibility' formulation** strikes me as being slightly evasive of the issue at stake, **turning the Committee's task into being one of 'prediction' rather than taking full responsibility for the expression of a clear view about compatibility**.

12.10 **Professor Janet Hiebert** has recently expressed similar views, based on her research on the Committee. She has written "The JCHR has given priority to scrutinizing bills from a rights perspective. In so doing, it has interpreted its role in legalistic terms – applying relevant jurisprudence and anticipating future court rulings – relying heavily on the opinion of its legal advisor." However "the HRA was specifically designed to broaden judgments about rights, so judges are not the only actors to consider how Convention rights should guide or constrain legislative and other state actors. **The HRA specifically envisages parliament as a venue for debate about the justification of legislation from a rights perspective.**[174]**"**

12.11 **Professor Hiebert suggested that an alternative** approach to the one currently used by the JCHR could involve "political actors" who "would take a more active role determining the scope of rights and how rights should constrain state actions." This approach "may also **consider a positive dimension to rights; how rights should guide governmental decisions to redress social problems or inequalities that arise from differing resources, power, or social prejudices."** This path **could still involve politicians taking into account "normative" values distilled from the relevant jurisprudence as explained by legal advisors,** but what would distinguish this approach would be "the extent to which political actors were willing to deliberate about the justification of proposed legislation from a rights perspective, and not simply equate morally appropriate judgments with lawyerly assessments of existing or anticipated judicial opinion.[175]**"**

12.12 Similarly, **legal academic Danny Nicol**, comments in *Legal Studies* that "the JCHR…tends to restrict itself to making predictions as to whether legislative provisions breach the ECHR. It does not initiate a debate about [what the rights in] the ECHR ought to mean." This can have the effect that "**legislators argue like judges whilst courts assume a legislative role**…the boundaries between law and politics disintegrate and the separation of powers ceases to be a worthwhile concept.[176]**"**

13. Conclusions

13.1 The **expression of sharp differences** between members on the purposes and working practices of the JCHR **masks some significant common ground amongst the majority of members**, once their perspectives are subject to closer examination. There are undoubtedly strongly held views by two or three members of the Committee that are probably irreconcilable with each other. They revolve around **two opposing views on the purpose of the Committee.**

174 *Governing Under a Bill of Rights: What does a compliance culture entail?* Conference speech, July 2006, note 141 above.

175 Ibid.

176 *The Human Rights Act and the Politicians,* note 16 above, pp 453-475.

i) One set of views considers the prime, or even sole, purpose of the JCHR as **providing 'quasi-judicial' legal advice to Parliament, thereby both directly and indirectly influencing government** in the process. This is reflected in the 19th report on the work of the Committee, which states "The perspective from which the Committee makes [its] analysis of legislation and policy is a **"clearly defined legal perspective of conformity with human rights law.**[177]**"**

ii) The other set of views perceives the **prime function of the JCHR as advising parliament in a sufficiently timely and accessible manner to help frame the agenda on issues of national importance concerning human rights**, engaging with, and responding to, the public in the process. The **executive is 'held to account' through the resonance of JCHR reports and proposals within parliament and beyond** and the extent to which they address difficult 'human rights dilemmas' confronting both government and society.

13.2 The **majority of members, however, have expressed the view that the JCHR should strive to accommodate both of these orientations within its work programme to varying degrees**[178]. The question for them is **what *priority* should be accorded to each** within current, or realistically achievable, resources and what **approach should be used to achieving them?**

13.3 Although the **JCHR is not mandated by its terms of reference to scrutinise published legislation** it took the decision, very early on, that this would be the prime focus of its work. There is no question that **some of the Committee's authority, notably in the House of Lords and amongst key stake holders, lies in the high quality and thoroughness of its reports**, **and in particular their legal analysis**. Based on our analysis of the current session, It is fair to say that **JCHR reports are quoted significantly less often by a smaller number of members in the Commons** (only 27 on the floor of the house) than in the Lords and the relative impression they appear to make on the respective houses is reflected in this disparity (**Table 4** and paras 9.6-7). **Some MPs on the Committee are doubtful about the value of Bill scrutiny therefore**. The number of amendments to legislation attributable to JCHR reports as a proportion of Bills scrutinised would tend to bear out this scepticism (**table 5**).

13.4 **It would seem an extraordinary decision, nevertheless, were the Committee to abandon legislative scrutiny altogether as a significant element of its work**. Given that it is not a departmental select committee and benefits from the expertise and 'reach' of being a Joint Committee of both Houses, **the scrutiny of legislation for compliance with human rights principles seems to most people I interviewed a sensible and uncontroversial element of the Committee's work**. The more difficult issues, which many members have given considerable thought to, are some of the following:

a) What should be scrutinised?

b) How to scrutinise?

c) Which enquiry functions should the Committee perform and what priorities should be accorded to them?

d) The relative priority given to legislative scrutiny over other functions of the Committee ?

177 Nineteenth Report, note 93 above, para 34.

178 There are parallels here with the House of Lords Constitution Committee and European Union Select Committee which combine both functions.

13.5 I have suggested above that given the crucial role of the legislature under the scheme of the HRA, and the broad and ethical nature of human rights, a **primary question** for the JCHR to consider in its examination of its working practices is as follows: **how can the Committee most usefully assist parliament in determining how legislation should be framed, and policies developed**

i) in a manner that is **not technically incompatible with the *settled* jurisprudence of the ECHR** now incorporated into our law through the HRA (**which in reality applies to a relatively narrow band of technical but fundamental principles** if the doctrines of a 'margin of appreciation' and 'discretionary area of judgement' are taken into account)

ii) but which **reflects the *purposive* nature of human rights, best understood as a set of fundamental values associated with liberal democracies,** drawn from a range of recognised domestic and international sources.

What to scrutinise?

13.6 **One of the main reasons cited for comprehensive scrutiny of government bills is the impact this is said to have on officials drawing up government policy and legal advisors drafting Bill memoranda on ECHR compliance** for the Legislative Procedure Committee. The commons clerk and legal adviser give as the main reason for maintaining the comprehensiveness principle in relation to government bills the knowledge that the JCHR conducts such comprehensive scrutiny which is said to operate as an important discipline on departmental policy makers drawing up policy and drafting legislation.

13.7 **The DCA officials I interviewed confirmed this view to the extent that departmental legal advisers were likely to consider how the JCHR would respond to their advice,** although the **risk of court challenge is the far more significant factor**. However **once government ministers have formed a view, they are mostly unlikely to alter it significantly as a result of JCHR reports**, however authoritative. This observation was **commensurate with the views of government lawyers in a number of departments** interviewed by Professor Janet Hiebert (paras 8.4-5). They are also **consistent with our analysis of the impact of JCHR scrutiny reports on amendments to government bills (table 5).** Our evaluation suggests that **out of 178 government bills considered by the JCHR since the beginning of the 2001-2 session, only 11 were amended as a direct consequence of JCHR 'risk assessments**.' (para 9.8).

13.8 The same DCA officials advised that the **Committee could be far more influential if it were to intervene at an earlier stage in the policy process and scrutinise green or white papers or draft bills**. Provided they are sufficiently robust, policy statements that have serious human rights implications, like the 'respect agenda' or 'child protection strategies' could also be scrutinised and evaluated by the Committee within a human rights framework (para 8.7). The **three ministers I spoke to were firmly of the view that early scrutiny is likely to be a far more effective approach to influencing government than commenting on draft Bills**, wherever this is possible (paras 8.8-10).

13.9 The Committee has **only reported on one White Paper** to date and one policy paper (the Respect Action Plan; see below). It has **never scrutinised more than 45% of draft bills in any session, with none in the last** two (**Table 1**)

13.10 Other than scrutinising a limited amount of delegated legislation (para 6.6 (m)) it has done **no post-legislative scrutiny** either and none to track the *effec*t of a Bill in

practice. One of the fundamental principles of the European Court of Human Rights is that rights should be 'real and effective' and not just 'formal' (para 3.10) There are currently no serious attempts by the Committee to evaluate the *effectiveness* of rights in practice, or the implications of limitations on rights for their effectiveness. **The Law Commission has produced a consultation paper on *Post-legislative Scrutiny*.** It distinguishes between a narrow review which might examine such factors as difficulties of interpretation and unintended consequences of the legislation and " a broader form of review" which might examine whether the policy objectives of the legislation have been achieved and whether steps need to be taken to improve its effectiveness[179].

13.11 The *Safeguarding Vulnerable Groups Bill* which was introduced to the House of Commons on 8 June (a Bill whose second reading target has not been met by the Committee because of other pressing priorities) **could lend itself very well to piloting post-legislative scrutiny.** It sets up a new vetting and barring scheme for people who work with children and vulnerable adults. Post-legislative scrutiny would allow the Committee to receive and review evidence to determine whether the procedures are effective in meeting the objectives of the Bill and whether the rights of employees, or potential employees, are disproportionately affected by its provisions. **One of the disadvantages of limiting scrutiny to Bill scrutiny is the lack of opportunity to assess a) how effective legislation is b) how capable it is of fulfilling government's positive obligations to *protect* rights, an obligation that Bill scrutiny on its own is not often well suited to establishing.**

13.12 The Committee also **does not systematically track and comment on Declarations of Incompatibility by the courts, even though the scheme of the HRA relies on parliament** to determine whether, and if so how, to respond to such Declarations. If parliament does not do so directly itself, then 'parliamentary sovereignty' remains 'executive sovereignty' in all but name.

How to scrutinise?

13.13 For some members, **a significant deterrent to pre and post-legislative scrutiny is the concern that the JCHR will become indistinguishable from departmental select committees which review policy and it will lose its authority in the process.**

13.14 **The current approach to scrutiny of published bills relies primarily on an estimation of the 'degree of risk' that a court will find legislation incompatible**. The focus is on predicting how the domestic courts are likely to judge the legislation in question, based mainly on the jurisprudence of the European Court of Human Rights or case law from the domestic courts interpreting the ECHR. The Committee only rarely makes judgements for itself on whether legislation is compatible or not . This is **despite the fact that the courts not infrequently 'defer' to 'elected representatives' in making discretionary human rights judgements, on the grounds that they have greater legitimacy and capacity, in particular when rights collide or are limited on the grounds of meeting an important social purpose** (paras 12.3-6).

13.15 This **importing of a 'quasi-judicial' approach into parliament sits uncomfortably with the scheme of the HRA which was intended to allow Parliament the 'final say' on legislatio**n (paras 12.10-11). If this is not to translate as allowing government 'the final say' on legislation in practice, **parliament needs to make independent judgements about compatibility**, particularly in circumstances that involve the assessment of evidence and weighing of values and where the courts

179 Law Commission Consultation Paper no 178, December 2005.

themselves can't rely on technical legal principles alone. This is a view with which the legal advisor to the committee concurs (para 12.9)

13.16 There are, of course, circumstances where it is appropriate for the Committee to draw on settled ECHR (or other human rights) jurisprudence to carry out scrutiny of a relatively 'technical nature' (para 12.5). But if the Committee is to develop its own human rights assessments, rather than second guess the courts (which Members and staff of the committee recognised from the outset are very difficult to predict) it will need to rely more frequently on written and oral evidence. Currently witnesses are called in only a handful of bills that are scrutinised.

13.17 Virtually all informed commentators I spoke to suggested that government policy needs to be scrutinised at an earlier stage in order for the Committee's advice to be more effective and timely. This could mean scrutinising policy at various stages of development (once it is sufficiently formed) as well as the legislation itself. Vera Baird QC, a former member of the committee, suggests that the challenge is to keep scrutiny of policy within a human rights framework and that it is perfectly possible to do this, provided members, guided by the legal advisor, are grounded in human rights principles which can be applied to evaluate the necessity and proportionality of proposed measures that limit individual rights.

13.18 The government's ***Respect Agenda*** is a case in point. It was originally published as an Action Plan on 10 January 2006. Its principles were said to be based on:

— a duty and a responsibility on the citizen to respect the rights of others

— a duty on the state to protect the vulnerable from significant harm

— a duty to uphold the rule of law in a system which is efficient and fair.

These are **all matters of central concern to a human rights framework, drawn from any source of human rights, nationally or internationally**. The Action Plan was ripe for scrutiny from a human rights perspective. Very unusually it *was* scrutinised by the Committee in advance of its incorporation into the Police and Justice Bill. The approach used was primarily a legal one to scrutinise two aspects of the plan in particular – conditional cautions and unpaid work and contracting out parenting orders functions – which were the subject of a letter by the Chair to the Home Secretary[180]. These were important issues for the Committee to scrutinise, of course. But **pre-legislative scrutiny** could also have **afforded an opportunity for the Committee to take and receive evidence** on the three principles (above) on which the Plan is said to be based in order **to suggest what a human rights framework based on those principles might offer to the policy objectives of the Plan**. The purpose could have been to try to influence the government before the Bill was published, both through the usual methods the Committee uses of writing letters and seeking clarifications on specific points, but also through seeking to attract public interest (via the media and other channels) in what might have been an alternative approach to fostering mutual respect, than the one presented by the government.

