Scrutiny : third progress report : seventh report of session 2004-05 : report, together with formal minutes and appendices / House of Lords, House of Commons, Joint Committee on Human Rights.

House of Lords
House of Commons

Joint Committee on Human Rights

Scrutiny: Third Progress Report

Seventh Report of Session 2004–05

Drawing special attention to:

International Organisations Bill
Gambling Bill
Drugs Bill
Clean Neighbourhoods and Environment Bill
Constitutional Reform Bill

HL Paper 47
HC 333

House of Lords
House of Commons

Joint Committee on Human Rights

Scrutiny: Third Progress Report

Seventh Report of Session 2004–05

Report, together with formal minutes and appendices

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Joint Committee on Human Rights

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

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

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Lord Campbell of Alloway
Baroness Falkner of Margravine
Lord Judd
Lord Plant of Highfield
Baroness Stern

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

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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), Pam Morris (Committee Secretary) and Tes Stranger (Senior Office Clerk).

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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.

In this report the Committee provides its final views on the human rights compatibility of the International Organisations Bill[1], and comments for the first time on the Gambling Bill, the Drugs Bill and the Clean Neighbourhoods and Environment Bill. The Committee is seeking clarification from the Government of certain points arising from the Gambling Bill and the Clean Neighbourhoods and Environment Bill. The Committee also publishes the response received from the Government to its previous report on the Constitutional Reform Bill[2], and is pursuing one matter arising from that response.

In relation to the International Organisations Bill

The Committee concludes that the extension of the Commonwealth Secretariat's immunity from suit conferred by clause 1 of the Bill, beyond that required by existing international obligations and excluding the limited judicial oversight currently available under Part I of the Arbitration Act 1996, may risk disproportionate interference with the right of access to court under Article 6 ECHR. In addition the Committee questions whether the Commonwealth Secretariat Arbitral Tribunal is sufficiently independent, both institutionally and in practice, to represent an Article 6 compliant alternative recourse for employees of the Commonwealth Secretariat.

In relation to the Gambling Bill

The Committee considers that the impact of the new gambling licensing regime to be introduced by the Bill on holders of existing gaming licences is not such as to give rise to any significant risk of a disproportionate interference with their property rights under Article 1 Protocol 1 ECHR. The Committee is also satisfied that the safeguards contained in the Bill surrounding the exercise of the new Gambling Commission's enforcement powers are such as to make it likely that any interferences with Article 8 (right to respect for private and family life) and Article 1 Protocol 1 ECHR will be proportionate to the legitimate aim those powers are designed to serve.

[1] The Committee's initial views on the Bill are contained in its Fourth Report of Session 2004-05, *Scrutiny: First Progress Report*, HL 26/HC 224

[2] Contained in the Twenty-third Report of Session 2003-04, *Final Scrutiny Progress Report*, HL 210/HC 1282

In respect of the provisions of the Bill providing for a right of appeal against decisions of the Gambling Commission to the Gambling Appeals Tribunal, the Committee is seeking clarification from the Government of the circumstances in which individuals' rights of access to a court in the determination of their civil rights will be limited to a right to bring judicial review proceedings, which may raise problems of compatibility with Article 6(1) ECHR (right of access to a court). The Committee also notes that the Bill's provisions concerning the exchange of information between the Gambling Commission and other bodies engage Article 8, and expresses the view that the conditions attached to the exchange and use of such information should be contained on the face of the Bill.

In relation to the Drugs Bill

The Committee notes that the introduction of a consent requirement in relation to intimate searches for drugs enhances compatibility with human rights, but it considers that safeguards need to be put in place to ensure that excessive weight is not placed by courts on refusals to consent to an intimate search or an X-ray or ultrasound scan. The Committee also expresses some concerns that provisions in the Bill which may have the effect of coercing people into agreeing to drug treatment before they have been charged with any criminal offence may interfere with the Article 8 ECHR right to refuse treatment.

In relation to the Clean Neighbourhoods and Environment Bill

The Committee concludes that it is satisfied that the provision in the Bill for local authorities to make "gating orders", restricting the public's right of way over certain highways for the purpose of reducing crime or anti-social behaviour, is compatible with both Article 8 and Article 1 Protocol 1 ECHR. It considers however that, in order to avoid the potential engagement of Articles 10 (freedom of expression) and 11 (freedom of assembly and association) it should be made clearer on the face of the Bill that the Government's intention is that the highways in relation to which such orders may be made are alleyways in built-up areas, rather than the potentially wider definition of "any relevant highway" contained in the Bill.

The Committee is seeking clarification from the Government as to whether the power to order the forfeiture of vehicles where a person has been convicted of unauthorised or harmful deposit of waste, and the extended powers in relation to nuisance parking and the removal and disposal of abandoned and illegally parked vehicles in Part 2 of the Bill, would extend to caravans used by Gypsies and Travellers for their accommodation, in which case the exercise of such powers might amount to a disproportionate interference with the right to respect for home and family life in Article 8.

In relation to the Constitutional Reform Bill

The Committee publishes the Government's response to its previous report on the Bill without comment, except for one point on which it is writing to the Lord Chancellor for clarification. This is in relation to the statement in the Government's response that the Lord Chancellor's duty to defend the independence of the judiciary is qualified by various factors, including competing policy considerations.

Bills drawn to the special attention of both Houses

Government Bills

1 International Organisations Bill

Date introduced to the House of Lords	24 November 2004
Current Bill Number	House of Lords 2
Previous Reports	4th

Introduction

1.1 The International Organisations Bill was introduced in the House of Lords on 24 November 2004.[1] A statement has been made by Baroness Symons of Vernham Dean under section 19 (1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with Convention rights. The Bill completed its committee stage in the House of Lords on 11 January 2005. We reported our preliminary views on the human rights compatibility of the Bill in our Fourth Report of this Session.[2] We also wrote to the Foreign and Commonwealth Office requesting clarification on two points. We have now received a reply to that letter from Bill Rammell MP, Minister of State at the FCO,[3] and in light of this we set out our conclusions on the human rights compatibility of the Bill.

The purpose of the Bill

1.2 The International Organisations Bill is intended to allow privileges and immunities from suit to be conferred on a number of international organisations and bodies which operate in the UK, and on certain individuals connected to those organisations and bodies.[4]

The right of access to court

1.3 The conferring of immunities from suit engages the right to a fair hearing in the determination of civil rights and obligations, protected by Article 6 ECHR. Where civil rights and obligations are in dispute, Article 6 requires a right of access to an independent and impartial tribunal, with competence to hear and determine the dispute.[5]

1 HL Bill 2

2 Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224

3 Appendix 1

4 The relevant organisations are: the Commonwealth Secretariat (clause 1); the Commonwealth Secretariat Arbitral Tribunal (CSAT) (clause 2); the Organisation for Security and Co-operation in Europe (OSCE) (clause 4); certain EU bodies (clause 5); the International Criminal Court (ICC) (clause 6); the European Court of Human Rights (ECtHR) (clause 7); and the International Tribunal for the Law of the Sea (ITCLOS) (clause 8).

5 *Golder v UK* (1979-80) 1 EHRR 524

1.4 It is important to emphasise that neither the European Convention of Human Rights, nor the Human Rights Act 1998 are in any way disapplied in respect of international organisations operating in the UK.[6] In particular, proceedings relating to international organisations are not exempt from fair hearing obligations under Article 6 ECHR. Rather, Convention law recognises that the right of access to court under Article 6 may be legitimately qualified in the interests of the immunity of such organisations. Thus the European Court of Human Rights has stated that—

> where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.[7]

1.5 Since the right of access to court is not absolute, limitations on access to court, including procedural bars to access such as immunity from suit, may be justified where they are in accordance with law, pursue a legitimate aim and are proportionate to that aim. However, the European Court of Human Rights has stressed that restrictions on access to court such as immunity from suit must not impair the very essence of the right to a fair hearing under Article 6.[8] A key factor in determining whether the very essence of the right has been impaired, is whether those affected by the immunity have recourse to alternative and adequate avenues of dispute resolution.[9]

Proportionality of the interference

1.6 In our first report on the Bill, we raised two queries: first the degree to which the immunities conferred by the Bill were necessary to fulfil international legal obligations, and secondly the extent to which the organisations affected by the Bill had in place alternative dispute resolution procedures sufficient to ensure that the very essence of the right to a fair hearing under Article 6 ECHR would not be impaired by the conferral of immunity from suit. Both of these matters are relevant to the justification for an immunity from suit as in pursuit of a legitimate aim, and to the proportionality of the immunity to that aim. We are grateful for the comprehensive information provided by the FCO in response to these queries.

1.7 We retain some concerns regarding the extended immunities conferred on the Commonwealth Secretariat by clause 1 of the Bill. As Mr Rammell notes in his letter to us, privileges and immunities accorded to the Commonwealth Secretariat have their basis in Annex A to the 1965 Agreed Memorandum agreed at a Commonwealth Heads of Government meeting in 1965, implemented in the UK by the Commonwealth Secretariat Act 1966. The FCO explains that, in response to the High Court decision in *Selina Mohsin*

6 Article 1 ECHR requires States Party to the Convention to secure the Convention rights to everyone in the jurisdiction. *Matthews v United Kingdom* (1999) 28 EHRR 361 paras. 29–35

7 *Waite and Kennedy v Germany*, App. No. 26083/94, para. 67

8 ibid., para. 59

9 ibid., para. 73

v Commonwealth Secretariat,[10] where it was held that Part I of the Arbitration Act 1996 was applicable to the Commonwealth Secretariat Arbitral Tribunal (CSAT), the Bill intends to clarify that there is no recourse to the courts under the Arbitration Act, from decisions of CSAT.

