Scrutiny of bills : final progress report : twenty-third report of session 2003-04 : report, together with formal minutes and appendices / Joint Committee on Human Rights.

House of Lords
House of Commons

Joint Committee on Human Rights

Scrutiny of Bills: Final Progress Report

Twenty-third Report of Session 2003–04

Drawing special attention to:

Constitutional Reform Bill
Mental Capacity Bill
Housing Bill
Anti-social Behaviour Bill
Criminal Justice (Justifiable Conduct) Bill
Domestic Energy Efficiency Bill
Doorstep Selling (Property Repairs) Bill
Organ Donation (Presumed Consent and Safeguards) Bill
Prevention of Homelessness Bill
Rite of Passage (Welcoming and Coming of Age) Bill

HL Paper 210
HC 1282

House of Lords
House of Commons

Joint Committee on Human Rights

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Twenty-third Report of Session 2003–04

Report, together with formal minutes and appendices

Ordered by The House of Lords to be printed
17 November 2004
Ordered by The House of Commons to be printed
17 November 2004

HL Paper 210
HC 1282
Published on 29 November 2004 by authority of the House of Lords and the House of Commons London: The Stationery Office Limited
£13.50

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
Lord Bowness
Lord Campbell of Alloway
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Prashar

HOUSE OF COMMONS
Mr David Chidgey MP (Liberal Democrat, *Eastleigh*)
Jean Corston MP (Labour, *Bristol East*) (*Chairman*)
Mr Kevin McNamara MP (Labour, *Kingston upon Hull*)
Mr Richard Shepherd MP
(Conservative, *Aldridge-Brownhills*)
Mr Paul Stinchcombe (Labour, *Wellingborough*)
Mr Shaun Woodward MP (Labour, *St Helens South*)

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. A list of Reports of the Committee in the present Parliament is at the back of this volume.

Current Staff

The current staff of the Committee are: Nick Walker (Commons Clerk), Ed Lock (Lords Clerk), Murray Hunt (Legal Adviser), Róisín Pillay (Committee Specialist), Duma Langton (Committee Assistant) and Pam Morris (Committee Secretary).

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Summary

The Joint Committee on Human Rights examines every Bill presented to Parliament. With Government Bills its starting point is the statement made by the Minister under section 19 of the Human Rights Act 1998 in respect of compliance with Convention rights as defined in that Act. However, it also has regard to the provisions of other international human rights instruments to which the UK is a signatory.

The Committee publishes regular progress reports on its scrutiny of Bills, setting out any initial concerns it has about Bills it has examined and, subsequently, the Government's responses to these concerns and any further observations it may have on these responses. From time to time the Committee also publishes separate reports on individual Bills.

This is the Committee's ninth and final scrutiny of Bills progress report of the 2003-04 Session, and its thirteenth report in all on Bills before either or both Houses.[1] The Committee has considered a total of 105 public bills, 35 of which were Government Bills. It has also examined the four Private Bills presented this Session,[2] and the Draft Charities Bill,[3] the Draft School Transport Bill[4] and the Draft Criminal Defence Service Bill.[5]

In this report the Committee comments for the first time on the Constitutional Reform Bill and the Mental Capacity Bill, which are both being carried over into Session 2004-05.

In relation to the Constitutional Reform Bill

The Committee welcomes in principle the inclusion in the Bill of an express recognition of the constitutional principle of judicial independence, but it considers that the particular duties imposed on the Minister in relation to judicial independence in the Bill

[1] Third Report, Session 2003-04, *Scrutiny of Bills: Progress Report*, HL Paper 23/HC 252; Fourth Report, Session 2003-04, *Scrutiny of Bills: Further Progress Report*, HL Paper 34/HC 303; Fifth Report, Session 2003-04, *Asylum and Immigration (Treatment of Claimants, etc.) Bill*, HL Paper 35, HC 304; Eighth Report, Session 2003-04, *Scrutiny of Bills: Third Progress Report*, HL Paper 49, HC 427; Tenth Report, Session 2003-04, *Scrutiny of Bills: Fourth Progress Report*, HL Paper 64, HC 503; Twelfth Report, Session 2003-04, *Scrutiny of Bills: Fifth Progress Report*, HL Paper 93, HC 603; Thirteenth Report, Session 2003-04, *Scrutiny of Bills: Sixth Progress Report*, HL Paper 102, HC 640; Fourteenth Report, Session 2003-04, *Asylum & Immigration (Treatment of Claimants, etc.) Bill: New Clauses*, HL Paper 130, HC 828; Fifteenth Report, Session 2003-04, *Civil Partnership Bill*, HL Paper 136, HC 885; Seventeenth Report, Session 2003-04, *Scrutiny of Bills: Seventh Progress Report*, HL Paper 157, HC 999; Nineteenth Report, Session 2003-04, *Children Bill*, HL Paper 161, HC 537; Twentieth Report, Session 2003-04, *Scrutiny of Bills: Eighth Progress Report*, HL Paper 182, HC 1187

[2] Third Report, Session 2003-04, *Scrutiny of Bills: Progress Report*, HL Paper 23/HC 252; Fourth Report, Session 2003-04, *Scrutiny of Bills: Further Progress Report*, HL Paper 34/HC 303; Eighth Report, Session 2003-04, *Scrutiny of Bills: Third Progress Report*, HL Paper 49, HC 427;

[3] Twentieth Report, Session 2003-04, *Scrutiny of Bills: Eighth Progress Report*, HL Paper 182, HC 1187

[4] Seventeenth Report, Session 2003-04, *Scrutiny of Bills: Seventh Progress Report*, HL Paper 157, HC 999; Twentieth Report, Session 2003-04, *Scrutiny of Bills: Eighth Progress Report*, HL Paper 182, HC 1187

[5] Seventeenth Report, Session 2003-04, *Scrutiny of Bills: Seventh Progress Report*, HL Paper 157, HC 999

are too weakly stated. The Committee considers that the functional separation of those parts of the office of Lord Chancellor which are identifiably judicial, executive and legislative would enhance the UK's compliance with the guarantee of independence and impartiality of the judiciary. However, it also considers that the ministerial power to give guidance to the Judicial Appointments Commission as to how to assess candidates for appointment is incompatible with the principle of judicial independence, as is the requirement that the Lord Chief Justice's disciplinary powers can only be exercised "with the agreement of the Minister".

In relation to the abolition of the Appellate Committee of the House of Lords and the creation of a new Supreme Court, and the disqualification of serving judges from sitting in Parliament, the Committee considers that such steps would make it less likely that violations of Article 6(1) ECHR will occur in practice. The Committee also recommends that provision be made to ensure that judicial office holders do not sit as judges while they are also members of the House of Commons. The Committee agrees with the House of Lords Select Committee on the Bill that a parliamentary committee would be desirable to act as a channel of communication between the judiciary and Parliament.

In relation to the Mental Capacity Bill

The Committee considers that the Bill should be broadly welcomed as a measure which enhances the human rights of people who lack capacity, but it has a number of concerns about the adequacy of various safeguards contained in the Bill. It has written to the Minister about these concerns and will report again in light of the Minister's response.

The Committee is concerned that the provisions in the Bill concerning the use or threat of force or other restrictions of liberty of movement are likely to lead to deprivations of liberty which are not compatible with Article 5(1) ECHR. It is also concerned about the absence from the Bill of any of the procedural safeguards which the judgment of the European Court of Human Rights in *HL v UK* makes clear are required by Article 5 ECHR in respect of compliant incapacitated people. The Committee also expresses concern about the adequacy of the safeguards surrounding the use of advance directives, and about the fact that the presumption in favour of life-sustaining treatment is not sufficiently strong in the Bill. It also considers that the safeguards provided by the Bill in relation to the carrying out of research on or in relation to people lacking capacity are less strict than the safeguards contained in the European Convention on Human Rights and Biomedicine.

In relation to other Bills

The Committee welcomes amendments made to the Housing Bill in response to points which it had previously raised. The Committee draws attention to potential incompatibilities with Convention rights in relation to a number of private Members' Bills.

Bills drawn to the special attention of both Houses

Government Bills

1 Constitutional Reform Bill

Date introduced to the House of Lords	24 February 2004
Current Bill Number	House of Lords 91
Previous Reports	None

Background

1.1 The Constitutional Reform Bill is a Government Bill, introduced to the House of Lords on 24 February 2004. The Lord Falconer of Thoroton, Lord Chancellor and Secretary of State for Constitutional Affairs, has made a statement of compatibility with Convention rights under s. 19(1)(a) of the Human Rights Act 1998. Explanatory Notes to the Bill have been published[6] and deal with the Government's view as to the compatibility of the Bill with Convention rights at paragraphs 318–326.

1.2 At Second Reading on 8 March 2004 the Bill was committed to a Select Committee by the House of Lords. The Select Committee on the Constitutional Reform Bill reported the Bill with amendments to the House of Lords on 24 June 2004.[7] The Bill was reprinted as amended by the Select Committee on the Bill and recommitted to a Committee of the Whole House. The Bill completed its Committee stage on 11 November 2004 and will be carried over to the new Session.

The effect of the Bill

1.3 The Bill introduces very significant changes to the structure of the judicial system, the relationship between the judiciary on the one hand and the legislature and the executive on the other, and the process for judicial appointments.

1.4 Part 1 of the Bill provides for the abolition of the office of Lord Chancellor and the arrangements for the future exercise of the functions of that office. It also makes provision designed to guarantee continued judicial independence.

1.5 Part 2 of the Bill creates a new Supreme Court of the United Kingdom, which will be separate from Parliament, and provides for the transfer of the appellate jurisdiction of the House of Lords and the devolution jurisdiction of the Judicial Committee of the Privy Council to the new Supreme Court. It also provides for the process of appointment of judges to the new Court.

6 HL Bill 91-EN

7 Select Committee on the Constitutional Reform Bill [HL], Constitutional Reform Bill [HL], HL Paper 125-I

1.6 Part 3 of the Bill creates a new Judicial Appointments Commission and provides for the process of selecting and appointing judges, and judicial office-holders from within the judiciary (e.g. the Lord Chief Justice, Heads of Division etc.). It provides for a disciplinary procedure in relation to the judiciary. It also provides for a Judicial Appointments and Conduct Ombudsman, to deal with complaints about the appointments process and about judicial disciplinary cases.

1.7 Part 4 provides for parliamentary disqualification of members of the Supreme Court and certain other holders of high judicial office. It disqualifies them from membership of the House of Commons and also bars them from sitting or voting in the House of Lords. It also removes the right of the Lord President of the Council to be a member of the Judicial Committee of the Privy Council.

1.8 The Bill has aroused very considerable political controversy. This is not surprising for a Bill which aims to redesign some of the most important features of the UK's constitutional arrangements. We recognise that on matters of constitutional design there will be a wide range of strongly held views and that there will be considerable scope for disagreement between reasonably and legitimately held views. As we have pointed out before in relation to controversial bills, our task is to examine carefully and dispassionately the content of the relevant international human rights obligations which bind the UK, and to advise Parliament as to whether the provisions of a Bill are compatible with those obligations. In performing that task, we confine ourselves strictly to the relevant human rights obligations and other recognised standards which are engaged by the subject matter of the Bill. The range of issues with which we are concerned is therefore very much narrower than that considered by the House of Lords Select Committee on the Bill, as many of those issues do not engage human rights law.

The human rights implications of the Bill

The relevant human rights standards

1.9 The Bill has major implications for the independence of the judiciary from both the executive and Parliament, and for both the actual and perceived impartiality of courts. The independence and impartiality of the judiciary is a subject on which there exists a wide range of international human rights standards.

1.10 It has come to be internationally accepted that a truly independent judiciary is an inherent feature of the rule of law on which the protection of human rights in democratic societies depends. All of the major human rights instruments by which the UK has chosen to be bound include an individual right to a fair hearing before an independent and impartial court in the determination of both criminal charges and disputes involving civil rights, and since the coming into force of the Human Rights Act 1998 UK law on the requirements of independence and impartiality has itself been modified to bring it into line with these international obligations.

UN standards

1.11 Article 10 of the Universal Declaration of Human Rights ("the UDHR") provides—

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

1.12 Article 14 of the International Covenant on Civil and Political Rights ("the ICCPR") provides—

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. …

1.13 The Human Rights Committee, in its General Comment on Article 14, has indicated the reach of this provision by the sort of information it has asked to be provided with by States—

> The Committee would find it useful if, in their future reports, States parties could provide more detailed information on the steps taken to ensure that … competence, impartiality and independence of the judiciary are established by law and guaranteed in practice. In particular, States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.[8]

ECHR standards

1.14 The most significant international standard from the UK point of view is Article 6(1) of the European Convention on Human Rights ("the ECHR"), which provides, so far as relevant—

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

1.15 There is considerable case-law of the European Court of Human Rights elaborating the standards of judicial independence and impartiality which are required by that Article. The case-law establishes that there is a close relationship between the concepts of independence and that of impartiality in Article 6(1), and that, in relation to both, objective appearances are important.

8 Human Rights Committee, General Comment 13, Article 14 (21st session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994).

1.16 "Independence" in Article 6(1) means independent of the executive, of Parliament and of the parties. In determining whether the "independence" requirement is satisfied, it is necessary to have regard to factors such as the manner of appointment of judges, their terms of office, the existence of guarantees against outside pressure, and whether the court presents an appearance of independence.[9]

1.17 The test to be applied to determine whether a court satisfies the Article 6 guarantee of an "impartial" tribunal has relatively recently been the subject of an important evolution in Convention case-law. A distinction is drawn by the European Court of Human Rights between a "subjective" approach on the one hand, which endeavours to ascertain the personal conviction of a given judge in a given case, and an "objective" approach on the other, that is, determining whether the tribunal "offered guarantees sufficient to exclude any legitimate doubts" about impartiality.[10]

1.18 As the Court explained in *Piersack*, a purely subjective test for impartiality is not sufficient, because "in this area, even appearances may be of a certain importance". The "objective" test is therefore a recognition of the fact that appearances are important. Moreover, the European Court of Human Rights was explicit about the rationale for adopting such an objective approach: it said, "what is at stake is the confidence which the courts must inspire in the public in a democratic society".[11] It followed that "any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw".

1.19 In *Piersack* itself, application of this test for impartiality led to a finding that there had been a breach of the guarantee of an impartial tribunal in Article 6(1) because the trial court had been presided over by a Judge who, when senior deputy *procureur*, had been in charge of the department which had decided to prosecute the accused. The test for impartiality which had been applied by the Belgian Court, namely whether the Judge had previously intervened in the case in the exercise of his functions in the public prosecutor's department, did not satisfy the requirements of Article 6(1). The Court of Human Rights applied a stricter objective test for impartiality—

> In order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation. If an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality.[12]

1.20 In a large number of cases since *Piersack*, the European Court of Human Rights has repeatedly reiterated the importance of appearances when deciding whether the impartiality guarantee has been complied with, and that the rationale for the objective approach is rooted in the importance of maintaining the public's confidence in the

9 For example, see *Findlay v UK* (1997) 24 EHRR 221 para 73; *Kingsley v UK*, App. No. 35605/97, 7 November 2000, para. 47

10 See *Piersack v Belgium* (1982) 5 EHRR 169, at para. 30

11 ibid., at para. 30(a)

12 ibid., at para. 30(d)

administration of justice.[13] In *Borgers v Belgium* the Court noted that the concept of a fair trial in Article 6(1)—

> ... has undergone a considerable evolution in the Court's case law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice.[14]

1.21 "Independence" and "impartiality" therefore require not only that the court must be truly independent and free from actual prejudice or bias, but also that it must not appear in the objective sense to lack independence or impartiality. In deciding whether there is an appearance of bias or lack of impartiality, the Court of Human Rights has explicitly connected the standard to be applied with the importance of courts commanding the confidence of the public in their impartiality.

1.22 Neither the Convention nor the Court of Human Rights, however, prescribe a rigid constitutional doctrine of separation of powers. The Court has always been careful to make clear that neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of interaction between the judiciary, the legislature and the executive.[15] Because it is part of an international supervisory mechanism which entertains complaints about violations of individual rights, the Court is always concerned with whether the requirements of the Convention are met in the circumstances of an individual case.

1.23 Inevitably, however, the application of these standards in individual cases often has structural implications. In recent years the notion of the separation of powers between the political organs of government (Parliament and the Executive) on the one hand and the judiciary on the other has assumed growing importance in the Court's case-law. For example in *McGonnell v UK*, the Court found there to be a violation of the independence and impartiality requirement in Article 6(1) because of the close connections between the judicial functions of the Bailiff of Guernsey (as President of the Royal Court) and his legislative and executive roles.[16] The Bailiff's overlapping functions meant that he had presided over the Guernsey legislature when it had adopted the Development Plan which was relevant to the applicant's planning application. He subsequently sat, in his judicial capacity, on the court which determined the applicant's planning appeal. The Court held this to be in breach of the requirement of impartiality in Article 6(1), because it gave legitimate grounds to the applicant for fearing that the Bailiff may have been influenced by his prior participation in the adoption of the development plan.

1.24 The growing importance attached by the Strasbourg Court to the separation of the judicial function from the political branches is also shown by *Stafford v UK*, in which the Court held that "the continuing role of the Secretary of State in fixing the tariff and in deciding on a prisoner's release following its expiry, has become increasingly difficult to

13 See for example, *De Cubber v Belgium* (1984) 7 EHRR; *Hauschildt v Denmark* (1989) 12 EHRR 266 (what is decisive is whether the test can be held objectively justified).