Enquiries

13.19 Government Ministers, Directors of Human Rights NGOs and some members of the Committee all expressed **regret that the Committee only rarely seeks to shape the national agenda** on the major human rights interests of the day (paras 8.9-10,10.5-6, 11.8 (iv)). When the Committee does intervene on issues of current public interest, like

180 13 February 2006.

'extraordinary renditions,' deportations of suspected terrorists to countries where they may face torture, indefinite detentions of suspected terrorists and so forth, it is generally through the lens of Bill or treaty scrutiny. **There is a case for the JCHR to ' free itself up,' like most other select committees** do, to review and comment on major human rights issues whether or not they are subject of legislation (or a treaty monitoring body report) **at the time that it is fruitful for the committee to enquire into them.**

13.20 During this session the Committee has carried out **two major 'scrutiny enquiries' on torture and counter-terrorism**. These have involved **Bill/treaty scrutiny in a wider context of policy review, using the techniques of evidence gathering and witness interrogation generally associated with thematic enquiries** (para 6.10). Some members have felt that this was not a good use of the Committee's resources, given that the time involved in conducting 'scrutiny enquiries' of this nature has inevitably impacted on the capacity of the Committee to maintain a 'comprehensive bill scrutiny service,' where witnesses would be called, or evidence examined, in only a handful of bills. However, in the course of my interviews with them, a **majority of members expressed support for continuing to conduct 'scrutiny reviews' where bill scrutiny raises significant human rights *policy*** issues that cannot be resolved through 'paper scrutiny' alone (e.g the use of intercept evidence in court or the approach to detaining 'terror suspects' in other European states). **The implication** of this, it is understood, **is that there will need to be greater flexibility about, and prioritisation of, other work**.

13.21 The ongoing nature of the two major scrutiny enquiries, combined with the continuing focus on bill scrutiny, has meant that **there has been less time to conduct 'thematic enquiries' than some members would have wished.** The current 'thematic enquiry' into human trafficking also involves reviewing the implications of ratifying the European Convention on Action against Trafficiking in human beings (para 6.8) and in this sense is not *only* a 'thematic enquiry,' like the *Deaths in Custody report.* **The forthcoming Commission for Equality and Human Rights, will have the power to conduct thematic enquiries**. It may be that the Committee could be more effective in 'holding the executive to account', and influencing debate in parliament and beyond, by **prioritising enquiries into pressing issues of major national concern, or scrutiny enquiries** which combine bill scrutiny with a wider policy context, **over thematic enquiries** (para 6.8).

Relative Priorities

13.22 **Most members of the committee see a strong case for combining bill scrutiny with 'agenda setting enquiries' and 'scrutiny enquiries**,' although there are members who see no case for carrying out any functions besides bill scrutiny and others who, conversely, are unpersuaded of the merits of bill scrutiny. **The question that most divides members, however, is whether bill scrutiny should be *comprehensive*** or not. The strength of the case for maintaining this principle, on the basis that the knowledge that the JCHR scrutinises bills is an important discipline on departmental policy makers,[181] is not borne out by this research to any significant extent, nor the research of Professor Janet Hiebert (13.5-7). It is anyway the case that **provided a significant number of bills are scrutinised**, whatever **'deterrent effect ' applies** is likely to still operate, as departments will not know *which* bills will be selected. **The evidence**, whether direct testimony from officials and ministers, or inferred from the proportion of bills that have been amended as a result of JCHR reports (**table 5), suggests that bill scrutiny is not having the significant impact on legislative outcomes that is sometimes claimed for it**. It may be that occasional well-timed enquiries on human rights issues of national significance - from the respect agenda and child protection to the use of control orders or the removal of juries in fraud trials -could

181 See section 13.6 above.

enhance the reputation of the committee, and of the human rights framework in general, as providing effective tools for resolving some of the most difficult dilemmas we face today. Combined with pre-legislative and post –legislative scrutiny, where appropriate, this could potentially increase the 'stock' of the JCHR when its bill scrutiny reports are received, particularly, but importantly, in the House of Commons.

13.23 One implication of a more flexible approach, in which **the committee 'frees itself up' to determine the balance of its bill scrutiny with other functions**, depending on other pressing concerns, is that the **second reading target is more likely to be met for the smaller number of bills scrutinised**. In the current session 11 government bills have not been considered before the second reading of the second house, which is of some concern to a number of members (**table 6**).

13.24 The **reality is that the comprehensive principle is no longer applied in practice to the degree that it was**[182] in the earlier sessions **largely due to the de facto decision to prioritise 'scrutiny reviews' on torture and counter-terrorism over the scrutiny of private members bills.** The latter have reduced from 97 in 2001-2 to none in the current year (para 9.3; **table 2**). The Committee has maintained comprehensive scrutiny of Private Bills since 2001-02, but with 6 Private Bills not yet considered in this session (**table 3). The number of government bills scrutinised has remained steady although there are 14 'not yet considered'** and **11 have not made the second reading targe**t in this session. In its 19th report of its work in the last session, the Committee acknowledged the many "difficulties encountered" in maintaining this target[183]. The Legal Adviser is of the view that **on the current level of resources it is not possible to reinstate the former approach to comprehensive bill scrutiny,** including PMBs[184].

13.25 There is a **case to be made, based on the pivotal role of parliament under the HRA, for prioritising the scrutiny and monitoring of Declarations of Incompatibility by the courts** over even comprehensive government bill scrutiny. If the Committee were to further prioritise the bills they scrutinise by raising the threshold for determining "significance" (see below) and producing one clear and accessible report on each bill, rather than a series tracked in 'progress reports', it is likely **the Committee's reputation might rise due to an increase in the clarity of its output and purpose** . As Professor Hiebert observed in an interview with me based on her research, it may be a case of **"more is less" in terms of the influence the Committee can bring to bear within the House of Commons, at least.**

13.26 **Before determining any specific changes to working practices with regard to bill scrutiny, and the relative priority that should be accorded to the various functions of the Committee, the most fundamental questions** for members to consider are:

i) the prime purposes of the Committee within the context of the scheme of the HRA which envisaged a specific role for parliament in the implementation of the Act (paras 2.4-2.9 ; 3.14-3.19).

ii) how the Committee can most be effective in achieving its goals (para 7.2 ; 13.1)

182 Recognised, for example, in Lord Brabazon's letter of 8 May, notes 139 and 140.

183 Nineteenth Report, note 93 above, para 73.

184 Interview

iii) the kind of scrutiny and reviews it considers are most appropriate for achieving i) and ii) in the context of an appreciation of human rights as a set of broad values and fundamental principles, rather than a set of technical rules.(paras 3.1-3.13).

14 Options and Recommendations

The Constitution Unit, in a well regarded report on human rights legislation published in 1996, proposed that a human rights committee be established and that "the decision as to the balance of priorities" for its work "would rest with the committee itself and would certainly need adjustment over time." This is the opportunity, rightly foreseen, for members to review the Committee's " balance of priorities."[185] Based on the views of members as expressed to me, and this review of the aims and purposes of the committee, as well as its current working practices, there are three potential options members could consider. **Each of these should only be considered in the light of the research, reflections and comments in the rest of the report. They will have little meaning or significance outside that context.** The Committee may need to revisit this review when the CEHR comes on stream towards the end of 2007.

Option A

— Provide a comprehensive 'bill scrutiny service,' to both Houses of Parliament as the major purpose of the Committee.

— Ensure that all government and private bills meet the 2nd reading target as a matter of first priority.

— Scrutinise all PMBs which a) receive 2nd reading in either house b) elicit considerable public interest c) at the specific requested of the bill sponsor.

— Only call witnesses or examine wider evidence in a handful of bills of exceptional significance

— Scrutinise treaty monitoring body reports and government responses to these.

— Monitor government compliance with European Court of Human Rights decisions and extend this to Declarations of Incompatibility issued by domestic courts

— Only occasion call ministers as witnesses for specific purposes, provided this does not incapacitate the 2nd reading target.

— Scrutinise draft bills where possible but only scrutinise other pre-legislative policy documents or White Papers on an exceptional basis and not at the expense of meeting the 2nd reading target.

— Continue to press Government to provide a Human Rights Memorandum or more detailed Explanatory Notes on s19 statements that accompany each bill.

Option B

— Only scrutinise published government bills and only on an exceptional basis, usually where they are of major human rights significance. No longer consider that the purpose of the committee is to provide a 'bill service' on any kind of bill.

185 Note 70 above.

— Conduct regular 'thematic enquiries' on human rights issues of relevance to the wider public, using the approach and techniques associated with departmental select committees.

— Seek to raise the profile of the Committee by conducting enquiries on significant human rights issues of national concern. Examples in the current session might have included reviewing allegations about the UK's role in so-called 'extraordinary renditions' or the implications of introducing the equivalent of 'Megan's Law' into the UK.

— Ensure there is sufficient 'slack' to be able to respond rapidly to major unexpected developments, such as conducting a review into claims that the Probation Service or Parole Board are becoming 'distracted' by human rights concerns or into the operation of the HRA within public services more generally, in the context of the government's wider review.

— Conduct pre- and post- legislative enquiries at the time where they are most likely to be of influence, for example into the implications of extending detention without full trial beyond 28 days or into the effects of the Government's 'Respect Agenda' on young people in specific localities, after the Police and Justice Bill has come into force.

Option C

— Retain the intention to scrutinise and report on all Government Bills which raise "significant human rights issues," and all private bills whenever feasible, in the context of the role allotted to Parliament in the scheme of the Human Rights Act,

— Only scrutinise PMBs on an exceptional basis, and only if they have a serious chance of becoming law or are of major national significance.

— Revisit the definition of "significant" human rights to elaborate further on the criteria used to decide significance, which may be expanded to include government obligations to 'protect' rights as well as refraining from breaching them. Committee members to engage with this process as an opportunity to reassess meaning and scope of human rights.

— Delegate to the legal adviser the responsibility to develop a system for sifting *all* Government Bills to determine if a) they reach the new 'significance' threshold b) they reflect a 'pattern of incompatibility' threshold which the legal advisor will draw up based on past patterns of repeated incompatibility.

— Only report on Bills which meet these two sets of criteria to the Committee and to the House and no longer spend Committee time on Bills that do not raise a 'significance' or 'pattern of incompatibility' issue.

— Frontload the timetable so that the legal adviser and Committee decide whether a Bill is sufficiently 'significant' (based on criteria above) to be reported to the House within 2-3 weeks of publication.

— Try to ensure that each Bill is reported in its own freestanding report wherever possible, to increase accessibility and comprehension for MPs and Peers.

— Consider the case for the Committee carrying out its *own* assessment of compatibility, in its own 'less technical voice' *when appropriate* -in particular where proportionality considerations apply - based on the examination of

witnesses and evidence, rather than necessarily determine 'risk of incompatibility' by 'second guessing' the courts.

— Use the additional time freed from streamlining bill scrutiny for considering some or all of the following functions *when appropriate*

  i) reporting on all Declarations of Incompatibility issued by the domestic courts, advising parliament on whether, and if so how, the government should respond to them

  ii) Conduct pre- and post -legislative enquiries at the time where they are most likely to be of influence (see option B).

  iii) Continue to carry out 'scrutiny enquiries,' where appropriate, of the sort that have been piloted this year on counter terrorism and torture, where Bill scrutiny can be conducted in a wider policy context.

— Hold regular sessions with the Human Rights minister and staff on the implementation of the Human Rights Act and other related human rights issues

— Ensure there is sufficient 'slack' to be able to respond rapidly to major unexpected developments and seek to raise the profile of the Committee by conducting enquiries on significant human rights issues of national concern (see option B).

— Continue to monitor treaty body reports and Strasbourg decisions if there is capacity to do so.

— Continue to press Government to provide a Human Rights Memorandum (see option A).

Should members choose option C, they will need to consider the case for pressing for further resources, in particular for an assistant to the legal adviser to carry out an efficient streamlining and sifting capacity.

Table 1: Draft Bills reported on by the JCHR by session

Parliamentary Session	Total number of draft bills published	Number reported on by JCHR	Percentage
2000-01	2	0	0%
2001-02	7	3	43%
2002-03	9	4	45%
2003-04	12	4	33%
2004-05	5	0	0%
2005-06	2	0	0%

Notes

The JCHR have also reported on one white paper (Schools White Paper, 9th report 2005-06) and two draft orders (Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006, 12th report 2005-06; The Draft Criminal Justice Act 2003 (Categories of Offences) Order 2004, 2nd report 2004-05).

In addition to the Draft Bills on which the JCHR reported, they have informally given their input at staff level on the human rights implications of the draft Mental Health Bill (2003-04) and the draft Legal Services Bill (2005-06).