1.8 Currently, the Commonwealth Secretariat Act 1966 allows an exception to the Commonwealth Secretariat's immunity from suit in respect of arbitration proceedings. Therefore, under Part I of the Arbitration Act, there is some judicial supervision of arbitration proceedings, including the power to enforce an award, power to challenge the jurisdiction of the arbitral tribunal, power to challenge a serious irregularity in the arbitral proceedings, and power to appeal to the courts on a point of law (unless otherwise agreed by the parties to the arbitration).[11] The nature of the courts' jurisdiction under Part 1 of the Arbitration Act is therefore limited, and provides minimum protections against procedural unfairness.

1.9 The Government does not suggest that the exclusion of CSAT proceedings from judicial supervision under Part I of the Arbitration Act 1996 is required by the current terms of the Agreed Memorandum. However, it points out that "both the Commonwealth Secretariat and a number of Commonwealth Governments have raised concerns about the level of immunity from the jurisdiction of the UK courts conferred on the Commonwealth Secretariat" and states that therefore "amendments to Annex A of the Revised Agreed Memorandum to reflect the extended immunity are expected to be acceptable to the Commonwealth Governments and will be formally agreed once the Bill receives Royal Assent".[12] **In our view, the extension of the Commonwealth Secretariat's immunity under clause 1 of the Bill, beyond that required by existing international obligations, to exclude the limited judicial oversight currently available under Part I of the Arbitration Act 1996, may risk disproportionate interference with the Article 6 right of access to court.**

1.10 We also asked the FCO for further information on the alternative recourse available to employees of the Commonwealth Secretariat, and other international organisations affected by the Bill. We note that concerns have been expressed in debates on the Bill as to the independence of CSAT from the Commonwealth Secretariat, in particular as regards appointment and remuneration.[13] In its letter to us, the FCO characterised CSAT as "an internal dispute resolution mechanism" but stated that "changes were made to the Statute of the CSAT in 2002 to ensure that it is an independent and impartial mechanism for settlement of disputes."

1.11 We emphasise that, for an immunity from suit to be Article 6 compliant, alternative mechanisms must be in place to provide recourse to a tribunal which is fully independent, both institutionally and in practice, of the international organisation involved in the dispute. An internal dispute resolution mechanism is unlikely to satisfy this requirement. Where recourse to an independent tribunal is not provided, the very essence of the right of

10 [2002] EHC 377 (Comm)

11 Sections 66–69, Arbitration Act 1996

12 Appendix 1

13 HL Deb, 11 January 2005, Cols. GC5–GC10

access to court under Article 6 ECHR may be impaired. **We draw this matter to the attention of both Houses.**

2 Gambling Bill

Date introduced to the House of Commons 03-04	18 October 2004
Date introduced to the House of Commons 04-05	24 November 2004
Date introduced to the House of Lords	25 January 2005
Current Bill Number	House of Lords 19
Previous Reports	None

Introduction

2.1 This is a Government Bill, brought from the House of Commons on 25 January 2005. Lord McIntosh of Haringey 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.[14] They set out the Government's view of the Bill's compatibility with the ECHR at paras 809–818. The Bill is due to receive its Second Reading in the Lords on 22 February 2005.

The human rights implications of the Bill

2.2 The main human rights compatibility issues raised by the Bill are—

(1) whether the effect of the new licensing and permit regimes on existing gambling businesses is compatible with the right to property;

(2) whether the enforcement powers of the Gambling Commission, such as the power to enter premises, to inspect and seize property, and to freeze payments, are compatible with the right to property and the right to respect for private life, family life and home;

(3) whether the new regime is compatible with the right of access to an independent and impartial tribunal in the determination of civil rights;

(4) whether the provision for exchange of information is compatible with the right to respect for private life;

(5) whether the limits on advertising are compatible with the right to freedom of expression.

Impact on existing businesses

2.3 The Bill repeals the previous legislation governing gambling and replaces it with an entirely new regime, including a new licensing and permit system in which a new Gambling Commission is responsible for licensing operators and persons, and local authorities are responsible for licensing premises.

2.4 The introduction of a new licensing regime will inevitably have an impact on the existing holders of gaming licences granted under the current licensing regime. It will also

have an impact on those businesses whose activities have not previously been regulated, namely those offering on-line gambling (over the internet or interactive television).

2.5 The economic interests connected with the running of a business are "possessions" for the purposes of Article 1 Protocol 1 ECHR.[15] A licence to conduct economic activities itself amounts to a "possession" within the meaning of Article 1 Protocol 1 if it gives rise to a reasonable and legitimate expectation of continuing benefits.[16] The repeal of the existing licensing regimes would therefore lead to large scale interferences with property rights if the Bill did not make provision for transitional arrangements between the two regimes.

2.6 The Bill makes such provision in Schedule 18, which empowers the Secretary of State in a commencement order to provide for the transitional continuation of licences, and for the modification of the Act in its application to such a licence.[17] In some cases,[18] this transitional provision allows certain businesses to continue to operate even though they cannot meet the new requirements. It is also possible under the Schedule to make advance applications to the Commission and to licensing authorities.[19] The Bill's transitional provisions in our view make it unlikely that the change from the old to the new licensing regime will lead to interferences with the property rights of existing licence holders.

2.7 However, as the Explanatory Notes to the Bill point out, because the new licensing regime imposes in some respects tighter controls on such activities, it is possible that in some circumstances a person who currently holds a gaming licence and is therefore able to provide facilities for gambling may be unable to satisfy the criteria for a licence under the new licensing regime.[20] The Notes state that in these circumstances it is possible that there will be a deprivation of rights.

2.8 In our view this would amount to an interference with rather than a deprivation of rights. The European Court of Human Rights has held that the withdrawal from a restaurant business of a licence to sell alcoholic beverages, which was one of the principal conditions for the carrying on of that business, was an interference rather than a deprivation, because although the premises could no longer be operated as a restaurant business, the company nevertheless kept some economic interests represented by the leasing of the premises and the property assets contained therein.[21]

2.9 Such an interference is capable of justification, provided a fair balance has been struck between the interests of the wider community and the businesses affected. Whether such justification is made out would depend on the proportionality of the interference in the particular case. It is impossible for us to know in advance the sorts of circumstances in which such an interference may arise, but in view of the important purposes served by the Bill, including the protection of children, young people and the vulnerable against

15 *Tre Traktorer Aktiebolag v Sweden* (1989) 13 EHRR 309 at para. 53

16 *JS v The Netherlands* (1995) 20 EHRR CD42

17 Schedule 18, Part 1

18 Casinos below minimum licensable size

19 Schedule 18, Part 2

20 EN para. 811

21 *Tre Traktorer*, above, at para. 55

exploitation, we consider it likely that any interference with the property rights of these licensed gambling businesses would be held to be justified under Article 1 Protocol 1.

2.10 As far as the impact on previously unregulated businesses is concerned, we do not consider the Bill to give rise to any incompatibility with Article 1 Protocol 1. As a matter of Convention case-law, future benefits, including profits from future business, only constitute "possessions" within the meaning of Article 1 Protocol 1 once those benefits have been earned, or an enforceable claim to them exists.[22] Claims for loss of future profits, based on a mere expectation of such profits, therefore fall outside the scope of Article 1 Protocol 1.

2.11 **We therefore conclude that the Bill does not give rise to any significant risk of incompatibility with Article 1 Protocol 1 by virtue of the impact it has on existing businesses.**

The Commission's enforcement powers

2.12 The Bill confers on the new Gambling Commission a number of intrusive powers of entry, search, inspection and seizure.[23] Such powers engage the right to respect for private life and home under Article 8 ECHR (which are also enjoyed by businesses) and the right to peaceful enjoyment of possessions under Article 1 Protocol 1. Such enforcement powers clearly have a legitimate aim of protecting the rights of others (children, young people and vulnerable adults) and the prevention of crime. The compatibility issue which they raise is whether the safeguards which accompany them are adequate to ensure that the interference with the relevant Convention rights is proportionate to the legitimate aim which is served by such enforcement powers.

2.13 We note that the Commission's enforcement powers, although intrusive, are accompanied by a number of important safeguards. The power of entry, for example, can only be exercised in relation to dwellings with prior judicial authorisation by way of a warrant.[24] The power to inspect or seize records is confined to those which relate to the matters to which the power of entry relates; any wider power to inspect or seize records must be authorised by warrant.[25] All Part 15 powers must be exercised having regard to any relevant provision of the Codes under the Police and Criminal Evidence Act 1984.[26] Powers can only be exercised at a reasonable time,[27] and any person exercising the powers must produce evidence of identity and authority.[28]

22 See Twentieth Report of 2003–04, *Scrutiny of Bills: Progress Report*, at para. 1.6 (Hunting Bill).

23 Part 15 of the Bill (clauses 298–320)

24 Clause 312

25 Clauses 311 and 313

26 Clause 311

27 Clause 314

28 Clause 315

2.14 **In light of these safeguards, we are satisfied that interferences under the Bill with Article 8 and Article 1 Protocol 1 rights are likely to be proportionate to the legitimate aims these enforcement powers are designed to serve,[29] and we therefore do not consider that the Bill presents any significant risk of incompatibility in this respect.**

The right of access to court

2.15 The Bill provides for a right of appeal against decisions and actions of the Gambling Commission concerning operating and personal licences to a new tribunal, the Gambling Appeals Tribunal.[30] On such an appeal the Tribunal has power to affirm or quash the Commission's decision or action, to substitute for it another decision or action which the Commission could have taken, to add to it a decision or action the Commission could have taken, to remit a matter to the Commission, and to reinstate a lapsed or revoked licence.[31] There is a right of further appeal from the Tribunal to the High Court on a point of law.[32]

2.16 The Bill also provides for appeals against certain decisions concerning premises licences and temporary use notices.[33] Such appeals are to be to the magistrates, who may dismiss the appeal, substitute a new decision that could have been made by the licensing authority, or remit the case back to the licensing authority. There is a further right of appeal from the magistrates to the High Court on a point of law.

