



House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill

Fourth Report of Session 2009-10

*Report, together with formal minutes and
written evidence*

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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 made under Section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in Standing Order No. 73 (Lords)/151 (Commons) (Statutory Instruments (Joint Committee)).

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

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Publication

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.

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Footnotes

In the footnotes of this Report, references to oral evidence are indicated by 'Q' followed by the question number. References to written evidence are indicated by the page number as in 'Ev 12'.

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Summary

We welcome a number of aspects of the Constitutional Reform and Governance Bill, which has been introduced to implement some of the commitments made by the Prime Minister in his Governance of Britain statement in July 2007.

We note, however, that there are a number of significant omissions from the Bill, including in relation to judicial appointments, parliamentary scrutiny of security and intelligence matters, and the restrictive judicial interpretation of the meaning of “public function” in the Human Rights Act. We recommend amendments to the Bill relating to the latter two points.

Protest around Parliament

We welcome the proposal to repeal sections 132 to 138 of the Serious and Organised Crime and Police Act 2005 and introduce new provision for protest around Parliament based on the Public Order Act 1986, which we recommended in reports on policing and protest in 2009. We have some detailed concerns about the drafting and look forward to seeing the draft order which will specify the area to be covered by the new regime and the entrances to the parliamentary estate by which access to Parliament will be maintained.

Ratification of treaties

If enacted, the Bill will place the parliamentary scrutiny of treaties on a statutory basis. We welcome this but recommend that the Bill should be amended to:

- require the Government to lay before Parliament an explanatory memorandum about a treaty at the same time as the treaty is laid;
- require Ministers to explain why any request for an extension of the time allowed for parliamentary scrutiny of a treaty has been refused; and
- remove the ministerial power to disapply the new regime in exceptional cases.

Right to a fair hearing and access to a court in the determination of civil rights

Article 6 of the European Convention on Human Rights relates to a fair hearing (including access to a court) in determination of a civil right. Provisions in the Bill relating to the removal from office of the Civil Service Commissioners; complaints about breaches of the Codes of Conduct by civil servants; complaints about selections for appointment to the civil service; and removal from office of the Comptroller and Auditor General and the chair of the National Audit Office, all, in our view, engage Article 6. We call on the Government to introduce more stringent procedural safeguards in relation to the exercise of these powers, in order to avoid breaches of Article 6.

Bills drawn to the special attention of each House

1 Constitutional Reform and Governance Bill

Date introduced to first House	20 July 2009
Date introduced to second House	
Current Bill Number	HC Bill 4
Previous Reports	None

Background

1.1 This is a Government carry-over bill first introduced in the House of Commons in the 2008-09 session on 20 July 2009. The Bill received its Second Reading on 20 October 2009 and progressed as far as the Committee of the Whole House stage which was not completed. It was reintroduced to the House of Commons on 19 November 2009 and is currently awaiting a date for continuation of the Committee of the Whole House. The Lord Chancellor and Secretary of State for Justice, the Rt Hon Jack Straw MP, has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998.

1.2 We wrote to the Secretary of State on 26 October 2009 asking a number of questions about certain aspects of the Bill with human rights implications or implications for the way in which we conduct our scrutiny of laws and policies for human rights compatibility. We received a full response, for which we are grateful, from Michael Wills MP, Minister of State, Ministry of Justice, dated 17 November 2009. That correspondence is published with this Report.

Purposes and effect of the Bill

1.3 The main purpose of the Bill is to give effect to some of the Government's proposals for constitutional reform contained in *The Governance of Britain* Green Paper¹ published on 3 July 2007 and outlined by the Prime Minister in his first statement to the House of Commons as Prime Minister on the same day.²

1.4 An early draft of this Bill was published as the Draft Constitutional Renewal Bill in March 2008. That draft Bill was subject to pre-legislative scrutiny by a Joint Committee chaired by Michael Jabez Foster MP.³ The scope of the Bill is much more modest than the Government's stated intentions in its Green Paper, the Prime Minister's statement to the House and the draft Bill scrutinised by the Joint Committee. The Bill makes no provision for reforming the role of the Attorney General, for example, nor for improving the

1 Cm 7170.

2 HC Deb 3 July 2007.

3 Joint Committee on the Draft Constitutional Renewal Bill: Report 2007-08, HL Paper 166, HC 551.

transparency and effectiveness of the Intelligence and Security Committee.⁴ The Bill's provisions in relation to judicial appointments are also considerably pared down from the Government's earlier proposals. The only prerogative powers affected by the Bill are the powers to manage the Civil Service and to ratify international treaties.

1.5 The Bill does, however, contain some provisions which were not anticipated in the Government's earlier constitutional reform proposals, including measures concerning the conduct and discipline of members of the House of Lords and the time limits for human rights actions against devolved administrations. It also includes measures designed to increase the transparency of Government financial reporting to Parliament, which have been discussed for some time, although not as part of the Governance of Britain reforms.

1.6 **We welcome a number of aspects of the Bill as human rights enhancing measures, in particular the repeal of the provisions concerning protest around Parliament in the Serious Organised Crime and Police Act 2005, or as measures enhancing opportunities for effective human rights scrutiny in Parliament, such as the provisions in the Bill concerning the ratification of international treaties. However, from a human rights perspective we are disappointed that the Bill does not reflect the much more ambitious scope of the Prime Minister's original statement about constitutional reform to the House of Commons in July 2007, which included a commitment to exploring the possibility of a new UK Bill of Rights, building on the Human Rights Act, as part of a wider programme of constitutional reform: a subject which we enquired into and reported favourably on in 2008 in our Report *A Bill of Rights for the UK?* We are also disappointed that the Bill does not take the opportunity to address a number of longstanding issues of human rights concern, such as the restrictive judicial interpretation of the meaning of "public function" in the Human Rights Act 1998 which continues to deprive significant numbers of vulnerable users of public services of the protection of that Act.**

Explanatory Notes

1.7 The Explanatory Notes to the Bill provide a reasonably detailed explanation of the Government's view that the Bill is compatible with the ECHR, including helpful references to relevant case-law which has been taken into account in reaching that view.⁵

Significant human rights issues

(1) Protest around Parliament

The effect of the Bill

1.8 Part 4 of the Bill deals with public order. Clause 35 proposes to omit sections 132 to 138 of the Serious Organised Crime and Police Act 2005 (SOCPA) which deal with protest around Parliament and to insert, by Schedule 5, new powers into the Public Order Act

4 Some changes to the way in which the Intelligence and Security Committee is appointed have been made by Standing Order, but the Government's proposals originally envisaged more far-reaching reforms.