Table 2: Number of Bills considered by the JCHR per session

Parliamentary Session[1]	Number of Gov Bills published[2]	Number of Gov Bills considered by JCHR	Number of Gov Bills JCHR commented substantively[3] on	Number of Private Members' Bills considered by JCHR	Number of Private Bills considered by JCHR	Total number of Bills considered by JCHR
2001-02 (20.06.01 – 07.11.02)	39	37	11	97	11	145
2002-03 (13.11.02 – 20.11.03)	36	36	15	74	2	112
2003-04 (26.11.03 – 18.11.04)	35	35	17	70	4	109
2004-05 (23.11.04 – 11.04.05)	34	34	24	53	5	92
2005-06 (17.05.05 –) up to 20 June 2006	51	36	23	0	5	41
Including Bills listed as 'not yet considered' by the JCHR this session,[4] the figures could rise to the following totals:						
2005-06 outstanding bills from 20 June 2006		50 (14 listed as 'not yet considered')		14 (14 have received a second reading)	11 (6 listed as 'not yet considered')	75

1 This table excludes the session 2000-01

2 Listed in the House of Commons Sessional Information Digests

3 Generally the JCHR list a bill as commented substantively on if it is "drawn to the attention of both Houses"

4 These are; Armed Forces, Company Law Reform, Safeguarding Vulnerable Groups, Animal Welfare, Childcare, European Union, Finance (no 2), Housing Corporation (Delegation), National Health Service, National Health Service (Consequential Provisions), National Health Service (Wales), Northern Ireland (Miscellaneous Provisions), Parliamentary Costs and Wireless Telegraphy

Table 3: Number of Private Bills published per session

Parliamentary Session	Number of Private Bills published	Number of Private Bills considered by JCHR
2001-02	11	11
2002-03	7[1]	3
2003-04	6[2]	4
2004-05	5	5
2005-06	11	5[3]

1 Four of these bills were reported on in the 2001-02 session. There was a motion to suspend them and they were re-introduced in the 2002-03 session

2 As above, two of these bills were reported on in the 2001-02 session. There was a motion to suspend them and they were re-introduced in the 2003-04 session

3 Figure correct at 20 June 2006. Six bills listed by JCHR as 'not yet considered'

Table 4: Analysis of JCHR references in Hansard for session 2005-06[1]

WHO IS CITING JCHR – THE JCHR MEMBERS?

WHERE CITED	TOTAL NUMBER OF REFERENCES	NUMBER BY JCHR MEMBERS	PERCENTAGE OF TOTAL
Lords	118	38	~33%
Lords Grand Committee	24	5	~20%
Commons	59	15	~25%
Commons Standing Committee	24	13	~50%

Overall average of 32% of references made by JCHR members

WHO IS CITING JCHR – WHICH PARTIES?

WHERE CITED	TOTAL NUMBER OF REFERENCES	TOTAL BY LABOUR	TOTAL BY LIB DEM	TOTAL BY CONSERVATIVES	TOTAL BY OTHERS	TOTAL NUMBER OF PEER/MPS MAKING THE REFERENCES
Lords	118	39	46 (40% of total)	17	16	43
Lords Grand Committee	24	8	11 (45% of total)	4	1	12
Commons	59	38 (64% of total)	13	8	0	27
Commons Standing Committee	24	6	16 (66% of total)	2	0	7
Percentage of total	(225)	~40%	~40%	~14%	~8%	

DID THE REFERENCES HAVE A SIGNIFICANT IMPACT ON THE PARLIAMENTARY PROCESS?

WHERE CITED	TOTAL NUMBER OF REFERENCES	NUMBER HAVING A SIGNIFICANT IMPACT[2]	PERCENTAGE OF TOTAL
Lords	118	71	~60%
Lords Grand Committee	24	9	~40%
Commons	59	26	~45%
Commons Standing Committee	24	16	~66%

Overall average of 50% of references judged to have had a significant impact on the Parliamentary process.

Source of information: House of Commons Library

1 From 17.05.05 to 14.03.06

2 Significant impact is defined to mean 'relying on JCHR reports to 1) scrutinise a bill; 2) ask questions or; 3) engage substantively in debate'

Table 5: Amendments made as a result of JCHR reports

Parliamentary Session	Total number of bills considered by JCHR	Number of bills[1] amended as result of JCHR report	Other amendments[2]	Of these, number where it is not clear JCHR was source of amendment
2000-2001 (06.12.00 – 14.05.01)	5	1	0	1
2001-02 (20.06.01 – 07.11.02)	145	2	1	0
2002-03 (13.11.02 – 20.11.03)	112	5 (including one Private bill)	1	2
2003-04 (26.11.03 – 18.11.04)	109	6 (including one Private bill)	1	1
2004-05 (23.11.04 – 11.04.05)	92	0	0	-
2005-06 (17.05.05 -) up to 20 June 2006	41	4	0	2

See the attached annex to this table for more information on the amendments.

NOTE

This table is based on evidence we have found suggesting amendments were brought in response to JCHR reports. It is quite possible that this table is incomplete as there are no reliable records kept of this.

SOURCES

1. JCHR, *The Work of the Committee in the 2001-2005 Parliament*, 19th report 2004-05 and other JCHR reports

2. Murray Hunt, Legal Adviser, JCHR

3. David Feldman, *Parliamentary scrutiny of legislation and human rights*, [2003] P.L. 323

4. Hiebert, *Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?*, (2006) 4(1) International Journal of Constitutional Law, 1

1 All Government bills unless indicated otherwise.

2 One remedial order and two draft bills.

Annex to Table 5: Evidence of amendments made as a result of JCHR reports

All Government bills unless indicated otherwise:

Criminal Justice and Police Bill of session 2000-01

JCHR had serious concerns about Part II of the bill, on disclosure of information between investigative agencies in the UK and abroad. Their concerns related to safeguards for privacy-related rights. This part of the bill was eventually dropped but only because the government wanted to rush as much of the bill through its final stages as possible before proroguing Parliament in preparation for a general election.[1]

[Recorded on table as not clear JCHR was source of amendment]

Anti-Terrorism, Crime and Security Bill of session 2001-02

Gov felt compelled to make some amendments that reflected JCHR concerns:[2]

"We accordingly welcome the amendment to clause 21(1) of the Bill, made in Committee in the Commons, to introduce a legal requirement for reasonableness relating to a decision to certify a person as a suspected international terrorist." (para 8, 5th report 2001-02)

"A further matter which the Home Secretary agreed to reconsider was the definition of 'international terrorist' in clause 21(2). In particular, we considered that the category of people under clause 21(2)(c) who have 'links with' an international terrorist or international terrorist group was too vague and indeterminate to satisfy the requirement for certainty which forms part of the basis for the lawfulness of a detention under Article 5 of the ECHR. We welcome the amendment, during the Committee Stage in the House of Lords, to clarify the connection which would justify bringing someone within the detention provisions. The amended version of clause 21(2)(c) limits it to people who have links with international terrorist organisations, while the new sub-clause explains that a person has links with such an organisation only if he or she "supports or assists" it. We note that "supports" will have to be interpreted as meaning "supports in a material or active way", in order to avoid violating the right to hold opinions conferred by Article 10(1) of the ECHR and Article 19(1) of the International Covenant on Civil and Political Rights. It would be desirable if the wording of the Bill made this clear." (para 19, 5th report 2001-02)

JCHR also welcomed the insertion, in a new clause (now clause 28), of provision for an annual review of the operation of the detention provisions in the Bill. "In addition, in what is now clause 29(7) of the Bill, there is a 'sunset clause' under which the detention provisions in the Bill (clauses 21 to 23) will cease to have effect at the end of 10 November 2006, in addition to the annual renewal requirement already in the Bill. We intend ourselves to review the working of the Act in relation to the protection of human rights before the first renewal order and consider whether its further continuation appears appropriate in relation to those concerns." (para 20, 5th report 2001-02)

1 David Feldman, 'Parliamentary scrutiny of legislation and human rights', [2003] P.L. 323 at 346.

2 Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?', 4(1) International Journal of Constitutional Law, 2006 at 29

Mental Health Act 1983 (Remedial) Order 2001 of session 2001-02 (remedial order)

JCHR considered the draft remedial order in 6th report 2001-02. JCHR wrote to Minister in Department of Health to express concerns about the draft order. It was subsequently withdrawn and the Minister instead made an order with immediate effect using the 'urgent' procedure under the HRA, as the JCHR had suggested.[3]

Enterprise Bill of session 2001-02

The bill made provision for courts to make interim enforcement orders to stop allegedly unlawful activities of traders carrying on business in breach of legal requirements. In certain circumstances the orders could be made ex parte and without notice to the trader. JCHR expressed concern that the safeguards in the Bill did not expressly require the person applying for the an order to make full disclosure to the judge of all relevant matters and would be insufficient to ensure respect for Article 1 Protocol 1 rights (26th report, 2001-02). The Department agreed to amend the Bill and the Act now expressly imposes an obligation on the applicant to make full disclosure to the judge.

Licensing Bill of session 2002-03

The JCHR raised concerns about the effect of the proposed licensing requirements on performers, particularly in pubs and places of worship (4th report, 2002-03). They highlighted the risk that clause 134 of the Bill, making it a criminal offence for performers, among others, to carry out a licensable activity (including many public performances) without due authorisation, would be disproportionate to the legitimate aims of the licensing scheme and hence would be incompatible with the right to freedom of expression under ECHR Article 10. The Government agreed, in correspondence with the JCHR, to propose an amendment to clause 134 to exclude from criminal liability a person whose only involvement in an entertainment is as a performer or participant. The new provision now forms s136 of the Licensing Act 2003.

Nottingham City Council Bill of session 2002-03 (Private bill)

This bill proposed a register of those dealing in second-hand goods in Nottingham city. Clause 14 of the bill conferred powers on police constables, and authorised officers of the council, to enter premises, inspect and seize goods, in order to ascertain whether an offence had been committed. The JCHR wrote to the promoters of the bill pointing out that this provision might violate the right to respect for private life and correspondence (Article 8 ECHR) because there was no protection for confidential material equivalent to that offered by section 9 of the Police and Criminal Evidence Act 1984. The promoters responded, and agreed to amend clause 14(7) broadening the protection for any such material. This now forms s14(7) of the Nottingham City Council Act 2003.

Courts Bill of session 2002-03

Clause 87 of the bill empowered the Lord Chancellor to prescribe, by statutory instrument, the fees payable in respect of any case dealt with by the Supreme Court, county courts and magistrates' courts. The JCHR pointed out that the level of fees affected people's access to courts, which is an element of the right to a fair trial (Article 6.1 ECHR), and that consideration should be given according to people's ability to pay. Clause 87 allowed for wide consultation as to the level of fees, but also that the enabling order would simply be laid before Parliament, and would not be subject to negative or affirmative resolution. Following the JCHR report, and a report from the Select Committee on Delegated Powers and Regulatory Reform, the Lord Chancellor agreed to clause 87 being amended so that

3 Above, note 1 at 333.

the relevant order was subject to negative resolution, and therefore enhanced scrutiny by Parliament.

[Recorded on table as not clear JCHR was source of amendment]

Draft Civil Contingencies Bill of session 2002-03 (draft bill)

Clause 25 of the draft bill provided that a regulation made under Part 2 of the Bill would "be treated as if it were an Act of Parliament" for the purposes of the Human Rights Act, thus depriving people of legal remedies for an extensive range of potential violations of human rights. The regulations would not have been scrutinised by Parliament in the same detail as primary legislation, and would not have been able to be struck down by the courts as secondary legislation can be. The Government removed clause 25 of the draft bill from the bill subsequently introduced in Session 2003-04 after criticism from the JCHR and other committees (15th report, 2002-03 and 4th report, 2003-04).

[Recorded on table as not clear JCHR was source of amendment]

Criminal Justice Bill of session 2002-03

Under the bill, some defendants under the age of 17 would not have had the right to see the pre-sentence reports prepared on them. Their representatives, and or parents/guardians if present, would have access. The JCHR had concerns as to both access to the pre-sentence report, and also the courts' responsibilities to unrepresented children under the age of 17 and the risk the provisions might violate the defendant's right to a fair hearing (Article 6 ECHR), right to respect for private life (Article 8 ECHR) and the right to participate in decisions (Article 12 UNCRC). The Government responded and initially agreed to amend the bill so as to disclose the reports to defendants over the age of 14. However, the JCHR remained of the view that problems might remain in relation to unrepresented children, and suggested the bill be amended to require the court to appoint legal representatives for unrepresented child defendants (7th report, 2002-03). In correspondence with the JCHR the Government agreed to introduce a general principle that the pre-sentence report should be made available to all offenders under the age of 18, and to their parents or guardians, whether or not the defendant was legally represented, unless the court believed that disclosure would put the defendant at risk of serious harm (now ss159 and 160 of the Criminal Justice Act 2003).

Crime (International Co-operation) Bill of session 2002-03

The JCHR raised concerns about clause 83 of the bill, which inserted a new section 76A to the Regulation of Investigatory Powers Act 2000 (7th report, 2002-03). This would have enabled a foreign police or customs officer to carry out directed or intrusive surveillance in the UK for up to five hours without authorisation, whilst investigating a wide range of crimes. Following an exchange of correspondence, the Government agreed to amend the bill so that a foreign officer would be required to contact a designated person on arrival in the UK, and that the surveillance would be limited to not entering private homes or places inaccessible to the public (now s83 of the Criminal (International Co-operation) Act 2003).

Medway Council Bill of session 2003-04 (Private bill)

After concerns were raised by the JCHR (4th report 2003-04) the bill was amended to propose that an officer who seizes goods should be required to notify the person from whom the goods were seized of the right of a person claiming to be owner of or otherwise interested in the goods to show cause why the goods should not be forfeited etc., and to invite the person from whom the goods are seized to give his name and address to make tracing easier. There would be a certificate of seizure. This would bring

the arrangements more closely into line with the provisions of the Police and Criminal Evidence Act 1984, Part I, and the associated Codes of Practice, in relation to notification to be given when constables seize items from people in the exercise of the stop and search powers. The JCHR welcomed the proposed amendment relating to seizure of goods, and considered that it would provide an acceptable level of safeguard for the rights of owners and other interested parties to appear before a court to defend their rights (ECHR Article 6), as well as other Convention rights (8th report 2003-04).