14 (1993) 15 EHRR 92

15 See for example, *McGonnell v UK* (2000) 30 EHRR 289 at para. 51; *Kleyn v Netherlands*, 6 May 2003, at para. 193.

16 *McGonnell v UK* (2000) 30 EHRR 289

reconcile with the notion of separation of powers between the executive and the judiciary".[17] And in *Sovtransavto Holding v Ukraine*, the Court held that there had been a breach of the fair trial guarantee in Article 6(1) where there had been interventions in the judicial process at the highest political level:[18] such interventions were said to disclose a lack of respect for the very function of the judiciary.

Domestic law under the Human Rights Act 1998

1.25 Some witnesses to the House of Lords Select Committee on the Bill questioned whether Article 6 introduced anything new into UK law when it was given direct domestic effect by the Human Rights Act 1998. Edward Garnier QC MP, for example, told the Select Committee that "the principle enshrined in Article 6 has been fundamental to English law for centuries. … This is not some new principle which entered our law for the first time with the Human Rights Act 1998. … It is inaccurate for the Government to say that the Human Rights Act requires a stricter view to be taken towards independence or impartiality".[19]

1.26 It is true that the right of an individual to a tribunal which is "independent and impartial" was recognised by the common law in various ways long before the enactment of the Human Rights Act made Article 6 ECHR part of UK law. But the Government is also correct to say that the Human Rights Act requires a stricter view to be taken towards independence and impartiality. Indeed, this has been expressly recognised in decisions of the Court of Appeal and House of Lords following the coming into force of the Act.

1.27 The Court of Appeal in the *Proprietary Association* case conducted a thorough review and restatement of the precise test to be applied in determining whether a court or tribunal meets the guarantee of impartiality, in light of the coming into force of the Human Rights Act 1998 and the consequent domestic effect of the Article 6(1) jurisprudence of the European Court of Human Rights.[20] The Court noted that the common law test for bias laid down by the House of Lords in *Gough* (which had become known as the 'real danger of bias' test)[21] had not commanded universal approval outside of England and Wales, and that Scotland and some Commonwealth jurisdictions had preferred an alternative test (the 'reasonable apprehension of bias' test) which was said to be more clearly in harmony with the jurisprudence of the European Court of Human Rights.

1.28 Since this was the first occasion on which the question had arisen since the coming into force of the Human Rights Act 1998 on 2 October 2000, the Court of Appeal treated the case as an occasion to review *Gough* to see whether the test it lays down was compatible with the Strasbourg test, or needed some modification. It therefore proceeded to conduct a

17 (2002) 13 BHRC 260 at para. 78. The House of Lords in *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 subsequently held that the Executive should play no part in the sentencing of prisoners, because the rule of law depends on the complete functional separation of the judiciary from the executive.

18 (2004) 38 EHRR 44

19 Select Committee on the Constitutional Reform Bill [HL], op cit., Ev 358–9

20 *Proprietary Association of Great Britain v Director General of Fair Trading* [2001] 1 WLR 700

21 [1993] AC 646 at 670 (Lord Goff)

thorough review of both the English and the Strasbourg authorities concerning "apparent bias" on the part of a tribunal.

1.29 Having reviewed the case-law, the Court sought to summarise the principles to be derived from the Strasbourg line of cases. It said that the Court has to decide whether, on an objective appraisal, the material facts gave rise to a legitimate fear that the Judge might not have been impartial, and "an important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice."

1.30 Taking that jurisprudence into account, the Court concluded that a "modest adjustment" of the *Gough* test was called for, which made it clear that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The test to be applied has two elements—

> (1) first, the Court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal is not impartial; and
>
> (2) then it must ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, (the two being the same), that the tribunal was biased.[22]

1.31 In short, the test is "whether the objective onlooker might have a reasonable apprehension of bias".[23]

1.32 The Court of Appeal's modification of the *Gough* test for common law bias in the *Proprietary Association* case has since been endorsed unanimously by the House of Lords in *Magill v Porter*.[24] It held that "the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".[25] As Lord Steyn subsequently explained—

> ... the purpose and effect of this modification was to bring the common law rule into line with the Strasbourg jurisprudence. ... The small but important shift approved in *Magill v Porter* has at its core the need for 'the confidence which must be inspired by the courts in a democratic society.[26]

Other international standards and guidelines

1.33 In addition to the case-law of the European Court of Human Rights under Article 6(1), there are some important other human rights instruments which seek to elaborate on

22 2001] 1 WLR 700 at para. 85

23 As the Court made clear at para. 69, this 'reasonable apprehension of bias' test is particularly appropriate where a judge is invited to recuse himself or herself on grounds of bias, since it is "invidious to expect a Judge to rule on the danger that he may actually be influenced by partiality."

24 *Magill v Porter* [2001] UKHL 67, [2002] 2 AC 357 at paras 95–105

25 ibid., at para. 103 (Lord Hope)

26 *Lawal v Northern Spirit Limited* [2003] UKHL 35, [2003] ICR 856 at para. 14

the requirements of the internationally recognised standards of independence and impartiality. The most important of these are—

— The United Nations *Basic Principles on the Independence of the Judiciary* (1985)[27]

— The Council of Europe's Committee of Ministers Recommendation on *The Independence, Efficiency and Role of Judges*[28]

1.34 Although these instruments are strictly non-binding, they are a useful and convenient articulation of the more concrete requirements of the very abstract standards of "independence" and "impartiality". The Government has expressly had regard to the Recommendation No. R (94) 12 when drafting Part 3 of the Constitutional Reform Bill.[29] That Recommendation itself expressly takes account of the UN Basic Principles.[30] We have therefore paid them close attention in our scrutiny of the human rights implications of the Bill.

1.35 Also relevant are some recent statements of principle and guidelines adopted by the Commonwealth Heads of Government, which contain statements of "best practice principles" in relation to judicial independence—

— Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence for the Commonwealth;[31]

— Commonwealth Principles on the Accountability of and the Relationship between the three branches of Government.[32]

The human rights issues

1.36 The human rights issues which arise when the Bill is measured against the relevant international standards fall into three broad categories—

(1) Judicial independence from the executive

— Whether there are sufficient guarantees of judicial independence from the executive in clause 1 of the Bill

— Whether the redistribution of the Lord Chancellor's functions respects the requirement that there be a complete functional separation of the judicial from the executive power

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27 UN Doc. A/CONF.121/22/Rev.1, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. The Principles have been adopted by the UN Special Rapporteur on the independence of judges and lawyers as the primary reference point for the implementation of his mandate.

23 Recommendation No. R (94) 12, adopted by the Committee of Ministers on 13 October 1994.

29 HL Bill 91-EN para. 324

30 Explanatory Memorandum to the Recommendation, para. 6.

31 Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles, (1998, updated March 2002).

32 Approved by the Commonwealth Heads of Government in 2003

— Whether the new process of judicial appointments satisfies the requirements of independence and impartiality

— Whether the disciplinary procedures for the judiciary contain sufficient guarantees of independence against political and outside pressure

(2) Judicial independence from the legislature

— Whether the separation of the Supreme Court from the legislature in Part 2 satisfies the relevant standards

— Whether the parliamentary disqualifications in Part 4 satisfy the requirements of independence and impartiality

— Whether a parliamentary committee responsible for the oversight of judiciary-related matters is compatible with judicial independence.

(3) Judicial diversity

— Whether the process of judicial appointments satisfies the obligation to ensure the equal participation of women in public life.

Judicial independence from the executive

The strength of the statutory guarantee of judicial independence

1.37 Clause 1 of the Bill contains a statutory guarantee of continued judicial independence. It places a duty on Ministers of the Crown and all others with responsibility for matters relating to the judiciary or the administration of justice to uphold the continued independence of the judiciary.[33] It also imposes two particular duties for the purpose of upholding judicial independence—

> (1) Ministers of the Crown are placed under a duty not to seek to influence particular judicial decisions "through any special access to the judiciary";[34] and
>
> (2) the Secretary of State for Constitutional Affairs is required to have regard to the need to defend the continued independence of the judiciary, the need for the judiciary to have proper support to enable them to exercise their functions and the need for the public interest in matters relating to the judiciary or the administration of justice to be properly represented in decisions affecting those matters.[35]

1.38 **We welcome in principle the inclusion in the Bill of an express recognition of the constitutional principle of judicial independence.** This is already explicitly recognised as a legal principle by the common law, and its constitutional status is also recognised, but nevertheless we consider it desirable that it also be accorded express statutory recognition.

33 Clause 1(1)
34 Clause 1(3)
35 Clause 1(4)

We note that it is a feature of a number of the relevant international statements of principles and guidelines that they call for the independence of the judiciary to be enshrined in the constitution of the country, or at least incorporated into legislation. The UN's Basic Principles on the Independence of the Judiciary, for example, states—

> The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.[36]

The Committee of Ministers' recommendation similarly recommends that amongst the measures which should be taken to respect, protect and promote the independence of judges—

> The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example by inserting specific provisions in the constitution or other legislation ...[37]

1.39 **We consider that the express statutory duty on Ministers in clause 1(1) of the Bill, to uphold the continued independence of the judiciary, will serve in practice to enhance the guarantee of judicial independence, in addition to the common law's recognition of the principle, as recommended by these international statements of principle.**

1.40 **We also welcome the recognition in clause 1(3) of the reality that the executive enjoys special access to the judiciary and that this must never be used to influence particular judicial decisions.** This gives effect to the important guideline in the Latimer House Guidelines, that "while dialogue between the judiciary and the government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence".[38]

1.41 However, we consider that the particular duties imposed on the Minister in relation to judicial independence in clause 1(4) are too weakly stated and that this potentially represents a retrograde step in terms of the degree of legal protection given to judicial independence. A duty expressed in terms of a duty to "have regard to" various "needs" is a weak form of duty.[39] It is a procedural rather than a substantive duty: instead of requiring the Minister to secure the actual achievement of the matters listed in clause 1(4), it merely requires him or her to treat them as a relevant consideration in the decision-making process. We have recently made similar criticisms of the strength of some of the duties contained in the Children Bill using the same weak formulation.[40]

1.42 We think that if express ministerial duties are to be included in the Bill the strength of their statement is of paramount importance. Since it is widely accepted to be one of the

36 UN Basic Principles on the Independence of the Judiciary, para 1

37 Council of Europe, The Independence, Efficiency and Role of Judges, Principle I, para. 2(a)

38 Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence, 1998 updated 2002, I para. 5

39 Lord Ackner in his evidence to the House of Lords Select Committee on the Bill regarded the phrase as "pretty meaningless": Select Committee on the Constitutional Reform Bill [HL], op cit., para. 78.

40 See our Nineteenth Report of Session 2003-04, *Children Bill*, HL Paper 161,HC 537, at paras 70, 72, 76–77

current functions of the Lord Chancellor to uphold judicial independence,[41] any weaker statutory duty would amount to a decrease in the level of guarantees for judicial independence. **We therefore consider that if particular ministerial duties are to be included in the Bill in addition to that in clause 1(1), they ought to be much more strongly stated.**

1.43 The House of Lords Select Committee on the Bill also considered whether clause 1 of the Bill should be amended to include a duty on Ministers to uphold the rule of law.[42] We have considered the arguments for and against the inclusion of such a duty, but we are not persuaded of the necessity to include a reference to the "rule of law" on the face of the legislation. This is not because we consider that there is too much scope for disagreement as to what the rule of law requires, which was one of the concerns expressed to the Select Committee on the Bill.[43] It is because we consider the rule of law to be an overarching constitutional principle, binding on all organs of the State not just the executive, and which does not and should not depend on statutory recognition for its vitality in our constitutional arrangements.

Abolition of the office of Lord Chancellor

1.44 Part 1 of the Bill also provides for the abolition of the office of Lord Chancellor and the arrangements for the future exercise of the functions of that office.

1.45 It is clear that there is nothing in either Article 6(1) ECHR or its case-law, or any other international human rights instrument, which requires the abolition of the office of Lord Chancellor as such. However, the increasing importance of appearances in the evolving case-law of the European Court of Human Rights, as described above, does have serious implications for the discharge of the judicial functions of that office so long as they are combined with other functions of an executive and legislative nature.

1.46 The most obvious and direct implication is for the Lord Chancellor's function as a judge eligible to sit on the Appellate Committee of the House of Lords. The decision of the European Court of Human Rights in *McGonnell v UK* makes clear that the Lord Chancellor's involvement in any case in the House of Lords involving the Government, or a measure promoted by the Government, would be very likely to be contrary to Article 6(1). Indeed, this much is implicitly acknowledged by Lord Bingham in his evidence to the House of Lords Select Committee, who said that he thought that "the time had come when the Lord Chancellor had to stop sitting judicially".[44] He gave an indication of the sorts of matters in which it was clearly thought inappropriate for the Lord Chancellor to sit as a judge: "It was agreed between us that he could not do anything to do with crime because

41 The Select Committee on the Constitutional Reform Bill described the obligation on the Lord Chancellor to defend judicial independence as already existing "as a matter of constitutional convention," op cit., para. 69

42 ibid., paras 67–75

43 Indeed we have in previous reports invoked the rule of law when reporting to Parliament on the human rights implications of a Bill: see for example, Thirteenth Report of Session 2003-04, *Scrutiny of Bills: Sixth Progress Report*, HL Paper 102, HC 640 at para. 1.32 (in connection with the ouster clause originally contained in the Asylum and Immigration (Treatment of Claimants etc.) Bill.

44 Select Committee on the Constitutional Reform Bill, op cit., Q 415

that affected his colleague, the Home Secretary, he could not deal with human rights because he piloted the Bill through the House, he could not deal with judicial review because it was of governmental interest".[45] It is also implicitly acknowledged in the present Lord Chancellor's announcement on assuming office that he would not sit in a judicial capacity in the House of Lords.

1.47 There are also implications for certain other of the Lord Chancellor's judiciary-related functions, the exercise of which by a member of both the executive and the upper house of the legislature might give rise to an appearance of a lack of independence or impartiality. Clause 3 and Schedule 1 of the Bill provide for the redistribution of the Lord Chancellor's judiciary-related functions between the Minister on the one hand and the Lord Chief Justice on the other. We find that this redistribution generally enhances the UK's compliance with the relevant standards of judicial independence and impartiality by making it less likely that grounds will arise for complaining that a particular judge appears to lack independence or impartiality. For example, the transfer to the Lord Chief Justice of the Lord Chancellor's functions concerning the deployment of individual judges, for example to deal with specific areas of business, or their appointment to committees, boards or similar bodies, clearly makes future challenges to the independence or impartiality of judges less likely in practice.[46]

1.48 **In light of both the refinement of the UK test for impartiality so as to place greater importance on appearances, and the developing jurisprudence of the European Court of Human Rights, we conclude that although there is nothing in Article 6(1) ECHR or any other international human rights standard to require the abolition of the office of Lord Chancellor, the complete functional separation of those parts of the office which are identifiably judicial, executive and legislative would enhance the UK's compliance with the guarantee of independence and impartiality by making less likely a successful future challenge to the Lord Chancellor sitting as a member of the Appellate Committee, or to other exercises of the Lord Chancellor's judicial functions, e.g. in relation to the appointment of judges.**

Judicial appointments

1.49 Part 3 of the Bill creates a Judicial Appointments Commission[47] and sets out the process to be followed by the Commission and by the Minister in appointing the Lord Chief Justice and other Heads of Division,[48] Lords Justices of Appeal,[49] and High Court Judges and other judicial office holders.[50] It also creates a Judicial Appointments and

45 ibid., Q 415

46 para. 14 of the UN Basic Principles provides: "The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration."

47 Clause 52 and Schedule 12.

48 Clauses 57–63

49 Clauses 64–70

50 Clauses 71–79

Conduct Ombudsman[51] and provides for complaints about the appointments process to be made to the new Ombudsman.[52]

1.50 The Minister has the power to reject a selection, following which the Commission or selection panel may not select the person rejected.[53] The main compatibility issue is whether this power in the executive to reject a candidate for judicial appointment who has been selected by an independent judicial appointments commission is compatible with the principle of judicial independence from the executive?

1.51 It is clear to us that nothing in human rights law *requires* that judicial appointments be made by a body which is independent of the executive. Principle 10 of the UN Basic Principles on the Independence of the Judiciary provides that "any method of judicial selection shall safeguard against judicial appointments for improper motives." Similarly the Committee of Ministers Recommendation on the Independence of the Judiciary states an independent appointments process as the ideal, but expressly recognises that the constitutional or legal provisions and traditions in some European states allow judges to be appointed by the government, in which case there should be "guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to objective criteria.[54]

1.52 Therefore, although an appointing commission might be thought to provide the strongest possible guarantee of judicial independence, because it would remove the power of appointment from the executive altogether, the mere fact that the Judicial Appointments Commission created by the Bill is a recommending commission rather than an appointing commission, or a hybrid commission making some appointments itself, is not itself incompatible with any human rights obligations or non-binding principles or guidelines. The question is whether the safeguards built into the recommending commission framework are adequate to ensure transparency and independence from the executive in practice.

1.53 One of the safeguards is the requirement that "selection must be on merit".[55] We welcome the inclusion of this requirement in the Bill. It reflects the central importance of the principle that judicial appointments should be merit-based in the various elaborations of the relevant international human rights standards. Those standards, however, are rather more detailed than a bald assertion of "merit" as the basis for selection. The UN Basic Principles, for example, state that "persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law".[56] The Committee of Ministers Recommendation provides that "all decisions concerning the professional career

51 Clause 53 and Schedule 13

52 Clauses 80–86

53 Clauses 61(2)(b) and 63(2)(a); 68(2)(b) and 70(2)(a); 75(2)(b) and 77(2)(a). The same applies in relation to appointments to the Supreme Court by the selection commission provided for that purpose: clause 23(2)(b) and 25(2)(a).