2.17 The human rights compatibility issue raised by these provisions is whether the Bill secures the right of access to an independent and impartial tribunal in the determination of one's civil rights, as required by Article 6(1) ECHR. This right is engaged, as the Explanatory Notes correctly accept,[34] where decisions of the Gambling Commission or other licensing authority determine a "civil right", which will be most if not all of their decisions concerning licences.

2.18 This compatibility issue is particularly important in light of the decision of the European Court of Human Rights finding a violation of Article 6(1) under the current legal framework. In *Kingsley v UK*, the Court held that administrative regulation of the gaming industry, including questions of whether specific individuals should hold particular posts in it, to be an appropriate procedure.[35] This meant that, in order to comply with Article 6(1), it was not necessary for an individual to have a full court hearing on both the facts and the law, but where a well-founded complaint was made of a lack of impartiality on the part of the Gaming Board of Great Britain, the court with the power to judicially review that decision had to have the power to remit the case for a fresh decision by a differently constituted body or another independent tribunal. The lack of that power meant that there was a breach of the right of access to a court in Article 6(1).

29 The Explanatory Notes at para. 817 state that these safeguards "will limit the extent to which Article 8 is engaged." Strictly speaking, as a matter of Convention analysis, Article 8 is clearly engaged by the enforcement powers, but the safeguards are likely to render the interferences with that right proportionate.

30 Part 7 of the Bill (clauses 138–147) and Schedule 8

31 Clause 142(1)

32 Clause 141

33 Clauses 200–203 and clause 220

34 EN para. 814

35 (2002) 35 EHRR 177

2.19 The Explanatory Notes to the Bill state that in every case where Article 6 is engaged the individual concerned will be entitled to a fair hearing by an independent and impartial tribunal and that, in the case of civil rights, "this will usually involve a right of appeal to the Gambling Appeals Tribunal (which is Article 6 compliant)".[36]

2.20 We welcome the creation of the Gambling Appeals Tribunal as a step which improves the procedural safeguards for those involved in the gambling industry and therefore enhances compatibility with Article 6(1). We doubt that the Tribunal itself is fully Article 6(1) compliant, as asserted in the Explanatory Notes. In particular, we note that para. 3 of Schedule 8 provides that a person appointed by the Lord Chancellor to be a member of the Tribunal "shall hold and vacate office in accordance with the terms of his appointment", and we do not consider this to satisfy the conditions of independence contained in the Article 6(1) case-law, which makes clear that the duration of the term of office of a tribunal member is an important indicator of whether they present the necessary appearance of independence.

2.21 In our view, however, **the fact that the new Tribunal is not itself Article 6(1) compliant does not mean that the entire regime is incompatible with Article 6(1), in light of the availability of a right of further appeal on a point of law to the High Court. The availability of this further recourse is sufficient in our view to render the scheme of the Bill compatible with Article 6(1), subject only to one reservation on which we have written to the Minister.**

2.22 The Explanatory Notes state that "in a few circumstances it will be limited to a right to bring judicial review proceedings".[37] In light of the *Kingsley* judgment, finding the availability of judicial review to be insufficient to satisfy Article 6(1) on the facts of that case, we are concerned that there may remain a residual category of case where there may continue to be Article 6(1) compatibility problems. **We have therefore written to the Minister asking him to identify the circumstances in which an individual whose civil right has been determined will be limited to a right to bring judicial review proceedings.[38]**

Exchange of information

2.23 The Bill makes provision for the exchange of information, in both directions, between the Gambling Commission and a list of persons or bodies, for use in the exercise of their respective functions.[39] It also provides for exchange of information between listed bodies who have functions under the Bill, for use in the exercise of those functions.

2.24 As we have frequently reported recently, the exchange of information relating to an individual's private life engages the right to private life in Article 8 ECHR.[40] "Information

36 EN para. 815

37 EN para. 815

38 Appendix 2

39 Clauses 29, 344 and Schedule 6

40 See for example our Fourth Report of Session 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224 (Serious Organised Crime and Police Bill), Fifth Report of Session 2004–05, *Identity Cards Bill*, HL Paper 35, HC 283 (Identity Cards Bill) and our Sixth Report of Session 2004–05, *Scrutiny: Second Progress Report*, HL Paper 41, HC 305 (Commissioners for Revenue and Customs Bill).

relating to private life" has been given a broad interpretation by the European Court of Human Rights, to include any information relating to an identified or identifiable individual, including information about activities of a business or professional nature.

2.25 There is no doubt that the exchange of information provisions in the Bill therefore engage Article 8 ECHR. The compatibility issue which therefore arises is whether those provisions are compatible with Article 8.

2.26 The exchange of information provided for by the Bill is subject to certain limits. The use which can be made of the information is limited to the functions of the relevant bodies. In addition, express statutory restrictions on the use which can be made of information obtained by one of the listed bodies are expressly preserved by the Bill.[41] **We welcome this ring-fencing of current provisions permitting the use of certain information by the bodies listed in Schedule 6.**

2.27 The Explanatory Notes to the Bill state that any processing of data will need to be consistent with the law of confidence, with any specific restraints and controls, and with other legislation relating to data processing, and that for that reason the Government does not consider that Article 8 will be engaged by the exchange of information provisions in the Bill.[42] The applicability of those other constraints is certainly relevant to an assessment of the compatibility of the Bill's provisions, but they go to the proportionality of the interference with Article 8 rights rather than whether those rights are engaged at all.

2.28 We welcome the Government's acknowledgment that other restrictions on the use of exchanged information under the Bill will still apply. However, we repeat the concern we have previously expressed,[43] that where a Bill authorises such exchange of information, it ought to set out on its face any criteria to guide decisions about the use for one purpose of information which has been acquired for another purpose, and provide procedural safeguards regulating the decision whether such use for a different purpose is necessary and appropriate in a particular case. The relevant provisions in this Bill state that "provision of information in reliance on this section may be subject to conditions (whether as to use, storage, disposal or otherwise)".[44] For reasons explained in our earlier reports, those conditions should in our view be contained on the face of the Bill. **We draw this matter to the attention of each House.**

Control of advertising

2.29 The Bill gives the Secretary of State power to make regulations controlling the advertising of gambling, including the form, content, timing and location of such advertisements, on pain of criminal penalty.[45] When making such regulations the Secretary

41 Para 1, Part 3 of Schedule 6

42 EN para. 816

43 See for example our Sixth Report of Session 2004–05, *Scrutiny: Second Progress Report*, HL Paper 41, HC 305, paras. 1.12–1.34

44 Clauses 29(3) and 344(3)

45 Clause 322(1) and (2). The power to regulate content includes the power to require that specified words be included in advertisements.

of State is required to have regard to the need to protect children and other vulnerable people from being harmed or exploited by gambling.[46]

2.30 The power to control advertising engages the right to freedom of expression in Article 10 ECHR. Commercial advertising has been recognised by the European Court of Human Rights as being within the scope of "expression" in Article 10.[47] But interferences with such speech are, as a matter of Convention case-law, much easier to justify than interferences with other forms of expression such as political speech.[48]

2.31 The purpose of the power to make such regulations is said by the Explanatory Notes to the Bill to be to protect members of the public, especially children, young persons and vulnerable adults, from inducements to gamble inappropriately or illegally, and to help prevent crime and disorder arising from unlawful gambling. These are all purposes which count as legitimate aims for the purposes of Article 10(2).

2.32 Whether the regulations themselves, when made, are compatible will depend on the proportionality of the controls which the regulations impose. **In principle, the existence of such a power to control advertising is not incompatible with Article 10 of the Convention.**

46 Clause 322(4)

47 *Markt Intern Verlag v Germany* (1989) 12 EHRR 161; *Casado Coca v Spain* (1994) 18 EHRR 1

48 See Eighth Report of Session 2001–02, *Tobacco Advertising and Promotion Bill*, HL Paper 59, HC 474, at paras. 12–24

3 Drugs Bill

Date introduced to the House of Commons	16 December 2004
Current Bill Number	House of Commons 55
Previous Reports	None

Background

3.1 This is a Government Bill, introduced in the House of Commons on 16 December 2004. The Prime Minister 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, but merely recite the fact that a statement of compatibility has been made.[49] The Bill received its Second Reading on 18 January and completed its committee stage on 3 February 2005. Its remaining stages in the Commons are scheduled for 22 February 2005.

The effect of the Bill

3.2 The Bill contains miscellaneous provisions in relation to drugs.

3.3 Part 1 provides for certain circumstances[50] to be treated as aggravating factors in respect of the offence of supply of a controlled drug,[51] and creates a presumption of intent to supply where a person is found to be in possession of an amount of controlled drugs to be prescribed by the Secretary of State by regulations.[52]

3.4 Part 2 extends police powers in relation to drugs, for example by providing that adverse inferences may be drawn where a person refuses without good cause to consent to an intimate search,[53] that a police officer may authorise an X-ray or ultrasound scan of a person suspected of swallowing a Class A drug, and that adverse inferences may be drawn from a refusal to consent to such an x-ray or scan. It also provides for drug testing of persons after arrest, and for the extended police detention of suspected drug offenders.[54]

3.5 Part 3 of the Bill provides the police with a new power to require persons who have tested positive for Class A drugs to attend both an initial and a follow-up assessment of their drug misuse.

3.6 Part 4 provides for a new order, an Intervention Order, which can be made alongside an ASBO when drug misuse has been a cause of the behaviour that led to the ASBO being made.

49 Bill 17-EN, para. 67. Clause and paragraph numbers in this report refer to the Bill and Explanatory Notes as Introduced to the House of Commons (Bill 17).

50 Supplying controlled drugs in the vicinity of a school when it is being used by children and young people, and requesting a child or young person to deliver controlled drugs or drug related cash in connection with the offence of supply.