Children Bill of session 2003-04

The JCHR recommended that the commissioner should use the principles of the CRC as a guide and measure in considering delivery of services to children by government and public authorities (9th report, 2002-03). The scheme of Part 1 of the Bill originally gave the CRC the status of a permissible relevant consideration: something to which, under clause 2(7), the Commissioner might have regard in considering what constituted the interests of children. The CRC was only to "form the backdrop of the Commissioner's work *if he considers it appropriate*". The Bill was amended in Committee by the Lords to provide that the Commissioner *must* have regard to the Convention. Baroness Ashton said that this change would mean that the CRC "sets the framework" within which the Commissioner will work (12th report 2003-04).

[Recorded on table as not clear JCHR was source of amendment]

Housing Bill of session 2003-04

The JCHR raised three main areas of concern in relation to the human rights compatibility of the Bill 8th report 2003-04):

First, they were concerned that there was no requirement to give reasons for the choice of a particular type of enforcement action by a local housing authority under the Bill, could give rise to disproportionate interference with property rights under Article 1 of Protocol 1, and with the right to respect for the home under Article 8, and might also fail to satisfy the right to a fair hearing under Article 6.1. The government introduced amendments which required local housing authorities to give reasons for their choice of a particular course of enforcement action (now s8 of the Housing Act 2004).

Secondly, they were concerned that the lack of procedural safeguards in the exercise of the investigatory powers under the Bill, including powers to require the production of documents and to enter premises, were subject to insufficient safeguards to ensure compliance with the right to respect for private life under Article 8. Amendments were introduced which required written authorisation by a senior local authority officer for the exercise of investigatory powers including powers of entry (s239 Housing Act 2004).

Thirdly, they considered that additional safeguards were needed to ensure that the requirement to introduce Home Information Packs did not intrude unjustifiably on Article 8 rights. In response to the JCHR report, the Government introduced an amendment to address their concerns in relation to Home Information Packs.

In the JCHR's 20th report they raised an additional point on the Bill. Following the decision of the European Court of Human Rights in Connors v UK they wrote to the Government suggesting they introduce amendments to the bill regarding security of tenure on county council gypsy and traveller sites. The Minister agreed, and the bill was amended at report stage in the Lords, going some though not all the way towards remedying the incompatibility identified in Connors.

Civil Partnership Bill of session 2003-04

The JCHR called on the Government to provide justification for its statement in the Explanatory Notes to the bill that it intended to use the power contained in the bill to amend pensions legislation for surviving civil partners in such a way as to calculate the value of survivor's pensions for civil partners on the basis of future contributions only (15th report 2003-04). This would have meant same-sex partners were treated less favourably than surviving spouses of married heterosexual couples. After initially maintaining the position which had been set out in the Explanatory Notes, the Government announced that regulations would be introduced under the bill to provide for same-sex couples to accrue survivor pensions in public service schemes from 1988, treating them in the same way as married couples.

Draft School Transport Bill of session 2003-04 (draft bill)

The bill made provision for local authorities to develop school travel schemes within a framework approved by the Secretary of State, or the National Assembly in Wales. The JCHR were concerned that if an LEA did provide transport for access to school, it had to do so in a non-discriminatory way (17th and 20th reports 2003-04 and 4th report 2005-06). This had particular relevance where an LEA provided transport for children to go to a denominational school, or to a Welsh-speaking school in Wales, which was not necessarily the nearest school, but did not provide similar schemes for children travelling to non-denominational or English-speaking schools. In its response, the Government agreed to expand the guidance in its prospectus for LEAs on the application of any scheme so as to encompass the points raised by the JCHR.

Mental Capacity Bill of sessions 2003-04 and 2004-05

JCHR raised concerns about safeguards to ensure advance decisions to refuse treatment do not lead to wrong decisions about existence, validity or applicability of advance decision to refuse treatment (23rd report 2003-04, para 2.46). Gov responded by bringing amendments requiring advance decisions concerning life-sustaining treatment to be in writing and signed by the patient (or someone else at his direction) in the presence of a witness who also signs it in P's presence. The Act also states that an advance decision should be verified by a statement by the patient that it is to apply to that treatment even if life is at risk. This was already in Bill but strengthened by amendments that the statement should also be in writing, witnessed etc. (s25(5) and (6))

JCHR raised concerns about withholding/withdrawing ANH where there was no advance directive and that the presumption in favour of life-sustaining treatment was not sufficiently strong in the Bill (23rd report 2003-04, para 2.51). In response the Gov introduced an amendment stating that in relation to life-sustaining treatment, a person considering whether treatment is in the patient's best interests must not be motivated by a desire to bring about his death (s4(5)).

JCHR raised concerns that the Bill could lead to deprivations of liberty which were not compatible with Art 5(1) and could lead to the involuntary placement in hospital of a person lacking capacity and deprive them of the procedural safeguards which apply when they are compulsorily admitted under the Mental Health Act (23rd report, para 2.19). The Gov responded by bringing amendments to confirm that someone does more than merely restrain P if they deprive them of their liberty under Art 5(1).

Baroness Ashton stated on bringing amendments:

"[The amendments] respond directly to particular concerns raised by the Joint Committee on Human Rights. The committee wanted the Bill to confirm expressly that actions amounting to the deprivation of liberty do not fall within the definition of "restraint" used in the Bill. The amendments achieve that." (HL Deb. Vol.670 Col.1469)

The Bill includes a section on research on people lacking capacity. JCHR raised concerns that the Bill required '*reasonable grounds* for believing' that the research would not be as effective if carried out only on persons with capacity which the JCHR saw as a significant dilution of the condition in the Convention on Human Rights and Biomedicine which stipulates as a condition of carrying out such research that 'research of comparable effectiveness *cannot* be carried out on individuals capable of giving consent' (23rd report, para 2.57). The Gov responded by amending the relevant clause (31(3)) to bring it closer to what the Convention says and *"closer to the view of Joint Committee"* (Baroness Andrews, HL Deb. Vol.670 Col.1500-01). There must now be '*reasonable grounds* for believing that research of comparable effectiveness *cannot* be carried out if the project has to be confined to, or relate only to, persons who have capacity to consent to taking part in it' (s31(4)).

As it retains the reasonable belief requirement this amendment does not wholly meet the JCHR recommendation as they say that stating the requirement in terms of reasonable belief contemplates the possibility of research being authorised where in fact there is an alternative (4th report 2004-05, para 4.60).

[All our emphasis added.]

Asylum and Immigration (Treatment of Claimants) Bill of session 2003-04

The bill altered some aspects of the Nationality, Immigration and Asylum Act and proposed the removal of judicial review, referred to as the 'ouster' clause. The clause would have introduced a new section 108A into the Nationality, Immigration and Asylum Act 2002 with the effect of cutting off all appeals to, and judicial review by, the ordinary courts in immigration matters, and excluding habeas corpus applications in immigration cases. It would also have made section 7(1) of the Human Rights Act subordinate to the Nationality, Immigration and Asylum Act 2002, and thereby severely curtailed remedies for violations of Convention rights through the ordinary courts.

The Government admitted the ouster clause might have been capable of "being interpreted as restricting access to the courts to a greater extent than is intended", and stated that the ouster clause was not intended to "affect the remedy of habeas corpus nor any right the person has to damages where he has been unlawfully detained. Nor is it intended to exclude judicial review where a person has no right of appeal against a particular immigration decision. The Government will give consideration to amending this subsection to make its scope clearer". (Gov response to JCHR, published in the 5th report of 2003-04)

The government gave in to the strong pressure to abandon its ouster clause:

"… I have brought forward these amendments to replace the judicial review ouster with a new system allowing oversight by the Administrative Court and Court of Appeal." (Lord Falconer, Hansard, 4 May 2004, Column 995)

This came after the reports of the JCHR and the Select Committee for Constitutional Affairs.[4]

Amendments were brought in response to other JCHR concerns about the bill. The Minister in charge of amendments tabled on Report in the Commons indicated that "the Government amendments respond to concerns raised by the Joint Committee on Human Rights and other hon. Members". (see 19th report 2004-05, para 63)

Equality Bill of sessions 2004-05 and 2005-06

The JCHR expressed concern that the breadth of the exceptions for schools to the duty of non-discrimination on grounds of religion or belief, could permit pupils to be subject to a range of detriments which might not be objectively and reasonably justified in the interests of protecting the rights to freedom of religion of others, in breach of the Convention rights (4th report 2005-06). The Government accepted their view in relation to the exceptions for faith schools and agreed that permitting faith schools to exclude a pupil or subject a pupil to any other detriment on the grounds of religion or belief goes beyond what is needed to protect the freedom of religion of faith schools. At report stage of the Bill in the House of Commons, the Government responded to JCHR concerns by tabling an amendment to clause 50 of the Bill. The amendment restricted the faith schools exception in clause 50(1), so that the exception to the duty of non-discrimination in clause 49 does not permit religious discrimination in exclusions, or allow discrimination in subjecting pupils to "any other detriment". In her response to the JCHR Report the Minister commented that: "while we have no reason to suppose that faith schools do or would discriminate in these respects against children of other faiths or none, we are happy to make it clear that the exception is intended to be limited only to those areas which are essential in order to enable faith schools to continue to operate as such" (5th report 2005-06). Similar comments were made by Meg Munn MP at Report stage in the House of Commons: HC Deb., 16 January 2006, col. 647.

The JCHR argued that a power to seek judicial review under the HRA would be critical to the Commission's effectiveness, and that the Bill's failure to provide for such a power was a "significant flaw" (16th report 2004-05). The Bill was amended in the House of Lords to provide that the Commission may institute or intervene in judicial review proceedings relating to breaches of Convention rights and does not itself need to satisfy the victim test in s.7 HRA in order to do so, provided that there is or would be one or more victims.

ID Cards Bill of session 2005-06

The JCHR pointed out that the retention of records of checks against the Register under Schedule 1 Paragraph 9 of the Bill is likely to build up a comprehensive picture of an individual's employment, use of public services and private transactions, which over time, would amount to a considerable intrusion on the individual's private life. The Government tabled an amendment to clause 1(5)(g) which would restrict the information retained on the Register under that subsection concerning identification numbers and related documents. The JCHR maintained the view that the Bill's provision for the retention of extensive personal information relating to all or large sections of the population may be insufficiently targeted to be justified as proportionate to the statutory aims and may lead to disproportionate interference with Article 8 rights. (1st report 2005-06, para 4.11)

[Recorded on table as not clear JCHR was source of amendment]

4 Hiebert, note 2 above at 35.

Health Bill of session 2005-06

The bill proposes a ban on smoking and the JCHR raised concerns about the differential treatment under Art 14 for exemptions for licensed premises not serving food and membership clubs (6th and 11th reports 2005-06). After correspondence with JCHR and debate in the House on this issue the government introduced an amendment and allowed a free vote on a complete ban on smoking in all enclosed public spaces, which was passed. During debate in Parliament Patricia Hewitt mentioned the Select Committee on Health, which she said made a very important contribution to the debate.

[Recorded on table as not clear JCHR was source of amendment]

Terrorism Bill of session 2005-06

The JCHR had concerns about the offence of Encouragement of Terrorism (3rd report 2005-06). They considered it necessary for this offence either to be restricted to intention or - if it is to be extended beyond intention—that it should be extended only to recklessness; and if it is so extended it should contain a subjective test of recklessness (that is, knowing or being aware of but indifferent to the likelihood that one's statement would be understood as an encouragement to terrorism), rather than the objective test currently contained within it. The Government responded that it had listened to concerns expressed in both Houses of Parliament and accepted that the recklessness test should be subjective rather than objective and the Bill was amended to provide for this.

Table 6: Number of Government Bills reported on by the JCHR before the second reading in the second House

Parliamentary Session	Total number of Government bills considered by JCHR	Number of bills considered before second reading in second House	Number of bills not considered before second reading in second House
2001-02	37	26	11
2002-03	36	29	7
2003-04	35	27	8
2004-05	34	21	7[1]
2005-06[2]	36	25	11

1 6 bills did not proceed to second reading in second House in this session. 5 of these were re-introduced in the next session.