54 Recommendation No. R (94) 12, Principle I, para. 2(c).

55 Clause 54(3)

56 UN Basic Principles on the Independence of the Judiciary, para 10

of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency".[57] **In our view, the safeguards in the Bill would be strengthened if it included at least an indicative elaboration of what is meant by "merit" in the context of judicial appointments, and what sorts of objective criteria will be relevant to such appointments.**

1.54 We are also concerned about the detrimental impact on the appearance of independence of the Judicial Appointments Commission of the Minister's power to give guidance to the Commission[58] and the requirement that the Commission and any selection panel must have regard to such guidance.[59] Although the power is expressed to be a power to give guidance to the Commission about *procedures* for the performance of its functions, the scope of that power is very broadly defined. It includes the power to give guidance as to how the Commission should assess eligible candidates for the purposes of selection.[60]

1.55 **We consider that the ministerial power to give guidance to the Judicial Appointments Commission as to how to assess candidates for appointment, to which the Commission is obliged to have regard, is incompatible with the principle of judicial independence.**

1.56 **Finally, we consider that the disqualification of members of the House of Lords from eligibility for membership of the Commission[61] is unnecessarily restrictive**, as it would prevent cross-bench peers from serving on the commission without any justification, and is therefore likely to be an unjustified interference with the right to participate in public life under the ICCPR.[62] In our view, since it is possible for a member of the House of Lords to move to the cross benches in the Lords, there should be no such blanket disqualification, rather the question should be dealt with on an ad hoc basis.

Judicial Discipline

1.57 Clause 90 of the Bill confers on the Lord Chief Justice a number of disciplinary powers over all judicial office holders, including the power of suspension. All of the international standards recognise the need for such powers to ensure that the judiciary fulfil its responsibilities. We are concerned, however, that these disciplinary powers can only be exercised "with the agreement of the Minister".[63] The very existence of this requirement risks creating a perception of political interference in judicial discipline, and we therefore consider it to be incompatible with the principle of judicial independence.

57 Council of Europe, The Independence, Efficiency and Role of Judges, Principle I, para. 2(c).

58 Clause 55(1)

59 Clause 55(4)

60 Clause 55(1)(b)

61 Schedule 12, para.14(3)

62 Article 25 ICCPR provides: "Every citizen shall have the right and the opportunity ... without unreasonable restrictions; (a) to take part in the conduct of public affairs; ... (c) to have access, on general terms of equality, to public service in this country."

63 Clause 90(2)

Supreme Court budget and administration

1.58 Clauses 41–44 of the Bill make provision for the budgetary and administrative arrangements for the new Supreme Court. The Minister is placed under a general duty to ensure that there is an efficient and effective system to support the carrying on of the business of the Supreme Court, and to ensure that appropriate services are provided for it.[64] The Minister is given a discretion to appoint such officers and staff,[65] or make such staffing arrangements with third parties,[66] as he thinks appropriate for the purpose of discharging his general duty.[67]

1.59 According to the Government's evidence to the House of Lords Select Committee on the Bill,[68] what is envisaged in practice in relation to the Supreme Court's budget is that the Supreme Court will prepare a budget and put it to the Minister who will have to be satisfied of its reasonableness before making a bid to the Treasury. The Treasury itself will then make a judgment about the reasonableness of the budget put forward for running the Supreme Court and will give such amount as it considers reasonable, through the Minister, to the Supreme Court. The rationale for interposing the Minister between the Supreme Court and the Treasury is to provide ministerial accountability for the expenditure of the money.[69]

1.60 A majority of the House of Lords Select Committee on the Bill considered that the Supreme Court should have greater financial and administrative autonomy than envisaged by these clauses.[70] It considered that the Supreme Court should be established according to the model of a non-ministerial department, whereby funding would go direct from the Treasury to the Supreme Court, and not into the budget of the Department for Constitutional Affairs.

1.61 We have commented before in the context of the proposed Commission for Equality and Human Rights on the importance of financial and administrative autonomy for both the actuality and the appearance of independence from the executive.[71] These concerns apply with even greater force in relation to the budgetary and administrative arrangements for the country's highest court. The potential for conflict with the important requirement of judicial independence from the executive, including the appearance of independence, is self-evident.[72]

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64 Clause 41(1)

65 Clause 42

66 Clause 43(1)

67 The Minister has similar discretions in relation to the provision of services and accommodation to the Supreme Court: clauses 44 and 45.

68 Select Committee on the Constitutional Reform Bill [HL], HL Paper 125-II, QQ 56–62 [Lord Falconer]

69 ibid., Q 57

70 Select Committee on the Constitutional Reform Bill [HL], HL Paper 125-I, para. 268

71 See our Eleventh Report of Session 2003–04, *Commission for Equality and Human Rights: Structure, Functions and Powers*, HL Paper 78, HC 536, paras 108–137

72 The same concern about compatibility of the proposed arrangements with the principle of judicial independence has been expressed by the House of Commons Constitutional Affairs Committee, in its Report, Judicial appointments and the Supreme Court (court of final appeal), HC 48-I at para. 100; and by a number of witnesses to the Select Committee on the Constitutional Reform Bill [HL], op cit., paras 257–260 and 267

1.62 The Government states that its proposals "aim to guarantee genuine independence and autonomy." To give effect to this aim, **in our view, there should be no interposition of a Minister between the Supreme Court and the Treasury, and the Government should prefer the model of the National Audit Office, which does not have to go through a minister to bid to the Treasury for its money.**

Judicial Independence from the legislature

A separate Supreme Court

1.63 Part 2 of the Bill creates a new Supreme Court of the United Kingdom, which is to be separate from Parliament, and provides for the transfer of the appellate jurisdiction of the Appellate Committee of the House of Lords and the devolution jurisdiction of the Judicial Committee of the Privy Council to the new Supreme Court.

1.64 The Explanatory Notes explain that the arrangements for a new Supreme Court are considered to be sufficient to entrench and safeguard judicial independence as required by Article 6 ECHR, and to prevent any legitimate or objectively justified fear of a lack of impartiality on the part of those coming before the new Supreme Court.[73]

1.65 In its written evidence to the House of Lords Select Committee on the Bill, the Government argued that the Law Lords are judges, not legislators, and that the separation between those two roles should be made explicit.[74] The independence of the highest court from the legislature should be "demonstrable", in the sense of "plain for all to see." Referring to the ECHR requirement that judges must be independent, impartial and free of any prejudice or bias, both real and perceived, the Government argued that—

> ... for this to be ensured, judicial independence needs not just to be preserved in practice, but also to be buttressed by appropriate and effective constitutional guarantees. The establishment of a Supreme Court will provide those guarantees.

1.66 The Report of the Select Committee on the Constitutional Reform Bill states that "the Government and others argue that a Supreme Court separate from Parliament is required in order to comply with the requirements of Article 6 of the European Convention on Human Rights",[75] while several other witnesses "rejected the Government's reliance on Article 6 of the ECHR".[76] In our view, there is scope for misunderstanding as to precisely what Article 6 requires in terms of separation between the judiciary and the legislature.

1.67 It is clear that Article 6 does not require the UK to abolish the Appellate Committee of the House of Lords and establish a new Supreme Court which is entirely separate from Parliament. Neither Article 6, nor the case-law under it, prescribes with such specificity the constitutional structures which must be adopted by Member States. This is not surprising,

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73 HL Bill 91-EN para. 322

74 Memorandum by the Secretary of State for Constitutional Affairs, Rt Hon Lord Falconer, Select Committee on the Constitutional Reform Bill [HL], HL Paper 125-II, Ev 9–10

75 Select Committee on the Constitutional Reform Bill [HL], HL Paper 125-I, para. 104

76 ibid., at para. 118

bearing in mind that the Convention and the case-law of the Court of Human Rights lay down the standards to be followed by some 46 countries with a very wide range of constitutional traditions.

1.68 However, it is clear from the case-law of the European Court of Human Rights, and in particular the judgment in *McGonnell v UK*, that a judge who has both legislative and judicial functions may well fail to satisfy the Article 6(1) requirement of independence and impartiality in a particular case, where his or her involvement in their legislative capacity in the passage of a statute relevant to the determination of a case gives rise to legitimate grounds for fearing that the judge may have predetermined the issue in question in the case. The current arrangement, whereby sitting Law Lords are entitled to participate in parliamentary debates, gives rise to this risk in subsequent cases concerning legislation in relation to which a Law Lord may have made his or her views known in the course of parliamentary debate.

1.69 We do not think it is an answer to this concern that the Law Lords have in practice exercised considerable restraint in their involvement in parliamentary debates. Although in June 2000 the Senior Law Lord, Lord Bingham, made a statement outlining the circumstances in which Law Lords would speak in the House of Lords in their legislative capacity,[77] it is clear that there is still no sufficiently established constitutional convention separating the judicial branch from the legislative in politically controversial matters. A number of examples of recent involvement in parliamentary debates can be cited to make clear the nature of the problem. Lord Woolf spoke in the House of Lords at the Second Reading debate of the Criminal Justice Bill on 16 June 2003. He subsequently placed in the House of Lords library a memorandum containing critical comments in relation to a number of aspects of the Bill, which subsequently became the Criminal Justice Act 2003. He also spoke in the House of Lords debate on the Asylum and Immigration (Treatment of Claimants, etc.) Bill, and again placed a letter in the House of Lords library, this time welcoming the Government's amendments to that Bill, which has since become the Asylum and Immigration (Treatment of Claimants etc.) Act 2004. Two Law Lords voted in the recent House of Lords debate on the Hunting Bill. In any subsequent case which arose raising issues on which these Law Lords had expressed a view in their legislative capacity, the case for their not sitting as a judge on Article 6(1) grounds would be irresistible, having played such an active part in their legislative capacity, and they would therefore be effectively unavailable to sit in a judicial capacity in such cases.

1.70 **We therefore conclude that, although Article 6 does not per se require the abolition of the Appellate Committee of the House of Lords and the creation of a new and separate Supreme Court, such a step would make it much less likely that violations of Article 6(1) will occur in practice, or that individual members of the highest court will have to recuse themselves from hearing particular appeals because of their involvement in some relevant way in their legislative capacity.**

77 Lord Bingham, HL Deb., 22 June 2000, col. 419. The text of this statement is reproduced in the Select Committee on the Constitutional Reform Bill [HL], op cit., Ev 10

Parliamentary disqualification

1.71 Clause 101 of the Bill disqualifies from sitting and voting in the House of Lords Judges of the Supreme Court, members of the supplementary panel of the Supreme Court, and other serving judges who hold peerages.[78]

1.72 The Government's rationale for the parliamentary disqualification clause is the same as its argument for a separate Supreme Court: it reinforces the separation between the judiciary and the legislature by making it impossible to hold high judicial office and at the same time be an active member of the House of Lords.

1.73 The relevance of the international human rights instruments to this provision is the same as noted above in relation to the Bill's provision for a Supreme Court separate from the legislature. It is clear that nothing in Article 6(1) ECHR requires a State to disqualify judges from also being members of the legislature. However, a State must have in place arrangements to ensure that in individual cases the individual litigant's right to a trial before an independent and impartial tribunal is respected. Disqualifying serving judges from being members of the legislature is one way of guaranteeing that such independence from the legislature is achieved in practice. In our view, this will make it less likely in practice that the right in Article 6(1) will be violated in particular cases.

1.74 **We therefore conclude, as we did above in relation to the provisions of the Bill creating a separate Supreme Court, that, although Article 6 ECHR does not per se require the disqualification of serving judges from sitting in Parliament, such a step would make it much less likely that violations of Article 6(1) will occur in practice, or that individual judges will have to recuse themselves from hearing particular appeals because of their involvement in some relevant way in their legislative capacity, and will therefore strengthen the arrangements in place to secure in practice the independence and impartiality required by Article 6.**

1.75 We note, however, that the Bill's additions to the list of judicial offices disqualifying for membership of the House of Commons only cover judges of the new Supreme Court and members of the supplementary panel for that Court.[79] They do not include other judicial offices not currently covered by the disqualification, such as magistrate or Recorder of the Crown Court, or Deputy District Judge. In our view, the same reasoning applies to such judicial office holders as applies to judges of the Supreme Court. A magistrate or recorder who had voted as a Member of Parliament on a particular statute would have to recuse themselves from hearing a case in which any such statute was relevant. **We therefore consider that, in order to be consistent with the underlying rationale of the Bill's provision for parliamentary disqualification, provision should be made to ensure that *any* holder of judicial office does not sit as a judge whilst also a member of the House of Commons. We recognise that the position of members of the House of Lords,**

78 Clause 101(2)

79 Clause 98(1), amending Part 1 of Schedule 1 to the House of Commons Disqualification Act 1975.The amendment is necessary because the list does not currently include Law Lords, who were automatically disqualified by virtue of being members of the House of Lords.

who are not elected, is different, and we urge the Lords authorities to consider the matter and to make recommendations.

A parliamentary committee

1.76 The House of Lords Select Committee concluded that a parliamentary committee would be desirable to act as a channel for communication between the judiciary and parliament, but that such a committee should not seek to hold individual judges to account.

1.77 We agree with both conclusions. It is an important aspect of the principle of judicial independence that "judges should no be obliged to report on the merits of their cases to anyone outside the judiciary".[80] However, we and other parliamentary committees have found the evidence of serving members of the judiciary invaluable in some of the inquiries we have conducted. A parliamentary committee through which the judiciary could maintain a dialogue with Parliament would also be consistent with the scheme of the Human Rights Act 1998 which makes it a common goal of the executive, legislature and judiciary to act compatibly with human rights. **In our view, the legitimate concern that such a committee should not seek to hold the judiciary to account can be accommodated by appropriate drafting of the committee's remit.**

Diversity

1.78 The Bill contains a provision enabling the Minister to issue guidance to the Judicial Appointments Commission for the purpose of encouraging diversity in the range of persons available for selection.[81] It does not, however, contain any duty on the Commission itself to engage in a programme of action aimed to secure that judicial appointments are "reflective of the community", such as is contained in the Justice (Northern Ireland) Act 2002.

1.79 The House of Lords Select Committee considered whether there should be such an express diversity duty on the Commission.[82] Although it agreed that diversity among the judiciary should be promoted, it was unable to agree on whether the Commission should be under a positive duty of its own in relation to diversity.

1.80 In addition to the above international human rights standards concerning the requirement of independence and impartiality, there are certain international standards concerning equality of opportunity which are relevant to the question of judicial diversity in the appointments process. Article 7 of the UN Convention for the Elimination of Discrimination Against Women, for example, specifically addresses the participation of women in political and public life. It provides—

80 For example, Council of Europe, The Independence, Efficiency and Role of Judges, Principle I para. 2(d).

81 Clause 55(3). We have expressed above our concern in principle about ministerial guidance to the Judicial Appointments Commission.

82 Select Committee on the Constitutional Reform Bill [HL], op cit., paras 336–346.

> 7. States parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right
>
> ...
>
> (b) to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.

1.81 General Comment No. 23 of the UN Committee on the Elimination of Discrimination Against Women (1997) deals with the obligation on States under Article 7 of CEDAW to ensure equal participation in political and public life. Para. 1 of the General Comment reminds States that CEDAW places special importance on the participation of women in the public life of their countries. Para. 5 makes clear that the obligation in Article 7 to take all appropriate measures to ensure that women enjoy equality with men in political and public life extends to all areas of the political and public life of a country, a concept which includes "the exercise of political power, in particular the exercise of legislative, ***judicial***, executive and administrative powers" (emphasis added).

1.82 A number of the non-binding statements of principle, recommendations and guidelines referred to above also contain provisions concerning the need for judicial diversity. The Latimer House Guidelines, for example, provide that "judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and other historic factors of discrimination".[83]

1.83 In light of these standards, we are of the view that the provision about diversity in the guidance clause is not sufficient. We agree with the evidence of Baroness Hale to the House of Lords Select Committee that a more robust approach to redressing gender imbalance in judicial appointments is required, particularly in light of the inclusion of the "merit" principle within the Bill.[84] **We therefore conclude that the Commission should be under an express duty in relation to the diversity of the appointments it makes, comparable to that in the Northern Ireland Act of 2002. We are also concerned that the lack of any provision for audit of appointments, as highlighted by the Commissioner for Judicial Appointments Sir Colin Campbell, is inconsistent with the UK's obligations in relation to equal opportunities.**

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83 Guidelines, II para. 1. The 2003 Commonwealth Principles are to the same effect.

84 Select Committee on the Constitutional Reform Bill [HL], op cit., Ev 363. Baroness Hale identifies as one of the main problems that "merit" is defined by reference to the qualities and careers of the existing incumbents. She argues that once it is recognised that our present methods of defining and assessing "merit" are not the only ones possible, there is no incompatibility between the aim of increasing diversity and appointing on merit. In her view, however, increased diversity is unlikely to happen unless the Judicial Appointments Commission is "specifically charged with trying to remedy the major mischief in the present system."

2 Mental Capacity Bill

Date introduced to the House of Commons	17 June 2004
Current Bill Number	House of Commons 175
Previous Reports	15th Report of Session 2002–03 (on the draft Bill)

Background

2.1 This is a Government Bill, introduced in the House of Commons on 17 June 2004. The Parliamentary Under Secretary of State at the Department for Constitutional Affairs, David Lammy MP, has made a statement of compatibility with Convention rights under s. 19(1)(a) of the Human Rights Act 1998. Explanatory Notes to the Bill have been published.[85] They deal with the Bill's compatibility with the ECHR at paragraphs 8–14. A draft Code of Practice relating to the Bill was published on 9 September 2004. The Bill completed its Committee stage on 4 November 2004 and will be carried over into the new Session.

