Mental Health Act 1983 (Remedial) Order 2001 : report, together with the proceedings of the Committee relating to the report and appendices / Joint Committee on Human Rights.

HOUSE OF LORDS
HOUSE OF COMMONS

SESSION 2001–02

JOINT COMMITTEE ON HUMAN RIGHTS

Sixth Report

MENTAL HEALTH ACT 1983 (REMEDIAL) ORDER 2001

Report, together with the Proceedings of the Committee relating to the Report and Appendices

Ordered by The House of Lords *to be printed*
17 December 2001

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HC 472

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SIXTH REPORT

The Joint Committee on Human Rights has agreed to the following Report:—

MENTAL HEALTH ACT 1983 (REMEDIAL) ORDER 2001

Introduction

1. In this Report to each House, as we are *required* by our standing orders to do, we make our recommendation as to whether the Mental Health Act 1983 (Remedial) Order, which was made on 18 November 2001 and laid before Parliament on 19 November, should be approved. The standing orders also *permit* us to report on matters arising from our consideration of the Order, and this we also do.

2. This report is the first occasion on which the JCHR has been required to perform this duty on behalf of Parliament. In an accompanying report[1] we therefore set out in more detail the procedures applying to the making of remedial orders, and our duties in relation to them, for the information of Members of both Houses and others. We also draw some lessons from this first occasion to be applied in the future.

The Original Proposal and Consultation by the Committee

3. A Proposal for a draft Remedial Order to amend sections 72 and 73 of the Mental Health Act 1983 was laid before Parliament on 19 July 2001. It was the first such Proposal to be made under section 10 of and Schedule 2 to the Human Rights Act.

4. At its meeting on that same day the Committee authorised the Chairman to write to a number of interested parties inviting their views on the Proposal,[2] and to the Secretary of State for Health seeking answers to a number of specific questions. The process of consultation was also advertised by means of a press notice. Responses were requested by 15th October.

5. Only a small number of the non-governmental organisations and individuals invited to comment responded—probably an indication of the uncontroversial nature of the Proposal. Their submissions are published within this report.[3] A response to the Committee's specific questions was received from the Health Minister responsible, Jacqui Smith MP, on 15 October.[4] After considering the comments of the respondents, and the Minister's response, the Committee wrote again to the Minister with further questions.[5] Her reply to these was received on 8 November.[6]

Withdrawal of the Proposal and the Making of the Urgent Procedure Order

6. In her second letter, dated 6 November, the Minister informed us that, in response to this Committee's comments, she was withdrawing the Proposal to lay a draft order[7] and was instead making an urgent procedure Order. This urgent procedure Order was laid before Parliament on 19 November.[8] Its substantive provisions are identical to those contained in the Proposal laid on 19 July. We are therefore now making this report under the urgent procedure rules set out in paragraph 4 of Schedule 2 to the 1998 Act, and under paragraph (4) of Standing Order No. 152B of the House of Commons and the cognate provision of the order of the House of Lords of 3 July 2001.

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[1] Seventh Report of Session 2001–02, *Making of Remedial Orders*, HL Paper 58/HC 473
[2] For a full list of those written to, see Annex to this Report
[3] See Appendices, pp 1, 2 and 4
[4] See Appendix, pp 2–4
[5] See Appendix 8, pp 4–5
[6] See Appendix 9, pp 5–6
[7] This was done on 9 November
[8] S.I., 2001, No. 3712

Recommendation of the Committee

7. The standing orders permit this Committee three options in reporting to the House on an urgent procedure order.[9] We consider that the Order made on 18 November remedies the incompatibility in the provisions of the Mental Health Act 1983 identified by the Court of Appeal in its declaration of 4 April 2001. **We recommend that the Mental Health Act 1983 (Remedial) Order 2001 should be approved by each House in the form in which it was originally laid before Parliament.**

8. The standing orders also require us to examine the Order against the tests applied by the Joint Committee on Statutory Instruments to other statutory instruments.[10] We find no reason to draw the special attention of either House to the Order on any of those grounds.

9. However, the standing orders permit us also to report on matters arising from our considerations, and this we now go on to do.

The Remedial Order

THE PURPOSE OF THE PROPOSED REMEDIAL ORDER

10. The Order which has now been made, and which came into effect on 26 November, amends sections 72 and 73 of the Mental Health Act 1983 to remove an incompatibility between those sections and the right to liberty under Article 5 of the ECHR. A declaration of incompatibility was made (under section 4 of the Human Rights Act 1998) by the Court of Appeal in *R. (H.) v. Mental Health Review Tribunal, North and East London Region* on 4 April 2001.[11]

11. In that case, the Court of Appeal held that sections 72 and 73 of the 1983 Act had prevented the tribunal from ordering the release of a compulsorily detained patient unless the *patient* could satisfy the tribunal that the criteria for detention were no longer met. By contrast, Article 5(1) of the ECHR[12] was held to require that nobody should continue to be detained unless the *tribunal* were satisfied that the criteria for detention continued to be satisfied. Placing the burden of persuasion on the patient was held by the Court to violate the patient's right under Article 5(1).

12. As section 4(6)(a) of the Human Rights Act provides, the 1983 Act remained valid and effective despite any incompatibility with Convention rights. The patient had no procedure whereby his release could be ordered. The Court of Appeal held that this violated his right under Article 5(4) of the ECHR to take proceedings to test the lawfulness of this detention,[13] because under that Article the lawfulness of detention must be judged by reference to Convention standards (as well as the requirements of national law). Since sections 72 and 73 of the 1983 Act prevented the Tribunal from ordering the release of a patient in circumstances under which continued detention would not be justified under Article 5(1), it followed that there was an a violation of the right to a procedure for ordering the patient's release under Article 5(4).

13. The effect of the Remedial Order is now to have replaced sections 72 and 73 of the 1983 Act with new provisions which make it clear that Tribunals must order the release of patients unless satisfied that the criteria for detention continue to be met.