2 Figures correct to 2 June 2006.

TABLE 7: Courts* referring to JCHR Reports

CASE NAME	COURT	DATE	JUDGE	ISSUE	WHAT KIND OF JCHR REFERENCE	AGREE?	HOW USED
R (Limbuela et al) v Secretary of State for the Home Department	HL	03.11.05	Hope	Nationality, Immigration and Asylum Act 2002 (23rd report 01-02)	**Opinion** given on when leg will threaten to breach Art 3/8	No	Quote JCHR opinion.
R (R) v Durham Constabulary	HL	17.03.05	Bingham (para 18)	Sexual Offences Bill (12th report 02-03)	**Concerns** about disproportionate registration burdens on children, eased by DC decision in this case on safeguards	No	Report used by counsel as approving of DC decision, court overrule it.
R (R) v Durham Constabulary	HL	17.03.05	Hale (para 38)	UNCRC (10th report 02-03)	Quote **stats** on children detained to show gov crime prevention strategy not working		Used as evidence to show custodial sentences increasing
R (R) v Durham Constabulary	HL	17.03.05	Hale (para 41)	Sexual Offences Bill (12th report 02-03)	**Concerns** about disproportionate registration burdens on children, eased by DC decision in this case on safeguards	Yes	Use report to argue her doubts about whether scheme breaches CRC but no breach of ECHR
A v Secretary of State for the Home Department	HL	16.12.04	Bingham (para 22-6)	Review of Counter-Terrorism Powers (18th report 03-04)	**Opinion** given that insufficient evidence was given to Parl to make it possible for them to accept derogation is strictly required by exigencies of situation.	No	Quote fed into arguments on imminence, quotes from academics, UN HRC, ministers etc. But gov entitled to conclude there was public emergency
Re McFarland	HL	29.04.04	Steyn (para 27)	Meaning of Public Authority (7th report 03-04)	**Concern** about restrictive interpretation of 'public authority', considers solutions and concludes courts should adopt clear 'functional' approach		"Illuminating" discussion in report fed into argument whether judge, magistrate and jury are public authority. (Pre-HRA facts)
R (Middleton) v West Somerset Coroner	HL	11.03.04	Judgment of court (para 5)	Deaths in Custody (1st report 03-04)	**Evidence** given on number of deaths in custody		Report referred to show suicide not rare, important issue.

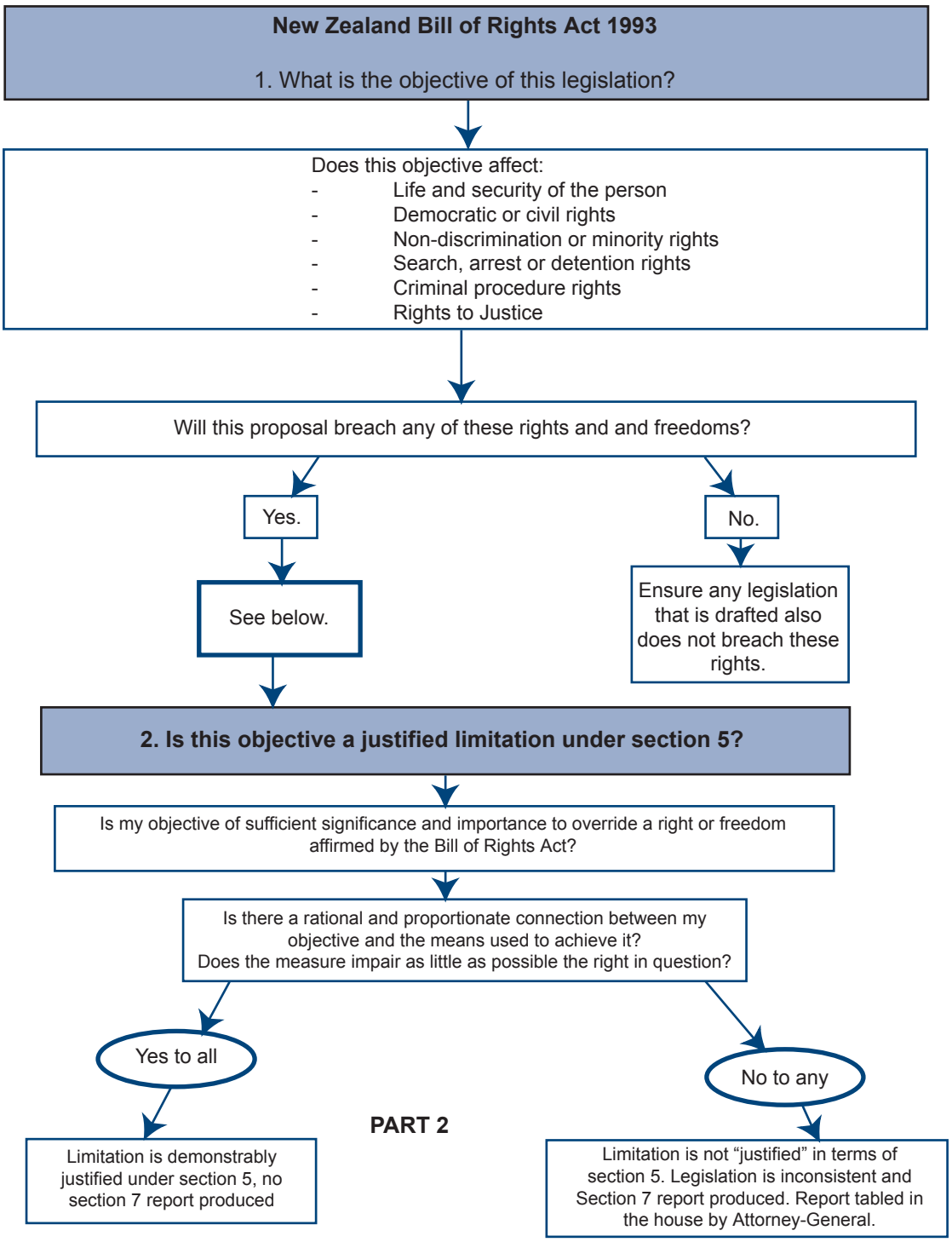
CASE NAME	COURT	DATE	JUDGE	ISSUE	WHAT KIND OF JCHR REFERENCE	AGREE?	HOW USED
R (Sacker) v West Yorkshire Coroner	HL	11.03.04	Judgment of court (para 4)	Deaths in Custody (1st report 03-04)	**Evidence** given on number of deaths in custody		Evidence in report quoted to show scale of problem
DT v Secretary of State for the Home Department	QBD	20.01.04	Hooper (para 88)	UNCRC (10th report 02-03)	Report **quotes** minister saying UK lead role in drafting CRC		Quote minister and cite report
R (M) v Secretary of State for Health	QBD	16.04.03	Kay (para 18)	Making of Remedial Orders (7th report 01-02)	**Review** of remedial order powers, first use etc.		Refer to report as interesting review of routes available to achieve compatibility, but is a matter for Parl and Gov, not the courts.
R (Q et al) v Secretary of State for the Home Department	QBD	19.02.03	Collins (para 8)	Nationality, Immigration and Asylum Act 2002 (23rd report 01-02)	**Concerns** about incompatibility with Art 3/8		Report mentioned when discussing background and justification for policy
A v Secretary of State for the Home Department	CA	25.10.02	Woolf (para 63)	Anti-Terrorism, Crime and Security Bill (2nd and 5th reports 01-02)	**Concerns** about power of detention etc	No	Dismisses each of reports concerns and says reports valuable but don't affect these appeals
R (S and Marper) v Chief Constable of South Yorkshire	CA	12.09.02	Woolf (para 38)	Criminal Justice and Police Bill (1st report 00-01)	**Opinion** given that a breach of Art 8 would be justified.	Yes	Counsel strongly contested correctness of JCHR assessment but court agrees.
Gough v Chief Constable Derbyshire Constabulary	CA	20.03.02	Phillips (para 57)	Anti-Terrorism, Crime and Security Bill (2nd report 01-02)	**Evidence** taken from Secretary of State for the Home Department that suspected terrorists would be free to leave country		Court uses this evidence to ask if it is proportionate to ban football hooligan from leaving country

KEY

"Agree?" If JCHR have expressed an opinion or concerns about possible breach, whether court agrees with their opinion/analysis. Left blank where court is quoting evidence or facts from JCHR report and not their opinion, or quoting their opinion as background information.

**Cases in higher courts, up to 16.03.06*
Source: House of Commons Library

Table 8: New Zealand Legislation Advisory Committee 'Guidelines on Process & Content of Legislation'



Note: *The diagram may be used to access all enactments for consistency with the New Zealand Bill of Rights Act 1990. however, please note that the requirements of sections 7 of the Bill of Rights Act do not apply to regulations.*

Appendix 1 to the Klug Report: People interviewed for this report

JCHR members
Lord Plant (23.06.06)
Douglas Carswell (18.05.06)
Richard Shepherd (24.04.06)
Evan Harris (19.04.06)
Dan Norris (19.04.06)
Lord Bowness (30.03.06)
Lord Lester (30.03.06)
Lord Judd (30.03.06)
Lord Campbell (28.03.06)
Baroness Stern (28.03.06)
Mary Creagh (13.03.06)
Andrew Dismore (09.03.06)

Former JCHR members
Baroness Whitaker (23.03.06)
Baroness Prashar (04.05.06)
Vera Baird (31.05.06)
Jean Corston (28.02.06)

JCHR staff and former staff
Murray Hunt (27.03.06)
Roisin Pillay (23.03.06)
Nick Walker (21.02.06)
Ed Lock
Paul Evans, (former JCHR clerk) Clerk of Delegated Legislation, House of Commons (09.03.06)
Frances Butler, former specialist adviser (06.03.06)

Ministers/Civil Servants
Mike O'Brien, Solicitor General (16.05.06)
Baroness Ashton, Human Rights Minister (22.03.06)
Two senior DCA officials (05.04.06)

Others (**comment provided only*)
Shami Chakrabarti, Director of Liberty*
Roger Smith, Director of Justice*
Katie Ghose, Director of BIHR*
Anneliese Baldaccini, Committee Specialist, House of Lords EU Committee (04.05.06)
Rhodri Walters, Clerk of Committees in the House of Lords (24.04.06)
Clare Ettinghausen, Hansard Society (14.03.06)
Janet Hiebert (23.02.06)

Other committees visited
House of Lords EU Committee (16.05.06)
Public Administration Committee (16.03.06)

Note
Views are only attributed to named individuals where they have specifically requested this or given their permission to do so.

Appendix 2 to the Klug Report: JCHR's Standing Order (House of Commons) and Orders of Reference (House of Lords)

STANDING ORDER NO. 152B OF THE HOUSE OF COMMONS

152B.—(1) There shall be a select committee, to consist of six Members, to join with the committee appointed by the Lords as the Joint Committee on Human Rights.

(2) The committee shall consider—

(a) matters relating to human rights in the United Kingdom (but excluding consideration of individual cases);

(b) proposals for remedial orders, draft remedial orders and remedial orders made under Section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and

(c) in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in Standing Order No. 151 (Statutory Instruments (Joint Committee)).

(3) The committee shall report to the House—

(a) in relation to any document containing proposals laid before the House under paragraph 3 of the said Schedule 2, its recommendation whether a draft order in the same terms as the proposals should be laid before the House; or

(b) in relation to any draft order laid under paragraph 2 of the said Schedule 2, its recommendation whether the draft order should be approved;

and the committee may report to the House on any matter arising from its consideration of the said proposals or draft orders.

(4) The committee shall report to the House in respect of any original order laid under paragraph 4 of the said Schedule 2, its recommendation whether—

(a) the order should be approved in the form in which it was originally laid before Parliament; or

(b) that the order should be replaced by a new order modifying the provisions of the original order; or

(c) that the order should not be approved,

and the committee may report to the House on any matter arising from its consideration of the said order or any replacement order.

(5) The quorum of the committee shall be two.

(6) Unless the House otherwise orders, each Member nominated to the committee shall continue to be a member of it for the remainder of the Parliament.

(7) The committee shall have power—

(a) to send for persons, papers and records, to sit notwithstanding any adjournment of the House, to adjourn from place to place, and to report from time to time; and

(b) to appoint specialist advisers either to supply information which is not readily available or to elucidate matters of complexity within the committee's order of reference.

HOUSE OF LORDS MINUTES OF PROCEEDINGS, 19 JULY 2005

It was moved by the Chairman of Committees that a Select Committee of six Lords be appointed to join with the committee appointed by the Commons as the Joint Committee on Human Rights:

To consider:

(a) matters relating to human rights in the United Kingdom (but excluding consideration of individual cases);

(b) proposals for remedial orders, draft remedial orders and remedial orders made under Section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and

(c) in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in Standing Order 74 (Joint Committee on Statutory Instruments);

To report to the House:

(a) in relation to any document containing proposals laid before the House under paragraph 3 of the said Schedule 2, its recommendation whether a draft order in the same terms as the proposals should be laid before the House; or

(b) in relation to any draft order laid under paragraph 2 of the said Schedule 2, its recommendation whether the draft order should be approved;

and to have power to report to the House on any matter arising from its consideration of the said proposals or draft orders; and

To report to the House in respect of any original order laid under paragraph 4 of the said Schedule 2, its recommendation whether:

(a) the order should be approved in the form in which it was originally laid before Parliament; or

(b) that the order should be replaced by a new order modifying the provisions of the original order; or

(c) that the order should not be approved,

and to have power to report to the House on any matter arising from its consideration of the said order or any replacement order;

That, as proposed by the Committee of Selection, the Lords following be named of the committee:

L. Bowness L. Campbell of Alloway L. Judd L. Lester of Herne Hill L. Plant of Highfield B. Stern;

That the committee have power to agree with the committee appointed by the Commons in the appointment of a chairman;

That the quorum of the committee shall be two;

That the committee have power to adjourn from place to place;

That the committee have leave to report from time to time;

That the committee have power to appoint specialist advisers;

That the minutes of evidence taken before the Human Rights Committee in the last Parliament be referred to the committee;

That the minutes of evidence taken before the committee from time to time shall, if the committee thinks fit, be printed; and

That the committee do meet with the committee appointed by the Commons at four o'clock this day in Committee Room 5.—(*The Chairman of Committees*.)