2.2 The Bill is the product of a lengthy process of deliberation and consultation. In 1989 the Law Commission was asked to carry out a comprehensive investigation of all areas of the law affecting decisions on the personal, financial and medical affairs of those lacking capacity. The Law Commission reported in March 1995, recommending that there should be a single comprehensive statute making new provision for people lacking mental capacity.[86] The Lord Chancellor's Department published a Green Paper, *Who Decides? Making Decisions on behalf of Mentally Incapacitated Adults*[87] in December 1997 and a policy statement, *Making Decisions*,[88] in October 1999. Consultation with the relevant stakeholders continued through the Mental Incapacity Consultative Forum, established after publication of the Green Paper, and in June 2003 the Government published the Draft Mental Incapacity Bill.[89] The draft Bill was subjected to pre-legislative scrutiny by a Joint Committee of both Houses which published its Report on 28 November 2003.[90] The Government's response to the Joint Committee's Report was presented to Parliament in February 2004.[91]

2.3 We reported our views of the human rights implications of the draft Bill in our Fifteenth Report of Session 2002–03.[92] We concluded that the draft Bill engaged a wide range of rights, but that the safeguards built into the draft Bill were sufficient to ensure that

85 Bill 120-EN

86 Law Commission Report No. 231, Mental Incapacity, HMSO 28 February 1995

87 Cm 3803

88 Cm 4465

89 Cm 5859-I. The draft bill was accompanied by Commentary and Explanatory Notes, Making Decisions, Cm. 5859-II

90 Joint Committee on the Draft Mental Incapacity Bill, Draft Mental Incapacity Bill, Session 2002–03, HL Paper 189, HC 1083 (hereafter, "the Joint Committee Report")

91 Cm 6121

92 JCHR Fifteenth Report of Session 2002–03, *Scrutiny of Bills and draft Bills: Further Progress Report*, HL Paper 149, HC 1005, paras. 4.1–4.7

there was no significant risk of the implementation of the draft Bill leading to an incompatibility with any of them.[93]

2.4 The Joint Committee which carried out the pre-legislative scrutiny of the draft Bill received a number of submissions expressing concern about the impact of the draft bill on Convention rights, and noted in its Report that there was significant disagreement as to the human rights implications of the draft Bill.[94] It therefore carried out its own scrutiny of the human rights issues.[95] It concluded that the mechanisms and safeguards provided by the draft Bill were sufficient to ensure that the relevant Convention rights were protected.

2.5 We will publish a full report setting out the results of our consideration of the Bill in due course. Here we report on our initial consideration of the Bill and identify some key issues on which we have written to the Government.[96]

The human rights implications of the Bill

The human rights engaged

2.6 The Bill engages a number of the most fundamental of human rights: the right to dignity and personal autonomy (in the sense of self-determination), both protected by Articles 3 and 8 ECHR; the right to life under Article 2; the right to liberty under Article 5 ECHR; and the right under Article 14 ECHR not to be discriminated against in the enjoyment of any of these rights including on grounds of mental disability.

2.7 The Bill also engages the State's positive obligations under various of these Articles. For example, there is a positive obligation to promote the autonomy and dignity of people lacking capacity, and also to protect them against exploitation. There may also in certain circumstances be a positive obligation to provide life-prolonging treatment, where a failure to do so would expose the patient to inhuman or degrading treatment contrary to Article 3.

2.8 In addition to these important rights, there are certain non-binding standards which are relevant to the subject-matter of the Bill which we have taken into account in our scrutiny of the Bill—

— The UN Principles for the protection of persons with mental illness and the improvement of mental health care[97]

— The Committee of Ministers of the Council of Europe has adopted a Recommendation to member states concerning the protection of human rights and the dignity of persons with mental disorder.[98]

93 ibid., para. 4.7
94 Joint Committee Report, above, at paras. 48–49
95 ibid., chapter 5 (paras. 45–61)
96 Appendix 1
97 Adopted by General Assembly Resolution 46/119 of 17 December 1991
98 R (2004) 10, adopted by the Committee of Ministers on 22 September 2004

2.9 We have also had regard to the Council of Europe Convention on Human Rights and Biomedicine.

The human rights issues

2.10 The law governing decision-making on behalf of adults lacking capacity has long been recognised as being in need of reform. Our view on initial consideration is that the Bill should be broadly welcomed from a human rights perspective because it enhances the ability of people who lack capacity to make their own decisions where they can, and makes it more likely that sound decisions will be made on their behalf where they cannot make those decisions for themselves. However, a number of human rights issues arise, mainly concerning the adequacy of the various safeguards contained in or envisaged by the Bill.

2.11 For the purposes of our initial consideration we have grouped the principal human rights issues raised by the Bill into four main categories—

(1) Involuntary placement

(2) Procedural safeguards for informally admitted patients: the so-called "Bournewood gap"

(3) withdrawing or withholding life-sustaining treatment

(4) Research

Involuntary placement (clauses 5 and 6 and 28)

2.12 Article 5(1) ECHR permits the detention of people suffering from mental disorders. It provides, so far as relevant—

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (e) the lawful detention of persons ... of unsound mind ...

2.13 To be compatible with Article 5(1)(e), any deprivation of liberty must be "lawful". The purpose of Article 5 is to protect the individual from arbitrary detention. The Court's case-law has established that in order to be "lawful" certain minimum requirements must be satisfied, including—

— an individual shall not be deprived of their liberty unless he has been reliably shown to be of unsound mind on the basis of objective medical expertise (except in emergencies);[99]

99 *Winterwerp v The Netherlands* (1979) 2 EHRR 387 at para. 39

— The deprivation of liberty must be necessary in the circumstances, in the sense that there is no less restrictive alternative to detention.[100]

2.14 Article 5 ECHR also guarantees the right to have the lawfulness of detention reviewed by a court. Article 5(4) provides—

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

2.15 The European Court of Human Rights has held that no deprivation of liberty of a person considered to be of unsound mind may be deemed in conformity with Article 5(1)(e) ECHR without the opinion of a medical expert: any other approach falls short of the required protection against arbitrariness inherent in Article 5 of the Convention.[101] The only exception to this requirement of prior consultation with a medical expert is in emergencies,[102] in which case the medical opinion can be obtained "immediately after the arrest."

2.16 The Court has also held that in order to be "lawful" within the meaning of Article 5(1)(e) ECHR any deprivation of liberty must be necessary in the circumstances—

> The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained.[103]

2.17 The Joint Committee on the Draft Mental Incapacity Bill identified the authorisation of the use of force against a person lacking capacity or the restriction of such a person's liberty of movement as a problematic feature of the draft Bill. It said "where force or restriction of the person's movement is permitted, the Bill contains no requirement for the risk of serious harm to be immediate, which would justify emergency action being taken." It noted the possibility of this giving rise to detention of incapacitated persons in contravention of the HRA.[104] It recommended that the relevant clause be redrafted to specify that detention can only be justified in a situation of urgency (including an emergency) and that the period of detention should be as short and least restrictive as possible.

2.18 The Government in its Response said "We are undertaking further work in relation to [clause 6] and the use of force and restriction of liberty. Bearing in mind ECHR rights, the Government agrees that detention should be as short and least restrictive as possible. We

100 ibid.; *Witold Litwa v Poland*, App. No. 26629/95 (4 April 2000), at para. 78

101 *Varbanov v Bulgaria*, App. No. 31365/96 (5 October 2000), at para 47

102 "in urgent cases or where a person is arrested because of his violent behaviour."

103 *Witold Litwa v Poland*, above, at para. 78

104 Joint Committee Report para. 132

want to capture that requirement in the Bill whilst allowing the care of people with particular needs to continue without undue restriction".[105]

2.19 Clauses 5 and 6 of the Bill in its current form, however, still give rise to the same concern, because they contemplate deprivation of liberty without any medical opinion being obtained, and without any provision confining such deprivation to emergency situations.

2.20 Clause 5 of the Bill aims to clarify aspects of the common law principle of necessity by providing statutory protection against liability for certain acts done in connection with the care or treatment of a person lacking capacity. It provides protection against any liability which would not have arisen if the person who lacks capacity had in fact consented to the act concerned.[106] The protection is available where the person doing the act does so in connection with the care or treatment of another person and has formed a reasonable belief as to that person's lack of capacity and best interests.[107]

2.21 Clause 6 of the Bill sets certain limitations to the acts which are protected from liability by clause 5. One of the limitations is on acts intended to "restrain" the person lacking capacity, which is defined so as to include the use or threat of force where the person lacking capacity is resisting and any restriction of liberty of movement (whether or not the person is resisting).[108] Under clause 6, restraint can only be used where two conditions are satisfied:[109] the person using it must reasonably believe that it is necessary to do the act in order to prevent harm to the person lacking capacity;[110] and the restraint used must be proportionate both to the likelihood of the harm and the seriousness of the harm.[111]

2.22 Although clauses 5 and 6 contain important safeguards against the inappropriate use of restraint (see further below), the combined effect of the two clauses appears to be to authorise (in the sense of protect against liability for) the use of force or the threat of force to overcome an incapacitated person's resistance in certain circumstances, or restrict their liberty of movement, in order to avert a risk of harm. For example, the power in clause 5 could be used to secure the admission into hospital of a person lacking capacity who is resisting such admission, where the person using or threatening force reasonably believes that the person lacks capacity in relation to his treatment, that it is in his best interests for him to be admitted to hospital for treatment and that it is necessary to admit the person in order to prevent harm to himself.

2.23 We have written to the minister asking why the Government has not adopted the recommendation of the Joint Committee that the use or threat of force or other restriction of liberty of movement be expressly confined to emergency situations.

105 Government Response, R 43
106 Clause 5(2)
107 Clause 5(1)
108 Clause 6(4)
109 Clause 6(1)
110 Clause 6(2)
111 Clause 6(3)

Without such an express limitation on the face of the Bill, it appears to us that these provisions are likely to lead to deprivations of liberty which are not compatible with Article 5(1) ECHR, because they do not satisfy the *Winterwerp* requirements that deprivations of liberty be based on objective medical expertise and are necessary in the sense of being the least restrictive alternative. The Bill as drafted therefore does not appear to contain sufficient safeguards against arbitrary deprivation of liberty.

2.24 Clauses 5 and 6 of the Bill could therefore be relied on to authorise the use of force to make an informal admission to hospital of a person who lacks capacity to make decisions about their treatment and is resisting admission to hospital for treatment, and thereby deprive the person lacking capacity of the procedural safeguards which apply when they are compulsorily admitted under the Mental Health Act 1983, in breach of the requirements of Article 5 ECHR.

2.25 According to the decision of the House of Lords in *Bournewood* (considered in detail below at paragraphs 2.34–2.42),[112] persons suffering from mental disorder who are treated for their condition as in-patients in hospital fall into two categories—

> (1) those who are compulsorily and formally admitted into hospital against or regardless of their will, and are detained or liable to be detained in hospital pursuant to the Mental Health Act 1983 ("compulsory patients"); and
>
> (2) those who entered hospital as in-patients for treatment, and who either
>
> — having the capacity to consent, did consent ("voluntary patients"), or
>
> — lacking the capacity to consent, did not object ("informal patients"),
>
> who are admitted pursuant to s. 131(1) MHA 1983 without the formalities and procedures for admission necessary for detention under the Act.[113]

2.26 It follows from this that, under current law, people who lack the capacity to consent to their admission for treatment, but who resist it, should be treated as compulsory patients and admitted pursuant to Part II of the MHA 1983. The Codes of Practice on the MHA issued by the Department of Health state precisely this: for incapacitated patients who are non-compliant or resist treatment, an application should be made for compulsory admission to hospital under the MHA in order that treatment for mental disorder can be given.[114]

2.27 Under current law, therefore, force cannot be used to admit a person lacking capacity into hospital if they are resisting admission. In such cases they must be compulsorily admitted and detained pursuant to Part II of the MHA 1983, which attracts the protection

112 *R v Bournewood Community and Health NHS Trust*, ex p. L (Secretary of State for Health and others intervening) [1999] 1 AC 458; [1998] 3 All ER 289 (HL).

113 Section 131(1) MHA 1983 provides for the "informal admission" of patients: "(1) Nothing in this Act shall be construed as preventing a patient who requires treatment for mental disorder from being admitted to any hospital or registered establishment in pursuance of arrangements made in that behalf and without any application, order or direction rendering him liable to be detained under this Act, or from remaining in any hospital or registered establishment in pursuance of such arrangements after he has ceased to be so liable to be detained."

114 Mental Health Act 1983 Codes of Practice para. 19.27; Health Service Circular 1998/122.

of all the formalities and procedural safeguards provided in that Act. Those safeguards include—

— Application for compulsory admission must be made by an approved social worker on the basis of two medical recommendations

— A right of appeal to the Mental Health Review Tribunal to have the legality of detention determined

2.28 As currently drafted, it therefore appears that the Bill undermines the safeguards which currently exist under the MHA 1983 by authorising the use or threat of force to make an informal admission. Those safeguards are required in order to comply with Article 5 ECHR (see above).

2.29 Clause 28 of the Bill, which deals with the relationship between the Mental Capacity Bill and the Mental Health Act 1983, does not address this problem. It provides that nothing in the Bill authorises anyone to give a patient medical treatment for mental disorder, or to consent to a patient being given such treatment, if at the time when it is proposed to treat the patient, his or her treatment is regulated by Part IV of the MHA 1983. Part IV of the MHA 1983 deals with consent to treatment, including when compulsory treatment can be given to a patient. The effect of clause 28 is therefore to ensure that the specific statutory safeguards which the MHA 1983 affords in relation to compulsory treatment must always be afforded to those patients to whom it applies. It does not, however, apply to compulsory admission to hospital which is regulated by Part II of the MHA 1983. There is no equivalent provision which requires that the specific statutory safeguards which the Act gives in relation to compulsory admission must always be afforded to those who could be compulsorily admitted.

2.30 It might be argued that the proportionality requirements contained within the Bill would operate to ensure that in practice force would not be used or threatened to make an informal admission into hospital. Clause 6(3) makes it a condition of any act of restraint that the restraint used is proportionate both to the likelihood of the harm and the seriousness of the harm. The principle in clause 1(6) of the Bill would also apply to any act of restraint: before restraint is used, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

2.31 We have considered carefully whether this could be said to amount to a sufficient safeguard to satisfy the requirements of the Convention. On balance, however, it seems to us that the Bill as currently drafted does authorise the use or threat of force to make an informal admission, even allowing for the express proportionality requirements contained in the Bill.

2.32 The Joint Committee on the Mental Incapacity Bill noted this overlap and recommended that the Codes of Practice include clear guidance to govern the choice of legal powers to provide treatment for mental disorder of people lacking capacity to

consent.[115] It seems to us that it would be preferable to put the matter beyond doubt in the primary legislation itself by extending the scope of clause 28 to make clear that nothing in the Act authorises anyone to admit a person into hospital against his or her will where the conditions for compulsory admission or guardianship under Part II MHA 1983 are met.

2.33 **We have therefore written to the Minister drawing this deficiency to his attention and asking whether the Government intends to redress it by amending the Bill, or, if it does not intend to do so, for its reasons for its view that there is no incompatibility in this respect between the Bill as it stands and Article 5 ECHR.**

Compliant incapacitated patients: "the Bournewood Gap"

2.34 The second issue of compatibility with the right to liberty is whether the failure to extend the procedural safeguards in the Mental Health Act 1983 to compliant incapacitated persons who do not resist informal admission is in breach of Article 5(1) and (4) ECHR.

2.35 This issue arises as a direct result of the decisions of the courts in *Bournewood*. The issue in that case was whether a person who lacked capacity to consent to medical treatment had been unlawfully detained when he was admitted to hospital "informally" and did not object to his admission. The Court of Appeal had held that he had been unlawfully detained, because the MHA 1983 created a complete legal regime which excluded the application of the common law doctrine of necessity. The House of Lords, however, held that people who lacked capacity to consent, but did not object to their admission to hospital (compliant incapacitated persons), could be informally admitted under s. 131(1) MHA 1983, without the formalities and procedures for admission necessary for detention under the Act. The justification for the provision of treatment and care for such informal patients was held to be the common law doctrine of necessity.

2.36 The House of Lords held that it had no alternative but to reach this conclusion applying orthodox principles of statutory interpretation to the MHA 1983, but it recognised that its decision left a gap in protection for compliant incapacitated persons. Informally admitted patients are a particularly vulnerable group, because their condition is often such that they have no understanding of the implications of admission to hospital or treatment which is why they do not resist. Lord Steyn described the denial of the statutory safeguards to this vulnerable group as "an indefensible gap in our mental health law." He described the effect of the House of Lords decision in the following terms—

> The general effect of the decision of the House is to leave compliant incapacitated patients without the safeguards enshrined in the Act of 1983. This is an unfortunate result. The Mental Health Act Commission has expressed concern about such informal patients in successive reports. And in a helpful written submission the Commission has again voiced those concerns and explained in detail the beneficial effects of the ruling of the Court of Appeal. The common law principle of necessity is a

115 Joint Committee Report, paras 220–222. The Government in its response to this recommendation of the Joint Committee said "We fully acknowledge that the Codes of Practice will play an important role in clearly explaining how mental incapacity legislation operates in relation to other pieces of legislation, particularly mental health legislation": Government Response, R 68.

> useful concept, but it contains none of the safeguards of the Act of 1983. It places effective and unqualified control in the hands of the hospital psychiatrist and other health care professionals. It is, of course, true that such professionals owe a duty of care to patients and that they will almost invariably act in what they consider to be the best interests of the patient. But neither habeas corpus not judicial review are sufficient safeguards against misjudgments and professional lapses in the case of compliant incapacitated patients. Given that such patients are diagnostically indistinguishable from compulsory patients, there is no reason to withhold the specific and effective protections of the Act of 1983 from a large class of vulnerable mentally incapacitated individuals. Their moral right to be treated with dignity requires nothing less. The only comfort is that counsel for the Secretary of State has assured the House that reform of the law is under active consideration.