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[9] These are: (a) that the order should be approved in the form in which it was originally laid before Parliament; or (b) that the order should be replaced by a new order modifying the provisions of the original order; or (c) that the order should not be approved.

[10] See SO. No. 151(1)(B) of the House of Commons and S.O. No. 73 of the House of Lords

[11] [2001] 3 W.L.R. 512, C.A.

[12] Article 5(1), so far as relevant, provides, 'Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ... (e) the lawful detention of ... persons of unsound mind.'

[13] Article 5(4) provides, 'Everyone who is deprived of his liberty by arrest of detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

CONSULTATION

14. As we described above, the Department of Health originally proposed that the Order be made under the non-urgent procedure, and the preliminary Proposal paving the way for a draft Order was laid before the House on 19 July 2001. We wrote to the Secretary of State for Health seeking answers by 15 October to a number of questions we had about the Proposal. These questions were—

- why the Department of Health had decided not to appeal against the decision of the Court of Appeal that, contrary to the submission made on behalf of the Department, sections 72 and 73 of the 1983 Act were incapable of being interpreted in a manner compatible with Article 5 of the ECHR;
- how many patients were thought to be adversely affected by the incompatibility established in the decision of the Court of Appeal in *R. (H.) v. Mental Health Review Tribunal, North and East London Region*;
- why the Department decided to proceed by way of the non-urgent procedure, rather than the urgent procedure, in relation to an incompatibility which continues to affect the liberty of at least some individuals;
- what provision would be made for the payment of compensation to people who have been detained in violation of Article 5(1) and Article 5(4) of the ECHR (a matter not dealt with in the Proposal for a Draft Remedial Order), in order to give effect to their entitlement to an enforceable right to compensation under Article 5(5)[14] and to the right to an effective remedy for violations of Convention rights under Article 13 of the ECHR;[15] and
- what representations the Department of Health had received in relation to the Proposal for a Draft Remedial Order.

15. The Minister of State at the Department of Health, Jacqui Smith MP, as the Minister with responsibility for the mental health legislation, gave a holding reply on 27 September 2001 and a fuller response was received on 15 October 2001. It is printed with the Appendices to this Report.[16]

16. We also wrote to a number of individuals and organizations with expertise in the field of mental health, seeking their views on the merits of the Proposal.[17] The respondents all accepted that the proposed Draft Remedial Order would be effective in removing the incompatibility identified in the Court's declaration of incompatibility. The Law Society considered that the matter should have been dealt with under the urgent procedure rather than the non-urgent procedure,[18] and suggested that the Committee might ask the Department about criteria for deciding when a case is urgent. This, as noted above, we had already done.

17. Two respondents noted equivalent potential incompatibilities in other legislative provisions: Professor Richardson referred to the provisions of section 72(4) of the 1983 Act on guardianship, and suggested that there was a general question about the relationship between the criteria for release and the criteria for initial detention, particularly 'treatability', under sections 3 and 37;[19] while Liberty referred to the provisions concerning release by the Parole Board of

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[14] Article 5(5) provides, 'Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.'

[15] Article 13 provides, 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.' This is not one of the rights forming part of the law in this country under section 1 of the Human Rights Act 1998, but it binds the United Kingdom in international law and can be asserted by a victim before the European Court of Human Rights.

[16] See Appendix 6, pp 2–4

[17] See Annex to this Report

[18] See p 2

[19] See p 1

discretionary life sentence prisoners under the Crime (Sentences) Act 1997, section 28(6).[20] These are matters which are outside the scope of the current inquiry, as there is no statutory provision for a remedial order to be made in respect of a statutory provision which has not itself been held to be incompatible with a Convention right by either the European Court of Human Rights or a court in the United Kingdom granting a declaration of incompatibility. However, we have taken note of the suggestions. No doubt the Department of Health will wish to take account of the point on guardianship, and the Home Office will wish to take account of the issue relating to the Parole Board. **We draw these matters to the attention of each House, in the hope that the Government will look into the need for making amendments to the legislation at the first opportunity in order to minimise the risk of related incompatibilities being held to exist in other legislation.**

OUR INITIAL RESPONSE TO THE PROPOSAL

18. Having considered the Proposal and the responses of the Minister and others who wrote to us, we asked ourselves the following questions.

- *Had the conditions for making a remedial order been met?* The conditions appeared to have been met, in view of the fact that none of the parties to the decision of the Court of Appeal was seeking to appeal to the House of Lords against the making of the declaration of incompatibility.[21]

- *Were the reasons for proposing to proceed by remedial order rather than by primary legislation compelling?* Although the Government has declared its intention of revising and replacing the 1983 Act soon, in view of the pressure on the legislative timetable, we consider that it was appropriate in this case to use the more expeditious means of removing an incompatibility. We say more about this in our companion Report on the making of Remedial Orders.[22]

- *Had the Department of Health responded adequately to the questions raised by the Committee?* With the exceptions set out below it appeared to have done so.

- *Did the document containing the proposal provide the information required by the Human Rights Act 1998?* It appeared to do so.

- *Did the terms of the proposed draft remedial order remove the incompatibility and are they appropriate?* We concurred with all the respondents to our consultation that the terms of the proposed Order are effective in removing the incompatibility with Article 5(1) and (4), and were appropriate for that purpose. No-one has dissented from this view.

However, there were two qualifications to our otherwise positive conclusion.

Compensation

19. **We considered that there was a strong probability that the failure to make provision for compensating as of right anyone who proves to have been a victim of detention in violation of Article 5(1) and (4) leaves open a serious risk of incompatibility with Article 5(5).** As noted above, Article 5(5) provides that—

> Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

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[20] See p 2

[21] Although the Committee might entertain doubts as to the conclusion of the Court of Appeal that sections 72 and 73 of the Mental Health Act 1983 cannot be interpreted in a manner compatible with Article 5 of the ECHR, it would probably be inappropriate for a parliamentary Committee to express doubts about the legal correctness of a judicial decision on a matter of law. The Committee has consistently taken the view that it is the job of the courts, rather than the Committee, to make final decisions about the interpretation of the Convention rights, the Human Rights Act 1998, and other legislation.