51 Clause 1(1), inserting new s. 4A Misuse of Drugs Act 1971.Clause 1(2) provides that new s. 4A does not apply to an offence committed before it comes into force, as required by Article 7 ECHR.

52 Clause 2

53 Clause 3(5)

54 Clause 7

The human rights implications of the Bill

3.7 The main human rights implications of the Bill are—

(1) whether the statutory assumption[55] that possession of controlled drugs above a certain quantity is possession with intent to supply it, is compatible with the presumption of innocence in Article 6(2) ECHR;

(2) whether providing for adverse inferences to be drawn where a person refuses without good cause to consent to an intimate search or an X-ray or ultrasound[56] is compatible with the right to a fair trial in Article 6(1) ECHR;

(3) whether compulsory drug testing on arrest, the power to require a person to attend an initial and follow-up assessment of their drug misuse and intervention orders requiring people to participate in specified activities to address their drug misuse are compatible with the right to respect for physical integrity and private life in Article 8 ECHR.

Explanatory Notes

3.8 Once again we regret the need to have to point out the inadequacy of the Explanatory Notes in relation to the Bill's implications for human rights. The Notes merely recite the fact that a statement of compatibility has been given. They do not identify the Convention rights engaged nor provide any reasoning in support of the bald statement of compatibility. This does not inspire confidence that human rights compatibility has been a matter of central concern in the formulation of the policy and the drafting of the legislation.

Statutory assumption of intent to supply (clause 2)

3.9 Clause 2 of the Bill introduces a reverse burden provision, i.e. a statutory assumption that one of the ingredients of an offence is proved, in relation to the offence of possessing a controlled drug with intent to supply it to another.[57]

3.10 In proceedings for the offence of possession with intent to supply, if it is proved that the accused was in possession of an amount of a controlled drug that is greater than the amount prescribed in regulations made by the Secretary of State, the court or jury must assume that he had the drug in his possession with intent to supply.[58] The statutory assumption does not apply if evidence is adduced which is sufficient to raise an issue that the accused may not have had the drug in his possession with intent to supply it.[59]

3.11 Reverse burden provisions such as this engage the presumption of innocence in Article 6(2) ECHR. Reverse burdens are of two types: legal, which is where the burden is placed on the accused to prove that a particular defence applies to him on a balance of

55 Clause 2(2)

56 Clauses 3(5) and 5(9)

57 Section 5(3) Misuse of Drugs Act 1971. Clause 2(2) of the Bill inserts new s. 5(4A)–(4C) into the 1971 Act

58 New s. 5(4A)

59 New s. 5(4B)

probabilities; or evidential, which is where the accused must adduce enough evidence for the defence to be an issue, but it remains for the prosecution to disprove the defence.

3.12 In *R v Lambert* the House of Lords held that, in order to be compatible with Article 6(2) ECHR, the burden of disproving knowledge on a charge of possessing a controlled drug with intent to supply[60] is required by s. 3 of the Human Rights Act 1998 to be read as imposing only an evidential burden on the accused.[61]

3.13 The new provision inserted into the Misuse of Drugs Act casts an evidential and not a legal burden of proof on the accused: it does not require the accused to prove that the defence applies to him on the balance of probabilities, but requires him or her to adduce evidence sufficient to raise an issue that he or she may not have had the necessary intent.

3.14 We are unable to reach a definitive view on compatibility because the prescribed amount which triggers the applicability of the statutory assumption is not on the face of the Bill but will be contained in regulations to be made by the Secretary of State.[62] Bearing in mind the seriousness of the offence of possession with intent to supply, it will be important that there is a sense of proportion in the amounts which are prescribed by regulation as triggering the statutory assumption.

3.15 Assuming that the regulations prescribe amounts which are proportionate to the seriousness of the offence, we are satisfied that the reverse burden provision in clause 2(2) is compatible in principle with the presumption of innocence in Article 6(2) ECHR because it imposes only an evidential burden on the accused.

Drug offence intimate searches (clauses 3–6)

3.16 Clause 3 of the Bill amends the provisions of the Police and Criminal Evidence Act 1984 ("PACE") relating to intimate searches in relation to drug offences. Section 55 of PACE provides for an intimate search of a person where it is suspected that the person may have a Class A drug concealed on his person. Intimate searches of body orifices can be carried out without the need for the person's consent. Such intimate searches for drugs offences must be conducted by doctor or nurse in a hospital or clinic.

3.17 The Bill provides that such intimate searches for drug offences can only be carried out where the person concerned has given their consent in writing. It also provides for the person who is to be the subject of the search to be informed of the giving of the authorisation for such a search and the grounds for such authorisation, and requires that the authorisation, the reasons for the authorisation and the fact that the person concerned consented be recorded in the custody record. Clause 5 also amends PACE to make new provision enabling a police officer to authorise an X-ray or ultrasound scan of a person in police detention who is suspected of swallowing a Class A drug. Both clauses provide that, where the appropriate consent to an intimate search or an X-ray or ultrasound is refused without good cause, a court or jury may draw such inferences from the refusal as appear proper.

60 In ss. 5(4) and 28(2) and (3) of the Misuse of Drugs Act 1971

61 [2001] UKHL 37, [2002] 2 AC 545

62 New s.5(4C). Such regulations are to be made by affirmative resolution procedure: clause 2(3)

3.18 We welcome the introduction of the requirement that intimate searches for drugs may only be undertaken when the person to be searched has consented. Carrying out such searches without consent, as provided for under the present law, carries a very considerable risk of violation of the right not to be subjected to inhuman or degrading treatment under Article 3 ECHR, as well as an unjustified interference with the right to physical integrity under Article 8 ECHR.[63] **Introducing a consent requirement therefore enhances compatibility with human rights.**

3.19 Providing for the drawing of adverse inferences from a refusal to consent to an intimate search or an X-ray or ultrasound scan, however, raises a separate question of compatibility with the right to a fair trial in Article 6(1) ECHR. Permitting adverse inferences to be drawn in criminal proceedings from a refusal to consent to an intimate search, or to an intrusive procedure such as an X-ray or ultrasound scan, in our view engages the privilege against self-incrimination which has been recognised by the European Court of Human Rights as lying at the heart of the right to a fair trial.[64]

3.20 According to the Court's case-law, the drawing of adverse inferences from an accused's silence, or refusal to answer questions or to give evidence himself is not *per se* incompatible with the right to a fair trial in Article 6(1). The Court has clearly stated that an accused's silence, in situations which clearly call for an explanation from him, can be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. To determine whether there has been a breach of Article 6, the Court will look at all the circumstances of the particular case, including the safeguards that are in place to ensure both that the person is fully aware of the consequences of staying silent and that excessive weight is not placed on the silence by the court or the jury. The need for safeguards is particularly acute where the question of guilt is determined by a jury.[65]

3.21 Whether the provisions in the Bill providing for the drawing of adverse inferences are likely to give rise in practice to breaches of Article 6(1) ECHR will therefore depend on the adequacy of these safeguards. None are set out on the face of the Bill. **We therefore draw to the attention of each House the need for safeguards to be put in place to ensure that excessive weight is not placed on a refusal to consent to an intimate search or an X-ray or ultrasound scan, and in particular for the police to be required to ensure that individuals are aware of the consequences of refusing such consent, and that adequate guidance will be given by judges to juries.**

Compulsory drug testing on arrest, compulsory assessments of misuse of drugs and intervention orders (clauses 7, 9–10 and 20)

3.22 A number of the remaining provisions of the Bill are avowedly designed to coerce drug users into drug treatment programmes. These include the power in clause 7 to carry

63 We note that the Court of Appeal in *R v Secretary of State for the Home Department, ex p. Carroll, Al-Hasan and Greenfield* [2001] EWCA Civ 1224 held that "squat searches" in prison, to search for items concealed in the genital area or the anus, although adversely affecting the dignity of a prisoner, are nevertheless lawful if conducted "for good reason". We doubt that this conclusion is correct as a matter of Convention law, and agree with commentators who regard the carrying out of intimate searches without consent as likely to involve breaches of Article 3 ECHR: see for example, Feldman, *Civil Liberties and Human Rights*, (2nd edn., 2002) at 412–416.

64 See for example *John Murray v UK* (1996) 22 EHRR 29

65 See *Condron v UK* (2001) 31 EHRR 1

out compulsory drug tests on arrest (on pain of criminal penalty) where a person has been arrested for a trigger offence, or any offence where a police officer of the rank of Inspector or above has reason to believe that drugs contributed to the offence; the power in clauses 9 and 10 to require people who test positive on such a test to attend both an initial and a follow-up assessment of their drug misuse, also on pain of criminal penalty; and the power to make "intervention orders" alongside ASBOs, requiring participation in drug treatment programmes or other activities.

3.23 All of these provisions engage the right to respect for private life in Article 8 ECHR. That right includes the right of a person with capacity to refuse treatment, regardless of whether that refusal is in their best interests. We accept the necessity for the criminal justice system to interfere with this right in certain circumstances in the wider interests of the public, for example by imposing bail conditions requiring treatment. On the information currently available to us, however, we have some concerns that these clauses have the potential to interfere with the Article 8 right to refuse treatment even before a person has even been charged with a criminal offence, let alone had the circumstances of their case considered by a court. Our concern is that people who have been compulsorily drug tested on arrest, are then effectively coerced, by threat of criminal sanction, into agreeing to treatment, before being charged with any criminal offence and without any prior judicial authorisation. **We draw these matters to the attention of each House.**

4 Clean Neighbourhoods and Environment Bill

Date introduced to the House of Commons	7 December 2004
Current Bill Number	House of Commons 52
Previous Reports	None

Introduction

4.1 This is a Government Bill, introduced in the House of Commons on 7 December 2004. The Secretary of State for the Environment, Food and Rural Affairs, the Rt Hon Margaret Beckett 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.[66] They set out the Government's view of the Bill's compatibility with the ECHR at paras 294–307. The Bill received its Second Reading on 10 January and completed its committee stage on 1 February 2005. Its remaining stages will be taken in the Commons on 21 February 2005.