5 Bill 4-EN, paras 460-509.

1986. The Bill proposes to reduce the area within which specific provisions operate to within 250 metres of the area where Parliament is sitting.⁶

1.9 The Government announced in July 2007 that it would review the current law on protest around Parliament and proposed to repeal section 132 to 138 SOCPA.⁷ It invited Parliament to consider whether specific provisions, over and above those contained in the Public Order Act, were required to manage protest around Parliament.⁸ The Joint Committee on the draft Constitutional Renewal Bill agreed that the provisions should be repealed and endorsed the presumption that protest must not be subject to unnecessary restrictions. It noted, however, that “the right to protest must be balanced against ensuring that the police and other authorities have adequate powers to safeguard the proper functioning of Parliament and to protect the enduring amenity value of Parliament Square ...”.⁹ Its recommendations included that:

- As a general rule there should be unrestricted access to the Houses of Parliament for Members, staff and the public, subject to some disruption during large scale protests, with a minimum of one point of vehicular and pedestrian entry.¹⁰
- Regulation of protest around Parliament should apply equally to sitting and non-sitting days.¹¹
- The legal requirement to obtain prior authorisation from the Metropolitan Police Commissioner before protesting in the vicinity of Parliament should be removed.¹²

1.10 In our recent Report on *Policing and Protest*, we welcomed the proposal to repeal sections 132 to 138 SOCPA, broadly endorsed most of the recommendations of the Joint Committee on the draft Bill and recommended that the Public Order Act 1986 should be amended to enable conditions to be placed on static protests which seriously impede, or are likely seriously to impede, access to Parliament.¹³

1.11 During the Second Reading debate, the Secretary of State for Justice, the Rt Hon Jack Straw MP, set out the Government’s intention behind the public order provisions of the Bill:

Our starting point has been to remove unnecessary restrictions on the right of protest, with a presumption in favour of freedom of expression, balancing that with the requirement that Members should be able to gain access to the House freely, that

6 Schedule 5, inserting Sections 14ZB(3) and 14ZC1)(b) into the Public Order Act 1986. Schedule 5 includes a new provision which effectively applies the provisions on public assemblies and processions around Parliament to any building outside of the Palace of Westminster which is used to hold meetings of the House or any of its Committees (“a specified building”).

7 The Governance of Britain: Constitutional Renewal, March 2008, CM 7342-I, Clause 1.

8 Ibid, para. 29.

9 Paras. 23-24.

10 Para. 35.

11 Para. 37.

12 Para. 72.

13 Seventh Report of Session 2008-09, Demonstrating Respect for Rights? A Human Rights Approach to policing Protest, HL Paper 47-I, HC 320-I; Twenty-Second Report of Session 2008-09, Demonstrating Respect for Rights? Follow Up, HL Paper 141, HC 522; Tenth Report of Session 2008-09, Legislative Scrutiny: Policing and Crime Bill, HL Paper 68, HC 395.

their work should not be disrupted, and that the general public, who may not necessarily be taking part in demonstrations, should not have their rights disrupted.¹⁴

1.12 We welcome the Government’s decision to legislate to repeal sections 132 to 138 SOCPA and, in particular, to amend the Public Order Act to deal with protest around Parliament. This is consistent with much of the evidence we received during our policing and protest inquiry and gives effect to the recommendations which we made in our Reports on this issue. As we have previously stated, sections 132 to 138 have proved too heavy-handed in practice, are difficult to police, and lack widespread acceptance by the public. We also welcome the Government’s decision to reduce the area around Parliament in which special requirements will apply to 250 metres as this constitutes a more proportionate response which is less intrusive on individual rights to freedom of association and expression. However, some details of the proposed replacement provisions give us cause for concern, as they are, in parts, widely drafted and may result in legal uncertainty. We deal with these provisions in more detail below.

Police power to give directions imposing conditions

1.13 Schedule 5 allows a senior police officer to give directions where a public procession or public assembly takes place within 250 metres of Parliament or a specified building. These directions impose conditions on those organising or taking part in a procession or assembly which “in the officer’s reasonable opinion, are necessary” for ensuring that certain specified requirements are met.¹⁵

1.14 We wrote to the Secretary of State for Justice to ask him to provide examples of the types of conditions which the Government considers will be reasonable and necessary for a senior police officer to impose.¹⁶ The Rt Hon Michael Wills MP, Minister of State, Ministry of Justice, replied noting that the drafting of the Schedule in relation to the conditions which may be imposed is “the same as that which appears concerning conditions on public processions and assemblies in Part 2 of the Public Order Act”. He stated that the Government therefore “envisages that the types of conditions that will be reasonable and necessary will be the same types of conditions that can be imposed on processions and assemblies in the rest of the country under the Public Order Act. These conditions would have to be necessary for ensuring that the specified requirements in relation to access are met”. He provided the example of the police requiring demonstrators to keep a path clear to allow pedestrians or vehicles access to entrances to Parliament and suggested that a procession might be re-routed or an assembly repositioned if the number of protesters was large enough to obstruct access to Parliament.¹⁷

1.15 We also asked what Codes of Practice, training, policy and guidance will be issued to senior police officers about the operation of their discretion.¹⁸ The Minister replied that the Government intended to issue a Home Office Circular to the Metropolitan Police and others containing guidance stating “it is important that the police, Parliamentarians and

14 HC, 20 October 2009, col 809.

15 Schedule 5, inserting Sections 14ZA(2) and 14ZC(4) into the Public Order Act 1986.

16 Letter from the Chair of the Committee to Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, dated 27 October 2009.

17 Letter to the Chair of the Committee from Rt Hon Michael Wills MP, dated 17 November 2009

18 See footnote 16.

those wishing to demonstrate around Parliament are clear about what maintaining access to and from the Palace of Westminster means”. The Minister explained that the guidance will contain the considerations which the police will need to take into account before giving directions which are reasonably believed to be necessary to maintain access to the Palace of Westminster, but that the Metropolitan Police is ultimately responsible for training its officers about the new powers.¹⁹

1.16 We asked the Minister whether it was proposed that the ACPO manual on Keeping the Peace would be updated to provide guidance to police officers in advance of the powers coming into force. In reply, the Minister told us that the ACPO manual was currently being revised but would be unlikely to be published until later in 2010. However, “given that the exercise of the new powers will be undertaken primarily by officers from the Metropolitan Police, we intend to provide separate specific guidance for the Metropolitan Police on the new powers by way of the Home Office Circular mentioned above. We will consult ACPO on the need to flag the new provisions in the current revision of the manual on *Keeping the Peace*”.²⁰

1.17 We agree with the Minister that it is vitally important that the police, parliamentarians and protesters are clear about the level of access to Parliament which is envisaged. This accords with the evidence we heard and the recommendations we made in our Policing and Protest Report. We note that conditions may be imposed which are necessary “in the [senior police] officer’s reasonable opinion”. However, we are concerned that the “reasonable” opinion of an officer is a subjective test which raises the risk of uncertainty as to what an individual officer will or will not deem to be “reasonable” in the circumstances. This may lead to confusion for protesters, police officers and those seeking access to the Parliamentary estate.

1.18 We have previously recommended that any officer who is involved, in whatever way, with policing protests, should have access to accurate and helpful guidance on how to police compatibly with human rights standards. In his recent Report on *Adapting to Protest – Nurturing the British Model of Policing*, Her Majesty’s Chief Inspector of Constabulary referred to the police having out of date training and guidance on policing protest. He stated:

The current tactics training manual was written in 2004 and has not been revised since. ACPO has recognised the need for revision of the manual. Work started over a year ago but is currently incomplete. Knowledge transfer in today’s world needs to be rapid and accessible. More practical mechanisms of disseminating accurate up-to-date knowledge need to be developed.²¹

1.19 We welcome the Minister’s commitment to publishing guidance to the Metropolitan Police in a Home Office Circular on the operation of the new powers. Such guidance should make clear the kinds of conditions which it is reasonable for an officer to impose. The new legislation on protest around Parliament will also apply to locations away from Westminster where Parliament or a parliamentary committee meets and consequently guidance should be available to police officers across the UK.

19 See footnote 17.

20 See footnote 17.

21 *Adapting to Protest – Nurturing the British Model of Policing*, November 2009, p. 6.

We reiterate our recommendation that clear, up to date and accurate guidance on policing protest, in a variety of circumstances, is needed for police officers throughout the country and urge ACPO and the Home Office to ensure that the various manuals on policing protest are rapidly updated to take account of the proposed new powers in this Bill. We share Her Majesty’s Inspector’s view that practical methods of disseminating information to officers in a timely manner need to be developed to avoid a repetition of the time lag which has occurred in relation to the revision of the current ACPO manuals.