2.37 The Joint Committee on the Draft Mental Incapacity Bill considered this issue in its Report.[116] It noted that certain additional safeguards for compliant incapacitated people were proposed in Part 5 of the draft Mental Health Bill, including a right to advocacy, appointment of a nominated person, and access to a tribunal.[117] The Joint Committee sought clarification from the Government as to whether it is intended to incorporate additional safeguards for compliant incapacitated patients into the draft Mental Incapacity Bill if there was likely to be a delay in implementing the provisions proposed in the draft Mental Health Bill.[118] The Government in its Response said—

> We are still in the process of considering what safeguards are necessary for compliant incapacitated patients and whether such safeguards would be best placed in a Mental Incapacity Bill or a Mental Health Bill. The judgment in the *HL v UK* case is still awaited and it is anticipated that this would provide useful guidance.[119]

2.38 The European Court of Human Rights gave its judgment on 5 October 2004.[120] It upheld the applicant's complaints that his detention was in breach of Article 5(1) ECHR because it was neither "in accordance with a procedure prescribed by law" nor "lawful", and in breach of Article 5(4) because the procedures available to him as an informal patient for the review of the legality of his detention did not satisfy the requirements of that Article.

2.39 The Court of Human Rights found particularly striking the lack of any fixed procedural rules by which the admission and detention of compliant incapacitated persons is conducted.[121] It considered significant the contrast between this dearth of regulation and the extensive network of safeguards applicable to psychiatric committals covered by the Mental Health Act 1983.

> In particular and most obviously, the Court notes the lack of any formalised admission procedures which indicate who can propose admission, for what reasons

116 Joint Committee Report, paras 223–227

117 ibid., para. 224, referring to the evidence of Health Minister Ms Rosie Winterton MP

118 ibid., para. 225

119 Government Response, R 69

120 *HL v UK*, App no. 45508/99 (5 October 2004).The judgment will become final in the circumstances set out in Article 44(2) ECHR

121 ibid., at para. 120

> and on the basis of what kind of medical and other assessments and conclusions. There is no requirement to fix the exact purpose of admission (for example, for assessment or treatment) and, consistently no limits in terms of time, treatment or care attach to that admission. Nor is there any specific provision requiring a continuing clinical assessment of the persistence of a disorder warranting detention. The nomination of a representative of a patient who could make certain objections and applications on his or her behalf is a procedural protection accorded to those committed involuntarily under the 1983 Act and which would be of equal importance for patients who are legally incapacitated and have … extremely limited communication abilities.

2.40 As far as Article 5(4) was concerned, the Court held that its requirements were not satisfied by judicial review or habeas corpus proceedings.

2.41 The judgment of the European Court of Human Rights in *HL v UK* raises starkly for the Government the question whether the absence from the Mental Capacity Bill of any of the procedural safeguards required by Article 5 in respect of compliant incapacitated patients is compatible with the UK's Convention obligations. When the Draft Mental Incapacity Bill was being scrutinised, the Government relied on the fact that additional procedural safeguards for such patients were contained in Part 5 of the draft Mental Health Bill. Those safeguards are no longer contained in the latest version of the draft Mental Health Bill.

2.42 **In light of the judgment of the European Court of Human Rights, the Government can no longer maintain that the current position is Convention compatible and proceed with the adoption of new legislation premised on that assumption. It is now established beyond doubt that the failure to extend various procedural safeguards to a group of vulnerable people who are acknowledged to be excluded from the benefit of the safeguards will give rise to future findings of incompatibility with Article 5 ECHR. The Government has accepted that the present Bill "may not, by itself, deliver all the necessary safeguards".[122] It has promised to deliver the appropriate safeguards as soon as possible, but only following a wide consultation as to how to design procedural safeguards which are both effective and proportionate and deliverable in practice. We are concerned at the apparent postponement of a remedial measure following the judgment in *HL v UK*, and have written to the Minister asking for more details about the possible solutions being canvassed. It is obviously undesirable for the present Bill to proceed to enactment on its original assumption that there was no *Bournewood* gap to be filled.**

Withholding or withdrawing life-sustaining treatment

2.43 The Bill contains a number of provisions which affect the circumstances in which life-sustaining or prolonging treatment may be withheld or withdrawn from a person lacking capacity. These provisions raise issues of compatibility with the right to life under Article 2,

122 HC Deb., 28 October 2004, col. 251

the right not to be subjected to inhuman or degrading treatment under Article 3, and the right to physical and moral integrity, including mental stability, under Article 8.

Advance decisions to refuse treatment

2.44 Clauses 24 to 26 make provision for advance decisions to refuse treatment. The inclusion of such provisions in the Bill does not itself raise issues of compatibility with Article 2 ECHR. It is well established in current law that, important though the principle of the sanctity of life is in human rights law, it may have to yield where it comes into conflict with the rights to dignity and personal autonomy protected by Articles 3 and 8 ECHR.[123] The compatibility question is whether the safeguards surrounding such advance directives are adequate.

2.45 We have scrutinised very carefully the safeguards provided to ensure that such advance decisions to refuse treatment do not lead to wrong decisions being made about the existence, validity and applicability of an individual's advance decision to refuse treatment. We are generally satisfied that the safeguards are adequate for this purpose, save in two respects.

2.46 First, it is not clear to us why advance directives should not carry the additional safeguard that they should be required to be in writing. Second, the classification of artificial nutrition and hydration ("ANH") as "treatment" may not be well known to laypeople. The requirement that an advance directive specify the particular treatment for which consent is refused in advance should mean in practice that a specific advance refusal of ANH would be required in order to be effective. However, in order to be sure that a general advance directive refusing consent to life-sustaining treatment generally is not treated as extending to refusal of consent to ANH, we consider that the guidance in the Code of Practice should make this clear to people who make advance directives.[124] We have written to the Minister in relation to both issues.

2.47 We have also considered whether clauses 24 to 26 should be amended to reflect the recent decision in *Burke* that an advance directive requiring the provision of ANH is determinative of the question whether such treatment should be provided.[125] The reasoning of the High Court is that this is required in order to comply with the patient's right to autonomy. We have written to the Minister asking for an explanation as to whether the Government will be doing this, and if not, why not.

Withdrawal of life-sustaining treatment where no advance directive

2.48 We are, however, concerned, about the operation of certain other provisions of the Bill which may have the effect of permitting the withdrawal of life-sustaining treatment of

123 See for example, *HE v A Hospital NHS Trust* [2003] EWHC 1017 (Fam), [2003] FLR 408

124 See the suggestion of Ann Winterton MP in Committee, HC Deb., 28 October 2004, col. 226, asking that the guidance on the Act point out to people wishing to make advance directives that treatment includes basic care such as hydration and nutrition, however delivered.

119 *R (on the application of Burke v The General Medical Council)* [2004] EWHC 1879 (Admin) (30 July 2004)

persons lacking capacity in circumstances which may breach their rights under Article 2, 3 and 8 ECHR.

2.49 The problem mainly arises because artificial nutrition and hydration is classified by existing case-law as "treatment" which can therefore be withheld or withdrawn if correctly judged not to be in a patient's best interests. In the recent case of *Burke*, the High Court held that it was hard to envisage any circumstances in which a withdrawal of ANH from a sentient patient, whether competent or incompetent, would be compatible with the Convention. Withdrawal of ANH from a sentient patient lacking capacity would expose the patient to acute mental and physical suffering and therefore be in breach of Article 3, unless the patient's life, if thus prolonged, would from the patient's point of view be intolerable. The only circumstances in which the court could envisage that there would be no breach of Article 3 as a result of the withdrawal of ANH is where it is withdrawn in circumstances where it is serving absolutely no purpose other than the very short prolongation of the life of a dying patient who has slipped into his final coma and lacks all awareness of what is happening.

2.50 The High Court held that the GMC's Guidance, *Withholding and Withdrawing Life-prolonging Treatment: Good Practice in Decision-Making*, was unlawful in certain respects, because it was incompatible with patients' Convention rights. In particular, it held that the GMC Guidance fails sufficiently to acknowledge the heavy presumption in favour of life-prolonging treatment and to recognise that the touchstone of best interests is intolerability: in other words, it is only in the best interests of a patient to withhold or withdraw life-sustaining treatment if it is intolerable for them to continue to live. The Guidance fell short because it seemed to accept that ANH can be withdrawn from patients who are not dying, if they are in a "very serious condition", and that it can be enough to justify withdrawing ANH from a patient who is not dying that it "may cause suffering" or be "too burdensome in relation to the possible benefits." The Guidance was also found wanting because it failed to spell out the legal requirement that in certain circumstances it is necessary to obtain prior judicial authorisation for the withdrawal of ANH.

2.51 We are similarly concerned that, in relation to the withdrawal of ANH, the presumption in favour of life-sustaining treatment is not sufficiently strong in the Bill to satisfy the requirements of Articles 2, 3 and 8 as explained by the High Court in *Burke*. Under clause 11, for example, a lasting power of attorney in relation to personal welfare decisions includes authority to refuse consent to the carrying out or continuation of a treatment by a person providing health care for the patient concerned.[126] Although the same clause also provides that this does not authorise the giving or refusing of consent to the carrying out or continuation of life-sustaining treatment unless the instrument creating the power of attorney contains express provision to that effect,[127] this is not in our view sufficient to safeguard against the possibility of the donee of a power of attorney which expressly extends to life-sustaining treatment purporting to refuse consent to ANH on the ground that the power of attorney includes power to consent to or refuse life-sustaining

126 Clause 11(6)(c)
127 Clause 11(7)(a)

treatment. In our view, there is a danger that the donor of a lasting power of attorney who expressly authorises their attorney to make decisions in relation to life-sustaining treatment, will not appreciate that artificial nutrition and hydration count as "treatment" and that the instrument is therefore conferring authority in effect to refuse food and drink. The significance of this is that the health care professionals will be obliged to comply with such a refusal of consent by the attorney, even if they judge it to be contrary to the best interests of the patient. In our view, the safeguards need considerably tightening in this respect, for example by requiring that any authority to refuse consent to ANH be expressly conferred in any instrument creating a power of attorney, and we have written to the Minister asking for a response to these concerns.[128]

Research (clauses 30–33)

2.52 Clauses 30–33 of the Bill provide for research to be carried out on, or in relation to, a person lacking capacity in circumstances where consent would be required if it were carried out on, or in relation to, a person with capacity. It has become clear in the course of the Bill's passage that the type of research envisaged is not confined to medical research, but includes "social care research" projects, such as interviewing service users about their care or accessing data from patient records.[129]

2.53 The carrying out of scientific research on persons who lack capacity is a politically controversial issue. As a matter of human rights law, it engages the individual's right to dignity and privacy, to be free of inhuman and degrading treatment, and to physical and moral integrity, as well as the State's positive obligations to take steps to protect particularly vulnerable people from harm or exploitation. During both public and parliamentary debates on the Bill, some have argued that the carrying out of research on people lacking the capacity to consent to such research is never justifiable, or should only be permitted where it is in their best interests because it provides them with a direct benefit.

2.54 The Explanatory Notes explain that the Bill's provisions on research "are based on long-standing international consensus, for example laid down by the World Medical Association and the Council of Europe Convention on Human Rights and Biomedicine".[130] We have therefore considered the provisions of the Bill alongside those standards, particularly those contained in the Convention on Human Rights and Biomedicine which contains detailed provision in relation to the carrying out of scientific research on human beings, including those lacking capacity.[131] It is clear from the relevant

128 The same danger arises in relation to a deputy appointed by the court under clause 16 with powers in relation to a person's welfare because by clause 17(1)(d) these powers extend to refusing consent to the carrying out or continuation of a treatment by a person providing healthcare to the individual concerned. The power is subject to the same safeguard, that the deputy may not refuse consent to the carrying out or continuation of life-sustaining treatment unless the court has conferred on the deputy express authority to that effect: Clause 20(5).

129 Rosie Winterton MP, Minister of State, Department of Health, HC Deb., 28, October 2004, col. 271

130 EN para. 88

131 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, CETS no. 164, 4 April 1997, chapter V, Articles 15–17. The UK has not yet ratified the Convention, but accepts in relation to its provisions on research that it represents "long-standing international consensus". Committee of Ministers Recommendation R(2004)10, concerning the protection of the human rights and dignity of persons with mental disorder (above) provides in

international human rights standards that research on people lacking capacity *is* permissible, but only subject to very strict safeguards. The question therefore is the adequacy of the safeguards provided in the Bill. A comparison of those safeguards with the relevant international standards raises a number of questions.

2.55 Articles 15–17 of the Convention provide—

> **Article 15 – General rule**
>
> Scientific research in the field of biology and medicine shall be carried out freely, subject to the provisions of this Convention and the other legal provisions ensuring the protection of the human being.
>
> **Article 16 – Protection of persons undergoing research**
>
> Research on a person may only be undertaken if all the following conditions are met—
>
> i. there is no alternative of comparable effectiveness to research on humans;
>
> ii. the risks which may be incurred by that person are not disproportionate to the potential benefits of the research;
>
> iii. the research project has been approved by the competent body after independent examination of its scientific merit, including assessment of the importance of the aim of the research, and multidisciplinary review of its ethical acceptability;
>
> iv. the persons undergoing research have been informed of their rights and the safeguards prescribed by law for their protection;
>
> v. the necessary consent as provided for under Article 5 has been given expressly, specifically and is documented. Such consent may be freely withdrawn at any time.
>
> **Article 17 – Protection of persons not able to consent to research**
>
> 1. Research on a person without the capacity to consent as stipulated in Article 5 may be undertaken only if all the following conditions are met—
>
> i. the conditions laid down in Article 16, sub-paragraphs i to iv, are fulfilled;
>
> ii. the results of the research have the potential to produce real and direct benefit to his or her health;
>
> iii. research of comparable effectiveness cannot be carried out on individuals capable of giving consent;
>
> iv. the necessary authorisation provided for under Article 6 has been given specifically and in writing; and
>
> v. the person concerned does not object.
>
> 2. Exceptionally and under the protective conditions prescribed by law, where the research has not the potential to produce results of direct benefit to the health of the person concerned, such research may be authorised subject to the conditions laid

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Article 14 that biomedical research on a person with mental disorder should respect the relevant provisions of the Convention on Human Rights and Biomedicine.

down in paragraph 1, sub-paragraphs i, iii, iv and v above, and to the following additional conditions—

i. the research has the aim of contributing, through significant improvement in the scientific understanding of the individual's condition, disease or disorder, to the ultimate attainment of results capable of conferring benefit to the person concerned or to other persons in the same age category or afflicted with the same disease or disorder or having the same condition;

ii. the research entails only minimal risk and minimal burden for the individual concerned.

The "no alternative" criterion

2.56 Clause 31(3) of the Bill requires that there must be "reasonable grounds for believing" that the research would not be as effective if carried out only on persons who have capacity to consent.. Article 17(1)(iii) of the Convention, by comparison, stipulates as a condition for the carrying out of such research that "research of comparable effectiveness cannot be carried out on individuals capable of giving consent."

2.57 **It seems to us, on initial consideration, that the introduction of the reference to there being reasonable grounds for believing that the research would be less effective if carried out only on persons with capacity is a significant dilution of the condition contained in the Human Rights and Biomedicine Convention, which states the requirement as a matter of fact rather than a matter of reasonable belief.[132] We have written to the Minister asking for the reasoning behind the departure from the wording of the Convention.**

The nature of the benefit

2.58 Clause 31(4) of the Bill provides that the research must either have "potential benefit" to the person lacking capacity, without imposing a disproportionate burden, or be intended to provide knowledge of the causes or treatment of, or of the care of, persons affected by the same or a similar condition.

2.59 Again this appears to us to be a considerably weaker requirement than that contained in the Human Rights and Biomedicine Convention. Article 17 provides that research on persons lacking capacity may only be undertaken if the results of the research have the potential to produce "real and direct benefit" to the health of the person concerned,[133] or, *exceptionally*, where there is no such potential for direct benefit, where certain additional conditions are met. One of those additional conditions is that the research has the aim of contributing, through *significant* improvement in the scientific understanding of the

132 The Adults with Incapacity (Scotland) Act 2000 uses the unqualified formulation contained in Article 17(1)(iii) of the Convention.

133 Article 17(1)(ii)

individual's condition, to results capable of conferring benefit to the person concerned or others with the same condition.[134]

2.60 **We find it impossible to avoid the conclusion that the nature of the benefit from the research required in clause 31(4) of the Bill has the effect of lowering the threshold of when research will be permissible compared to the standards contained in the Convention. The absence of a reference to the potential benefit being "real and direct" in clause 31(4)(a), the breadth of the test for whether the research is intended to add to the sum of general knowledge on the subject under clause 31(4)(b) and the absence of a structure in which it is only in exceptional cases that research may be conducted which does not have the potential to confer a direct benefit on the person concerned, all amount to relaxations of the standards contained in the Convention. We have written to the Minister asking that the structure and language of the Convention be more closely followed in relation to the nature of the benefit required in order for research to be permissible in the absence of consent.**

The nature of the risk of harm

2.61 Clause 31(5) contains additional conditions that must be satisfied if the research in question does not have the potential to benefit the person lacking capacity but is intended to provide knowledge of the causes, treatment or care of the condition. The additional conditions are that there must be reasonable grounds for believing that the risk to the person lacking capacity from taking part in the research is likely to be negligible, and that anything done to the person will not interfere with their freedom of action or privacy in a significant way or be unduly invasive or restrictive. Article 17(2)(ii), by comparison, requires that the research must entail "only minimal risk and minimal burden for the individual."