On Question, Motion agreed to; and a message was ordered to be sent to the Commons to acquaint them therewith.

Appendix 3 to the Klug Report: Core Tasks for Select Committees

	OBJECTIVE A: TO EXAMINE AND COMMENT ON THE POLICY OF THE DEPARTMENT
Task 1	**To examine policy proposals from the UK Government and the European Commission in Green Papers, White Papers, draft Guidance etc, and to inquire further where the Committee considers it appropriate.**
Task 2	**To identify and examine areas of emerging policy, or where existing policy is deficient, and make proposals.**
Task 3	**To conduct scrutiny of any published draft bill within the Committee's responsibilities.**
Task 4	**To examine specific output from the department expressed in documents or other decisions.**
	OBJECTIVE B: TO EXAMINE THE EXPENDITURE OF THE DEPARTMENT
Task 5	**To examine the expenditure plans and out-turn of the department, its agencies and principal NDPBs.**
	OBJECTIVE C: TO EXAMINE THE ADMINISTRATION OF THE DEPARTMENT
Task 6	**To examine the department's Public Service Agreements, the associated targets and the statistical measurements employed, and report if appropriate.**
Task 7	**To monitor the work of the department's Executive Agencies, NDPBs, regulators and other associated public bodies.**
Task 8	**To scrutinise major appointments made by the department.**
Task 9	**To examine the implementation of legislation and major policy initiatives.**
	OBJECTIVE D: TO ASSIST THE HOUSE IN DEBATE AND DECISION
Task 10	**To produce reports which are suitable for debate in the House, including Westminster Hall, or debating committees.**

Appendix 4: Non-departmental select committees formally charged with scrutinising legislation

COMMITTEE	HOUSE	TERMS OF REFERENCE	LEG SCRUTINISED	METHOD	CRITERIA	VOICE
European Scrutiny Committee	Commons	To examine European Union documents and to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected; to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Standing Committees); and to consider any issue arising upon any such document or group of documents, or related matters. [Standing Order No. 143]	Rapidly sifts all proposals under consideration in the Council of Ministers (~1000 per year, reports on ~500 per year)	Gov dept with responsibility for a doc produces an Explanatory Memorandum on it which triggers the scrutiny process. Committee then decides whether it is a politically or legally important doc. If so, will report on it in weekly Report, setting out its progress, any criticisms and whether more info requested from gov. Committee can choose to have doc debated in one of the European Standing Committees or on floor of House. Ministers are constrained by Resolution of the House from agreeing to leg proposals in Council or European Council which the Committee hasn't cleared (with some exceptions).	Will be considered a politically important doc if has sensitive subject matter, financial implications, likely impact on UK. Will be considered legally important if has doubtful legal base, unsupported assertion by Commission of powers to act, difficulties of drafting, impact on existing law.	Committee does not make decision of merits of doc but in assessing its importance and whether it should be debated they might identify potential problems/benefits and question Ministers about them.

COMMITTEE	HOUSE	TERMS OF REFERENCE	LEG SCRUTINISED	METHOD	CRITERIA	VOICE
European Union Select Committee	Lords	To consider European Union documents and other matters relating to the European Union.	Sifts docs but reports on much smaller number than Commons Committee and in considerably greater detail in longer inquiries (~40-50 per year)	Gov dept with responsibility for a doc produces an Explanatory Memorandum which triggers the scrutiny process. The Chairman conducts a 'sift' of these docs and decides which should be referred to the sub-committees for further examination. About a quarter (~250) are referred. Each sub-committee then examines docs and chooses a few each year to conduct substantial inquiry on and make report. Other docs are subject of short inquiry. The committee publishes a report setting out its conclusions and recommendations. By Resolution of House of Lords the gov should not agree an EU law until the Committee has had chance to consider it (with some exceptions).	Sub-committees look at the policy implications of proposals; whether they are properly matters which the EU (rather than the UK) should be legislating for, whether they have been subject to a proper cost analysis and whether they inappropriately delegate power to EU official committees.	Sub-Committees also prepare letters for the Chairman of the Committee to send to Ministers to set out its views. This correspondence is designed to influence the detailed formulation of policy.

COMMITTEE	HOUSE	TERMS OF REFERENCE	LEG SCRUTINISED	METHOD	CRITERIA	VOICE
Joint Committee on Statutory Instruments	Joint	Responsible for scrutinising all statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations do not fall to be scrutinised by JCSI unless they are required to be laid before Parliament.	All statutory instruments made in exercise of powers granted by Act of Parliament.	Scrutinises all statutory instruments made in exercise of powers granted by Act of Parliament with a view to determining whether the special attention of the House should be drawn to it on any of the grounds in the next column, set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 74.	(i) it imposes a charge on public revenues or requires payments to the Exchequer or any gov dept or any local/public authority in consideration of any licence/consent/services to be rendered, or prescribes amount of such charge/payment; (ii) it includes provisions excluding it from challenge in the courts, either at all times or after the expiration of a specific period; (iii) it has retrospective effect where the parent statute confers no express authority so to provide; (iv) unjustifiable delay in the publication or laying of it before Parl; (v) unjustifiable delay in sending a notification under the proviso to s4(1) Statutory Instruments Act, where an instrument has come into operation before it has been laid before Parl; (vi) a doubt whether it is intra vires or it appears to make some unusual or unexpected use of powers conferred by statute under which it is made; (vii) for any special reason its form/purport calls for elucidation; (viii) drafting appears to be defective; or any other ground which does not impinge on its merits or the policy behind it.	House of Commons Standing Order No. 151 and House of Lords Standing Order No. 74 require the committee to report its decision and its reasons.

COMMITTEE	HOUSE	TERMS OF REFERENCE	LEG SCRUTINISED	METHOD	CRITERIA	VOICE
Merits of Statutory Instruments	Lords	Consider (a) every instrument (whether or not a statutory instrument), or draft of instrument, laid before each House and upon which proceedings may be, or might have been, taken in either House under an Act of Parliament; (b) every proposal in the form of a draft of such an instrument laid before each House under an Act of Parliament, with a view to determining whether or not the special attention of the House should be drawn to it. The exceptions are (a) Orders in Council (and draft), under para 1 Schedule to the Northern Ireland Act 2000; (b) remedial orders (and draft), under s10 Human Rights Act 1998; (c) draft orders (and draft subordinate provisions orders) under s1 Regulatory Reform Act 2001, subordinate provisions orders and proposals in the form of a draft order under that Act; (d) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made (and drafts), under them. Also consider other general matters relating to the effective scrutiny of the merits of statutory instruments, except matters within the orders of reference of the Joint Committee on Statutory Instruments.	Consider every instrument and drafts laid before each House. The Committee has had to consider, at times, over 80 instruments a week	Explanatory Memoranda usually provide sufficient information to enable the Committee to reach a conclusion. In some cases further information is needed and requested by the Committee. It is provided either by correspondence or over the telephone to the secretariat. Where the committee believes the further information would assist the House they publish it in an appendix to their report under the heading "correspondence" or "explanatory information". In researching the policy background of instruments, the Committee's secretariat has developed a range of contacts in the public and private sector, and the committee has, on occasion, received submissions from outside organisations.	The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House; (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act; (c) that it may inappropriately implement European Union legislation; (d) that it may imperfectly achieve its policy objectives.	Role is to identify instruments of interest and offer preliminary view on aspect which causes concern. It is for House to decide whether instrument is at fault or of such significance that it should be debated. Committee reported that its TERMS OF REFERENCE do not quite reflect its function as a "sifting" committee but suggest that it should make conclusive findings. They recommend the TERMS OF REFERENCE should be amended accordingly.

COMMITTEE	HOUSE	TERMS OF REFERENCE	LEG SCRUTINISED	METHOD	CRITERIA	VOICE
Delegated Powers and Regulatory Reform Select Committee	Lords	Appointed by the Lords in each session to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate level of parl scrutiny, to report on documents and draft orders laid before Parl under the Regulatory Reform Act 2001 and to perform, in respect of such documents and orders and subordinate provisions orders laid under that Act, the functions performed in respect of other instruments by the Joint Committee on Statutory Instruments	1) Bills to see if the provisions inappropriately delegate legislative power or if they subject the exercise of legislative power to an inappropriate level of parl scrutiny. 2) Regulatory reform order introduced under the Regulatory Reform Act 2001.	Committee takes evidence in writing on each Public Bill from gov dept. The written evidence identifies the provisions for delegated legislation, describes their purpose, explains why the matter has been left to delegated legislation and explains the degree of parliamentary control provided for the exercise of each power (affirmative, negative or none at all) and why it is thought appropriate. The committee may also hear oral evidence. The committee issues separate reports on bills and regulatory reform orders.	In examining a bill the Committee considers i) whether the power to make secondary leg is appropriate, expressing a view on whether the subject matter is so important it should only be regulated by primary leg; ii) always pays special attention to 'Henry VIII' powers; iii) considers what form of parl control is appropriate and whether proposed power calls for affirmative rather than negative resolution procedure. In considering a proposed regulatory reform order the Committee asks i) whether its subject matter is appropriate for the regulatory reform procedure; ii) is it intra vires; iii) if it removes a burden; vi) whether 'necessary protections' are maintained; v) if it would prevent anyone from exercising an existing right or freedom which they might reasonably expect to continue to exercise; vi) whether consultation has been adequate.	Committee's role is to advise the House of Lords. It is for the Lords to decide whether or not to act on the Committee's recommendations

COMMITTEE	HOUSE	TERMS OF REFERENCE	LEG SCRUTINISED	METHOD	CRITERIA	VOICE
Constitution Committee	Lords	To examine the constitutional implications of all public bills coming before the House and to keep under review the operation of the constitution. The Committee has defined 'the constitution' as "the set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual".	Assisted by a Legal Adviser, the Committee considers the constitutional implications of all public bills introduced to the HL.	The Committee asks whether the bill raises issues of principle affecting a principal part of the constitution. If a bill appears to do so, the Committee may request info/clarification from the Minister or may seek advice more widely. May invite Minister to give evidence or exchange letters. If info/advice is obtained that would assist the House in considering the bill, the Committee reports the evidence to the House as well as publishing any conclusions that it has reached or drawing the attention of the House to specific provisions of the bill.	Considers whether bill makes a significant change in the system of gov or in the relations between the state and the individual, or is consistent with similar legislation in other areas of gov. If new decision-making powers are conferred on a public authority, Committee considers whether procedure provided for appeals, review and redress of grievances is satisfactory, and whether the bill makes clear division between matters for which ministers are responsible and for which authority is devolved to autonomous office-holders. Attention is most likely to be engaged by significant leg proposals that affect the relationship between the executive and judicial system, system of civil and criminal justice, integrity of the leg process, democratic process, distribution of powers between central executive, devolved institutions and local gov, public accountability and fundamental principles relating to good gov, liberty and rule of law.	The Committee does not form a view on the merits of a bill. It reports evidence to the House as well as any conclusions it has reached or draws the attention of the House to specific provisions of the bill.

COMMITTEE	HOUSE	TERMS OF REFERENCE	LEG SCRUTINISED	METHOD	CRITERIA	VOICE
Regulatory Reform Committee	Commons	The Committee's role is to undertake on behalf of the House of Commons the scrutiny of regulatory reform proposals and draft orders	Scrutiny of regulatory reform proposals and draft orders	Receives copies of all consultation documents issued by the Government. Formal duties begin when Gov lays before Parl a proposal for an order. Committee considers proposal and explanatory statement and has access to all non-confidential responses to Gov consultation. Committee may seek further written or oral evidence either from the Gov Dept or other interested parties. Once satisfied it has all information it requires, it makes a substantive report to the House assessing the proposal against all the relevant criteria. Committee also reports formally to the House either that a draft order in the same terms as the proposal should be laid before the House, that the proposal should be amended before a draft order is laid before the House, or that the order-making power should not be used in respect of the proposal. Committee considers extent to which the Minister has had regard to its report and to any other representations made. It considers whether any further evidence, written or oral, is required before it is able to come to a decision. It is required to report formally to the House within fifteen sitting days its recommendation whether the draft order should be approved. It also makes a further substantive report to the House on the draft order.	Consider in each case whether the proposal: (a) appears to make an inappropriate use of delegated legislation (b) removes or reduces a burden or the authorisation or requirement of a burden (c) continues any necessary protection (d) has been the subject of, and takes appropriate account of, adequate consultation (e) imposes a charge on the public revenues or contain provisions requiring payments to be made to the Exchequer or any government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payment (f) purports to have retrospective effect (g) gives rise to doubts whether it is intra vires (h) requires elucidation, is not written in plain English or appears to be defectively drafted (i) appears to be incompatible with any obligation resulting from membership of the European Union (j) prevents any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise (k) satisfies the conditions of proportionality between burdens and benefits set out in sections 1 ["proportionality"] and 3 ["fair balance"] of the Act (l) satisfies the test of desirability set out in section 3(2)(b) of the Act (m) has been the subject of, and takes appropriate account of, estimates of increases or reductions in costs or other benefits which may result from their implementation, and (n) includes provisions to be designated in the draft order as subordinate provisions; and if so, to what Parliamentary procedure any subordinate provisions order should be subject.	If Committee recommends unanimously that the draft order should be approved, the question is put forthwith, without debate. If Committee's recommendation that the draft order should be approved is made only after a division in Committee, there may be up to an hour and a half's debate on the motion to approve the draft order. If Committee recommends that the draft order should not be approved, there may be up to three hours' debate on a motion to disagree with the Committee's report, following which, if that motion is agreed to, the motion to approve the draft order is put forthwith, with no further debate.