Secretary of State’s order-making powers

1.20 The Secretary of State is granted a wide order-making power to specify requirements that must be met to maintain access to and from the Palace of Westminster or a specified building, such as the number or location of entrances to be kept open or access routes around Parliament.²² We asked why the Government has chosen to set out the requirements which may be specified by the Secretary of State for the purposes of maintaining access to and from Parliament or a specified building in a non-exhaustive rather than an exhaustive list and why the Bill enables the Secretary of State to do so by regulation, rather than on the face of the Bill, to ensure legal certainty. The Minister explained that “the Government has adopted this approach to ensure that we retain the flexibility necessary to ensure that the regime we put in place can adapt to the reality of changing circumstances”. He suggested that this approach enhanced legal certainty as “the order-making power will enable clear and specific requirements to be set out in legislation”.²³ He stated:

Although the list of matters that may be included in the order specifying requirements for access is a non-exhaustive list, the Government considers that this is reasonable given that the requirements to be specified are subject to the limitation that they must relate to maintaining access to and from the Palace of Westminster (or specified building in new section 14ZC).²⁴

He also committed the Government to making the draft text of the order available to the House when the provisions are reached in Committee.²⁵

1.21 In its Memorandum to the Delegated Powers and Regulatory Reform Committee, the Government stated that:

Rather than the requirements being left as a matter solely for the senior police officer at the scene, it was considered that the order-making power invested in the Secretary of State provides more transparency for the police, Parliament and protesters in terms of maintaining access to and from the Palace of Westminster.²⁶

²² Schedule 5, inserting Sections 14ZA(3) and 14ZC(5) into the Public Order Act 1986.

²³ See footnote 17.

²⁴ See footnote 17.

²⁵ See footnote 17.

²⁶ Ministry of Justice, Memorandum Concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee, July 2009, para. 26.

The Government reiterated its view that this had an advantage over primary legislation as requirements may change from time to time and there is a need to be flexible²⁷ and contended that the negative resolution procedure was appropriate.²⁸

1.22 We welcome the Government’s commitment to making available the draft text of the order specifying the requirements for access to Parliament in time for the Committee stage debate. This facilitates Parliament’s ability to scrutinise the provisions for human rights compliance. We accept that there may be some need for flexibility, and we look forward to seeing the exact terms of the draft order to see if our concerns about legal certainty are met.

1.23 The Bill also vaguely states that “an order under this section may confer discretions on the senior police officer”.²⁹ We therefore asked the Minister precisely what discretions the Government envisages will or may be conferred on senior police officers by paragraphs 14ZA(5) and 14ZC(8). The Minister replied:

The Government envisages that the requirements may be to keep at least one entrance open for pedestrian and vehicle access to the Palace of Westminster at all times. It is not necessarily practical to say that one particular entrance is the “open entrance” at all times and it may be necessary for the senior police officer to consider which entrance, in all the circumstances of the moment, is the most practical one to keep open. It is this type of discretion that the Government envisages will or may be conferred on senior police officers.

Additionally, each demonstration will throw up a range of different factors in terms of the vulnerability of individuals or character of the demonstration. Clearly police officers need to use discretion in enforcing legislation in order to strike the appropriate balance between securing access, facilitating protest, protecting life and keeping the peace.

The discretion that could be conferred on the senior police officer would be exercised in the context of the other limitations on the order-making power. In particular, the Order would have to relate to the maintaining of access to and from the Palace of Westminster.³⁰

1.24 We welcome the fact that the purpose of the order making power is clearly defined in terms of maintaining access to and from the Palace of Westminster (or a specified building being used by Parliament) and that the scope of any discretions conferred by the order on the police must also be limited by that overriding purpose of maintaining access. However, we are concerned about the vagueness of the language used in paragraphs 14ZA(5) and 14ZC(8) of Schedule 5 and the possibility of open-ended and broadly drafted discretions being conferred on police officers by these provisions. We agree that officers policing an event will have to exercise their discretion as to how the specified requirements for maintaining access should be met. The exercise of that discretion could relate, for example, to the precise entrances to Parliament which

27 Ibid., para. 26.

28 Ibid., para. 27.

29 Schedule 5, inserting Sections 14ZA(5) and 14ZC(8) into the Public Order Act 1986.

30 See footnote 17.

should be kept open, but only insofar as it is necessary in order to maintain access to and from the Palace of Westminster or a specified building. We recommend that the Bill be amended to reduce the scope for any possible uncertainty about the discretions which may be conferred on the police by the order specifying the requirements for maintaining access. The following amendments are suggested in order to give effect to this recommendation.

Schedule 5, page 55, line 7, at end insert ‘in relation to how the specified requirements for maintaining access to and from the Palace of Westminster shall be met’

Schedule 5, page 56, line 27, at end insert ‘in relation to how the specified requirements for maintaining access to and from the specified building shall be met’

Public procession or public assembly?

1.25 Although all conditions which may be imposed are limited to those which maintain access to and from the Palace of Westminster or a specified building, a distinction is drawn in the Bill between public processions and public assemblies:

- In relation to *public processions*, a non-exhaustive list of conditions which may be imposed is set out in the Bill. These include conditions regarding the route of procession or prohibiting it from entering a public place.³¹
- In relation to *public assemblies*, the Bill sets out an exhaustive list of conditions which may be imposed, namely, the place, maximum duration and maximum number of persons at the assembly.³²

1.26 The human rights section of the Explanatory Notes states that “insofar as the conditions may only pertain to the place of the demonstration, its maximum duration and the maximum number of persons who may constitute it, they are proportionate in respect of legitimate aims”.³³ However, these conditions only relate to public assemblies (i.e. static demonstrations), not to public processions, where no limit on the conditions which may be imposed is set out in the Bill, save that they must meet the aim of maintaining access to and from Parliament or a specified building. The Explanatory Notes suggest that the directions which may be made under section 14ZA are much more limited than those under the SOCPA regime as they only relate to one aim and therefore:

... the Government considers that this is a legitimate aim, namely the proper and secure functioning of Parliament. Since directions are limited in scope and in geographical effect (section 14ZB), the Government’s view is that they are a proportionate interference with individual rights.³⁴

31 Schedule 5, inserting Section 14ZA(7) into the Public Order Act 1986.

32 Schedule 5, inserting Section 14ZA(8) into the Public Order Act 1986.

33 EN, para. 483.

34 EN, para. 486.

1.27 We asked the Minister to explain why the Bill does not set out the conditions which may be imposed on a public procession in an *exhaustive* list. He replied that this mirrored the current Public Order Act 1986 which set out an exhaustive list of conditions which may be imposed on public *assemblies*, but did not exhaustively set out the conditions which may be imposed on a public *procession*.³⁵ He continued:

The Government considers that processions do raise different issues compared to static assemblies and therefore that it is harder to come up with a definitive list of conditions which will cover all eventualities with a moving group. The difference in treatment also reflects the desirability of having tighter controls on the conditions that can be placed on public assemblies compared to public processions... The Government decided to mirror the approach in the rest of the country as we could see no reason in this context to make the regime around Parliament different from the regime elsewhere in the country.³⁶

1.28 We agree with the Government's view that it is desirable, in terms of legal certainty and clarity for police and protesters alike, for the same or similar provisions to apply throughout the country in relation to protest and that as few distinctions between different protests should be created as possible. However, in view of the particular significance of Parliament as a venue for protest and the historic problems which have arisen in policing protest in this area, we consider that it is appropriate for a more precise list of conditions to be set out in relation to public processions around Parliament. We recommend that the Bill be amended to include an exhaustive list of conditions which may be applied to public processions around Parliament. The following amendment is suggested to give effect to this recommendation:

Schedule 5, page 55, line 12, leave out 'include' and insert 'are limited to'

1.29 Alternatively, in the interests of legal certainty, we recommend that the Government publish in the relevant guidance a comprehensive list of the sorts of conditions that may be imposed on processions under this section.