2.62 **We again consider, on an initial comparison of the two requirements, that the provision in the Bill is a much weaker requirement than that contained in the Convention. The introduction again of a reference to "reasonable grounds for believing", the reference to "negligible" rather than "minimal", and the introduction of the qualification that the impact on the person's rights should not be "significant", all in our view reduce the threshold for the carrying out of research on people lacking capacity, and therefore make it more likely that such research will be carried out in circumstances which are not contemplated by the Human Rights and Biomedicine Convention. We have written to the Minister asking for the explanation for this approach.**

The competent body

2.63 By clause 31(1) of the Bill, the "appropriate body" may not approve a research project unless satisfied that a number of requirements are met in relation to the research carried out for the project. The "appropriate body" is defined by the Bill to mean "the person,

134 Article 17(2)(ii) (emphasis added)

committee or other body specified in regulations made by the Secretary of State as the appropriate body in relation to a project of the kind in question".[135] The Bill contains no further definition of the appropriate body or of the procedures by which it is to decide whether or not to approve a research project. The Explanatory Notes merely say that "the Secretary of State must specify an appropriate authority for approving research projects" and that this authority is "likely to be a research ethics committee".[136] The Minister, however, has made clear that it will not necessarily be a research ethics committee.[137] It might, for example, be a different type of body if the nature of the research project is different, such as a social care research project.

2.64 The Human Rights and Biomedicine Convention stipulates as one of the conditions that must be satisfied before research can be undertaken on a person that "the research project has been approved by the competent body after independent examination of its scientific merit, including assessment of the importance of the aim of the research, and multi-disciplinary review of its ethical responsibility".[138]

2.65 **Precisely how the appropriate authority will go about deciding whether to approve a research project on people lacking capacity is an important part of the scheme providing for research. We have written to the Minister asking for more detail of how the "appropriate body" which will be specified in regulations will conduct its work of deciding whether or not to approve a particular research project. Without such information we cannot assess whether an important element of the procedural protections required by the Convention on Human Rights and Biomedicine is satisfied.**

2.66 We will report further on the Bill in due course in light of the Government's response to the questions set out above.

135 Clause 30(4)

136 EN para. 90

137 HC Deb., 28 October 2004, col. 268

138 Article 16(iii)

3 Housing Bill

Date introduced to the House of Commons	8 December 2003
Date introduced to the House of Lords	13 May 2004
Current Bill Number	House of Lords 118
Previous Reports	8th, 10th and 20th

3.1 We have reported previously on the Housing Bill in our Eighth, Tenth and Twentieth Reports of this session. On 21 October 2004 the Minister wrote to us commenting on a point we raised in relation to clause 207 (then clause 185) in our Eighth Report concerning the disclosure of information to registered social landlords for the purposes of section 1 of the Crime and Disorder Act 1998.[139]

3.2 In our Twentieth Report, we noted the recent decision of the European Court of Human Rights in *Connors v UK*, which found that the summary eviction of a family from a local authority gypsy caravan site breached Article 8 ECHR. We wrote to the Office of Deputy Prime Minister, suggesting that amendments be introduced to the Housing Bill to rectify this incompatibility.[140] The Rt Hon Keith Hill MP replied to our letter on 1 November 2004, noting that amendments had been made to the Bill at report stage in the House of Lords, which seek to establish security of tenure on county council gypsy and traveller sites. **We welcome these amendments.** We publish the Minister's letter as an Appendix to this report.[141]

139 Appendix 2a
140 Appendix 2b
141 Appendix 2c

Private Members' Bills

4 Anti-social Behaviour Bill

Date introduced to the House of Commons	29 June 2004
Current Bill Number	House of Commons 128
Previous Reports	None

4.1 This is a Private Members' Bill introduced by Mr Wayne David MP. The Bill would allow persons designated under the Police Reform Act 2002,[142] as community support officers, the power of arrest without warrant in circumstances prescribed by the Secretary of State by regulations (clause 1). It would also allow the Secretary of State to make regulations conferring additional powers on community support officers in relation to the confiscation of alcohol (clause 2).

4.2 The conferring of powers of arrest on community support officers engages Article 5.1 ECHR, the right to liberty. In order to comply with Article 5, any regulations allowing for the exercise of this power would need to make it subject to sufficient safeguards to ensure that it is exercised in accordance with law and is not used arbitrarily or in a discriminatory way. In order to satisfy the conditions in Article 5(1)(c), it will also be necessary to ensure that any power of arrest is only available where there is reasonable suspicion that the person arrested has committed, is committing or is about to commit an offence. These important limits on the width of any power to arrest should really be set out on the face of the primary legislation, rather than left to regulations which will not receive the same degree of parliamentary scrutiny and debate.

4.3 Although the terms of any additional powers for the confiscation of alcohol to be provided for in regulations are unclear from the face of the Bill, such powers would engage property rights under Article 1 of Protocol 1 ECHR, and would need to be justified as a proportionate interference with such rights.

142 Under section 38 of the Police Reform Act 2002, persons may be designated to perform certain police functions by Chief officers of police or Directors General

5 Criminal Justice (Justifiable Conduct) Bill

Date introduced to the House of Commons	12 January 2004
Current Bill Number	House of Commons 36
Previous Reports	None

5.1 This is a Private Members' Bill introduced by Mr Roger Gale MP. The Bill would exempt from any criminal liability any householder—or anyone present in a house with the householder—who takes action against someone he or she believes (whether reasonably or unreasonably) to be a trespasser, where the action is taken (reasonably or unreasonably) in self-defence, in defence of another person or of the property, or to apprehend a wrongdoer or to prevent crime (clause 1). An exemption from civil liability would apply in similar circumstances (clause 3). Under clause 2, the Crown Prosecution Service, in considering whether to bring any prosecution in these circumstances, is expressly required to have regard to the public interest in protection against intruders in the home.

5.2 Under clause 1, the exemption from criminal liability would apply to any offence committed by the householder, including murder or manslaughter. A householder would have an absolute defence to any charge of murder or manslaughter, where he or she asserted beliefs, however unreasonable, that the person killed had been a trespasser, and that the killing had been necessary in self-defence, or in defence of other persons or of property. In such cases, having regard to clause 2, a prosecution would be unlikely to be initiated. Furthermore, no civil action in damages would be open to anyone injured, or to the relatives of anyone killed, by the householder's actions.

5.3 Article 2 ECHR protects the right to life. The right to life is one of the most fundamental rights in the Convention and is subject to very limited restrictions. Article 2.1 states: "Everyone's right to life shall be protected by law. No one shall be deprived of life intentionally …". Under Article 2.2, deprivation of life may be justified where it results from the use of force which can be shown to be no more than is absolutely necessary in defence of any person from unlawful violence.

5.4 Under Article 2 ECHR, there is a positive obligation on the State to take reasonable steps to protect the right to life of individuals.[143] This includes an obligation to protect against the actions of private individuals which breach Article 2. There are also similar positive obligations under Article 3 (freedom from inhuman and degrading treatment)[144] and Article 8 (the right to respect for private life including physical integrity) to protect against physical harm. An important element of these positive obligations is the duty to put in place a legal framework which provides effective protection for the Convention rights. Where essential aspects of rights to life or physical integrity are at stake, it has been

143 *Oneryildiz v Turkey*, App. No 48939/99, *Osman v UK*(1998) 29 EHRR 245; *LCB v UK* (1998) 27 EHRR 212

144 *A v UK*, (1998) 27 EHRR 611

established that there is an obligation on the state to put in place criminal law sanctions which ensure effective deterrence against breaches of these rights.[145]

5.5 This Bill would remove the deterrent effect of the criminal law in relation to murder, manslaughter and assault, amongst other offences, in cases which would not be limited to the use of force which could be shown to be no more than absolutely necessary in self defence. In removing the deterrent of the criminal law in this way, the Bill would in our view breach positive obligations to protect Convention rights to life and physical integrity. We consider that the Bill would be unlikely to be capable of interpretation in accordance with the rights protected under the Human Rights Act, under section 3 HRA. **We draw this matter to the attention of both Houses.**

145 *X and Y v Netherlands* (1986) 8 EHRR 235; *A v UK*, op cit; *Stubbings v UK* (1996) 23 EHRR 213

6 Domestic Energy Efficiency Bill

Date introduced to the House of Commons	4 May 2004
Current Bill Number	House of Commons 100
Previous Reports	None

6.1 The Domestic Energy Efficiency Bill is a Private Members' Bill introduced by Mr Jim Cunningham MP. It would introduce a number of measures designed to address the problem of fuel poverty, through enhancing energy efficiency in households which are fuel poor. It would establish a system for the identification of persons who were fuel poor through co-operation between relevant agencies and professionals (clause 1). It would establish a system for inspection of heating appliances in fuel poor homes (clause 2) and for assessing the energy performance of housing owned by local authorities or registered social landlords, and issuing certificates in respect of such performance (clause 3).

6.2 Fuel poverty raises issues under the UN International Covenant on Economic, Social and Cultural Rights, and in particular under Article 11 of the Covenant which guarantees the right to an adequate standard of living. This right must, in accordance with Article 2 of the Covenant, be progressively realised to the maximum of resources available to the state, and without discrimination. We note that, in its Concluding Observations on the fourth report of the UK under the Covenant, issued in 2002,[146] the UN Committee on Economic, Social and Cultural Rights drew particular attention to this issue. It recommended—

> ... that the State party take immediate measures to improve the situation of the large number of families and individuals who live in poor housing conditions and to relieve the situation of those who are "fuel poor".[147]

6.3 Extremes of fuel poverty may also raise issues under the ECHR, in particular under Article 8, the right to physical integrity, and under Article 3, the freedom from inhuman or degrading treatment. In providing for additional measures to address fuel poverty, this Bill would, in our view, further the protection of rights under the Covenant on Economic, Social and Cultural Rights, and enhance protection of rights under the ECHR. **We draw this matter to the attention of both Houses.**

146 E/C.12/1/Add. 79

147 para. 39

7 Doorstep Selling (Property Repairs) Bill

Date introduced to the House of Commons	18 May 2004
Current Bill Number	House of Commons 111
Previous Reports	None

7.1 This is a Private Members' Bill introduced by Mr Gordon Marsden MP. The Bill would prohibit unsolicited household visits to sell property repairs, maintenance and improvements (clause 3(1)). Contravention of the prohibition would be punishable by up to three month's imprisonment or a fine (clause 3(2)).

7.2 The Bill would allow police constables and other authorised officers to exercise powers of entry and search of premises other than dwellings in order to enforce the terms of the Bill, and to require documents to be produced and to seize them in the investigation of a suspected offence under the Bill (clause 5(1)). Clause 5(3) provides for a warrant to be issued by a justice of the peace for entry onto premises by force in pursuit of an investigation of offences under the Bill.

7.3 Household visits to sell goods or services are likely to engage the right to freedom of expression (Article 10 ECHR).[148] The ECtHR has held that commercial information conveyed to a limited group, intended to promote the economic interests of an undertaking, does fall within the protection of Article 10.[149] This includes advertising, regardless of whether it is commercial.[150] Insofar as household visits are designed to advertise a commercial service to householders, therefore, they are likely to fall within protection for commercial speech under Article 10. It should be noted, however, that states are accorded a relatively wide margin of appreciation in the extent to which they regulate commercial speech,[151] which may justify the restriction on Article 10 rights imposed by the Bill, where they can be shown to be a necessary and proportionate response to a legitimate aim.

7.4 It must further be considered whether the offence would have a discriminatory effect, contrary to Article 14 (the prohibition on discrimination in the enjoyment of other Convention rights) read in conjunction with Article 10. The Bill criminalises a particular type of commercial activity, whilst other similar types of commercial activity which might be considered to present similar problems (for example selling by way of unsolicited mail) remain permissible. Were the category of commercial behaviour criminalised in the Bill to be found to impact disproportionately on particular groups, for example travellers, such discriminatory impact could lead to a breach of Article 14 read in conjunction with Article 10.

7.5 The investigatory powers provided for in clause 5 of the Bill engage the right to respect for private life in Article 8 ECHR. Article 8 rights may be engaged not only in searches of

148 *Markt Intern and Beerman v Germany* (1989) 12 EHRR 161; *Casado Coca v Spain* (1994) 18 EHRR 1

149 *Markt Intern and Beerman v Germany*, op cit

150 *Casado Coca v Spain*, op cit

151 *Markt Intern and Beerman v Germany*, op cit

the home, but also in searches of office premises.[152] Any exercise of the powers of investigation under clause 5 would need to be justified sufficiently determinate to be in accordance with law, as pursuing a legitimate aim, and as necessary, proportionate and non-discriminatory in the specific circumstances of the case. In this regard the absence of safeguards for the exercise of investigatory powers under clause 5, in particular the absence of a requirement of judicial authorisation, or for a particular level of internal authorisation for search, seizure, or the production of documents, may lead to disproportionate interference with Article 8 rights.

7.6 This is a particular concern in regard to the powers of entry under clause 5(1)(a) which are wide in their terms and permit entry "for the purpose of ascertaining whether any offence under this Act has been committed". This power, on its face, would appear to allow wide scope for search of premises of categories of businesses likely to be involved in door-to-door selling. In contrast, powers to require the production of documents, to take copies of documents, and to seize goods, are exercisable only where there is "reasonable cause to believe that an offence has been committed". In our view, the provisions of clause 5 as currently drafted are likely to lead to disproportionate interference with Article 8 rights. **We draw these matters to the attention of both Houses.**

152 *Neimitz v Germany* (1993) 16 EHRR 97

8 Organ Donation (Presumed Consent and Safeguards) Bill

Date introduced to the House of Commons	3 February 2004
Current Bill Number	House of Commons 47
Previous Reports	None

8.1 This is a Private Members' Bill introduced by Siobhan McDonagh MP, similar to other Bills introduced in the 2001–02 Session, initially by Tom Watson MP, and later by Cheryl Gillan MP. The Bill provides for a presumption that a person aged 17 or over has consented to have his or her organs used for transplantation after death, unless—

— the person has previously registered an objection in an official register, or

— the hospital or other institution in which the person dies is satisfied on information provided by the persons family, that he or she had expressed an objection to donation; or

— proceeding with a donation would cause distress to the deceased's immediate family. (clause 1)

8.2 The Bill provides that no organs must be removed unless two independent medical practitioners have satisfied themselves that the person is dead (clause 3). This is to be judged in accordance with the definition contained in clause 4, including through brain stem tests carried out in accordance with standards set by the Conference of Royal Colleges.

8.3 We reported in similar terms to this, regarding the previous versions of the Bill that in regard to a matter such as the criteria for brain stem tests, which engage the right to life (Article 2 ECHR) as well as the freedom from inhuman or degrading treatment (Article 3 ECHR) it was unusual to delegate responsibility to a body not responsible to Parliament.[153] We reiterate our view that the absence of Parliamentary accountability omits what may be a significant safeguard in the protection of Convention rights.

8.4 The Bill would also engage the Article 8 rights to respect for private life of a person whose organs may in the future be removed, after death, without his or her consent. The ECtHR has held that a person's wishes as to his or her burial after death engage Article 8.[154] In our view, the presumption of consent is unlikely to constitute a proportionate interference with Article 8 rights unless regulations make provision for people to be informed of the presumption, and provided with an opportunity to object to its application to them. The Article 8 right to respect for private life of family members of a person whose organs are to be removed would also be in issue, although the safeguards in clause 1 of the Bill are likely to ensure that they are not disproportionately interfered with. The right of

153 For our comments on the Organ Donation (Presumed Consent and Safeguards) Bill 2001–02, and the Organ Donation (Presumed Consent and Safeguards)(No.2) Bill 2001–02, see our Twenty-sixth Report of Session 2001–02, *Scrutiny of Bills: Final Progress Report*, HL Paper 182, HC 1295.

154 *X v Germany* 24 DR 137, where the obligation to be buried in a cemetery rather than on the applicant's own land engaged article 8, though it did not engage the right to manifest beliefs under Article 9 ECHR.

family members to manifest a religious belief may also be in issue,[155] but safeguards in the Bill should adequately ensure the protection of this right. **We draw this matter to the attention of both Houses.**

155 In *Re Crawley Green Road Cemetery, Luton* [2001] WLR 1175

9 Prevention of Homelessness Bill

Date introduced to the House of Commons	16 March 2004
Current Bill Number	House of Commons 73
Previous Reports	None

9.1 This is a Private Members' Bill introduced by Mr Mohammad Sarwar MP. The Bill contains a number of measures which would allow courts discretion to take measures protecting a person at risk of homelessness as a result of possession proceedings. It would allow the court to suspend an order in such proceedings to allow the person concerned to secure reasonable alternative accommodation (clause 1). In such proceedings, the court may also vary the parties' contractual rate of interest where it is reasonable to do so in order to prevent homelessness (clause 2). It may waive charges levied under the mortgage, and legal expenses, again where reasonable in order to prevent homelessness (clause 3). The Bill also makes provision for the payment of benefits to persons subject to mortgage possession proceedings.

9.2 In seeking to enhance protection against homelessness, the likely effect of the Bill would be to further protection of the UK's international human rights obligations, in particular the right to adequate housing, an element of the right to an adequate standard of living under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

9.3 Two clauses of the Bill, however, raise issues for protection of property rights under Article 1 of Protocol 1 to the ECHR. Contractual entitlements to economic benefits, such as interest payments or mortgage charges, amount to property rights under Article 1 of Protocol 1.[156] Deprivation of those property rights, by waiver of charges or variation of the interest rate, would amount to a deprivation of property under Article 1 of Protocol 1, which would be likely to breach the Convention in the absence of payment of compensation.[157] In our view, measures under clauses 2 and 3 of the Bill are likely to give rise to breaches of the Convention rights, and are unlikely to be capable of interpretation in accordance with the Convention rights under section 3 of the HRA. **We draw this matter to the attention of both Houses.**

156 *Beis v Greece* (1997) 25 EHRR 335; *Association of General Practitioners v Denmark* 62 DR 226

157 Although the measures which constitute a deprivation of property serve a public interest, it is only in the most exceptional circumstances that the public interest will justify deprivation of property: *Holy Monasteries v Greece* (1994) 20 EHRR 1

10 Rite of Passage (Welcoming and Coming of Age) Bill

Date introduced to the House of Commons	12 October 2004
Current Bill Number	House of Commons 160
Previous Reports	None

10.1 This is a Private Members' Bill introduced by Mr Frank Field MP. It would require all parents to make arrangements for a civil welcoming ceremony within 21 days of the birth of a child. Such ceremonies would be conducted by registrars. At the ceremony, parents would be required to sign a "responsibility to children agreement" (clause 1(3)). Failure to undertake the welcoming ceremony would result in sanctions to be prescribed by the Secretary of State (clause 1(6)). The Bill specifies that the ceremony shall not include any religious service (clause 1(7)(c)).