[22] *op cit*

The letter from the Minister of 15 October stated that compensation would be paid on an *ex gratia* basis. While accepting that a legally enforceable right might have been preferable, the Minister said—

> ...we believe that an *ex gratia* response is appropriate here, in the short term, where the detention is not unlawful domestically.[23]

20. However, Article 5(5) requires an enforceable right to compensation for detention 'in contravention of the provisions of this article' of the ECHR, *whether or not* the detention is also unlawful as a matter of domestic law.

21. After due deliberation, therefore, we decided to press the Department on the question of including a provision in the Order allowing a person detained in breach of Article 5 by virtue of the previously incompatible legislation to claim compensation as of right. We believed that this simple provision would be unlikely to lead to a significant number of claims, in view of the information given by the Minister in her letter about the number of patients affected by the incompatibility. We also believed it would do much to guard against an adverse finding by the European Court of Human Rights and a further declaration of incompatibility in the national courts.[24]

22. We therefore wrote again to the Minister saying that we were not persuaded by the argument that an *ex gratia* payment for any victim of the incompatibility (that is someone who had been detained in violation of Article 5 of the ECHR) would meet the United Kingdom's obligations under Article 5(5). The obligations apply in respect of people in the United Kingdom, even if a breach of them does not give rise to a cause of action in domestic law. We asked the Minister whether, in the light of these considerations, she would reconsider whether the making of a remedial order without including provision for an enforceable right to compensation risked a further finding of incompatibility. We also asked what considerations of policy had led her to conclude that a non-statutory scheme was the more desirable route to choose in this particular case, and in what different circumstances she might have judged this to be an inadequate provision.

23. The Minister responded in a letter dated 6 November.[25] She did not accept our recommendation that the Order should include a statutory compensation scheme, arguing that the Department had—

> ... identified three options that would enable compensation of those individuals, if any, who have been detained contrary to the Convention as a direct result of the incompatibility identified by the Court of Appeal in the case of *H*. Having considered each option in considerable detail, we have concluded that the *ex gratia* scheme outlined in earlier correspondence is the most practical and effective way of compensating any victims of the incompatibility.

24. The three options identified by the Department were: to make the Remedial Order retrospective in effect (under paragraph 1(1)(b) of Schedule 2 to the 1998 Act); the inclusion of a statutory compensation scheme in the remedial order; or the adoption of an *ex gratia* scheme.

25. The Minister recognised the attraction of bringing the Remedial Order into effect retrospectively because it would indirectly have created a cause of action under the 1998 Act for all those who had been detained contrary to the Convention. However, the drawback identified by the Department was that it might also have led to complaints by those patients whose detention did not in fact breach the Convention. Whilst these latter patients should not succeed ultimately in any legal proceedings they brought (on the basis that the question of who bore the

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[23] See p 4

[24] There is a wider question concerning the availability of compensation for unlawful detention of mental patients under the Mental Health Act 1983, section 139, which prevents civil proceedings being brought for acts done in pursuance of the Act unless the act was done in bad faith or without reasonable care, but that cannot be addressed in the context of the present remedial order.

[25] See Appendix 9, pp 5–6

"burden of proof" in law did not affect the outcome) they would nonetheless have the right to test this before the court. The Department believed this would create a great deal of uncertainty, potentially for a long time into the future, as old cases before the Mental Health Review Tribunal were re-litigated in the courts.

26. After considering the relative effect of a statutory and an *ex gratia* compensation scheme, the Department remained convinced that the latter was the preferable route. They asserted that by introducing such a scheme, the Government will have done all that would have been required of it had the case been heard by the European Court of Human Rights and not the domestic court, and they argued that given that the purpose of the 1998 Act was to incorporate Convention rights into domestic law, it would be incongruous that a different response would be required to a domestic finding of incompatibility than a Strasbourg one. In the Government's view, the difference between the statutory scheme and an *ex gratia* scheme is more theoretical than real.

27. More persuasively to our mind, the Department argued that an *ex gratia* proposal could allow a degree of flexibility that was unlikely to come from a statutory scheme, and that claims could be entertained under an *ex gratia* scheme that would have been rejected as out of time under a statutory scheme. They also argued that the adoption of the *ex gratia* scheme would allow the remedial order to be transferred to the urgent procedure without delay.

28. However, we continue to believe that the failure to include in the remedial order a provision allowing a person detained in breach of Article 5 by virtue of the previously incompatible legislation to claim compensation as of right would automatically give rise to a violation of Article 5(5) if it proved that that person had been affected by the incompatibility. We remain of the view that the remedial order could have properly provided that the level of compensation would be calculated in accordance with the principles set out in section 8(4) of the Human Rights Act 1998 (that is taking into account the principles applied by the European Court of Human Rights when awarding compensation)—which the Department has already suggested would be the principle applying to the calculation of any *ex gratia* award.

29.The Minister, perhaps not unreasonably, declined our invitation to speculate as to under what 'different circumstances' she might have drawn a different conclusion.

Urgency

30. **We had also asked the Minister in our first letter whether she was convinced that it was desirable for the remedial order to be made by the non-urgent procedure rather than the urgent procedure.** We took the view that, where the liberty of the individual is at stake, the matter should always be regarded as urgent. Under the non-urgent procedure, it was likely to be February or perhaps March 2002 before the change in the law could take effect, about eleven months after the Court of Appeal decided that the Tribunal was unable to protect the Convention rights of compulsorily detained patients.

31. In her initial response of 15 October, the Minister had countered first, that there was no compelling evidence that any individual *was* being detained unreasonably (and, in amplification, that if any were the numbers were very small) and second, that the desirability of fully involving the Committee and Parliament in the process outweighed any such potential risk.