(2) Ratification of treaties

The effect of the Bill

1.30 The Bill gives effect to the Government's proposal that Parliament should have an opportunity to scrutinise treaties before they are ratified by the Executive, by putting parliamentary scrutiny of international treaties prior to ratification on a statutory footing.³⁷

1.31 The new statutory procedure for the ratification of treaties is based on the convention known as the Ponsonby Rule. A treaty is to be laid before Parliament for a period of 21 sitting days, during which time both Houses have the opportunity to resolve that the treaty should not be ratified.³⁸ If the 21 sitting days expire with no such resolution being passed by either House, the Government can proceed to ratification. If during the 21 day period

35 See footnote 17.

36 See footnote 17.

37 Clauses 24-28.

38 Clause 24.

the House of Commons resolves that the treaty should not be ratified, the Government cannot at that stage proceed to ratification. If it still wishes to ratify the treaty, the Government must lay a statement explaining why it believes the treaty should be ratified and then wait a further 21 sitting days before it can proceed to ratification. If, during this second 21 day period, the House of Commons resolves against ratification again, the Government remains blocked from ratifying the treaty: if it still wishes to ratify, it must re-lay its statement and start the 21 day period running again. The Bill therefore gives legal effect to a resolution of the House of Commons that a treaty should not be ratified.

1.32 The House of Lords, however, does not have the power to block ratification. If it resolves that a treaty should not be ratified, the Government must lay a statement explaining why it believes that the treaty should nevertheless be ratified, but is not required to provide the House of Lords with a further 21 sitting days to consider its statement: the Government can proceed to ratify the treaty as soon as the statement is laid, if the House of Commons has not resolved against ratification.

1.33 The Bill also provides a mechanism for Parliament to request extensions to the 21 day sitting period.³⁹ Extensions are at the discretion of the relevant Minister and can be granted in blocks of up to 21 sitting days. Extensions can be granted more than once.

1.34 The new procedure may, however, be disapplied if a Minister is of the view that for exceptional reasons a treaty should be ratified without having to meet the specified conditions.⁴⁰ Where this exceptional power is relied upon, and a treaty ratified without meeting the necessary conditions, the Minister must either before or as soon as practicable after the treaty is ratified lay before Parliament a statement explaining why the Minister was of the opinion that the treaty should be ratified without meeting the prescribed conditions.

The JCHR's particular interest

1.35 As a human rights committee, we have a particular interest in the opportunities which exist for effective parliamentary scrutiny of international treaties prior to their ratification. As our predecessor Committee explained in 2004,⁴¹ the problem of lack of effective parliamentary scrutiny of international treaties is particularly pressing in relation to human rights treaties, because it is now well established that UK courts will have regard to such treaties in a wide range of circumstances, whether or not they have been incorporated into UK law,⁴² and the Executive and administration also routinely have regard to such treaties in both policy-making and decision-making. Given the significant status which international human rights treaties have attained in our domestic legal system, it is particularly important that Parliament be more involved in scrutinising treaties which incur human rights obligations on behalf of the UK, before their ratification by the Executive, in order to enhance their democratic legitimacy.

39 Clause 25.

40 Clause 26.

41 First Report of 2004-05, The Fourteenth Protocol to the European Convention on Human Rights, paras 5-7.

42 For the various ways in which international human rights treaties may become relevant in legal proceedings even before they are incorporated into domestic law by statute, see Lord Bingham's maiden speech in the House of Lords HL Deb 3 July 1996 col 1465.

1.36 Both we and our predecessor Committee have therefore long been committed to increasing opportunities for Parliament's involvement in the scrutiny of human rights treaties, or treaties with human rights implications, prior to their ratification. Our predecessor Committee decided to report to Parliament in relation to all human rights treaties, or amendments to such treaties, in respect of which there is a need to ensure that Parliament is fully informed about the background, content and implications, to enable parliamentarians to decide whether it is appropriate to call for a debate on the treaty concerned before it is ratified and to ensure that any such debate is properly informed.⁴³ The Government welcomed the Committee's intention to report to Parliament on future human rights treaties, agreeing that this will facilitate informed parliamentary debate and so enhance the democratic legitimacy of any new human rights obligations, and promised that the Government "will bear this in mind in future as a predictable procedural step in the timetable for parliamentary approval of human rights treaties and amendments."⁴⁴ When we reviewed our working practices at the beginning of this Parliament, we decided to continue with this practice, agreeing with our predecessor about the importance of increasing parliamentary understanding and involvement in the process of ratifying human rights treaties in order to enhance to some degree the democratic legitimacy of such treaties and the Government's accountability in respect of them.⁴⁵

1.37 To this end, our predecessor Committee reported prior to ratification of the Fourteenth Protocol to the European Convention on Human Rights (the treaty designed to introduce important reforms to the European Court of Human Rights in order to enable it to deal with its ever-growing caseload). During the current Parliament we have reported, prior to ratification, on one major human rights treaty, the UN Convention on the Rights of Persons with Disabilities.⁴⁶ We have also reported on treaties which, while not strictly speaking human rights treaties themselves, have human rights implications: the Council of Europe Convention on the Prevention of Terrorism,⁴⁷ and (briefly) the UK-Libya Prisoner Transfer Agreement (to which we return below).⁴⁸ In the case of the UN Convention on the Rights of Persons with Disabilities (a major UN human rights treaty), we conducted a detailed inquiry into the reservations and interpretative declarations that the UK Government was considering entering when it ratified the treaty, considering a significant number of submissions from interested individuals and organisations and oral evidence from the Minister. In our Report, which scrutinises the Government's justifications for its proposed reservations and interpretative declarations, we expressed the hope that our inquiry had demonstrated the importance of parliamentary scrutiny in ensuring that the process leading to ratification of treaties by the Government is transparent, accountable

43 First Report of 2004-05 (above); Nineteenth Report of 2005-06, *The Work of the Committee in the 2001-2005 Parliament*, HL 112/HC552.

44 Eighth Report of 2005-06, *Government Responses to Reports from the Committee in the last Parliament*, HL 104/HC 850, Appendix 2 – Government Response to the Committee's First Report of 2004-05, on Protocol No. 14 to the European Convention on Human Rights, para. 5.

45 Twenty-third Report of 2005-06, *The Committee's Future Working Practices*, HL 239/HC 1575, at para. 68.

46 First Report of 2008-09, *The UN Convention on the Rights of Persons with Disabilities*, HL 9/HC 93; Twelfth Report of 2008-09, *The UN Convention on the Rights of Persons with Disabilities: Reservations and Interpretative Declaration*, HL 70/HC 397.

47 First Report of 2006-07, *The Council of Europe Convention on the Prevention of Terrorism*, HL 26/HC 247.

48 Thirteenth Report of 2008-09, *Prisoner Transfer Treaty with Libya*, HL 71/HC 398.

and informed by the views of those who will be most directly affected.⁴⁹ Our report was subsequently the subject of a House of Lords debate.⁵⁰

1.38 We therefore welcome in principle the implementation of the Government’s proposal to try to increase parliamentary involvement in the ratification of treaties.