10.2 The responsibility to children agreement would set out the rights and duties of parents, as well as the responsibility of society to the child. The terms of the agreement would be prescribed by regulations (clause 2). Regulations are also envisaged to prescribe rights of redress for breach of the agreement (clause 2(3)).

10.3 The Bill also provides for "coming of age ceremonies" to be undertaken by all children by the completion of Key Stage 3, the form of which is to be prescribed in regulations (clause 3).

10.4 The provisions of the Bill engage both the parents' and the child's rights to respect for private and family life under Article 8 ECHR. In order to be justified as a necessary and proportionate interference with these rights, it would need to be established that the imposition of such compulsory ceremonies, backed up by sanctions for their avoidance, served a pressing social need and was proportionate to a legitimate aim under Article 8.2. The terms of responsibility to children agreements, in particular if their breach were to lead to any sanctions as appears to be envisaged by clause 2(3), would also need to be closely justified as a necessary and proportionate interference with private and family life rights. In our view, without more information about the content of the proposed agreements, we cannot be confident that a blanket legal requirement for all parents to enter into a standard binding agreement regarding care of their children, as envisaged by the Bill, would be proportionate interference with Article 8 rights. **We draw this matter to the attention of both Houses.**

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

Bills that raise no significant risk of incompatibility

11 Children's Food Bill

Date introduced to the House of Commons	18 May 2004
Current Bill Number	House of Commons 110
Previous Reports	None

11.1 The Children's Food Bill provides a power to make regulations prohibiting the marketing of certain foods and drinks to children, where the Food Standards Agency has decided that their content is detrimental to the health of children.[158] Such a prohibition would engage freedom of commercial expression under Article 10 ECHR, and the compatibility of any such prohibition would depend on the precise form of the regulations, but we consider it likely to be a proportionate interference serving the legitimate aim of the protection of health.

11.2 The Bill also bans the sale of such food or drink to children on school premises.[159] This might engage the right to property/peaceful enjoyment of possessions in Article 1 of Protocol 1 ECHR, if it were to interfere with vested contractual rights, but we consider that such interference would be likely to be a proportionate interference serving the legitimate aim of public health.

158 Clause 3(1)
159 Clause 6(1)

12 Domestic Tradable Quotas (Carbon Emissions) Bill

Date introduced to the House of Commons	7 July 2004
Current Bill Number	House of Commons 136
Previous Reports	None

12.1 This Bill would establish a system for regulating carbon emissions. It would set a national limit for emission of greenhouse gasses each year—the "carbon budget" (clause 3). Within this "carbon units", allowing for prescribed levels of emissions, would be allocated (clause 4). Carbon units would be allocated automatically to individuals. "Eligible organisations" would then be permitted to buy the remaining carbon units, which would be sold by auction. Carbon units would be used up whenever prescribed fuels or electricity were purchased (clause 6). Carbon units could also be traded, and a commission would be appointed under clause 6 (2) which would regulate this trade and provide for licensing of brokers in the transfer of carbon units.

12.2 The scheme established by the Bill, in limiting fuel emissions for all organisations and individuals, and in requiring organisations and individuals to pay for fuel use beyond these limits, would be likely to amount to a control on the use of property under Article 1 of Protocol 1 ECHR. This interference with property rights would, in our view, be likely to be justified in the public interest, provided that regulations under the Bill allowed for the operation of the scheme in a proportionate and non-discriminatory manner.

Bills that raise no human rights issues

13 Private Members' Bills

13.1 The following Private Members' Bills seem to us to raise no human rights issues and do not require to be drawn to the attention of either House on human rights grounds.

a) Cinemas (Rural Areas) Bill

b) Directors' and Employees' Pensions (Provision of Information) Bill[160]

c) Disposal of Public Land and Property (Design Competitions) Bill[161]

d) Food Justice Strategy Bill[162]

e) Independent Milk Ombudsman Bill[163]

f) Legislation (Memoranda of European Derivation) Bill[164]

g) Lighter Evenings Bill[165]

h) Northern Ireland (Severe Learning Disability) Bill[166]

i) Sex Discrimination (Clubs and Other Private Associations) Bill[167]

j) Telecommunications Masts (Need and Safety Tests) Bill[168]

k) Telecommunications (Permitted Development Rights)(Amendment) Bill[169]

l) Trade Union (Political Funds) Reform Bill[170]

160 House of Commons Bill 118 (Harry Cohen MP)
161 House of Commons Bill 148 (Roger Casale MP)
162 House of Commons Bill 125 (Alan Simpson MP)
163 House of Commons Bill 66 (Simon Thomas MP)
164 House of Commons Bill 155 (William Cash MP)
165 House of Commons Bill 115 (Nigel Beard MP)
166 House of Commons Bill 130 (Rev Martin Smyth MP)
167 House of Commons Bill 68 (David Wright MP)
168 House of Commons Bill 112 (David Amess MP)
169 House of Commons Bill 95 (Jim Dowd MP)
170 House of Commons Bill 116 (John Mann MP)

Formal Minutes

Wednesday 17 November 2004

Members Present:

Jean Corston MP, in the Chair

Lord Bowness
Lord Plant of Highfield
Mr Kevin McNamara MP

The Committee deliberated.

* * * * *

Draft Report [Scrutiny of Bills: Final Progress Report], proposed by the Chairman, brought up and read.

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

Paragraphs 1.1 to 13.1 read and agreed to.

Resolved, That the Report be the Twenty-third Report of the Committee to each House.

Ordered, That certain papers be appended to the Report.

Ordered, That the Chairman do make the Report to the House of Commons and that Lord Bowness do make the Report to the House of Lords.

[Adjourned till Wednesday 1 December at a quarter past Four o'clock.

Appendices

Appendix 1: Mental Capacity Bill

Letter from the Chair to David Lammy MP, Parliamentary Under-Secretary of State, Department for Constitutional Affairs

The Joint Committee on Human Rights is considering how to report to each House on the Mental Capacity Bill. It has now carried out an initial examination of the Bill and is provisionally of the view that the Bill should be broadly welcomed from a human rights perspective as a much needed reform which enhances the legal protection for the fundamental rights of people who lack capacity. However, members would be grateful for your answers to a number of questions which arise concerning the adequacy of the various safeguards contained in or envisaged by the Bill. Our starting point is of course the statement made under s. 19(1)(a) of the Human Rights Act 1998, but, as you will be aware, the Committee's remit extends to human rights in a broad sense, not just the Convention rights under the Act. The Committee has therefore also had regard to other relevant human rights standards in its consideration of the Bill.

The Committee is concerned about the following matters in particular—

1. Involuntary placement
2. Procedural safeguards for informally admitted patients: the so-called "Bournewood gap"
3. Withdrawing or withholding life-sustaining treatment
4. Research

1. INVOLUNTARY PLACEMENT

The European Court of Human Rights has held that no deprivation of liberty of a person considered to be of unsound mind may be deemed in conformity with Article 5(1)(e) ECHR without the opinion of a medical expert: any other approach falls short of the required protection against arbitrariness inherent in Article 5 of the Convention.[1] The only exception to this requirement of prior consultation with a medical expert is in emergencies,[2] in which case the medical opinion can be obtained "immediately after the arrest."

The Court has also held that in order to be "lawful" within the meaning of Article 5(1)(e) ECHR any deprivation of liberty must be necessary in the circumstances:

> The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained.[3]

1 *Varbanov v Bulgaria*, App. No. 31365/96 (5 October 2000), at para 47

2 "in urgent cases or where a person is arrested because of his violent behaviour."

3 *Witold Litwa v Poland*, above, at para. 78

The Joint Committee on the Draft Mental Incapacity Bill identified the authorisation of the use of force against a person lacking capacity or the restriction of such a person's liberty of movement as a problematic feature of the draft Bill. It said "where force or restriction of the person's movement is permitted, the Bill contains no requirement for the risk of serious harm to be immediate, which would justify emergency action being taken." It noted the possibility of this giving rise to detention of incapacitated persons in contravention of the HRA.[4] It recommended that the relevant clause be redrafted to specify that detention can only be justified in a situation of urgency (including an emergency) and that the period of detention should be as short and least restrictive as possible.

The Government in its Response said "We are undertaking further work in relation to [clause 6] and the use of force and restriction of liberty. Bearing in mind ECHR rights, the Government agrees that detention should be as short and least restrictive as possible. We want to capture that requirement in the Bill whilst allowing the care of people with particular needs to continue without undue restriction".[5]

It appears to the Committee, on its initial consideration, that Clauses 5 and 6 of the Bill in its current form still give rise to the same concern, because they contemplate deprivation of liberty without any medical opinion being obtained, and without any provision confining such deprivation to emergency situations. Although clauses 5 and 6 contain important safeguards against the inappropriate use of restraint, the combined effect of the two clauses appears to be to authorise (in the sense of protect against liability for) the use of force or the threat of force to overcome an incapacitated person's resistance in certain circumstances, or restrict their liberty of movement, in order to avert a risk of harm. For example, the power in clause 5 could be used to secure the admission into hospital of a person lacking capacity who is resisting such admission, where the person using or threatening force reasonably believes that the person lacks capacity in relation to his treatment, that it is in his best interests for him to be admitted to hospital for treatment and that it is necessary to admit the person in order to prevent harm to himself.

Without express limitation on the face of the Bill, the Committee is concerned that these provisions are likely to lead to deprivations of liberty which are not compatible with Article 5(1) ECHR, because they do not satisfy the long established requirements that deprivations of liberty be based on objective medical expertise and are necessary in the sense of being the least restrictive alternative. The Bill as drafted therefore does not appear to contain sufficient safeguards against arbitrary deprivation of liberty.

Question 1: Why has the Government not adopted the recommendation of the Joint Committee that the use or threat of force or other restriction of liberty of movement be expressly confined to emergency situations?

Question 2: What are the Government's reasons for saying that the Bill is compatible with Article 5(1)(e) ECHR when its provisions enable deprivation of liberty without being based on objective medical expertise?

Clauses 5 and 6 of the Bill could therefore be relied on to authorise the use of force to make an informal admission to hospital of a person who lacks capacity to make decisions about their treatment and is resisting admission to hospital for treatment, and thereby deprive the person lacking capacity of the procedural safeguards which apply when they

4 Joint Committee Report para. 132

5 Government Response, R 43

are compulsorily admitted under the Mental Health Act 1983, in breach of the requirements of Article 5 ECHR.

Clause 28 of the Bill, which deals with the relationship between the Mental Capacity Bill and the Mental Health Act 1983, does not address this problem. It provides that nothing in the Bill authorises anyone to give a patient medical treatment for mental disorder, or to consent to a patient being given such treatment, if at the time when it is proposed to treat the patient, his or her treatment is regulated by Part IV of the MHA 1983. Part IV of the MHA 1983 deals with consent to treatment, including when compulsory treatment can be given to a patient. The effect of clause 28 is therefore to ensure that the specific statutory safeguards which the MHA 1983 affords in relation to compulsory treatment must always be afforded to those patients to whom it applies. It does not, however, apply to compulsory admission to hospital which is regulated by Part II of the MHA 1983. There is no equivalent provision which requires that the specific statutory safeguards which the Act gives in relation to compulsory admission must always be afforded to those who could be compulsorily admitted.

Question 3: Does the Government intend to extend the scope of clause 28 to make clear that nothing in the Act authorises anyone to admit a person into hospital against his or her will where the conditions for compulsory admission or guardianship under Part II MHA 1983 are met?

Question 4: If not, what are the reasons for the Government's view that there is no incompatibility in this respect between the Bill as it stands and Article 5 ECHR?

2. Compliant incapacitated patients: the "Bournewood gap"

The judgment of the European Court of Human Rights in *HL v UK*[6] raises starkly the question whether the absence from the Mental Capacity Bill of any of the procedural safeguards required by Article 5 in respect of compliant incapacitated patients is compatible with the UK's Convention obligations. In light of the judgment of the European Court of Human Rights, the Government can no longer maintain that the current position is Convention compatible and proceed with the adoption of new legislation premised on that assumption. It is now established beyond doubt that the failure to extend various procedural safeguards to a group of vulnerable people who are acknowledged to be excluded from the benefit of the safeguards will give rise to future findings of incompatibility with Article 5 ECHR.

The Government has accepted that the present Bill "may not, by itself, deliver all the necessary safeguards".[7] The Committee notes that the additional procedural safeguards for such patients originally contained in Part 5 of the first draft Mental Health Bill are no longer contained in the latest version of the draft Mental Health Bill. It also notes that the Minister has promised to deliver the appropriate safeguards as soon as possible, but only following a wide consultation as to how to design procedural safeguards which are both effective and proportionate and deliverable in practice. The Committee is concerned at the risk of a prolonged postponement of a remedial measure following the judgment in *HL v UK*. It is obviously undesirable for the present Bill to proceed to enactment on its original assumption that there was no *Bournewood* gap to be filled.

Question 5: What possible solutions to the problem of the "Bournewood gap" are currently being considered by the Government?

6 App no. 45508/99 (5 October 2004)

7 HC Deb., 28 October 2004, col. 251

Question 6: In view of the urgency of remedying the deficiencies identified by the European Court of Human Rights can the Government assure the Committee that the necessary remedial measures will be introduced into the current Bill to ensure Parliament's early attention to the problem?

3. Withholding or withdrawing life-sustaining treatment

The Committee is satisfied that the inclusion in clauses 24 to 26 of the Bill of provision for the making of advance decisions to refuse treatment does not itself raise issues of compatibility with Article 2 ECHR, but it has some concerns about whether the safeguards provided are adequate to ensure that such advance decisions do not lead to wrong decisions being made about the existence, validity and applicability of an individual's advance decision to refuse treatment. It is concerned, first, about whether the Bill requires sufficient formality in the making of an advance directive and, second, about whether a person making an advance directive which extends to the refusal of life-sustaining treatment would be aware that artificial nutrition and hydration ("ANH") is classified as "treatment".

Question 7: What is the reason for not requiring that advance directives carry the additional safeguard of having to be made in writing?

Question 8: Is it the Government's intention that a specific advance refusal of ANH would be required in order to be effective as an advance directive?

Question 9: If not, will the guidance in the Code of Practice make clear to people making advance directives that ANH is regarded as treatment and that an advance directive refusing life-sustaining treatment may therefore be interpreted as extending to a refusal of ANH?

In the recent decision of the High Court in the case of *Burke*,[8] it was held that in order to comply with a patient's right to autonomy under Articles 3 and 8 of the ECHR, an advance directive positively *requiring* the provision of ANH when they subsequently lack capacity is determinative of the question whether such treatment should be provided. The provisions in the Bill only cover advance directives *refusing* treatment.

Question 10: In light of the *Burke* judgment, will the Government be amending clauses 24–26 of the Bill to enable advance directives to be made requiring ANH to be provided, and if not, why not?

The Committee is also concerned that the presumption in favour of life-sustaining treatment is not sufficiently strong in the Bill and that in particular its provisions may have the effect of permitting the withdrawal of ANH from people lacking capacity in circumstances which may breach that person's rights under Articles 2, 3 and 8 ECHR. In *Burke*, the High Court held that it was hard to envisage any circumstances in which a withdrawal of ANH from a sentient patient, whether competent or incompetent, would be compatible with the Convention. Withdrawal of ANH from a sentient patient lacking capacity would expose the patient to acute mental and physical suffering and therefore be in breach of Article 3, unless the patient's life, if thus prolonged, would from the patient's point of view be intolerable. The only circumstances in which the court could envisage that there would be no breach of Article 3 as a result of the withdrawal of ANH is where it is withdrawn in circumstances where it is serving absolutely no purpose other than the very short prolongation of the life of a dying patient who has slipped into his final coma and lacks all awareness of what is happening.

8 *R (on the application of Burke) v The General Medical Council* [2004] EWHC 1879 (Admin) (30 July 2004)

Under clause 11, for example, a lasting power of attorney in relation to personal welfare decisions includes authority to refuse consent to the carrying out or continuation of a treatment by a person providing health care for the patient concerned.[9] Although the same clause also provides that this does not authorise the giving or refusing of consent to the carrying out or continuation of life-sustaining treatment unless the instrument creating the power of attorney contains express provision to that effect,[10] this is not in the Committee's view sufficient to safeguard against the possibility of the donee of a power of attorney which expressly extends to life-sustaining treatment purporting to refuse consent to ANH on the ground that the power of attorney includes power to consent to or refuse life-sustaining treatment. The Committee is concerned that there is a danger that the donor of a lasting power of attorney who expressly authorises their attorney to make decisions in relation to life-sustaining treatment, will not appreciate that artificial nutrition and hydration count as "treatment" and that the instrument is therefore conferring authority in effect to refuse food and drink. The significance of this is that the health care professionals will be obliged to comply with such a refusal of consent by the attorney, even if they judge it to be contrary to the best interests of the patient.