32. Despite these arguments we took the view (also advanced by the Law Society) that this *was* an unnecessarily and undesirably slow response to a threat to the liberty of the individuals concerned, and that it would be desirable to withdraw the present Proposal and proceed instead to make an Order under the urgent procedure.

33. We considered that there should be a presumption that the remedying of any incompatibility which could affect the liberty of the individual should be regarded as an urgent matter. We also considered that the possibility that the detriment was only hypothetical should not be regarded as sufficient grounds for overriding this principle.

34. We also noted that a remedial order made under the urgent procedure would still be subject to scrutiny by this Committee, albeit retrospectively. Our view that the urgent procedure

would have been compatible with effective scrutiny was strengthened by the recognition that the change in the law proposed was relatively simple and uncontroversial (despite our reservations on the compensation question). In the light of these considerations, we asked the Minister whether she would reconsider her decision on the appropriateness of the non-urgent procedure to the circumstances of this case; and what guiding principles she considered should apply in determining which procedure to choose.

35. In her reply of 6 November, the Minister accepted our argument and indicated her intention of withdrawing the Proposal to lay a draft Order and instead to make an urgent procedure Order. This she did. However, she said that she was not in a position to answer the question as to in what different circumstances she would have chosen differently.

36. The Remedial Order came into effect on 26 November, and the incompatibility is now remedied. It is therefore this Order that each House must decide whether or not to approve before the end of the 120 day period from its making on 18 November.

Conclusion

37. **We welcome the decision to reintroduce the proposal for a remedial order by way of the urgent procedure. As we set out above, the change in the law which has now come into effect remedies, in narrow terms, the incompatibility identified by the court in its declaration. For this reason, we have recommended that the order be approved by each House in the form in which it was originally made.**

38. **We are disappointed that the Minister was unable to agree to the inclusion of a statutory compensation scheme within the Remedial Order.** A Minister has power, when making a remedial order, to include 'such incidental, supplemental, consequential or transitional provision as the person making it considers appropriate', and to make it have effect 'from a date earlier than that on which it is made'.[26] **We remain of the opinion that the inclusion of a statutory compensation scheme in the Remedial Order would have been appropriate.** However, since this provision would have been to forestall a further finding of incompatibility rather than to remedy the narrower point identified by the Court of Appeal in this case, we shall not insist on our view. It will be for the courts to decide, should a case come before them in the future. Meanwhile, we trust that the proposed *ex gratia* scheme will be applied justly and appropriately. If it is, that may itself forestall any further legal challenge.

[26] Human Rights Act 1998, Sch. 2, para. 1(1)(a), (b)

ANNEX

List of those invited to comment on the original Proposal of 19 July

British Medical Association
Broadmoor Hospital, Medical Director
Community Mental Health Team Management Association
Community Psychiatric Nurses Association
Council on Tribunals
General Council of the Bar
Health Committee, House of Commons (Chair)
Health Service Ombudsman
JUSTICE
Liberty
Mental After Care Association
Mental Health Act Commission
Mental Health Review Tribunal Secretariat
MIND
Mindlink
National Association for the Care and Resettlement of Offenders
National Director for Mental Health, Department of Health
National Schizophrenia Fellowship
Professor Genevra Richardson, Department of Law, Queen Mary and Westfield College
SANE
Society of Clinical Psychiatrists
The Home Office
The Law Society
The Local Government Association
The Lord Chancellor's Department
The Royal College of Psychiatrists
The Zito Trust
United Kingdom Advocacy Network
United Kingdom Federation of Smaller Mental Health Agencies
Voice

PROCEEDINGS OF THE COMMITTEE RELATING TO THE REPORT

MONDAY 17 DECEMBER 2001

Members present:

Jean Corston MP, in the Chair

Lord Campbell of Alloway
Baroness Perry of Southwark
Baroness Prashar
Baroness Whitaker
Vera Baird MP
Mr Kevin McNamara MP
Mr Shaun Woodward MP

The Committee deliberated.

Draft Report [Mental Health Act 1983 (Remedial) Order 2001], proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 38 read and agreed to.

Resolved, That the Report be the Sixth 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 Perry do make the Report to the House of Lords.

* * * * *

[Adjourned till Monday 14 January at half-past Four o'clock.

PROCEEDINGS OF THE COMMITTEE RELATING TO THE REPORT

MONDAY 17 DECEMBER 2001

Member present:

Jean Corston MP, in the Chair

Lord Campbell of Alloway
Baroness Perry of Southwark
Baroness Prashar
Baroness Whitaker

Vera Baird MP
Mr Kevin McNamara MP
Mr Shaun Woodward MP

The Committee deliberated.

Draft Report [Mental Health Act 1983 (Remedial) Order 2001] proposed by the Chairman, brought up and read.

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

* * * * *

[Adjourned till Monday 14 January at half-past Four o'clock.

APPENDICES

1. Letter from Council on Tribunals

PROPOSAL FOR DRAFT REMEDIAL ORDER TO AMEND MENTAL HEALTH ACT 1983, SS 72 AND 73

The Council is grateful to have been consulted on the proposal for amendment by Order to sections 72 and 73 of the Mental Health Act 1983. Council members were generally content with the provisions of the Order. However, you might wish to note an observation made by one of the Council members; that is, that section 72(4) of the Act, concerning application to the Mental Health Review Tribunal in respect of a patient who is subject to guardianship under the Act, is still couched in the same terms as the current section 72(1). It may be that this anomaly (if such it be) can only be cured by primary legislation.

26 September 2001

2. Letter from The Zito Trust

PROPOSAL FOR DRAFT REMEDIAL ORDER TO AMEND MENTAL HEALTH ACT 1988, SS 72 AND 73

We have received an invitation from Jean Corston, Chair of the Joint Committee on Human Rights, to respond to the Secretary of State for Health's proposal for a draft remedial order amending sections 72 and 73 of the Mental Health Act 1988.