1.39 However, in view of our particular interest, as a human rights committee, in the opportunities for parliamentary scrutiny of international treaties, we have considered carefully the detail of the proposed statutory regime in the light of our experience of scrutinising international treaties.

Facilitating parliamentary scrutiny by the provision of information and reasons

1.40 Under the new statutory regime for the ratification of treaties set out in the Bill, one of the requirements which must be met before a treaty can be ratified is that a copy of the treaty must have been laid before Parliament.⁵¹ The Government’s current practice, since 1997, is to lay an Explanatory Memorandum with each treaty laid under the Ponsonby Rule at the same time as laying a copy of the treaty. In our experience the key to effective parliamentary scrutiny is the timely provision of fully reasoned explanations and justifications by the Government. We were surprised that the Bill does not reflect the current practice under the Ponsonby Rule by requiring the Minister to lay an Explanatory Memorandum before Parliament at the same time as the copy of the treaty is laid, in order to facilitate scrutiny of the treaty within the 21 day period. When we asked the Government whether it would turn this practice into a requirement it replied that it does not consider it necessary to do so: it is in the Government’s interests to explain to Parliament its reasons for proposing to ratify a treaty and this will even more be the case in future under the new statutory regime in view of the legal effect it will give to a resolution of either House against ratification. The Government intends to continue its practice of laying such an Explanatory Memorandum and prefers not to “set in stone” this particular way of providing information to Parliament in a way that might inhibit the evolution of new and better ways of doing so in future.

1.41 We welcome the Government’s unequivocal statement of its intention to continue the practice of laying an Explanatory Memorandum at the same time as the treaty. However, we recommend that the laying of an Explanatory Memorandum at the same time as the treaty be an express requirement in the Bill which must be met before a treaty can be ratified. The following amendment to the Bill is designed to give effect to this recommendation:

Page 12, line 38, clause 24(1)(a), leave out ‘a copy of the treaty’ and insert:

- i. a copy of the treaty and, at the same time,
- ii. an explanatory memorandum explaining the background to the treaty, the Minister’s reasons for proposing to ratify it, and the reasons for any reservations or interpretative declarations that the Minister intends to enter on ratification.

49 First Report of 2008-09 (above) at para. 11.

50 House of Lords debate, 28 April 2009

51 Clause 24(1)(a).

1.42 We also asked the Government whether it would undertake to notify relevant select committees when a treaty has been laid, and in response the Government reiterated its undertaking given in 2000 to the House of Commons Procedure Committee, that copies of all treaties laid before Parliament will be sent to the relevant select committee at the same time. This is important because committees do not necessarily have the resources systematically to monitor the laying of treaties before Parliament, and when the period for scrutiny is as short as 21 days any time lost might prevent the treaty from being scrutinised at all. We have appreciated the Government's particular commitment to facilitate the involvement of our Committee where a treaty raises significant human rights issues. Even with that arrangement, however, there has sometimes been a delay between the laying of a treaty with human rights implications and it being drawn to our attention. This was recently the case, for example, in relation to the Prisoner Transfer Agreement with Libya: we did not learn of the fact that this treaty had been laid until some way into the 21 day period for scrutiny. **We recommend that the Government undertake to send copies of all treaties with human rights implications to the JCHR, along with their Explanatory Memoranda, as soon as they are laid under clause 24(1).**

Extension of time for parliamentary scrutiny of treaties

1.43 The Bill provides that a Minister may extend the 21 sitting day period for scrutiny of a treaty for up to a further 21 days, and may do so more than once. The period is extended by the Minister laying before Parliament a statement to that effect and setting out the length of the extension.

1.44 We asked the Government whether the Minister should also be required to lay a statement explaining why any request for an extension of the 21 sitting day period has been refused, but the Government did not consider this necessary. It said that, in practice, requests for an extension of time come from a select committee, and if the Minister refused the select committee's request for an extension of time it would be open to the select committee to bring the correspondence to Parliament's attention.

1.45 We regret that we do not find this to be a satisfactory answer in light of our experience of scrutinising treaties. We requested an extension of the 21 sitting days period under the Ponsonby Rule in relation to the Prisoner Transfer Agreement with Libya, to enable us to scrutinise properly the possible human rights implications of the treaty and to report to Parliament prior to ratification, to give parliamentarians the opportunity to consider whether to debate the treaty. The Secretary of State agreed to a small extension, but refused our request to extend the period for scrutiny of the treaty for long enough to enable us to publish a substantive report on the treaty before its ratification. The reasons he gave in his letter for refusing to extend the time further were that delay in ratifying the treaty would be damaging to the UK's judicial and wider bilateral relations with Libya. He said that any further delay in ratification of the treaty would be likely to lead to serious questions on the part of Libya about the UK's willingness to conclude these agreements. As a result, as our Report records, we were unable to publish a substantive report on the treaty before ratification. We published the correspondence setting out the minister's reason for refusing our request for an extension, but this was only possible after ratification (a ministerial statement explaining why the request for an extension had been refused, by contrast, could be required to be laid before Parliament before ratification). With the benefit of hindsight,

in view of the subsequent controversy over the release of Abdel-basset Al-Megrahi (the Libyan man convicted of the Lockerbie bombing),⁵² this was a treaty which should have been subjected to much more detailed parliamentary scrutiny prior to ratification.

1.46 We remain of the view we expressed in our report on the Prisoner Transfer Treaty with Libya, that when a select committee states that it intends to scrutinise a treaty, ratification should be delayed until the committee's inquiry has concluded. We recommend that the Bill be amended to require the Minister to lay a statement explaining why any request for an extension of the 21 day sitting period has been refused.

Ministerial power to disapply in exceptional cases

1.47 We asked the Government to explain its justification for including in the Bill a power for the Minister to disapply the new statutory regime in exceptional cases and to indicate the sort of exception that the Government has in mind. The Government refused to be drawn on the type of exceptional cases it has in mind: "it is impossible to predict in advance what those [exceptional] circumstances might be since by their very nature they tend to arise through exceptional combinations of a range of factors." What the Government appears to have in mind are cases of urgency, where it is not possible in the time available to complete the usual laying procedure.

1.48 Our experience of attempting to scrutinise the Prisoner Transfer Agreement with Libya leads us to be very wary of granting to ministers a very widely worded power to proceed to ratification of a treaty after bypassing Parliament altogether. The Secretary of State's invocation in that case of considerations of urgency and relations with a foreign state are precisely the sort of "exceptional cases" that could be relied upon if this provision remains in the Bill. We agree with the Public Administration Committee, that "it does not seem right that it should be for the Government alone to decide whether to circumvent its obligations to Parliament", and that "a safeguard that can be ignored at will is no safeguard at all".⁵³ **We recommend that the ministerial power to disapply the new regime in exceptional cases be removed from the bill.**

(3) The right to a fair hearing and access to court in the determination of civil rights

1.49 The Bill contains a number of different provisions which engage, or may engage, the right of an individual under Article 6(1) ECHR to a fair hearing in the determination of civil rights, a right which has been interpreted by the European Court of Human Rights as including a right of access to a court.⁵⁴

52 Al-Megrahi's case was the first to be considered under the terms of the Prisoner Transfer Treaty, but in the event he was transferred to Libya by the Scottish Executive not under the treaty but pursuant to the Justice Minister's powers of compassionate release.

53 Public Administration Select Committee, Tenth Report of Session 2007-08, Constitutional Renewal: Draft Bill and White Paper, (HC 499) , para 87.