The human rights implications of the Bill

4.2 The main human rights implications of the Bill are—

(1) whether the new power to make "gating orders" is compatible with the right to respect for home and peaceful enjoyment of possessions, and freedom of expression and assembly;

(2) whether the provisions concerning the seizure and forfeiture of vehicles are compatible with the right to peaceful enjoyment of possessions and the right of Gypsies and Travellers to respect for their home;

(3) whether the various reverse burden provisions are compatible with the presumption of innocence;

(4) whether the controls on the distribution of printed matter are compatible with the right to freedom of expression;

(5) whether miscellaneous interferences with property in the Bill are compatible with the right to peaceful enjoyment of possessions.

Gating orders

4.3 Clause 2 introduces a new power to enable local authorities to make "gating orders" restricting the public's right of way over certain highways for the purposes of reducing crime or anti-social behaviour.[67]

66 Bill 11–EN. Clause and paragraph numbers in this report refer to the Bill and Explanatory Notes as introduced to the House of Commons (Bill 11)

67 Clause 2 inserts a new Part 8A (ss. 129A-G) into the Highways Act 1980

4.4 The power to make gating orders over highways to reduce crime or anti-social behaviour provides the state with a further means to protect people's right to respect for their home and private and family life under Article 8 ECHR and their right to peaceful enjoyment of their possessions under Article 1 Protocol 1, and therefore enhances the UK's compliance with the positive obligations to take steps to protect those rights.

4.5 Such a power, however, is also capable of interfering with the rights of adjoining landowners to respect for their home under Article 8 ECHR and to the peaceful enjoyment of possessions under Article 1 Protocol 1 ECHR, insofar as it may interfere with rights of access to the home or to business premises. We have therefore considered the measure's compatibility with those rights.

4.6 We are satisfied that the Bill provides a sufficiently defined legal basis for interference with those rights to satisfy the requirement that such interferences be prescribed by law. The power also serves a legitimate aim, namely the reduction of crime and anti-social behaviour. Whether the interference with Article 8 and Article 1 Protocol 1 rights is proportionate depends on an assessment of the detailed provisions regulating the exercise of the power.

4.7 In order for the power to make a gating order to be exercisable, the local authority must be satisfied that premises adjoining or adjacent to the relevant highway are affected by crime or anti-social behaviour, and that the existence of the highway is facilitating "the persistent commission of criminal offences or anti-social behaviour".[68] The authority making the order is required to have regard to the effect of making the order on the occupier of premises adjoining or adjacent to the highway.[69] Orders may not be made so as to restrict the public right of way over a highway for the occupiers of adjoining or adjacent premises, nor where the highway is the only or principal means of access to a dwelling, nor, in relation to a highway which is the only or principal means of access to any premises used for business or recreational purposes, so as to restrict public access during periods when those premises are normally used for those purposes.[70] Orders can also be varied so as to reduce the restriction imposed, or revoked altogether if no longer necessary for the purpose of reducing crime or anti-social behaviour. In light of these provisions, we are satisfied that any interference with Article 8 and Article 1 Protocol 1 rights is likely to be proportionate.

4.8 **We are therefore satisfied that the new power to make gating orders is compatible with both Article 8 and Article 1 Protocol 1 ECHR.**

4.9 The power to restrict rights of public access over a highway also potentially engages the rights to freedom of expression and assembly under Articles 10 and 11 ECHR to the extent that the power is exercisable in relation to a public highway capable of being used for those purposes. We note from the Explanatory Notes[71] and the Minister's statement on Second Reading[72] that the power to make such orders is intended to be exercisable only in relation

68 New s. 129A(3)
69 New s. 129A(4)(a)
70 New s. 129B(3)–(5)
71 EN para. 21
72 HC Deb, 10 January 2005, col. 42

to what are colloquially described as "alleyways" in built up areas giving rear and side access to properties and providing shortcuts between blocks of properties. If the power were expressly confined to such types of highway, we doubt whether Articles 10 or 11 would be engaged at all, as they are not the sorts of public highway used for the purposes of expression or assembly.

4.10 The statutory power itself, however, is defined so as to be exercisable in relation to "any relevant highway"[73] which is defined as a highway other than certain specified types of highway, or highways of such type as may be prescribed by regulations.[74] The power on the face of the Bill therefore appears to be potentially wider than the power described by the Minister and the Explanatory Notes, and could be exercisable in relation to public highways which might be used for the purposes of expression or assembly. **In light of the Minister's clear statement in Parliament that the power is only intended to be exercised in relation to the types of highway described in the Explanatory Notes, it would be preferable if this were made clearer on the face of the Bill, to guard against future use of the power in a wider range of cases. We draw this matter to the attention of each House.**

Forfeiture and seizure of vehicles

4.11 Clause 44 of the Bill provides for the forfeiture of vehicles where a person has been convicted of unauthorised or harmful deposit of waste. Such forfeiture engages the right to peaceful enjoyment of possessions in Article 1 Protocol 1 ECHR. Forfeiture of property is not *per se* a breach of that right, even where the vehicle concerned is connected to an individual's livelihood. However, any exercise of such power must be proportionate.[75]

4.12 In light of clause 44(7) of the Bill, requiring a court to have regard to various matters before exercising the power, including the likely financial and other effects on the offender and the offender's need to use the vehicle for lawful purposes, we are satisfied that the power in clause 44 is proportionate and therefore compatible with Article 1 Protocol 1.

4.13 We note, however, that there is a question, both in relation to this clause, and in relation to the powers over vehicles in Part 2, as to whether the powers extend to caravans used by Gypsies and Travellers for their accommodation, as this would engage their right to respect for home and family life in Article 8 ECHR, and may make the use of the powers disproportionate in such cases. We have written to the Minister asking for clarification.[76] **We draw this matter to the attention of each House.**

Reverse burdens

4.14 In light of the recent decision of the House of Lords in *Sheldrake v DPP*, we accept the statement in the Explanatory Notes that the new reverse burdens in the Bill are compatible with the presumption of innocence in Article 6(2) ECHR.[77]

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73 New s. 129A(1) Highways Act 1980

74 New s. 129A(5)

75 See *International Transport Roth Gmbh v Secretary of State for the Home Department* [2002] EWCA Civ 158 for an example of a disproportionate power of forfeiture.

76 Appendix 3

77 [2004] UKHL 43, especially Lord Bingham's guidance at para. 21

Controls on distribution of printed matter

4.15 Clause 23 of the Bill introduces new controls on the distribution of printed matter, without the consent of a principal litter authority, in the interests of reducing the amount of litter in public places.

4.16 Such a provision clearly engages the right to freedom of expression in Article 10 ECHR. Printed matter which is for political, religious or charitable purposes is excepted from the controls. Although "commercial speech" is a recognised form of expression enjoying the protection of Article 10, the case-law of the Court does suggest a hierarchy of expression in which interferences with some type of expression are easier to justify than others, and we are satisfied that the proposed controls are compatible with Article 10, as being proportionate to the environmental goal pursued.

Miscellaneous interferences with property rights

4.17 Many other provisions in the Bill engage the right to peaceful enjoyment of possessions, being regulatory provisions which interfere with the way in which people may use their property. We have considered these but we do not find any of them disproportionate in the sense required by that Article.

5 Constitutional Reform Bill

Date introduced to the House of Lords 03–04	24 February 2004
Date introduced to the House of Lords 04–05	24 November 2004
Date introduced to the House of Commons	21 December 2004
Current Bill Number	House of Commons 18
Previous Reports	23rd Report of Session 2003–04

5.1 We reported on the Constitutional Reform Bill in our Final Scrutiny Progress Report of last Session.[78] We have since received a response from the Government to our comments, in the form of a letter from Rt Hon Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs and Lord Chancellor. We publish this letter as an Appendix to this Report.[79]

5.2 On one matter we are seeking further clarification from the Government. In our earlier Report we welcomed the express statutory duty placed on Ministers to uphold the continued independence of the judiciary, contained then in clause 1(1) and now in clause 4(1) of the Bill.[80] But we also took the view that the particular duties imposed on the Minister for the purpose of upholding that independence, then in clause 1(4) and now in clause 4(6) of the Bill, were too weakly stated and potentially represented a retrograde step in terms of the degree of legal protection given to judicial independence[81]. In his reply, Lord Falconer states that "the Lord Chancellor's ability to fulfil [the clause 4(6)] duties cannot be and has never been unqualified. His duty in relation to the defence of judicial independence is, and always has been, subject to issues of resources, differing views about the effect of particular policies, rival demands on government and Parliamentary time, and competing policy considerations". We find this argument surprising. **We have therefore written to the Lord Chancellor to ask for further justification for his contention that the duty of the Lord Chancellor, and of other Ministers, to defend judicial independence may be qualified by factors such as those he has described, and how such qualifications could be held to be consistent with the apparently unqualified nature of the duty as expressed in clause 4(1) of the Bill.**[82]

78 Twenty-third Report of Session 2003–04, *Scrutiny of Bills: Final Progress Report*, HL Paper 210, HC 1282

79 Appendix 4a

80 Twenty-third Report, op cit., para. 1.39

81 ibid., paras. 1.41 and 1.42

82 Appendix 4b

Formal Minutes

Wednesday 9 February 2005

Members present:

Jean Corston MP, in the Chair

Lord Bowness	Mr David Chidgey MP
Lord Campbell of Alloway	Mr Kevin McNamara MP
Baroness Falkner of Margravine	Mr Richard Shepherd MP
Lord Judd	Mr Paul Stinchcombe MP
Lord Plant of Highfield	
Baroness Stern	

The Committee deliberated.