I am writing to confirm that we support the proposed amendment following the recent Court of Appeal's declaration of incompatibility, made under section 4 of the Human Rights, and have nothing further to add.

18 September 2001

3. Letter from Genevra Richardson, Professor of Public Law, Queen Mary, University of London

DRAFT REMEDIAL ORDER TO AMEND MENTAL HEALTH ACT 1983, SS 72 AND 73

The proposed Remedial Order appears to be doing precisely what was required by the finding of incompatibility. It is my understanding that the government was intending to place the burden of proof on the "detaining authority" in its new Mental Health Bill in any event. Nevertheless, I know of no firm timetable for the introduction of that Bill and would therefore regard the Remedial Order as necessary to secure compliance in the meantime.

It may also be relevant to note that section 72(4), concerning guardianship, is currently phrased with the same burden of proof as was found incompatible in relation to hospital detention. It may be assumed therefore that section 72(4) would be equally incompatible. While there may well be an argument that guardianship under section 7 does not engage ECHR rights in the same way as hospital detention, as far as I know there is no definitive ruling on this. There is certainly a good argument that the more restrictive forms of guardianship do engage such rights and no doubt a further challenge will be brought if the government does not act to reverse the burden of proof for guardianship as well.

One other major issue raised by sections 72 and 73 concerns their relationship to the criteria for compulsory admission to hospital in sections 3 and 37 and, in particular, sections 3(2)(b) and 37(2)(a)(i). The so-called "treatability" requirement for compulsory hospital admission in the case of psychopathic disorder has attracted much criticism and debate in recent years. Its possible relevance to the decision to discharge from detention has also been subject to legal challenge, raising questions of Convention compliance, most recently in the context of Scottish legislation.

Whatever the outcome of current litigation, the issue of "treatability", or its possible successor "health benefit", will re-emerge if the government introduces legislation following its White Paper *Reforming the Mental Health Act* (2000). These questions were considered by the Health Committee of the House of Commons in its Report *Provision of NHS Mental Health Services* (1999–2000 HC 373–1), paras 136–8. The Committee was concerned by some of the implications of the earlier Green Paper and it remains to be seen how those concerns will be dealt with in any new Bill.

3 October 2001

4. Letter from The Law Society

RE: PROPOSAL FOR DRAFT REMEDIAL ORDER TO AMEND MENTAL HEALTH ACT 1983, SS 72 AND 73

I am writing in my capacity as Secretary to the Mental Health and Disability Committee of the Law Society, further to Jean Corston's letter requesting comments to your Committee on the Draft Remedial Order. This matter was discussed by the Mental Health and Disability Committee on Tuesday 18 September. The collective view of the Committee was that, in terms of the limited inquiry on the remedial order itself, that

the remedial order achieves its purpose in resolving the issue of incompatibility with Article 5(1) and 5(4) of the European Convention on Human Rights (as per Court of Appeal decision in *R (H) v Mental Health Review Tribunal, North and East London Region*).

We understand that wider issues of mental health law and policy are not included within the consultation. However, there are two process and procedural issues that concern the Committee. The first is the treatment of the declaration of incompatibility and subsequent draft remedial order as a "non-urgent case". The Committee's view is that the continued detention and deprivation of an individual's liberty is indeed an urgent issue and should be treated as such. Secondly, the Committee would be interested to know what the criteria for urgent and non-urgent cases is, and what the procedure would be to rectify the domestic legislation in an urgent case.

If the later two points are outside of the remit of the Joint Committee on Human Rights at this time, I would be grateful if you could advise me on where these concerns might usefully be taken.

Philip King
Policy Adviser: Mental Health, Disability and Older People

5. Letter to the Chairman from Liberty

DRAFT REMEDIAL ORDER

I am writing following the publication of the decisions made by the Committee at its first meeting on 19 July.

I have considered this remedial order and it clearly does what is necessary to rectify the incompatibility identified in *R (H) Mental Health Review Tribunal*. However, I am concerned about potential incompatibility in parallel legislation.

As you may know those prisoners sentenced to discretionary life sentences are assessed for release by Discretionary Lifer Panels of the Parole Board. The assessment by those Panels is based on section 28(6)(b) of the Crime (Sentences) Act 1997 which states:

> "(6) The Parole Board shall not give a direction under sub-section (5) above [a direction to the Secretary of State to release the lifer] with respect to a life sentence prisoner to whom this section applies unless . . .
>
> (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

This provision puts the burden on the prisoner in exactly the same way as the Mental Health Act does (see *R v Secretary of State for the Home Department, ex parte Watson* [1996] 2 All ER 641). I accept that section 10 of the Human Rights Act does not allow the remedial order to rectify section 28 of the Crime (Sentences) Act because that provision has not been declared incompatible. However, I wonder whether it would be appropriate for your Committee to ask the Government whether in the light of the decision in *H* it also intends to amend the law for discretionary lifers.

John Wadham
Director

18 August 2001

6. Letter to Chairman from Jacqui Smith MP, Minister of State, Department of Health

DRAFT REMEDIAL ORDER TO AMEND THE MENTAL HEALTH ACT, SS 72 AND 73

Your letter of 1 September 2001 addressed to Alan Milburn raised a number of questions about the decision to lay the above order. I am responding on his behalf.

I shall address each of the points raised by the Committee in turn.

Question 1: Did you consider seeking leave to appeal to the House of Lords against the Court of Appeal's interpretation of the 1983 Act, and, if so, what persuaded you that it would be preferable to accept the Court of Appeal's restrictive interpretation.

We gave very careful consideration to the question of appeal but decided not to pursue that course on the basis of advice that there would be no realistic prospect of success. We understand that there was no discernible error of law in the judgement of the Court of Appeal and an application for leave to appeal to the House of Lords had been refused by the Court of Appeal. In addition the judgement was not out of line with the direction of Government policy intentions for new mental health legislation as set out in the White Paper *Reforming the Mental Health Act 1983.*

Question 2: Do you have any information about the number of patients who might be in this position, with grounds for applications to the European Court of Human Rights in respect of their continued detention, until such time as the law is brought into line with ECHR Article 5 and their cases are considered or reconsidered by a Tribunal?