54 Golder v UK (1975) 1 EHRR 524 (a right of access to a court is inherent in the object and purpose of Article 6(1) ECHR).

(a) Removal of Civil Service Commissioners

1.50 The Bill provides⁵⁵ for the removal from office of the Civil Service Commissioners, including the First Commissioner, by HM the Queen on the recommendation of the Minister for the Civil Service if one of four specified conditions is met.⁵⁶ One of those conditions is that person is “unfit or unable to carry out the functions of the office.”⁵⁷ The Bill does not specify the procedure to be adopted in removing the First Commissioner or Commissioner from office. The Explanatory Notes to the Bill, however, state that “it is envisaged that the procedure will be specified in the terms of appointment.”⁵⁸

1.51 We note that the power to remove the First Commissioner and the Civil Service Commissioners is exercisable by HM the Queen on the recommendation of the Minister for the Civil Service. The Comptroller and Auditor-General, on the other hand, is removable by HM the Queen only on an address of each House of Parliament. Given the importance of the independence of the civil service, we do not see any justification for providing any less rigorous protection to Civil Service Commissioners. **We therefore recommend that the Bill be amended to provide that the First Commissioner and other Civil Service Commissioners may only be removed by HM the Queen on an Address by each House of Parliament.**

1.52 Alternatively, we recommend that the procedural safeguards against improper exercise of the power of removal be spelt out in more detail. The Government accepts, rightly, that the removal from office of the First Commissioner or Commissioner is likely to engage Article 6(1) ECHR as it is likely to constitute the determination of a civil right within the meaning of that Article.⁵⁹ However, it considers that the combination of the procedure which will be set out in the terms of appointment, and the fact that the decision of the Minister recommending removal would be amenable to judicial review, is sufficient to satisfy the requirements of Article 6(1) ECHR.

1.53 In view of the Bill’s silence on the procedure to be followed prior to removal, we asked the Government whether it would agree to amend the Bill so as to specify the detail of the procedure to be used in removing the First Commissioner or Commissioners from office; or at the very least publish the detail of the procedure which it intends to set out in the Commissioners’ terms of appointment. The Government replied that it is not considered necessary to determine the procedure to be used in removing the First Commissioner or Commissioners from office on the face of the Bill. “The process that is adopted must be fair in the context of the conditions that must be met.”

1.54 We find the Government’s response disappointing. **As we have repeatedly pointed out to Government departments, where the Government argues that a provision in a Bill is compatible with Article 6(1) ECHR because of the combination of the availability of judicial review and the procedures before the original decision-maker, we cannot assess the provision’s compatibility with Article 6(1) ECHR unless we know exactly what those procedures are going to be. In the absence of this information we cannot**

55 Schedule 1, para. 5(3).

56 *Ibid.*, para. 5(4)(a)-(d).

57 *Ibid.*, para. 5(4)(d).

58 EN para. 463.

59 *Ibid.*.

advise Parliament about the degree of risk that the Bill may lead to the removal of Commissioners in breach of Article 6(1) ECHR.

1.55 We note that under the Constitutional Reform Act 2005 the Lord Chancellor’s power to remove a judicial office-holder is expressly made “exercisable only after the Lord Chancellor has complied with prescribed procedures.”⁶⁰ The Lord Chief Justice, with the agreement of the Lord Chancellor, has the power to make regulations providing for the procedures that are to be followed,⁶¹ and has made the Judicial Discipline (Prescribed Procedure) Regulations 2006.⁶² **We consider the provisions in the Constitutional Reform Act 2005 concerning the removal of judicial office holders to be a good model for the protection both of the Article 6(1) rights of the office holders and for the constitutional principle of civil service independence. We recommend that the Bill be amended to require that the Minister’s power to remove Civil Service Commissioners and the First Commissioner from office be exercisable only after the Minister has complied with prescribed procedures and to provide a power to make regulations prescribing the procedure to be followed. We also recommend that the Government publish at least the outline of the procedure that it envisages should be followed before removal of Civil Service Commissioners and the First Commissioner.**

(b) Complaints about breaches of the Codes of Conduct by civil servants

1.56 The Bill provides for civil servants to complain to the Civil Service Commission about breaches of the codes of conduct for the civil service and for the diplomatic service.⁶³ The procedures for the making of such complaints and for the investigation and consideration of them by the Commission are not specified by the Bill, but are left to the Commission itself to determine.⁶⁴ After considering a complaint, the Commission may make recommendations about how the matter should be resolved.⁶⁵

1.57 The Government’s view is that the consideration of breaches of the codes of conduct by the Commission does not engage the right to a fair hearing and access to a court in Article 6(1) ECHR for two reasons. First, it does not involve the determination of a “civil right” within the meaning of that Article, because “the Codes will set out the standards of behaviour expected of civil servants based on the core values of the Civil Service rather than create any civil rights.”⁶⁶ Second, the Commission’s role after consideration of a complaint is limited to making recommendations, which in practice are likely to be made confidentially to the department and civil servants concerned, so there will be no effect on the civil servant’s reputation. In the Government’s view, the Commission’s role is therefore not likely to be considered as being “determinative” of any civil rights even if such rights were in play.⁶⁷ It says that the position under the Bill is the same as in *Fayed v UK*, in which the European Court of Human Rights held that a report by two Government inspectors

60 Constitutional Reform Act 2005 s. 108(1).

61 *Ibid.*, s. 115.

62 SI 2006/676.

63 Clause 9(2) and (3). A civil servant may complain to the Commission if they have reason to believe that they are being, or have been, required to act in a way that conflicts with the relevant code of conduct, or that another civil servant is acting, or has acted, in a way that conflicts with the code.

64 Clause 9(5)(a).

65 Clause 9(5)(b).

66 EN para. 466.

67 EN para. 467.

appointed to investigate the affairs of a company did not engage Article 6(1) even though it made findings that certain individuals had misrepresented their origins, wealth and business resources, because the report did not determine the individuals' civil right to a good reputation.⁶⁸

1.58 Even if the Commission's consideration of breaches of the codes constituted the determination of a civil right within Article 6(1) ECHR, in the Government's view the requirements of that Article would be satisfied anyway, because of the combination of the procedures which the Commission will determine for the investigation and consideration of complaints, and the fact that the act of the Commission in making a recommendation would be amenable to judicial review.⁶⁹

1.59 We have carefully scrutinised the Government's analysis of the Article 6(1) compatibility of the provisions in the Bill concerning complaints about breaches of the codes of conduct, as set out in both the Explanatory Notes to the Bill and the Minister's answers to our questions, but we do not find it entirely convincing, for three reasons.

1.60 First, while the Government is probably correct to say that the codes of conduct themselves do not create any civil rights, this does not mean to say that the investigation and consideration of a complaint about a breach of the codes is not capable of determining a civil right. A complaint about a breach of the code by a civil servant may involve an allegation of such serious misconduct that an adverse determination by the Commission will have serious consequences for that individual's reputation with his civil service employer and inevitably affect their employment status or future prospects, together with the financial consequences that this entails. In our view it is artificial to suppose that in such a case an adverse determination of a complaint by the Commission does not affect the individual's civil rights. We think that the better view is that the Commission's investigation and consideration of at least *some* complaints are capable of affecting the civil servant's civil rights.