* * * * *

Draft Report [Scrutiny: Third 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 5.2 read and agreed to.

Resolved, That the Report be the Seventh 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 Baroness Stern do make the Report to the House of Lords.

[Adjourned till Wednesday 23 February at Four o'clock.

Appendices

Appendix 1: Letter from Bill Rammell MP, Parliamentary Under Secretary of State, Foreign and Commonwealth Office re International Organisations Bill

Thank you for your letter of 17 January 2005, addressed to Baroness Symons of Vernham Dean, asking for information about the basis in international law for the immunities conferred by the Bill and alternative avenues of redress available in respect of each of the organisations covered by the Bill. I am replying as the Minister responsible for the Bill.

As you rightly point out the European Court of Human Rights, in *Waite and Kennedy v Germany*,[1] found immunity from suit of an international organisation to be compliant with Article 6 of the ECUR. The Court also noted in that case that the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments, and that the immunity from jurisdiction commonly accorded by States to international organisations is a long-standing practice established in the interests of the good working of the organisations.[2]

I will respond to the two points set out in your letter on which the Committee requires further information below.

1. BASIS IN INTERNATIONAL LAW

The Bill confers jurisdictional immunities on the Commonwealth Secretariat and the President and members of the Commonwealth Secretariat Arbitral Tribunal (CSAT). The Commonwealth Secretariat was established by a Memorandum on the Commonwealth Secretariat (the 1965 Agreed Memorandum), which was agreed at a Commonwealth Heads of Government meeting in 1965. Annex A of that Memorandum sets out the privileges and immunities that the UK is required to accord; this includes immunity from jurisdiction currently enjoyed by the Secretariat. The 1965 Agreement is implemented in the UK by the Commonwealth Secretariat Act 1966. In 2002, at the Meeting of Commonwealth Heads of Government in Australia, a revised text of the 1965 Memorandum was agreed (the Revised Agreed Memorandum). The Revised Agreed Memorandum adds a new paragraph to Annex. A conferring official act immunity on the President and members of CSAT. The purpose of clause 2 of the Bill is to implement this change.

CSAT was established by the Commonwealth Secretariat in 1995 as an internal arbitral body to deal with contractual disputes between the Commonwealth Secretariat on the one hand, and its staff and any other person who enters into a written contract with the Commonwealth Secretariat on the other. However, the exclusive nature of the jurisdiction of CSAT to determine employment and contractual disputes was limited by the 2002 High Court decision *Selina Mohsin v Commonwealth Secretariat*[3] when the court found that Part I of the Arbitration Act 1966 was applicable to the decisions and procedures of CSAT, and therefore the UK courts retained some jurisdiction. In light of this decision the Commonwealth Secretariat and a number of Commonwealth Governments have raised concerns about the level of immunity from the jurisdiction of the UK courts conferred on

1 Application No 26083/94

2 para. 63

3 EWCC 377

the Commonwealth Secretariat. The UK accepts, in principle, that the Commonwealth Secretariat's jurisdictional immunity should be on the same level as that enjoyed by other international organisations based in the UK. Amendments to Annex A of the Revised Agreed Memorandum to reflect the extended immunity are expected to be acceptable to the Commonwealth Governments and will be formally agreed once the Bill receives Royal Assent. Clause 11(4) of the Bill provides that clauses 1 to 3 of the Bill will come into force on such day as the Secretary of State appoints. We will ensure that clause 1 of the Bill, which will confer the extended immunity on the Commonwealth Secretariat, enters into force at the same time as the agreed changes to Annex A. To agree changes to Annex A before the Bill enters into force could result in the UK not being able to fulfil its commitments in the Revised Agreed Memorandum as HMG could not be sure that clause 1 of the Bill will proceed through both Houses without any amendments.

Clauses 4 to 8 of the Bill concern the Organization for Security and Co-operation in Europe (the OSCE), bodies established under the Treaty on European Union (EU bodies), the International Criminal Court (the ICC), the European Court of Human Rights (the ECHR) and International Tribunal for the Law of the Sea (ITLOS). These are enabling clauses which do not confer any privileges or immunities but will enable the conferral of privileges and immunities by Orders in Council. I have, however, set out below the bases of the Orders in Council which will be made pursuant to clauses 4 to 8 of the Bill—

(a) OSCE: The OSCE was previously known as the Conference on Security and Co-operation in Europe (the CSCE). Clause 5 of the Bill will enable the United Kingdom to implement the provisions regarding legal capacity and privileges and immunities on the OSCE and certain categories of persons connected with it, as set out in a report of the CSCE Ad Hoc Group of Legal and Other Experts annexed to the decision of the CSCE Council of Ministers of 1 December 1993 held in Rome (the 1993 Rome Council Decision). The OSCE is based upon political commitments rather than any binding international agreement. However, the OSCE has been established by agreement between States and the various Documents and Charters of the OSCE, including the 1993 Rome Council Decision, evidence a commitment amongst participating States that the Organisation should be constituted and administered according to the terms of those instruments.

    The OSCE is an important instrument for the attainment of HMG's foreign policy priorities for international security. The UK is committed to the OSCE's comprehensive and co-operative approach to security and values the unique contribution it makes in support of conflict prevention and nation building including in the Balkans, the Caucasus and Central Asia. Its membership, which brings together Euro-Atlantic and Euro-Asian communities, provides a unique forum for development and implementation of common values and democratic standards we regard as essential to our security. HMG does not want to see any weakening of the UK's relationship with the OSCE. A failure to take this opportunity to implement the political commitments in the Rome Council Decision could call into question our commitment to the OSCE.

(b) EU bodies: Clause 5 of the Bill will enable the conferral of legal capacity and privileges and immunities on bodies established under the Treaty on European Union, and certain categories of individuals connected with those bodies. There are currently three EU bodies on which privileges and immunities will be conferred pursuant to this clause, and in all three cases, the basis of the privileges and immunities are EU Council Decisions—

(i) ATHENA: Decision of the Representatives of the Governments of the Member States meeting within the Council of 28 April 2004 concerning privileges and immunities granted to ATHENA.

(ii) Institute for Security Studies and the EU Satellite Centre: Decision of the Representatives of the Governments of the Member States of the European Union, meeting within the Council on the privileges and immunities granted to the European Union Institute for Security Studies and the European Union Satellite Centre, and to their bodies and staff members.

(c) ICC: The international law basis of the privileges and immunities conferred pursuant to the entry into force of clause 6 of the Bill is the Agreement on the Privileges and Immunities of the International Criminal Court of 10 September 2002 which obliges States Parties to confer legal capacity and privileges and immunities on the ICC and specified categories of individuals connected with the ICC.

(d) ECHIR: The international law basis for the conferral of privileges and immunities on the family members of the judges of the Court is article 1 of the Sixth Protocol to the General Agreement on the Privileges and Immunities of the Council of Europe of 1949.

(e) ITLOS: The international law basis for the conferral of privileges and immunities on ITLOS and various categories of individuals connected with it is the Agreement on the Privileges and Immunities of the International Tribunal of the Law of the Sea done at New York on 23 May 1997.

2. ALTERNATIVE AVENUES OF REDRESS

The alternative avenues of redress available in respect of each organisation covered by the Bill are set out below—

(a) Commonwealth Secretariat: There is an internal dispute resolution mechanism in place, the Commonwealth Secretariat Arbitral Tribunal, in which individuals may pursue claims against the organisation. CSAT was established in 1995 by the Commonwealth Secretariat. A number of changes were made to the Statute of the CSAT in 2002 to ensure that it is an independent and impartial mechanism for settlement of disputes.

(b) OSCE: In 2003 the OSCE adopted Staff rules and regulations which made provision for an appeals procedure for staff or mission members against administrative decisions concerning alleged non-observance of their letters of appointment or terms of assignment, or of any provisions governing their working conditions, as well as in relation to disciplinary measures taken against them. In the event of an appeal, an Internal Review Board is established.

Staff or mission members also have a right of final appeal to a Panel of Adjudicators against an administrative decision directly affecting them in accordance with the Terms of Reference of employment. The Panel of Adjudicators is appointed from a roster to which all participating States are invited to nominate candidates.

(c) EU bodies: The ATHENA financing mechanism has no permanent staff. Staff from the Commission or Council Secretariat seconded to ATHENA will be subject to the rules and regulations for employees of the Institutions. Secondees from Member States are subject to the rules on "Seconded National Experts".

The EU Satellite Centre and the Institute for Security Studies have both agreed separate staff regulations for employees. There is an appeals procedure which includes mediation by a qualified, independent legal expert and an independent Appeals Board made up of staff from outside the agencies. Temporary staff also have access to this appeals procedure. In addition the staff regulations state that disputes not relating to the rights and remuneration of temporary staff come under the jurisdiction of the courts of the host State.

(d) ICC: The ICC is at a formative stage in its development. It is currently working to develop its internal procedures. Article 11.2 of the ICC Staff Regulations states that "The Administrative Tribunal of the International Labour Organisation shall, under conditions prescribed in its statute, hear and pass judgement upon applications from staff members alleging non-observance of their terms of appointment, including all pertinent regulations and rules

Article 31 of the Agreement on Privileges and Immunities obliges the Court to make provision for various types of dispute with third parties, including where these relate to an ICC official with immunity. In addition, States parties are currently reviewing a Code of conduct for counsel before the ICC which will have a disciplinary procedure.

(e) ECHR: While the Bill only concerns family members of judges of the Court, staff of the ECHR have access to the Council of Europe's Administrative Tribunal, which is made up of three judges. One is appointed by the European Court of Human Rights and should hold, or have held, judicial office in one of the Member States of the Council of Europe or with another international judicial body, other than present judges of the European Court of Human Rights. The other two judges are selected by the Council of Europe's Committee of Ministers from among jurists or other persons of high standing. The judges of the Administrative Tribunal are appointed for a term of three years.