The Committee's comment in the pre-amble to this question indicates that at least one patient (I assume H) has been detained contrary to his Convention rights. I am not persuaded that this is what the judgement says.

The Tribunal's written decision is ambiguous as to whether there is a positive finding of mental disorder in the case of H (see paragraph 6 of the judgment—"*. . . this patient is (a) still exhibiting symptoms of his illness, namely the hearing of voices . . .*"). This specific issue was not addressed in the Court of Appeal's judgment which focused on the abstract question of whether the test was compatible, not whether H had been treated compatibly. It remains unclear whether a positive finding of mental disorder warranting detention was actually made, and hence unclear whether H's detention was at any time contrary to Article 5.

Paragraphs 33 and 34 of the judgement cast further doubt as to whether H was ever detained contrary to Article 5. A clear analogy is drawn between the circumstances of the case of H and the case of M and reference is made to the difficult question of schizophrenia in relation to Tribunal discharge. Here, the Court of Appeal suggests that schizophrenia, even when in remission, enables the Tribunal to make the positive findings necessary to satisfy Article 5 (albeit it is unclear whether they did so in this case). The Court of Appeal then go on to say in paragraph 34 that "*it is only rarely that the provisions of ss 72 and 73 constrain an MHRT to refuse an order of discharge where the continued detention of the patient infringes Article 5*".

The Committee may wish to note that when H's case came back before the Tribunal in August this year, the Tribunal made a positive finding of a mental disorder of a nature and degree warranting detention in hospital. As a result, H is subject to continuing detention.

Turning now to the Committee's question, we are not aware of any patients whose Convention rights are being breached as a result of the incompatible provisions.

My Department issued Guidance to Tribunal Chairmen on 5 April 2001. It provides:

> *Where a Tribunal (having sought further information) remains unable to make a positive finding that all the criteria for continued detention are made out but nonetheless orders that the patient be detained, it should state in its reasons that a positive finding was not possible and that the statutory test was applied.*

Hence, patients whose continued detention is contrary to article 5 should be easily detectable. To date, no such cases have been brought to the Department's attention by patient representatives (over 95 per cent of patients have legal representation before the Tribunal) or the Tribunal. We understand that the Regional Chairmen of the Tribunal are not aware of any such cases.

We would not expect there to be any unrestricted patients detained contrary to Article 5 given the Tribunal's absolute discretion to order a discharge in any such case.

The same discretion does not extend to restricted patients. That said, it remains the Court of Appeal's view that it will "rarely" be the case that detention will be contrary to Article 5 where the Tribunal refuses a discharge.

Question 3: What led you to decide against using the "urgent cases" procedure for making a remedial order under the Human Rights Act 1998, Schedule 2, paragraph 2(b) and (4) which would have allowed the amendment of the law to take effect at once, instead of delaying the opportunity for the patients to seek their discharge until a date which is unlikely to be earlier than March 2002?

Choosing between the urgent and non-urgent procedures was not clear-cut.

The decision required balancing the potential interference with patient's Convention rights against the need for Parliamentary scrutiny of a proposal to change primary legislation.

The non-urgent procedure allows for a period of consultation after which the draft order can be amended. With the urgent procedure, there is no opportunity for the House or its Committees to ask for changes until after the order has been made. There is then no obligation on the Government to make any change. The non-urgent procedure allies itself more closely with the Parliamentary procedure used to scrutinise Bills. It provides a higher level of Parliamentary scrutiny.

The non-urgent procedure was adopted in the light of the fact that the Court of Appeal thought the Tribunal would rarely be constrained to refuse discharge in Violation of Article 5, and we had no evidence that any patient was currently affected.

Question 4: Please will you inform the Committee of any steps which you propose to take to make available sufficient compensation to avoid a situation in which the United Kingdom is in breach of its obligations in international law under those Articles of the ECHR?

We do not envisage a statutory compensation scheme. This is not least because the number of people who are actually affected, if any, is expected to be very low. In light of the very small number of possible violations, we consider that a readiness to address complaints on a case by case basis would be a more flexible and efficient response, and one less open to vexatious applications.

Where a patient is able to demonstrate that were it not for the double negative part of the test he would have been discharged, the Government will pay compensation. It seems likely that any intended application to Strasbourg will be notified to my Department prior to issue and the question of compensation can be looked at then. Under the guidance issued by my Department in April any problems should be picked up long before then. I would anticipate that the level of any compensation awards would be in line with Strasbourg levels and not domestic ones.

We recognise that a legally enforceable right to a remedy for breach of a Convention right is preferable, as a long-term solution, to an *ad hoc* response of the kind described. Indeed, I understand that it is the model provided by the Human Rights Act for breaches that are unlawful as a matter of domestic law. However, we believe that an *ex gratia* response is appropriate here, in the short term, where the detention is not unlawful domestically. Our international obligations not to detain people in breach of Article 5 are being anticipated and met by the Remedial Order itself.

15 October 2001

7. Letter from Justice

DRAFT REMEDIAL ORDER TO AMEND MENTAL HEALTH ACT 1983, SS 72 AND 73

I am writing in response to the letter of Jean Corston MP, requesting comments on the above order. Justice has examined the draft remedial order, and has taken legal advice on the matter. We fully support the form and content of the draft order, and consider that it satisfactorily redresses the incompatibility with Article 5 of the ECHR, found by the Court of Appeal in *ex parte H*.

15 October 2001

8. Letter from Chairman to Jacqui Smith MP, Minister of State, Department of Health

Proposal for a Draft Remedial Order to amend the Mental Health Act 1983, sections 72 and 73

The Committee is grateful to you for your letter of 15th October 2001 responding to the questions in my letter to the Secretary of State relating to the proposal for a Mental Health Act 1983 Remedial Order. The Committee considered your response at its meeting on 22 October, and has asked me to seek your views on two aspects of it. The first is a technical question of compliance. The second is a more political question about the choice of procedure.