1.61 Second, we consider that the Government's argument that there is no "determination" of any civil rights by the Commission, because the Commission can only make recommendations, is somewhat unrealistic in its appreciation of the serious detriment that could be suffered by the individual concerned. It is true that the Commission may only make recommendations "about how the matter should be resolved."⁷⁰ Prior to making any such recommendation, however, the Commission must "determine" the complaint: it must decide, in the light of its investigation, whether the individual complained against has acted in breach of the code of conduct. It is this decision, about whether the complaint that there has been a breach of the code has been made out, which in our view may well be, at least in some cases, determinative of the civil servant's civil rights. In the *Fayed* case, on which the Government relies, the object of the Inspectors' report was essentially investigative: the purpose of their inquiry was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities, e.g prosecuting, regulatory or disciplinary. The Commission's role under the Bill in relation to complaints about breaches of the codes, on the other hand, is not merely investigative: it is to investigate *and consider* whether there has been a breach of the code. In our view, the Commission's role is

68 *Fayed v UK* (1994) 18 EHRR 393 at paras 61-62.

69 EN para. 468.

70 Clause 9(5)(b).

therefore to determine whether the code of conduct has been breached as alleged, and, at least in the case of serious breaches of the code, that would in practice be determinative of the civil servant's civil rights, whether or not the Commission's recommendation about how the matter should be resolved is followed. Indeed, the Government's acknowledgment of the fact that the Commission's recommendations would be amenable to judicial review could be said implicitly to concede this: it certainly sits uneasily with the argument that the Commission's role is not "determinative" of civil rights.⁷¹

1.62 Third, the Government's reliance on the combination of the procedures before the Commission and the possibility of judicial review is not in our view a satisfactory response for the same reason we have given above in relation to the removal of Commissioners from office: in the absence of any information about what those procedures will be, it is impossible for us to assess whether the combination of the two is sufficient to satisfy the requirements of Article 6(1) ECHR. The Government asserts that it does not consider it necessary for the procedures to be prescribed on the face of the Bill, but where it seeks to argue that Article 6(1) is satisfied by the combination of procedures before the Commission and the possibility of judicial review, it must be prepared at the very least to make public what those procedures are intended to be in order for its Article 6(1) claim to be assessed.

1.63 We acknowledge that there is not a clear cut answer to whether the Commission's consideration of breaches of the codes engages Article 6(1) ECHR. It may be that Article 6 applies in some cases but not in others, depending on the seriousness of the alleged breach. However, we note that the Government accepts that the procedures for the investigation and consideration of complaints by the Commission "must be fair".⁷² As we have pointed out in previous reports, UK courts now accept that there is no substantive difference in content between the protection afforded by the common law of procedural fairness and that provided by Article 6(1) ECHR. We are puzzled therefore, in this as in other contexts, as to why the Government goes to such lengths to argue that Article 6(1) ECHR does not apply to decisions which it accepts must be taken in accordance with a procedure which is "fair." **We recommend that the Government amend the Bill, either to prescribe the minimum content of the procedures for the investigation and consideration of complaints by the Commission, or to provide a power to make regulations prescribing such minimum procedural protections, in order to ensure that the civil servant who is the subject of a complaint about a breach of the code receives a fair hearing, including access to an independent and impartial court or tribunal.**

(c) Complaints about selections for appointment to the Civil Service

1.64 The Bill also provides⁷³ for a person to complain to the Civil Service Commission if they have reason to believe that a selection for an appointment to the civil service breached the requirement⁷⁴ that selections be made on merit on the basis of a fair and open

71 In the Fayed case the UK Government argued that the applicants had failed to exhaust their domestic remedies because they had not applied for judicial review of the inspectors' report, but the Court rejected this argument on the basis that judicial review would not have ensured access to a court for determination of the truth of the statements made about the applicants' in the Inspectors' Report: (1994) 18 EHRR 393 at para. 53.

72 Letter from Michael Wills MP dated 17 November 2009, p. 48

73 Clause 13(2) and (3).

74 In clause 10(2).

competition. As with the provision concerning complaints to the Commission about breaches of the codes, the Bill does not specify the procedures for the investigation and consideration of such complaints by the Commission: this is left to the Commission itself to determine.⁷⁵ After considering a complaint, the Commission may make recommendations about how the matter should be resolved.⁷⁶

1.65 These provisions in the Bill also raise questions concerning their compatibility with the fundamental right to a fair hearing, whether at common law or under Article 6(1) ECHR. As far as Article 6(1) ECHR is concerned, the Government makes essentially the same arguments here as in relation to complaints about breaches of the codes. First, there is no “civil right” in play because “selections for appointment do not amount to a ‘civil right’.” Second, even if such rights were in play, there is no “determination” of them because the Commission’s role is limited to making recommendations after considering the complaint.⁷⁷ And third, the requirements of Article 6(1) would be satisfied in any event by the combination of the procedures before the Commission and the possibility of judicial review of the Commission’s decisions.⁷⁸

1.66 We note that until fairly recently disputes relating to the recruitment, careers and termination of civil servants were as a general rule held to be outside the scope of Article 6(1) ECHR by the European Court of Human Rights. In the case of *Vilho Eskelinen v Finland*,⁷⁹ however, the Court departed from that approach, so that now the Strasbourg Court clearly starts from a presumption that Article 6(1) applies to the employment of civil servants. We asked the Government what account it had taken of the *Vilho Eskelinen* case and it replied that its argument that Article 6(1) ECHR does not apply to complaints about selection competitions is not based on the status of civil servants as such but on its view that the Commission does not determine any civil rights because it only has the power to make recommendations.

1.67 We accept that the Government’s view about the applicability of Article 6(1) is not an argument that civil servants are excluded from the protection of Article 6(1) ECHR because of their status as civil servants, but is an argument about whether the Commission determines any civil rights when it considers complaints about the fairness and openness of competitions for appointments. However, we have difficulty seeing why, in the light of the Court’s approach in *Vilho Eskelinen*, the presumption that Article 6(1) applies to disputes concerning the employment of civil servants does not apply to the mechanisms in the Bill for resolving disputes about selections through the Civil Service Commission. While we again acknowledge that the question of the applicability or otherwise of Article 6(1) ECHR is not straightforward, we are not entirely persuaded by the Government’s reasons for it not applying. While there is clearly no “civil right” to be selected for appointment to the civil service, that does not mean to say that a decision that a selection for appointment has not been made on merit is not capable of affecting other civil rights, such as the job of the person who was appointed, or, in the case of the person not appointed, the right of access to employment or promotion through a fair and open competition. The effect of the Commission’s decision on those other rights might be seriously detrimental, for example if

75 Clause 13(3)(b).

76 Clause 13(3)(c).

77 EN para. 469.

78 EN para. 470.

79 (2007) 45 EHRR 43.

the Commission considers that a particular appointment was not made on merit on the basis of a fair and open competition. It seems to us that, whether or not the Commission's recommendation about how the matter should be resolved is followed, its prior decision on the complaint is likely to be determinative of civil rights. It is certainly the kind of decision which engages the common law right to procedural fairness. **We therefore recommend that the Government amend the Bill, either to prescribe the minimum content of the procedures for the investigation and consideration by the Commission of complaints about selection competitions, or to provide a power to make regulations prescribing such minimum procedural protections, in order to ensure that those involved in a dispute about the fairness and openness of a selection receive a fair hearing, including access to an independent and impartial court or tribunal.**

(d) Removal, expulsion and suspension of members of the House of Lords

1.68 The Bill provides for the removal of members of the House of Lords if any of a number of specified conditions are met,⁸⁰ and enables the House of Lords to discipline its members through either expulsion or suspension.⁸¹

1.69 The Explanatory Notes to the Bill state that Article 6(1) ECHR does not apply because membership of the House of Lords does not constitute a civil right or obligation for the purposes of that Article.⁸² The Government acknowledges that there may be financial loss associated with being removed from the House, such as no longer being able to claim expenses and allowances available to peers,⁸³ but the fact that a dispute has pecuniary consequences is not always sufficient to bring it within the scope of Article 6(1). In any event, the Government argues, even if expulsion or suspension of members engaged Article 6(1), the provisions would be compatible, because of the robust procedural safeguards which are accorded to members faced with such an extreme sanction:⁸⁴ investigation by a sub-committee of the Committee for Privileges, carried out under a Code of Conduct which expressly provides that “Members of the House have the right to safeguards as rigorous as those applied in the courts and professional disciplinary bodies”, followed by a right of appeal to the Committee for Privileges, which includes four Lords of Appeal.