Appendix 2: Correspondence from The Lord Brabazon of Tara DL, Chairman of Committees, House of Lords

LETTER DATED 24 JANUARY 2006 RE LONDON LOCAL AUTHORITIES BILL

In its 18th Report of last session, the JCHR made an interim report on the London Local Authorities Bill [HE] (a private bill), noting that its provisions would engage, or would be likely to engage, various rights under the Articles of the European Convention on Human Rights. The Committee concluded that, "Should [the bill] be reintroduced in the next Parliament, our successor committee may wish to scrutinise its terms further".

The bill was indeed revived in this session and received its second reading in the House of Lords on 5th July 2005. I would be grateful if you could let me know whether the JCHR is likely to report on the bill before the beginning of its Committee stage, which is due to begin on Monday 13 March.

I am particularly keen to hear the Committee's view, given the report in January 2005 by the then Minister of State for Housing and Planning, the Rt Hon Keith Hill MP, that the promoters had failed to make an adequate assessment of the compatibility of their proposals with the ECHR in respect of clauses 78(1), and clauses 117–120.

As there are a number of other private bills which may go into Committee in the next few months, I would also be grateful to know the JCHR's intentions more generally as regards the scrutiny of private bills, as this may affect the timing of future Select Committees.

24 January 2006

LETTER DATED 8 MAY 2006 RE HUMAN RIGHTS SCRUTINY OF PRIVATE BILLS

Following our correspondence earlier this year, I am again writing to ask whether the JCHR will be able to report on certain private bills. The JCHR's report on the London Local Authorities Bill greatly assisted the Committee on that bill, and I am grateful to you for producing it in time to assist its deliberations.

The bill which is in greatest need of a report by the JCHR is the London Local Authorities and Transport for London Bill. In its 18th Report of last session, the JCHR made an interim report on this bill, and noted that its provisions engaged Convention Rights. The Committee concluded that, "Should the Bill be reintroduced in the next Parliament, our successor committee may wish to return to this Bill and to engage in more detailed scrutiny of its terms."

The bill was indeed revived in this session and received its second reading in the House of Lords on 1 February 2006.

I would be grateful if the JCHR were able to report on the bill before the beginning of its Committee stage, which is likely to take place on 26–27 June.

As a secondary consideration, the Department for Trade and Industry has raised a Human Rights point in its report on the Leicester City Council, Liverpool City Council and Maidstone Borough Council bills. These bills, which are identical except for the names and locations, are likely to be considered in Committee in early July. Again, I would be grateful if the JCHR were able to report on these bills before then.

8 May 2006

LETTER DATED 9 MAY 2006 RE JOINT COMMITTEE ON HUMAN RIGHTS: WORKING METHODS

At its meeting on 8 May, the House of Lords Liaison Committee (which I chair) discussed briefly the review currently being undertaken into the working methods of the Joint Committee.

In their discussion, members of the Committee were very complimentary about the work of the Joint Committee in scrutiny of bills. As you know, I myself value highly the advice of your Committee on private legislation (for which I am responsible in this House).

The Liaison Committee asked me to write to you to record the value which it—and, indeed, the House as a whole—places on the scrutiny service you provide. While there may well be scope for an element of selectivity in the amount of detail presented in the Joint Committee's reports, the Liaison Committee of this House hopes that a comprehensive bill scrutiny service (at least of government and private bills) will be preserved, whatever other adjustments your Committee may decide to make in the light of the review.

I am sending a copy of this letter to the Lords' members of the Joint Committee and to its two Clerks.

9 May 2006

Appendix 3: DCA Table of Declarations of Incompatibility made under section 4 of the Human Rights Act 1998

Part 1: These are the declarations of incompatibility we are aware of which have been made under section 4 of the Human Rights Act 1998 in respect of provisions in primary legislation, and which have not been overturned on appeal (although some remain subject to appeal – see the "comments" column). Declarations of incompatibility which have been overturned on appeal are set out in Part 2 of the table below.

CASE NAME AND DESCRIPTION	DATE	CONTENT OF THE DECLARATION	COMMENTS
R (on the application of H) v Mental Health Review Tribunal for the North and East London Region & The Secretary of State for Health (Court of Appeal) [2001] EWCA Civ 415 *The case concerned a man who was admitted under section 3 of the Mental Health Act 1983 and sought discharge from hospital.*	28 Mar 2001	Sections 72 and 73 of the Mental Health Act 1983 were incompatible with Article 5(1) and 5(4) in as much as they did not require a Mental Health Review Tribunal to discharge a patient where it could not be shown that he was suffering from a mental disorder that warranted detention.	The legislation was amended by the Mental Health Act 1983 (Remedial) Order 2001 (SI 2001 No.3712) **(In force 26 Nov 2001)**
McR's Application for Judicial Review (Kerr J) [2003] NI 1 *The case concerned a man who was charged with the attempted buggery of woman. He argued that the existence of the offence of attempted buggery was in breach of Article 8.*	15 Jan 2002	Section 62 of the Offences Against the Person Act 1861 (attempted buggery), which continued to apply in Northern Ireland, was incompatible with Article 8 to the extent that it interfered with consensual sexual behaviour between individuals.	Section 62 was repealed in NI by the Sexual Offences Act 2003, sections 139, 140, Schedule 6 paragraph 4 and Schedule 7. **(In force 1 May 2004)**
International Transport Roth GmbH v Secretary of State for the Home Department (Court of Appeal, upholding Sullivan J) [2002] EWCA Civ 158 *The case involved a challenge to a penalty regime applied to carriers who unknowingly transported clandestine entrants to the UK.*	22 Feb 2002	The penalty scheme contained in Part II of the Immigration and Asylum Act 1999 was incompatible with Article 6 because the fixed nature of the penalties offended the right to have a penalty determined by an independent tribunal. It also violated Article 1 of Protocol 1 as it imposed an excessive burden on the carriers.	The legislation was amended by the Nationality, Immigration and Asylum Act 2002, section 125, and Schedule 8. **(In force 8 Dec 2002)**

CASE NAME AND DESCRIPTION	DATE	CONTENT OF THE DECLARATION	COMMENTS
R (on the application of Anderson) v Secretary of State for the Home Department (House of Lords) [2002] UKHL 46 *The case involved a challenge to the Secretary of State for the Home Department's power to set the minimum period that must be served by a mandatory life sentence prisoner.*	25 Nov 2002	Section 29 of the Crime (Sentences) Act 1997 was incompatible with the right under Article 6 to have a sentence imposed by an independent and impartial tribunal in that the Secretary of State decided on the minimum period which must be served by a mandatory life sentence prisoner before he was considered for release on licence.	The law was repealed by the Criminal Justice Act 2003, sections 303(b)(I), 332 and Schedule 37, Pt 8. Transitional and new sentencing provisions were contained in Chapter 7 and Schedule 21 and 22 of that Act. **(Date power repealed 18 Dec 2003)**
R v Secretary of State for the Home Department, ex parte D (Stanley Burnton J) [2002] EWHC 2805 *The case involved a challenge to the Secretary of State for the Home Department's discretion to allow a discretionary life prisoner to obtain access to a court to challenge their continued detention.*	19 Dec 2002	Section 74 of the Mental Health Act 1983 was incompatible with Article 5(4) to the extent that the continued detention of discretionary life prisoners who had served the penal part of their sentence depended on the exercise of a discretionary power by the executive branch of government to grant access to a court.	The law was amended by the Criminal Justice Act 2003 section 295. **(In force 20 Jan 2004)**
Blood and Tarbuck v Secretary of State for Health (Sullivan J) Unreported *The case concerned the rules preventing a deceased father's name from being entered on the birth certificate of his child.*	28 Feb 2003	Section 28(6)(b) of the Human Fertilisation and Embryology Act 1990 was incompatible with Article 8, and/or Article 14 taken together with Article 8, to the extent that it did not allow a deceased father's name to be given on the birth certificate of his child.	The law was amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003. **(In force 1 Dec 2003)**
Bellinger v Bellinger (House of Lords) [2003] UKHL 21 *A post-operative male to female transsexual appealed against a decision that she was not validly married to her husband, by virtue of the fact that at law she was a man.*	10 Apr 2003	Section 11(c) Matrimonial Causes Act 1973 was incompatible with Articles 8 and 12 in so far as it makes no provision for the recognition of gender reassignment.	In *Goodwin v UK* (11 Jul 2002) the ECtHR identified the absence of any system for legal recognition of gender change as a breach of Articles 8 and 12. This was remedied by the Gender Recognition Act 2004. **(In force 4 April 2005)**

CASE NAME AND DESCRIPTION	DATE	CONTENT OF THE DECLARATION	COMMENTS
R (on the application of M) v Secretary of State for Health (Maurice Kay J) [2003] EWHC 1094 *The case concerned a patient who lived in hostel accommodation but remained liable to detention under the Mental Health Act 1983. Section 26 of the Act designated her adoptive father as her "nearest relative" even though he had abused her as a child.*	16 Apr 2003	Sections 26 and 29 of the Mental Health Act 1983 were incompatible with Article 8, in that the claimant had no choice over the appointment or legal means of challenging the appointment of her nearest relative.	It is proposed to amend these provisions through a forthcoming Mental Health Bill.
R (on the application of Hooper and others) v Secretary of State for Work and Pensions (Court of Appeal, upholding Moses J) [2003] EWCA Civ 875 (The declaration was unaffected by subsequent House of Lords ruling [2005] UKHL 29 on 5 May 2005) *The case concerned Widowed Mothers Allowance which was payable to women only and not to men.*	18 Jun 2003	Sections 36 and 37 of the Social Security Contributions and Benefit Act 1992 were in breach of Article 14 in combination with Article 8 and Article 1 of Protocol 1 in that benefits were provided to widows but not widowers.	The law had already been amended at the date of the judgment by the Welfare Reform and Pensions Act 1999, section 54(1). **(In force 9 Apr 2001)**
R (on the application of Wilkinson) v Inland Revenue Commissioners (Court of Appeal, upholding Moses J) [2003] EWCA Civ 814 (The declaration was unaffected by subsequent House of Lords ruling [2005] UKHL 30 on 5 May 2005) *The case concerned the payment of Widows Bereavement Allowance to widows but not widowers.*	18 Jun 2003	Section 262 of the Income and Corporation Taxes Act 1988 was incompatible with Article 14 when read with Article 1 of Protocol 1 in that it discriminated against widowers in the provision of Widows Bereavement Allowance.	The section declared incompatible was no longer in force at the date of the judgment having already been repealed by the Finance Act 1999 sections 34(1), 139, Schedule 20. **(In force in relation to deaths occurring on or after 6 Apr 2000)**

CASE NAME AND DESCRIPTION	DATE	CONTENT OF THE DECLARATION	COMMENTS
A and others v Secretary of State for the Home Department (House of Lords) [2004] UKHL 56 *The case the detention under the Anti-terrorism, Crime and Security Act 2001 of foreign nationals who had been certified by the Secretary of State as suspected international terrorists, and who could not be deported without breaching Article 3. They were detained without charge or trial in accordance with a derogation from Article 5(1) provided by the Human Rights Act 1998 (Designated Derogation) Order 2001.*	16 Dec 2004	The Human Rights Act 1998 (Designated derogation) Order 2001 was quashed because it was not a proportionate means of achieving the aim sought and could not therefore fall within Article 15. Section 23 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with Articles 5 and 14 as it was disproportionate and permitted the detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status.	The provisions were repealed by the Prevention of Terrorism Act 2005, which put in place a new regime of control orders. **(In force 11 Mar 2005)**
R (on the application of Sylviane Pierrette Morris) v Westminster City Council & First Secretary of State (Court of Appeal, upholding Keith J) [2005] EWCA Civ 1184 *The case concerned an application for local authority accommodation by a single mother (a British citizen) whose child was subject to immigration control.*	14 Oct 2005	Section 185(4) of the Housing Act 1996 was incompatible with Article 14 to the extent that it requires a dependent child who is subject to immigration control to be disregarded when determining whether a British citizen has priority need for accommodation.	DCLG are considering how to remedy the incompatibility.
R (Gabaj) v First Secretary of State (Administrative Court) (unreported) *The case was a logical extension of the declaration granted in the case of Morris above, except that it was the claimant's pregnant wife, rather than the claimant's child, who was a person from abroad.*	28 Mar 2006	That section 185(4) of the Housing Act 1996 is incompatible with article 14 European Convention on Human Rights to the extent that it requires a pregnant member of the household of a British citizen, if both are habitually resident in the United Kingdom, to be disregarded when determining whether the British citizen has a priority need for accommodation or is homeless, when the pregnant member of the household is a person from abroad who is ineligible for housing assistance.	DCLG are considering how to remedy the incompatibility.