(f) ITLOS: Staff are employed by the UN and have access to the UN Administrative Tribunal.

28 January 2005

Appendix 2: Letter from the Chair to Rt Hon Lord McIntosh of Haringey, Parliamentary Under-Secretary of State, Department for Culture, Media and Sport re the Gambling Bill

The Joint Committee on Human Rights has now scrutinised the Gambling Bill for human rights compatibility. It has concluded that none of the Bill's provisions give rise to a significant risk of incompatibility with human rights, but would nevertheless be grateful for your clarification of a point which arises from the Explanatory Notes accompanying the Bill.

The point arises in relation to whether the Bill secures the right of access to an independent and impartial tribunal in the determination of one's civil rights, as required by Article 6(1) ECHR. The Explanatory Notes state, at para. 815, that in every case where Article 6 is engaged, the individual concerned will be entitled to a fair hearing by an independent and impartial tribunal, and that, in the case of civil rights, this will usually involve a right of appeal to the Gambling Appeals Tribunal, "although in a few circumstances it will be limited to a right to bring judicial review proceedings."

In light of the judgment of the European Court of Human Rights in *Kingsley v UK* (2002) 33 EHRR 1, finding the availability of judicial review to be insufficient to satisfy Article 6(1) on the facts of that case, the Committee wishes to be satisfied that there does not remain a residual category of case where there may continue to be Article 6(1) compatibility problems.

I would therefore be grateful if you could identify precisely the circumstances under the Bill in which an individual whose civil right has been determined will be limited to a right to bring judicial review proceedings.

It would be helpful if your reply could be with us by 28 February.

16 February 2005

Appendix 3: Letter from Chair to Rt Hon Margaret Beckett MP, Secretary of State for Environment, Food and Rural Affairs, Department for Environment, Food and Rural Affairs re Clean Neighbourhoods and Environment Bill

The Joint Committee on Human Rights has considered the human rights compatibility of the Clean Neighbourhoods and Environment Bill and will be reporting its views shortly. There is one question on which the Committee would be grateful for your clarification. The question concerns the extent to which various provisions of the Bill concerning vehicles apply to caravans used by Gypsies and Travellers as their home.

Clauses 3, 4, 10, 11 and 12, concerning nuisance parking offences, and fixed penalty notices, notice of removal and disposal of abandoned vehicles, use the definition of "vehicle" in the Refuse Disposal (Amenity) Act 1978 which expressly includes a "trailer": see s. 11(1) of that Act.

Clauses 15 and 16 of the Bill, concerning notice of removal and disposal of illegally parked vehicles, use the definition of "vehicle" in s. 99(5) of the Road Traffic Regulation Act 1984 which also includes "anything attached" to a vehicle.

Clause 44 of the Bill, concerning the forfeiture of vehicles used in the commission of the offence of unlawful deposit of waste, also defines "vehicle" to include any trailer: clause 44(10).

On the face of it, therefore, all of these clauses also apply to Gypsy and Traveller caravans. Bearing in mind that such caravans may be used by Gypsies and Travellers for their living accommodation, the exercise of the extended powers in the Bill for the purpose which they serve (reducing neighbourhood nuisance) is likely in many such cases to be a disproportionate interference with the right to respect for private life, family life and home in Article 8 ECHR.

The Committee would welcome your response as to how it is proposed to ensure that these provisions do not lead to disproportionate interferences with the Article 8 rights of Gypsies and Travellers.

It would be helpful if your response could be with us by 28 February.

16 February 2005

Appendix 4a: Letter from Rt Hon Lord Falconer of Thoroton QC, Secretary of State for Constitutional Affairs and Lord Chancellor, Department for Constitutional Affairs re the JCHR's 23rd Report of Session 2003–04 on the Constitutional Reform Bill

I am writing in response to the Committee's comments on the Constitutional Reform Bill.

First let me say that I welcome the Committee's scrutiny of the Bill, and have considered carefully the specific points it has made. The Constitutional Reform Bill will come to be seen as a landmark in our constitutional development arm d will build on the achievements of the Human Rights Act by further ensuring the proper independence and impartiality of the judiciary, both in their selection and appointment, in their relations with the executive and in separating the Supreme Court from the House of Lords.

JUDICIAL INDEPENDENCE

The Government welcomes the Joint Committee's general endorsement of the provisions in clause 4 of the Bill, which provide for the first time a statutory guarantee of judicial independence. The Government cannot, however, accept the Joint Committee's comments (at paragraphs 1.41 and 1.42) concerning the particular duties imposed on Ministers in (what is now) clause 4(6). It is worth noting that this provision has now been strengthened by the inclusion of a general provision about the rule of law in what is now clause 1 of the Bill.

The duties imposed in clause 4(6) are important aspects of the protections put in place for judicial independence in the Bill. These provisions flow directly from the opening sections of the Concordat with the Lord Chief Justice. The purpose of clause 4(6) is to state some of the various needs that the Lord Chancellor must consider for the purpose of upholding judicial independence. The list is not exhaustive, but for the first time sets down three cardinal needs that must be incorporated into the Lord Chancellor's deliberations. The list fleshes out, but does not detract from, the general duty to uphold judicial independence in clause 4(1).

The Government does not accept that the formulation of the clause 4(6) duties in any way weakens existing legal protection for the independence of the judiciary. In connection with the 'have regard to' formulation, this language recognises that—

- There are other constitutional principles in play, including that of cabinet collective responsibility, which must be properly respected;

- The Lord Chancellor's ability to fulfil these duties cannot be and has never been unqualified. His duty in relation to the defence of judicial independence is, and always has been, subject to issues of resources, differing views about the effect of particular policies, rival demands on government and Parliamentary time, and competing policy considerations;

- The fulfilment of the general objectives of a Minister's portfolio is not a matter to be settled by substantive judicial review in the courts, but is the subject of political accountability and the Minister's obligation to resign if he is unable to support a collective decision

A "more strongly stated" form of duty on the Lord Chancellor would need to take full account of these matters. We do not believe that it is possible to formulate such a statement in stronger terms than are in the Bill at present consistently with this need.

ABOLITION OF THE OFFICE OF LORD CHANCELLOR

Since the Committee wrote its report, the Bill has been amended and it no longer abolishes the office of Lord Chancellor but instead significantly reforms it, and redistributes some of its functions. The Bill leaves the Lord Chancellor with a clearly ministerial role, shorn of any judicial functions. The Bill prevents the Lord Chancellor from sitting as a judge and rightly recognises the Lord Chief Justice as the Head of the Judiciary of England and Wales. Relations between the executive and the judiciary, and the proper balance between them in their respective roles relating to the running of the courts and the justice system more widely, will be regulated by the Concordat which I have agreed with the Lord Chief Justice, which will ensure that judicial independence is respected.

JUDICIAL APPOINTMENTS

I welcome the Committee's agreement that the creation of a recommending Judicial Appointments Commission is compatible with our human rights obligations. In fact, as the Committee recognises in paragraph 1.51, nothing in human rights law requires that judicial appointments be made by a body which is independent of the executive. The Government's view is that judicial appointments are a central function of the state, and that final decisions are properly left to a Minister accountable to Parliament, even though he will have a strictly limited discretion.

The Committee suggests in paragraph 1.53 that the safeguards in the Bill would be strengthened if the Bill defined more clearly what is meant by merit in relation to judicial appointments and what criteria will be relevant to such appointments. We considered such an approach when preparing the Bill and discussed it with the senior judiciary. We concluded, however, that attempts to define what is meant by 'merit' at a level of broad generality tended merely to risk diluting that principle without adding anything of substance, while attempts to define more specifically what criteria should be employed in selecting particular judges risked tying the Commission to a fixed formula and approach, thereby limiting the flexibility and dynamism we hope to see it bring to appointments.

The requirements of different judicial posts vary widely across the spectrum of judicial appointments and over time. It may be very important in some posts, for example, for there to be leadership qualities, or a capacity to organise the work of other judges, which will not be present in some other posts. It is not feasible for the Bill to spell out in detail what is required for every post. We wished to leave the Commission with the greatest flexibility to match judges to the needs of an evolving justice system, subject, always, to the overriding requirement that selections must be solely on merit.

The Committee suggests in paragraphs 1.54 and 1.55 that the ministerial power to give guidance to the Commission is incompatible with judicial independence. I disagree. In fact this does not directly impinge on judicial independence in any way, since it is guidance to a Non-Departmental Public Body, not to judges. To the extent that there is a potential impact, the Minister is bound by the obligations of clause 4 of the Bill on judicial independence, as well as by the specific requirements of clause 59. Before the Minister can issue guidance he must consult the Lord Chief Justice and lay the guidance before both Houses of Parliament for approval. Even then, the Commission is required to 'have regard' to such guidance, but not obliged to follow it. To deprive the Minister of even this power to guide the Commission would risk a situation where the Commission, for whatever reason, was following an approach which had failed to command the support of the Parliament, the judiciary and the public, and no one had any power short of primary legislation to do anything about it.

Moreover, the guidance power will be used in relation to the objectives of furthering diversity, to which the Committee refers later in its report.

The Committee considered that the disqualification of members of the House of Lords from membership of the Commission was unnecessarily restrictive. On balance I have agreed with this. Lord Lester of Herne Hill QC moved amendments in the House of Lords to remove this disqualification in relation to cross-bench peers, which the Government accepted.