First, the Committee is not persuaded by the argument advanced in your letter that an *ex gratia* payment for any victim of the incompatibility (that is someone who had been detained in violation of Article 5 of the ECHR) would meet the United Kingdom's obligations under Article 5(5). Article 5(5) requires an *enforceable* right to compensation for detention 'in contravention of the provisions of this article' of the ECHR, *whether or not* the detention is also unlawful as a matter of domestic law. The obligations apply in respect of people in the United Kingdom, even if a breach of them does not give rise to a cause of action in domestic law.

The Committee believes that the failure to include in the remedial order a provision allowing a person detained in breach of Article 5 by virtue of the previously incompatible legislation to claim compensation as of right would automatically give rise to a violation of Article 5(5) if it proved that that person had been affected by the incompatibility. The Committee considers that the remedial order could properly provide that the level of compensation would be calculated in accordance with the principles set out in section 8(4) of the Human Rights Act 1998 (that is taking into account the principles applied by the European Court of Human Rights when awarding compensation)—which is what you already suggest would be the principle applying to the calculation of any *ex gratia* award.

The Committee notes that a Minister has power, when making a remedial order, to include 'such incidental, supplemental, consequential or transitional provision as the person making it considers appropriate', and to make it have effect 'from a date earlier than that on which it is made'.[1]

In the light of these considerations, the Committee wishes to know—

(i) whether on reflection you consider that the making of a remedial order without including provision for an enforceable right to compensation risks a further finding of incompatibility; and

[1] Human Rights Act 1998, Sch. 2, para 1(1)(a), (b).

(ii) what considerations of policy led you to conclude that a non-statutory scheme was the more desirable route to choose in this particular case, and in what different circumstances might you judge this to be an inadequate provision.

Second, the Committee remains concerned about the decision to use in this case the non-urgent procedure rather than the urgent procedure to make a remedial order. In your response you advance two arguments in support of this decision—that there is no evidence that anybody has been wrongly detained because of this incompatibility, and that the desirability of fully involving the Committee and others in the process outweighted any possible urgency.

It may well be, as you argue in your letter, that nobody is directly affected by the incompatibility identified by the Court of Appeal. Nonetheless, the Committee considers that, save in exceptional circumstances, there should be a presumption that the remedying of any incompatibility which could affect the liberty of the individual should be regarded as an urgent matter. The possibility that the detriment is only hypothetical should not be regarded as sufficient grounds for overriding this principle.

The Committee notes that a remedial order made under the urgent procedure would still be subject to its scrutiny, albeit retrospectively. The procedures set out in Schedule 2 to the Act are designed precisely to enable urgent action to be combined with effective scrutiny.

The Committee's view that the urgent procedure would have been compatible with effective scrutiny is strengthened by the recognition that the change in the law proposed is relatively simple and uncontroversial (despite our reservations on the compensation question).

In the light of these considerations, the Committee wishes to know—

(i) whether you would now reconsider your decision on the appropriateness of the non-urgent procedure to the circumstances of this case; and

(ii) what guiding principles you consider should apply in determining which procedure to choose.

It would of course be possible for you to proceed with a urgent remedial order even at this stage, enabling the incompatibility to be remedied some two or three months earlier than otherwise will be possible. While the Committee appreciates your wish to facilitate its scrutiny of the proposal for a draft remedial Order, it would be clearer that this involvement is being taken seriously were the draft Order (or urgent procedure order) when laid to contain provision for an enforceable right to compensation.

In order to report to each House within the statutory period set out in Schedule 2 to the Act (which expires on 23 November), the Committee must agree its report at its meeting on 19 November. I must therefore ask that your response to this letter is with me at the very latest by 9 November.

24 October 2001

9. Letter to Chairman from Jacqui Smith MP, Minister of State, Department of Health

Thank you for your letter of 24 October 2001. I am grateful for the Committee's assistance in identifying important issues arising from the remedial action being taken under section of the Human Rights Act 1998 ("the 1998 Act").

We have considered carefully the two aspects that you highlight on behalf of the Committee. We now intend to adopt the Committee's recommendation that the urgent procedure is used by have decided against the inclusion of a statutory compensation scheme in the remedial order. I will deal below with each of the points raised in your letter.

Urgent Procedure

We have taken very seriously the Committee's concern over the procedure chosen in relation to this particular remedial order. As I have previously stated in correspondence, the decision as to which procedure was to be used was not a clear cut one. The decision to adopt the non-urgent procedure was taken in deference to Parliament. In light of the views of the Committee, we are content in this case to switch to the urgent procedure and propose to take the neceesary action within the next week.

The Committee further seeks policy statements as to the guiding principles that should apply in determining which procedure is to be used. For my part, I cannot comment beyond the case in hand, except to say that the views expressed by the Committee will be considered very carefully by any of my ministerial collegues who may find themselves proposing future remedial orders.

Compensation

We identified three options that would enable compensation of those individuals, if any, who have been detained contrary to the Convention as a direct result of the incompatibility identified by the Court of Appeal in the case of *H*. Having considered each option in considerable detail, we have concluded that the *ex gratia*

scheme outlined in earlier correspondence is the most practical and effective way of compensating any victims of the incompatibility.

The three options identified were: to make the remedial order retrospective in effect (under paragraph 1(1)(b) of Schedule 2 to the 1998 Act); the inclusion of a statutory compensation scheme in the remedial order (with acknowledgements to the Committee); or the adoption of an *ex gratia* scheme.