Question 11: Will the Government now consider tightening the safeguards in the Bill in light of the *Burke* judgment?

Question 12: Will the Government amend the Bill to require that any authority to refuse consent to ANH in any instrument creating a power of attorney or any order appointing a deputy be expressly and specifically conferred?

4. Research on people lacking capacity

The provisions in the Bill concerning the carrying out of scientific research on people lacking capacity engage the individual's right to dignity and privacy, to be free of inhuman and degrading treatment, and to physical and moral integrity, as well as the State's positive obligations to take steps to protect particularly vulnerable people from harm or exploitation.

It is clear from the relevant international human rights standards, including the European Convention on Human Rights and Biomedicine on which these clauses are said to be based, that research on people lacking capacity *is* permissible, but only subject to very strict safeguards. The question therefore is the adequacy of the safeguards provided in the Bill. A comparison of those safeguards with the relevant international standards raises a number of questions.

Clause 31(3) of the Bill requires that there must be "reasonable grounds for believing" that the research would not be as effective if carried out only on persons who have capacity to consent. Article 17(1)(iii) of the Convention on Human Rights and Biomedicine, by comparison, stipulates as a condition for the carrying out of such research that "research of comparable effectiveness cannot be carried out on individuals capable of giving consent". It seems to the Committee, on initial consideration, that the introduction of the reference to there being reasonable grounds for believing that the research would be less effective if carried out only on persons with capacity is a significant dilution of the condition contained in the Human Rights and Biomedicine Convention, which states the requirement as a matter of fact rather than a matter of reasonable belief.[11]

9 Clause 11(6)(c)

10 Clause 11(7)(a)

11 The Adults with Incapacity (Scotland) Act 2000 uses the unqualified formulation contained in Article 17(1)(iii) of the Convention.

Question 13: What is the reasoning behind this departure from the wording of the Convention?

Clause 31(4) of the Bill provides that the research must either have "potential benefit" to the person lacking capacity, without imposing a disproportionate burden, or be intended to provide knowledge of the causes or treatment of, or of the care of, persons affected by the same or a similar condition. Again this appears to the Committee to be a considerably weaker requirement than that contained in the Human Rights and Biomedicine Convention. Article 17 provides that research on persons lacking capacity may only be undertaken if the results of the research have the potential to produce "real and direct benefit" to the health of the person concerned,[12] or, *exceptionally*, where there is no such potential for direct benefit, where certain additional conditions are met. One of those additional conditions is that the research has the aim of contributing, through *significant* improvement in the scientific understanding of the individual's condition, to results capable of conferring benefit to the person concerned or others with the same condition.[13]

It is hard to avoid the conclusion that the nature of the benefit from the research required in clause 31(4) of the Bill has the effect of lowering the threshold of when research will be permissible compared to the standards contained in the Convention. The absence of a reference to the potential benefit being "real and direct" in clause 31(4)(a), the breadth of the test for whether the research is intended to add to the sum of general knowledge on the subject under clause 31(4)(b) and the absence of a structure in which it is only in exceptional cases that research may be conducted which does not have the potential to confer a direct benefit on the person concerned, all appear to amount to relaxations of the standards contained in the Convention.

Question 14: In light of the above, what are the reasons for not following the structure and language of Article 17 of the Convention in relation to the nature of the benefit required in order for research to be permissible in the absence of consent?

Clause 31(5) contains additional conditions that must be satisfied if the research in question does not have the potential to benefit the person lacking capacity but is intended to provide knowledge of the causes, treatment or care of the condition. The additional conditions are that there must be reasonable grounds for believing that the risk to the person lacking capacity from taking part in the research is likely to be negligible, and that anything done to the person will not interfere with their freedom of action or privacy in a significant way or be unduly invasive or restrictive. Article 17(2)(ii), by comparison, requires that the research must entail "only minimal risk and minimal burden for the individual."

The Committee is concerned that the provision in the Bill is a much weaker requirement than that contained in the Convention. The introduction again of a reference to "reasonable grounds for believing", the reference to "negligible" rather than "minimal", and the introduction of the qualification that the impact on the person's rights should not be "significant", all appear to reduce the threshold for the carrying out of research on people lacking capacity, and therefore make it more likely that such research will be carried out in circumstances which are not contemplated by the Human Rights and Biomedicine Convention.

Question 15: What is the reason for providing weaker additional conditions than the Convention?

12 Article 17(1)(ii)

13 Article 17(2)(ii) (emphasis added)

By clause 31(1) of the Bill, the "appropriate body" may not approve a research project unless satisfied that a number of requirements are met in relation to the research carried out for the project. The "appropriate body" is defined by the Bill to mean "the person, committee or other body specified in regulations made by the Secretary of State as the appropriate body in relation to a project of the kind in question".[14] The Bill contains no further definition of the appropriate body or of the procedures by which it is to decide whether or not to approve a research project. The Explanatory Notes merely say that "the Secretary of State must specify an appropriate authority for approving research projects" and that this authority is "likely to be a research ethics committee".[15] The Minister, however, has made clear that it will not necessarily be a research ethics committee.[16] It might, for example, be a different type of body if the nature of the research project is different, such as a social care research project.

The Human Rights and Biomedicine Convention stipulates as one of the conditions that must be satisfied before research can be undertaken on a person that "the research project has been approved by the competent body after independent examination of its scientific merit, including assessment of the importance of the aim of the research, and multi-disciplinary review of its ethical responsibility".[17] Precisely how the appropriate authority will go about deciding whether to approve a research project on people lacking capacity is an important part of the scheme providing for research. Without such information it is impossible for the Committee to assess whether an important element of the procedural protections required by the Convention on Human Rights and Biomedicine is satisfied.

Question 16: Please provide more detail of how the "appropriate body" which will be specified in regulations will conduct its work of deciding whether or not to approve a particular research project.

REPRESENTATIONS

The Committee would also be grateful for a description of any representations you have received in connection with this Bill in relation to human rights issues, and to what specific points those representations were directed.

The Committee would be grateful for a response to its question as early as possible, and in any event no later than 15 December.

18 November 2004

Appendix 2: Housing Bill

2a. Letter from Rt Hon Keith Hill MP, Minister for Housing and Planning, Office of the Deputy Prime Minister, to the Chair, re the Housing Bill: Clause 207 and the Eighth Report

1. This letter responds to the concerns raised in the Eighth Report of the Joint Committee on Human Rights (the Committee). After careful consideration of the issues raised in

14 Clause 30(4)

15 EN para. 90

16 HC Deb., 28 October 2004, col. 268

17 Article 16(iii)

paragraph 4.24 of the report we have the following comments which I hope will satisfy the Committee's concerns.

2. At paragraph 4.24 of the Eighth Report, the Committee raised concerns about clause 207 of the Housing Bill (clause 185 at the time of the Report). This clause provides for the disclosure of information to registered social landlords (RSLs) for the purposes of section 1 of the Crime and Disorder Act 1998.

3. The Committee's concerns were that information may be passed to RSLs, without there being any obligation on them to deal with that information in conformity with Convention rights. The Committee recommended that the Bill should specify that, in relation to information received under section 115 of the Crime and Disorder Act 1998, RSLs should be considered to be performing a public function and therefore be subject to section 6 of the Human Rights Act 1998.

4. We have considered carefully the Committee's concerns and have discussed with Parliamentary Counsel how we might follow the Committee's recommendations without causing difficulties for RSLs or in future legislation. We have concluded that we are unable to make the amendments to clause 207 recommended by the Committee for the reasons set out below.

5. In the Department's view, the amendments recommended by the Committee are unnecessary as section 6 of the Human Rights Act will apply where information is received by an RSL under section 115 of the Crime and Disorder Act.

6. While the Government's position remains that RSLs are private bodies, the Court of Appeal has held that, for the purposes of the Human Rights Act, RSLs are hybrid bodies and consequently some of its functions are capable of being public in nature while some of its functions remain private.[18] Where a function is public in nature, section 6 applies and the body concerned must carry out those functions in a way that is compatible with convention rights. In our view the power to receive information under section 115 of the Crime and Disorder Act will be a function of a public nature as it is intrinsically linked to the power in section 1 of that Act to apply for an anti social behaviour order. It therefore must be exercised compatibly with Convention rights.

7. In addition to the amendment being unnecessary, we are concerned that, if we were to make the amendment recommended by the Committee, it might bring into question the applicability of section 6 of the Human Rights Act 1998 where a private body has public functions but section 6 is not expressly applied by primary legislation.

8. We trust that the Committee will find this explanation as to why we are not taking forward the Committee's recommendations in relation to clause 207 is satisfactory.

21 October 2004

2b. Letter from the Chair, to Rt Hon Keith Hill MP, Minister for Housing and Planning, Office of the Deputy Prime Minister, re *Connors v UK*

As part of the Joint Committee on Human Rights' ongoing review of decisions of the European Court of Human Rights finding the UK in breach of the European Convention on Human Rights (ECHR), I am writing to inquire about implementation of the decision of the Court in *Connors v UK* in May of this year.

18 *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; 33 HLR 73, CA; 3 WLR 183

In that case, the Court found that the summary eviction of a family from a local authority gypsy caravan site, without reasoned justification or sufficient procedural safeguards, breached the right to respect for private life and the home under Article 8 ECHR. The Court found no evidence that the specific circumstances of the gypsy community established a need for summary eviction procedures, without the procedural safeguards available to other local authority tenants. The summary eviction could not therefore be justified as responding to a pressing social need, or as proportionate to a legitimate aim, and was in breach of Article 8.

I would be grateful if you could provide the Committee with details of your department's response to this case. As you will be aware, the UK is under an obligation under Article 46 of the Convention to introduce general measures to prevent a future repetition of the violation in other cases. We understand that in correspondence with Lord Avebury, you have proposed referring the matter to the Law Commission. In our view rectification of the incompatibility identified by the Court could be achieved by a straightforward amendment to the definition of "protected site" under the Mobile Homes Act 1983. We also understand that an amendment to the Housing Bill to this effect has been drafted by the CRE and will be proposed by Lord Avebury. In light of this, and of the Court's recognition of the gravity of the interference with Article 8 rights involved in the case, it might be thought more appropriate to rectify the incompatibility by the more expeditious route of an amendment to the Housing Bill, or by way of remedial order under the Human Rights Act. If it is the case that the Government has decided not to proceed by one of these routes, we would appreciate your reasons for that decision.

12 October 2004

2c. Letter from Rt Hon Keith Hill MP, Minister for Housing and Planning, Office of the Deputy Prime Minister, to the Chair, re *Connors v UK*

Thank you for your letter of 12 October 2004 concerning the Government's response to the *Connors v UK* case in the European Court of Human Rights.

As you will know, Clauses are now contained in the Housing Bill which go some way to resolving the issues raised in this case. Clause 203 addresses a longstanding anomaly in relation to county council Gypsy and Traveller sites by including these sites within the definition of 'protected sites' under s1 of the Caravan Sites Act 1968. This will ensure that the security of tenure of those occupying county council caravan sites is the same as those occupying other local authority sites, i.e. that possession can only be obtained by a court order, and that 28 days minimum notice must be given before possession is sought.

Clause 205 goes further, and provides the courts with the power to suspend eviction orders against those occupying local authority sites. Section 4 of the Caravan Sites Act 1968 already gives discretion to a court to suspend eviction orders made in respect of most privately owned caravan sites, but until now, that discretion has not been available for eviction orders made in respect of local authority owned sites. Clause 205 addresses this issue: in cases where an eviction order would ordinarily result in outright eviction, courts will be able to suspend any order for a period of up to 12 months.

As examples, if possession is sought because of breaches of the occupation agreement, such as rent arrears, the eviction order could be suspended so long as the rent was paid in future, plus regular payments towards the arrears. In cases that deal with anti-social behaviour on sites, the eviction order could be suspended so long as the occupier's behaviour was acceptable.

You will also be aware that we are considering the tenure of local authority Gypsy and Traveller sites as part of our aim to mainstream site provision, one of the options being to look at the comparison with social housing. You will appreciate that this area of housing law is highly complex, and given the timescales involved it has not been possible to include appropriate measures in the Housing Bill. The Law Commission is undertaking a review of rented tenure and is due to report early next year. It is our intention to consider the security of tenure of Gypsy and Traveller sites in the context of that review.

1 November 2004

Public Bills Reported on by the Committee (Session 2003–04)

* indicates a Government Bill
Bills which engage human rights and on which the Committee has commented substantively are in bold

BILL TITLE	*REPORT NO*
Age Related Payments*	**17th**
Air Traffic Emissions Reduction [*Lords*]	3rd
Anti-social Behaviour Bill	**23rd**
Armed Forces (Pensions and Compensation)*	3rd
Assisted Dying for the Terminally Ill [*Lords*]	**12th**
Asylum and Immigration (Treatment of Claimants, etc)*	**3rd, 5th, 13th, 14th & 17th**
Cardiac Risk in the Young (Screening)	10th
Carers (Equal Opportunities)	8th
Child Trust Funds*	3rd
Children [*Lords*]*	**12th**
Children's Food	**23rd**
Christmas Day (Trading)	8th
Cinemas (Rural Areas)	23rd
Civil Contingencies*	**4th & 8th**
Civil Partnership [*Lords*]*	**15th & 20th**
Civil Service	8th
Companies (Audit, Investigations and Community Enterprise [*Lords*]*	**10th**
Consolidated Fund*	3rd
Consolidated Fund (No. 2)*	10th
Consolidated Fund (Appropriation)*	17th
Constitution for the European Union (Referendum)	10th
Constitutional Reform [*Lords*]*	**23rd**
Criminal Justice (Justifiable Conduct)	**23rd**
Crown Employment (Nationality)	4th
Directors' and Employees' Pensions (Provision of Information)	23rd
Disposal of Public Land and Property (Design Competitions)	23rd
Domestic Energy Efficiency	**23rd**
Domestic Tradable Quotas (Carbon Emissions)	**23rd**
Domestic Violence, Crime and Victims [*Lords*]*	**3rd & 4th**
Doorstep Selling (Property Repairs)	**23rd**
Employment Relations*	**4th, 8th, 10th, 13th, 17th & 20th**
Energy [*Lords*]*	**17th**
European Communities (Deregulation)	10th
European Parliamentary & Local Elections (Pilots)*	**8th**

Executive Powers and Civil Service [*Lords*]	3rd
Finance*	**12th**
Fire and Rescue Services*	8th
Fireworks (Amendment)	17th
Fisheries Jurisdiction	10th
Fishery Limits (United Kingdom) [*Lords*]	10th
Food in Schools	17th
Food Justice Strategy	23rd
Food Labelling	17th
Foundation for Unclaimed Assets	17th
Gangmasters (Licensing)	8th
Gender Recognition [*Lords*]*	**4th &12th**
Genetically Modified Organisms	10th
Harbours [*Lords*]	3rd
Health and Safety at Work (Offences)	8th
Health Protection Agency [*Lords*]*	3rd
Higher Education*	3rd
Highways (Obstruction by Body Corporate)	8th
Horserace Betting and Olympic Lottery*	3rd
Housing*	**8th, 10th, 20th & 23rd**
Human Rights Act 1998 (Making of Remedial Orders) Amendment [*Lords*]	8th
Human Tissue*	4th
Hunting*	**20th**
Independent Milk Ombudsman, etc.	23rd
Interest Rates (Limits on Charges)	17th
Justice (Northern Ireland)[*Lords*]*	4th
Legislation (Memoranda of European Derivation)	23rd
Life Peerages (Residency for Taxation Purposes)[*Lords*]	17th
Lighter Evenings	23rd
Local Land Charges (Fees)	17th
Marine Wildlife Conservation	17th
Mental Capacity*	**23rd**
Motor Vehicles Insurance Disc	10th
National Insurance Contributions and Statutory Payments*	4th
Northern Ireland (Severe Learning Disability)	23rd
Older People's Commissioners	17th
Organ Donation (Presumed Consent and Safeguards)	**23rd**
Patents [*Lords*]*	8th
Pensions*	10th
Performance of Companies and Government (Reporting)	4th
Planning and Compulsory Purchase*	**3rd, 8th & 10th**
Power Supply (Compensation for Erroneous Transfer)	17th
Prevention of Homelessness	**23rd**
Promotion of Volunteering	**12th**
Property Repairs (Prohibition of Cold Calling)	10th

Protective Headgear for Young Cyclists	10th
Public Audit (Wales) [*Lords*]*	3rd
Referendum (Thresholds)	4th
Regulation of Hormone Disrupting Chemicals	17th
Restricted Byways	17th
Retirement Income Reform	10th
Rights of Way (Amendment)	17th
Rite of Passage (Welcoming and Coming of Age)	23rd
Scottish Parliament (Constituencies)*	8th
Sex Discrimination (Clubs and Other Private Associations)	23rd
Sleep Apnoea	17th
Smoking in Public Places (Wales) [*Lords*]	4th
Sovereignty of Parliament (European Communities)	10th
Statute Law (Repeals) [*Lords*]*	3rd
Sustainable and Secure Buildings	4th
Telecommunications Masts (Need and Safety Tests)	23rd
Telecommunications Masts (Registration)	8th
Telecommunications (Permitted Development Rights)(Amendment)	23rd
Tobacco Smoking (Public Places and Workplaces) [*Lords*]	10th
Town & Country Planning (Enforcement Notices and Stop Notices)	10th
Town & Country Planning (Telecommunication Masts)	8th
Trade Union (Political Funds) Reform	23rd
Traffic Management*	8th
Trespassers on Land (Liability for Damage and Eviction)	**10th**
Wild Mammals (Protection)(Amendment) [*Lords*]	3rd
Wild Mammals (Protection)(Amendment)(No. 2)	8th

Printed in the United Kingdom by The Stationery Office Limited
11/2004 992352 19585

ISBN 0-10-400565-3

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