Judicial Discipline

The Committee suggests in paragraph 1.57 that the role given by the Bill to the Minister in disciplinary matters is incompatible with judicial independence. These provisions flow from the Concordat agreed between me and the Lord Chief Justice. The judges agree with me that there will continue to be a proper role for the Lord Chancellor in judicial disciplinary matters, both as the Minister accountable to Parliament for the justice system and more widely as a guarantor of the public interest. A judicial discipline system that was wholly within the hands of the judges themselves might fail to command public confidence. The Lord Chancellor retains statutory powers to dismiss judges below the High Court, subject to the agreement of the Lord Chief Justice. This is mirrored by the power of the Lord Chief Justice to impose lesser disciplinary sanctions on judges, subject to the agreement of the Lord Chancellor. No judge will be in the position of being disciplined by the Minister, or of being dismissed without the agreement of the Lord Chief Justice. Different arrangements apply in Scotland and Northern Ireland.

Supreme Court

The Committee recommends, in paragraph 1.62 that 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. The Government does not believe that such a step is necessary in order for the Supreme Court to accord with Human Rights requirements, and in fact believes that the Court will be assisted and strengthened by the involvement of the Lord Chancellor within Government in seeking appropriate levels of ring-fenced funding. Otherwise the risk is that the claims of the Supreme Court will be overlooked, not being defended by any Department. In any event, even without a DCA Minister involved, a Treasury Minister would still be responsible for determining whether the Supreme Court bid was acceptable.

The governance and funding model now provided for in clauses 45–48 establishes the Supreme Court as an independent statutory body with its own Estimate within the overall DCA Departmental Expenditure Limit (DEL) and flowing from this arrangement, independent financing from the Consolidated Fund through the normal supply process. The Chief Executive of the Supreme Court will be a separate accounting officer.

This model secures for the Supreme Court the greatest possible independence in securing and expending resources and in day-to-day administration which is consistent with the Minister remaining ultimately answerable to Parliament for its overall operation. It is a clear constitutional principle that Ministers must be accountable for public expenditure. Thus, the Minister will remain ultimately accountable for the Court; but his role will be reduced to the inescapable aspects within these constraints, of presenting and negotiating the Court's budget with the Treasury, and answering to Parliament for the Court's administration. The model ensures the funding for the Court will be completely ring-fenced and that the Chief Executive of the Court will be in complete control of utilising the funding, to ensure an effective and efficient administration is in place for the Supreme Court.

The Committee concludes in paragraph 1.70 that although Article 6 does not of itself require the creation of a separate Supreme Court, such a step would make it less likely that violations would occur, or that individual judges would have to recuse themselves from cases in which they had had some legislative involvement. I entirely agree with this view. The Government does not assert that our current arrangements are actually in breach of Article 6; however, the arrangement whereby the highest court of appeal is formally part of the legislature clearly does not accord with either the reality of the situation or with modern constitutional norms in liberal democracies, despite the self-imposed restraint now exercised by most Law Lords in their legislative role.

The Committee suggests in paragraphs 1.74 and 1.75 that all holders of judicial office, of whatever kind, ought to be disqualified from the House of Commons, and that the Lords authorities should consider the position in relation to members of the House of Lords. The Government does not accept that there is a need to remove all part-time members of judicial office from either House of Parliament. There is a considerable difference between the position whereby the Law Lords have been a constituent part of the House of Lords; the position of all other full-time judges, who are expected not to adopt party political positions in public; and the position of those lawyers and lay members of the public who offer their services as part-time judges, tribunal members or magistrates, who have traditionally been allowed to retain political and other interests including membership of the House of Commons. The key question is the potential for actual conflicts of interest. A judicial office holder who sits only part-time, particularly when that is in one of the lower courts, can readily avoid any case where there might be a suspicion of a conflict of interest. A judge or a magistrate sitting at that level will in any case be applying the law according to precedent; it is highly unlikely that he will be in a position of creating precedent through his interpretation of the law. Any previously expressed opinions on the issue are less likely to be relevant to his decisions; and there are more avenues of redress if a conflict of interest is alleged.

In paragraphs 1.76 and 1.77 the Committee records its agreement with the House of Lords Select Committee that following the separation of the senior judiciary from the House of Lords, a Parliamentary committee would be a suitable vehicle of communication between the two, subject to the proviso that such a committee could not seek to hold the judiciary to account. This will obviously be a matter to be resolved by Parliament and the senior judiciary. You will also wish to note, however, that clause 6 of the amended Bill now includes specific provision for the chief justices of the three UK jurisdictions to make representations to Parliament on matters of importance.

DIVERSITY

Paragraph 1.83 suggests that the Judicial Appointments Commission should be under an express duty in relation to the diversity of the appointments it makes, comparable to that in Northern Ireland; and that the lack of a provision for an audit role by the Judicial Appointments and Conduct Ombudsman, comparable to that currently exercised by Sir Cohn Campbell, is inconsistent with the UK's obligations in relation to equal opportunities.

The Government does not accept either point. One of the consequences of devolving arrangements in Northern Ireland, as in Scotland, is that arrangements may properly differ as between the devolved administrations and England and Wales. There is no expectation that they will necessarily be brought into line. The arrangements made in relation to Northern Ireland in this case reflect the agreements reached with the political parties there. In relation to England and Wales, the Government's intention is that guidance will be issued to the Commission requiring it to encourage diversity in the pool of candidates available for selection. This is clearly outlined on the face of the Bill in clause 58(3), while

clause 57 emphasises that, in relation to any actual selection, merit is the only criterion. The Government believes that this strikes the right balance.

Sir Cohn Campbell's 'audit' role reflects the fact that at present the selection or appointment of judges is almost entirely within the hands of myself and my officials. Given the concerns that have been expressed about that system, its lack of transparency, and its potential vulnerability to party political manipulation, it has in recent years been thought necessary to have some external scrutiny and guarantee of the integrity of the process. This has extended beyond an ability to consider actual complaints to an ability to examine and comment upon the policies and practices involved in judicial appointments generally.

This situation will be transformed by the Bill, which will place the selection of judges in the hands of an independent Commission, with only a limited mole for the Lord Chancellor, who will have no ability to appoint someone not selected by the Commission. The Commission itself will be the Lord Chancellor's main source of independent advice on all matters to do with judicial appointments. The Commission will be required to make annual reports and any trends in relation to the appointments made will of course be monitored by the Commission, by the Department for Constitutional Affairs, and, I would expect, by Parliament itself. I believe that there will still be a good reason for complaints about maladministration in making selections or appointments to be considered by a body independent of the Commission itself, which is why the Bill gives this role to the Judicial Appointments and Conduct Ombudsman. I do not believe it would be useful, however, for the Ombudsman to be set up as a source of rival advice on wider issues of judicial appointments policy or practice. I certainly do not consider this is necessary in order to comply with our obligations in relation to equal opportunities.

This letter inevitably concentrates on the areas where I disagree with or have reservations about the Committee's views; I would not like to conclude it without recording once again my gratitude to the Committee for its helpful consideration of all these issues, and for the way in which the report has informed the debate.

I am arranging for copies of this letter to be placed in the Libraries of both Houses.

29 January 2005

Appendix 4b: Letter from the Chair to Rt Hon Lord Falconer of Thoroton QC, Secretary of State for Constitutional Affairs and Lord Chancellor, Department for Constitutional Affairs

Thank you for your letter of 29 January comprising your response to the comments on the Constitutional Reform Bill contained in our 23rd Report of last Session. We are grateful for the serious consideration you have given to our Report, and for setting out so fully the reasons for your disagreement with certain of our conclusions. We will publish your response in full in one of our forthcoming scrutiny progress reports.

There is one point on which we would be grateful for further clarification. This is your statement that "the Lord Chancellor's ability to fulfil [the clause 4(6)] duties cannot be and has never been unqualified. His duty in relation to the defence of judicial independence is, and always has been, subject to issues of resources, differing views about the effect of particular policies, rival demands on government and Parliamentary time, and competing policy considerations".

We find this argument, that the duty to defend judicial independence is qualified by other considerations, including even "competing policy considerations", surprising. The international standards to which we referred in our report are unequivocal in their

statement of the duty on all governmental institutions to respect and observe the independence of the judiciary. They recommend enshrining the principle into law at the constitutional level. Principles enjoying constitutional status, as judicial independence has been recognized to enjoy at common law, should not be subject to competing policy considerations. Your response to this question heightens our concern expressed in our report that the statement of the Minister's duty in the Bill is a retrograde step in terms of the degree of legal protection given to judicial independence.

We would therefore be grateful for further justification for your contention that the duty of the Lord Chancellor, and of other Ministers, to defend judicial independence may be qualified by factors such as those you have described, and how such qualifications could be held to be consistent with the apparently unqualified nature of the duty as expressed in clause 4(1) of the Bill, and its recognition by the common law as a principle enjoying a constitutional status.

The Committee would appreciate your response by Monday 28 February if possible.

16 February 2005

Public Bills Reported on by the Committee (Session 2004–05)

* indicates a Government Bill

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

BILL TITLE	*REPORT NO*
Charities [*Lords*]*	**6th**
Clean Neighbourhoods and Environment Bill *	**7th**
Commissioners for Revenue and Customs*	**6th**
Constitutional Reform*[1]	**7th**
Criminal Defence Service*	**6th**
Disability Discrimination [*Lords*]*	**6th**
Drugs *	**7th**
Gambling [*Lords*]*	**7th**
Identity Cards*	**5th**
Inquiries [*Lords*] *	**4th**
International Organisations [*Lords*] *	**4th & 7th**
Mental Capacity *[2]	**4th**
School Transport *[3]	4th
Serious Organised Crime and Police *	**4th**

1 Bill carried over from previous Session. Previously reported in 23rd Report of 2003–04.

2 Bill carried over from previous Session. Previously reported in 15th Report of Session 2002–03 (on the draft bill) and 23rd Report of Session 2003–04

3 Bill carried over from previous Session. Previously reported in 17th and 20th Reports of Session 2003–04 on the draft Bill

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