CASE NAME AND DESCRIPTION	DATE	CONTENT OF THE DECLARATION	COMMENTS
R (on the application of Baiai and others) v Secretary of State for the Home Department and another (Silber J) [2006] EWHC 823 (Admin) and [2006] EWHC 1454 (Admin) (both to be read together) *The case concerned the procedures, put in place to deal with sham marriages, which persons subject to immigration control are required to go through before they can marry in the UK.*	10 April 2006 and 16 June 2006	Except in relation to cases involving illegal immigrants, section 19(3) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 is incompatible with (a) Article 12 of the European Convention on Human Rights in that it is disproportionate and (b) Articles 14 and 12 in that it discriminates unjustifiably on grounds of nationality and religion.	The judgment is subject to appeal by the Home Office.
Re MB (Sullivan J) [2006] EWHC 1000 (Admin) *The case concerned the Secretary of State's decision to make a non-derogating control order under s2 of the Prevention of Terrorism Act 2005 against MB, who he believed intended to travel to Iraq to fight against coalition forces*	12 April 2006	The procedure provided by the 2005 Act for supervision by the court of non-derogating control orders was held incompatible with MB's right to a fair hearing under Article 6 ECHR (right to a fair trial).	The judgment is subject to appeal by the Home Office.

Part 2: These are the declarations of incompatibility we are aware of which have been made under section 4 of the Human Rights Act 1998 in respect of provisions in primary legislation, but which were subsequently overturned on appeal.

Declarations of incompatibility made but overturned on appeal

CASE NAME AND COURT THAT MADE THE DECLARATION	DATE OF ORIGINAL DECISION	SUBSTANCE OF DECLARATION OF INCOMPATIBILITY	COURT THAT OVERTURNED DECLARATION
R (Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions (Divisional Court, Harrison J & Tuckey L.J) [2001] HRLR 2 *The Secretary of State's powers to determine planning applications were challenged on the basis that the dual role of the Secretary of State in formulating policy and taking decisions on applications inevitably resulted in a situation whereby applications could not be disposed of by an independent and impartial tribunal.*	13 Dec 2000	The Secretary of State's powers to determine planning applications were in breach of Article 6(1), to the extent that the Secretary of State as policy maker was also the decision-maker. A number of provisions were found to be in breach of this principle, including the Town and Country Planning Act 1990, sections 77, 78 and 79.	The House of Lords overturned the declarations. 9 May 2001 [2001] UKHL 23
Wilson v First County Trust Ltd (No.2) (Court of Appeal) [2001] EWCA Civ 633 The case concerned a pawnbroker who entered into a regulated loan agreement but did not properly execute the agreement so that the permission of the court was required to enforce it.	2 May 2001	Section 127(3) of the Consumer Credit Act 1974 was declared incompatible with the Article 6 and Article 1 Protocol 1 by the Court of Appeal to the extent that it caused an unjustified restriction to be placed on a creditors enjoyment of contractual rights.	The House of Lords overturned the declaration. 10 Jul 2003 [2003] UKHL 40

CASE NAME AND COURT THAT MADE THE DECLARATION	DATE OF ORIGINAL DECISION	SUBSTANCE OF DECLARATION OF INCOMPATIBILITY	COURT THAT OVERTURNED DECLARATION
Matthews v Ministry of Defence (Keith J) [2002] EWHC 13 The case concerned a navy engineer who came into contact with asbestos lagging on boilers and pipes. As a result he developed pleural plaques and fibrosis. The Secretary of State issued a certificate that stated that M's injury had been attributable to service and made an award of no fault compensation. The effect of the certificate, made under section 10 of the Crown Proceedings Act 1947, was to preclude the engineer from pursuing a personal injury claim for damages from the Navy due to the Crown's immunity in tort during that period. The engineer claimed this was a breach of Article 6.	29 May 2002	Section 10 of the Crown Proceedings Act 1947 was incompatible with Article 6 of the ECHR in that it was disproportionate to any aim that it had been intended to meet.	The House of Lords upheld the Court of Appeal decision to overturn the declaration. 13 Feb 2003 [2003] UKHL 4
R (Uttley) v Secretary of State for the Home Department (Moses J) [2003] EWHC 950 *The case concerned a prisoner who argued that his release on license was an additional penalty to which he would not have been subject at the time he was sentenced.*	8 Apr 2003	Sections 33(2), 37(4)(a) and 39 of the Criminal Justice Act 1991 were incompatible with the claimant's rights under Article 7, insofar as they provided that he would be released at the two-thirds point of his sentence on licence with conditions and be liable to be recalled to prison.	The House of Lords overturned the declaration. 30 Jul 2004 [2004] UKHL 38

CASE NAME AND COURT THAT MADE THE DECLARATION	DATE OF ORIGINAL DECISION	SUBSTANCE OF DECLARATION OF INCOMPATIBILITY	COURT THAT OVERTURNED DECLARATION
R (on the Application of MH) v Secretary of State for Health (Court of Appeal) [2004] EWCA Civ 1609 *The case concerned a patient who was detained under section 2 of the Mental Health Act 1983 and was incompetent to apply for discharge from detention. Her detention was extended by operation of provisions in the Mental Health Act 1983.*	3 Dec 2003	Section 2 of the Mental Health Act 1983 is incompatible with Article 5(4) of the ECHR in so far as: **(i)** it is not attended by provision for the reference to a court of the case of an incompetent patient detained under section 2 in circumstances where a patient has a right to make application to the MHRT but the incompetent patient is incapable of exercising that right; and **(ii)** it is not attended by a right for a patient to refer his case to a court when his detention is extended by the operation of section 29(4).	The House of Lords overturned the declaration. 20 Oct 2005 [2005] UKHL 60

This table has been prepared for information by lawyers in the Department for Constitutional Affairs. We have endeavoured to make it comprehensive, but if you are aware of any omissions or errors please contact James Adutt at james.adutt@dca.gsi.gov.uk

Last updated 16 June 2006

Appendix 4: Recent correspondence received in relation to declarations of incompatibility

1. LETTER FROM PHIL WOOLAS MP, MINISTER FOR LOCAL GOVERNMENT, OFFICE OF THE DEPUTY PRIME MINISTER, DATED 27 OCTOBER 2005, RE DECLARATION BY THE COURT OF APPEAL THAT SECTION 185(4) OF THE HOUSING ACT 1996 IS INCOMPATIBLE WITH ARTICLE 14 ECHR

This letter is to inform the Committee that a declaration of incompatibility has been made by the Court of Appeal, in the case of *R (on the application of Sylviane Pierrette Morris) v Westminster City Council* [2005] EWHC 1184 (CA). The decision upholds (with amendment) a declaration made by the High Court, which we previously drew to your attention.

The Court of Appeal also considered the case of *R (on the application of Joseph Papa Badu) v The London. Borough of Lambeth*, which raised similar issues.

The court has declared that section 185(4) of the Housing Act 1996 is incompatible with Article 14 of the Convention, to the extent that it requires a dependent child of a British citizen, if both are habitually resident in the United Kingdom, to be disregarded when determining whether the British citizen has a priority need for accommodation, when that child is subject to immigration control.

Section 185(4) is a provision of the homelessness legislation that prohibits a housing authority from taking account of a person from abroad who is ineligible for assistance when deciding whether another person (i.e. a homeless applicant) is homeless or has a priority need for accommodation. Who is a person from abroad who is ineligible for assistance is set out partly in the primary legislation itself, but categories of person can be included, or excluded, by the Secretary of State making regulations.

The First Secretary of State is considering the court's declaration and we will write to the Committee again when he has decided his response.

27 October 2005

2. LETTER FROM ALAN EDWARDS, HOMELESSNESS AND HOUSING SUPPORT, OFFICE OF THE DEPUTY PRIME MINISTER DATED 2 MARCH 2006 RE DECLARATION BY THE COURT OF APPEAL THAT SECTION 185(4) OF THE HOUSING ACT 1996 IS INCOMPATIBLE WITH ARTICLE 14 ECHR

Phil Woolas' letter of 27 October 2005 informed the Committee that a declaration of incompatibility had been made by the Court of Appeal, in the case of *R (on the application of Sylviane Pierrette Morris) v Westminster City Council* [2005] EWHC 1184 (CA).

This letter is to inform the Committee that the First Secretary of State has decided not to appeal against the decision of the Court of Appeal. The First Secretary of State is currently considering how to remedy the incompatibility, and will write to the Committee again as soon as he has reached a decision on this matter.

Should the Committee require any further information, please do not hesitate to contact me.

3 March 2006

3. Letter from Alan Edwards, Homelessness and Housing Support, Office of the Deputy Prime Minister dated 20 April 2006 re Declaration by the Court of Appeal that Section 185(4) of the Housing Act 1996 is incompatible with Article 14 ECHR

Further to my letter of 3 March 2006 concerning a declaration of incompatibility made by the Court of Appeal, in the case of *R (on the application of Sylviane Pierrette Morris) v Westminster City Council*, this letter is to inform the Committee that a further declaration of incompatibility has been made regarding section 185(4) of the Housing Act 1985.

On 28 March, in the case of *The Queen (on the application of) Gabaj and the First Secretary of State*, CO 7458/2005, the High Court made a declaration that section 185(4) Housing Act 1996 is incompatible with article 14 European Convention on Human Rights to the extent that it requires a pregnant member of the household of a British citizen, if both are habitually resident in the United Kingdom, to be disregarded when determining whether the British citizen has a priority need for accommodation when the pregnant member of the household is a person from abroad who is ineligible for housing assistance.

The declaration was made at the request of the Claimant and the second Defendant. Section 185(4) is a provision of the homelessness legislation that prohibits a housing authority from taking account of a person from abroad who is ineligible for assistance when deciding whether another person (i.e. a homeless applicant) is homeless or has a priority need for accommodation.

The First Secretary of State is currently considering how to remedy the incompatibility of the provision with Article 14, and will write to the Committee again as soon as he has reached a decision on this matter.

Should the Committee require any further information, please do not hesitate to contact me.

20 April 2006

4. Letter from Yvette Cooper MP, Minister for Housing and Planning, Department for Communities and Local Government dated 27 June 2006 re Section 185(4) of the Housing Act 1996: Declarations of incompatibility in Morris v Westminster & Gabaj v Bristol

Alan Edwards of this Department (then the Office of the Deputy Prime Minister) wrote to you on 3 March to advise that the First Secretary of State had decided not to appeal against the declaration of incompatibility made by the Court of Appeal on 14 October 2005 in the case of *Sylviane Pierrette Morris v Westminster City Council* [2005] EWHC 1184 (CA). The declaration concerned section 185(4) of the Housing Act 1996.

He also wrote, on 20 April, to advise you of a further declaration in respect of section 185(4), made by the High Court on 28 March in the case of *The Queen (on the application of) Gabaj and the First Secretary of State*, CO 7458/2005.

I am writing to advise you that the Government has given this matter careful consideration but the Secretary of State has not yet come to a decision whether to repeal or amend section 185(4). This matter raises some important policy issues and consequently further consideration and consultation with other Government departments will be necessary before a final decision can be made. However, I should like to assure the Committee that the Government intends to remedy the incompatibility as quickly as possible.

I will write to the Committee as soon as a decision is made.

27 June 2006

5. LETTER FROM HOUSING LAW PRACTITIONERS' ASSOCIATION DATED 29 JUNE 2006 RE MORRIS V FIRST SECRETARY OF STATE V WESTMINSTER CITY COUNCIL [2005]

I am writing to you on behalf of members of the Housing Law Practitioners Association (HLPA) about the case *Morris v Westminster* CA 2005, EWCA Civ 1184, which declared s185 (4) of the Housing Act 1996 incompatible with Article 14 of the European Convention on Human Rights.

HLPA is an organisation of solicitors, barristers, advice workers, independent environmental health officers and others who work in the field of housing law. Members work in housing law for the benefit of homeless people, tenants and other occupiers of housing.

The Court of Appeal declared s 185(4) of the Housing Act 1996 incompatible with Article 14 of the ECHR to the extent that it requires a dependant child of a British citizen, the child being subject to immigration control, to be disregarded when determining whether the British citizen has a priority need for accommodation under s 189(l)(b) of the Act.

The declaration of incompatibility leaves the offending legislation in force s 3(2) of the 1998 Act and local housing authorities obliged to comply with it. HLPA has conducted a survey amongst its members, which shows that the factual situation that led to the declaration regularly occurs. Therefore without legislation or a remedial action decisions contrary to the Convention will continue to be made. The result is that those who should be entitled to accommodation under the Housing Act are being denied it.

I understand that the Government wrote to the Joint Committee on Human Rights (JCHR) on 3 March 2006 to inform the committee that they will not be appealing against the Court of Appeal decision and that the matter is currently under consideration. If the JCHR should require further assistance, HLPA would welcome the opportunity to provide you with evidence about the impact of the factual situation that regularly occurs including the impact on families and children and explain why some form of legislation or a remedial action needs to be made a priority.

29 June 2006

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/ HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888

Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/ HC 701-I
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume II Oral and Written Evidence	HL Paper 185-II/ HC 701-II
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547