The option of bringing the remedial order into effect retrospectively initially appeared attractive because it would indirectly have created a cause of action under the 1998 Act for all those who had been detained contrary to the Convention. However, the drawback was that it would also have led to complaints by those patients whose detention did not in fact breach the Convention. Whilst these latter patients should not succeed ultimately in any legal proceedings they brought (on the basis that the question of who bore the "burden of proof" in law did not affect the outcome) they would nonetheless have the right to test this before the court. This would create a great deal of uncertainty, potentially for a long time into the future, as old cases before the Mental Health Review Tribunal were re-litigated in the courts.

The latter two options have more similarities than differences and were considered side by side and, as I said at the outset, we continue to prefer the *ex gratia* scheme route.

In practice, the UK Government will have done all that would have been required of it had the case been heard by the ECtHR and not the domestic court. Following a finding of an article 5 incompatibility by the ECtHR, the UK Government would have, in all likelihood, undertaken to amend its legislation prospectively to remove the incompatibility. Compensation would then have been paid to victims on an informal case by case basis. That is what is proposed in this case in response to a domestic finding of article 5 incompatibility. Given that the purpose of the 1998 Act was to incorporate Convention rights into domestic law, it seems incongruous that a different response would be required to a domestic finding of incompatibility than a Strasbourg one. Furthermore, the Government is not aware of any pending proceedings in Strasbourg in which the Article 5(5) issue is raised. Given the time limit of six months for bringing a case in Strasbourg, it is unlikely that there will be any such cases. But, if there were, and the UK Government had offered a complainant *ex gratia* compensation, it is highly unlikely, in the Government's view that the European Court of Human Rights would regard the complaint as admissible, since it would be academic on its facts. The difference between the statutory scheme and an *ex gratia* scheme is more theoretical than real.

Moreover, an *ex gratia* proposal could allow a degree of flexibility that is unlikely to come from a statutory scheme. For example, it may be the case that claims will be entertained under an *ex gratia* scheme that would have been rejected as out of time under a statutory scheme. This would potentially be of benefit to those who might claim compensation.

On a practical note, the adoption of the *ex gratia* scheme will allow the remedial order to be transferred to the urgent procedure without delay. The inclusion of a statutory compensation scheme at this stage would inevitably lead to delay, notwithstanding that it was dealt with expeditiously, as such a scheme would need to be drafted. For my part, I do not see the justification for introducing such a complex legal structure where it has little or no practical effect.

I have taken the opportunity to look at what Ministers said during passage of the Human Rights Bill. In the House of Lords, 27 November 1997, column 1108, the Lord Chancellor remarked that *ex gratia* payments, retrospectivity and the use of the prerogative might all be appropriate ways to respond to a declaration of incompatibility. I hope you will agree that a willingness to make *ex gratia* payments in this case, combined with a prospective change in the law, is indeed a responsible and proper course.

Finally under this head, I note that the Committee further seeks to know what "different circumstances" might have led to a different conclusion. Having confined myself to considering the facts of this case alone, I am afraid I am not in a position to answer this question.

6 November 2001

10. Memorandum from the Department of Health

MENTAL HEALTH ACT 1983 (REMEDIAL) ORDER 2001

1. The Department provides this explanatory memorandum to assist the Joint committee on Human Rights.

2. This explanatory memorandum should be read in conjunction with the explanatory notes accompanying the Mental Health Act 1983 (Remedial) Order 2001 ("the Order").

3. The Order is subject to the "urgent" procedure prescribed in paragraphs 2a and 4 of Schedule 2 to the Human Rights Act 1998. The "urgent" procedure is an affirmative procedure in that the Order is laid after making, but cannot remain in force after a period of 120 days beginning from the date the Order was made unless approved by each House of Parliament within that period.

4. The Order was made on 18 November 2001 and shall come into force on 26 November 2001. The Department does not consider that the Order comes into force unreasonably soon in light of the JCHR's previously expressed view that the remedying of an ECHR incompatibility in legislation which could affect

the liberty of the individual should be regarded as an urgent matter. Further, the JCHR have previously expressed the view that the change in law proposed is relatively simple and uncontroversial.

5. The delay in the Order coming in to effect is to allow the Department time to inform all the interested groups of the change to the Mental Health Act 1983. In particular, the Department needs to ensure that patient groups and Tribunal members are aware of the changes and the timing of their implementation.

19 November 2001

Annex: Required information relating to the Remedial Order made on 18 November 2001

(Paragraph 4(1) of Schedule 2 to the Human Rights Act 1998)

A. *An explanation of the incompatibility which the order (or proposed order) seeks to remove, including any particulars of the relevant declaration, finding or order*

An explanation of the incompatibility which the proposed order seeks to remove is encompassed in the text of the declaration of incompatibility made on 4 April 2001 in the case of *The Queen on the application of H v Mental Health Review Tribunal North & East London Region (Secretary of State for Health Intervening)*. The declaration reads as follows:

> "A declaration under section 4 of the Human Rights Act 1998 that sections 72(1) and 73(1) of the Mental Health Act 1983 are incompatible with Articles 5(1) and 5(4) of the European Convention of Human Rights in that, for the Mental Health Review Tribunal to be obliged to order a patient's discharge, the burden is placed upon the patient to prove that the criteria justifying his detention in hospital for treatment no longer exist; and that Articles 5(1) and 5(4) require the Tribunal to be positively satisfied that all the criteria justifying the patient's detention in hospital for treatment continue to exist before refusing a patient's discharge.".

B. *A statement of the reasons for proceeding under section 10 and for making an order in those terms*

The underlying issue is one of personal liberty. The incompatibility raises the prospect that patients detained by the State under the Mental Health Act 1983 may continue to be detained even though a decision by the Mental Health Review Tribunal not to discharge them is incompatible with their Convention rights.

The use of remedial action under section 10 of the Human Rights Act 1998 will ensure that the incompatibility is remedied quickly. Although new legislation is planned which would remove the incompatible provisions, there is no set timetable for introduction of a Bill at this stage.

The fact that personal liberty is at stake and that reform will not otherwise take place in the near future are compelling reasons for proceeding under section 10 of the Human Rights Act 1998.

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