1.70 The Government's position that Article 6(1) ECHR does not apply to the removal, expulsion or suspension of a member of the House of Lords is probably correct as a matter of Convention case-law, which does not regard the right to engage in political activities as a “civil right”.⁸⁵ However, members of the House of Lords have the common law right to be treated fairly. This was recently explicitly recognised and put into practice in the investigation by the Sub-Committee on Members' Interests into the allegations against four members alleged to have agreed to accept money in exchange for moving

80 Clause 30 and Schedule 4, Part 1.

81 Clause 31.

82 EN paras 476 and 479.

83 EN para. 477.

84 EN para. 480.

85 See e.g. *Pierre-Bloch v France* (1997) 26 EHRR 202 (Article 6(1) held not to apply to a member of the National Assembly who had been made to forfeit his seat and disqualified from standing for election for a year for having exceeded election expenses limit).

amendments to legislation.⁸⁶ There is nothing in the Bill to require such fair procedures, however. During the recent passage of the Parliamentary Standards Bill, the Government agreed to an amendment tabled in the House of Lords designed to ensure that the procedures to be laid down for the conduct of investigations by the Independent Parliamentary Standards Authority (“IPSA”) must be “fair”.⁸⁷

1.71 We asked the Government what would be its view of an amendment to the Bill to make clear that the procedures for investigating allegations of misconduct must be fair to those being investigated. The Government replied that the procedures put in place by the House of Lords concerning the disciplining of its members is properly a matter for that House, and that specifying the procedure to be followed on the face of the legislation would interfere with the privilege of both Houses to set their own procedures. The Government pointed out that the provision in the Parliamentary Standards Bill requiring that procedures laid down for the conduct of investigations into MPs must be fair, concerned the procedures to be used by the Independent Parliamentary Standards Authority (“IPSA”), which is a statutory body, and therefore does not impinge on or affect the internal procedures of the Houses of Parliament. We accept this distinction and we note that the new House of Lords Code of Conduct expressly provides that “in investigating and adjudicating allegations of non-compliance with this Code, the Commissioner, the Sub-Committee on Lords’ Interests and the Committee for Privileges shall act in accordance with the principles of natural justice and fairness.”⁸⁸

1.72 The provisions in the Bill concerning the removal, expulsion and suspension of members of the House of Lords raise a difficult issue about the relationship between common law fairness and parliamentary privilege. Members are entitled to be treated fairly, but the House of Lords is entitled to set its own procedure. We accept that the procedures adopted by the House of Lords in its new Code of Conduct satisfy the common law requirements of fairness.

(e) Removal of Comptroller and Auditor General and of Chair of National Audit Office

1.73 The Bill provides for the removal from office of both the Comptroller and Auditor General⁸⁹ and the chair of the National Audit Office⁹⁰ by HM the Queen on an Address of each House of Parliament.

1.74 In both cases the Government appears to accept that the right to a fair hearing in Article 6(1) ECHR, as well as the common law right to procedural fairness, would apply.⁹¹ However, the Bill is silent on the procedure which should be used prior to such removal, and the Government says that in the event of either provision being used, Parliament would need to devise a procedure which offers appropriate safeguards to ensure that the removal from office is carried out fairly and in accordance with Article 6(1). Establishing

86 See Second Report from the Committee for Privileges 2008-09, Annex at paras 11-27 (describing the procedural safeguards accorded to those being investigated).

87 HL Deb 20 July 2009 cols 1439-41.

88 Leader’s Group on the Code of Conduct, Report, HL 171, Part 2, para. 19.

89 Clause 46(2).

90 Schedule 7, para. 10(1).

91 EN paras 504 and 508.

the details of such a fair procedure, the Government argues, is properly a matter for Parliament.

1.75 We asked the Government why the Bill does not prescribe at least a minimum of procedural safeguards to ensure that the office holders receive a fair hearing and why there is no provision for a right of access to a court following removal. The Government replied that specifying what procedure the Houses should follow in making an address to Her Majesty risks breaching the privilege of Parliament to devise its own procedures. It accepts that “events preliminary to the giving of an address, whether in Parliament or outside it, might be covered by the protections of Article 6 and the common law right of procedural fairness”, but it does not believe that it would be appropriate to prescribe a more detailed mechanism in the Bill. To the extent that these rights are engaged, the Government believes that they are sufficiently protected by the obligation for Parliament to adopt a procedure that is fair in the circumstances.

1.76 We accept that these provisions raise a difficult issue about the relationship between Article 6(1) ECHR and parliamentary privilege. The Government accepts that the power to remove these office holders engages Article 6(1) ECHR and that Parliament is under an obligation to adopt a procedure that is fair in the circumstances, but parliamentary privilege demands that it is for Parliament itself to devise those procedures. Where Article 6 applies there must also be a right of access to a court or tribunal to challenge removal, but this is also in tension with the traditionally recognised privileges of Parliament. There is nothing in the Human Rights Act to require Parliament to address these issues, but parliamentary privilege will not provide a sufficient defence to a challenge brought before the European Court of Human Rights in Strasbourg and we therefore recommend that the Leader of the House of Commons bring forward proposals which are Article 6(1) compliant and make provision for a right of access to a court or tribunal.

(4) Time limits for human rights actions against devolved administrations

1.77 The Bill inserts a one year time limit for bringing claims involving Convention rights against actions of Ministers in Wales and Departments or Ministers in Northern Ireland.⁹² The Bill does not at present deal with Scotland because the Convention Rights Proceedings (Amendment) (Scotland) Bill has been passed by the Scottish Parliament and is awaiting Royal Assent, but the Government intends to re-enact those amendments to the Scotland Act when Royal Assent is given.

1.78 These provisions fill a gap in the devolution legislation as a result of which human rights claims could be brought against the devolved administrations without being subject to the one year time limit contained in the Human Rights Act, even though the grounds for the claim were identical to those which would have been time-barred under the Human Rights Act.⁹³ The time limit introduced is identical to that which already exists in the Human Rights Act.

1.79 The Explanatory Notes to the Bill state that the new time limit serves the legitimate aims of preventing stale claims, promoting legal certainty and providing consistency with

92 Clauses 33 and 34.

93 The gap arises as a result of the decision of the House of Lords in *Somerville v Scottish Ministers* [2007] UKHL 44.

the Human Rights Act, and is proportionate in view of the identical time limit that already exists under the Human Rights Act and the fact that courts and tribunals have the power to extend the one year period for such period as is equitable in all the circumstances.⁹⁴

1.80 We accept the analysis of the compatibility of these provisions in the Explanatory Notes.

(5) Nationality discrimination in Crown employment

1.81 The provisions in Part 1 of the Bill have been preceded by a long period of public and parliamentary debate about the desirability of comprehensive legislation for the Civil Service,⁹⁵ and are intended to implement the Government's proposal to "enshrine the core principles and values of the Civil Service in law."⁹⁶ As introduced, however, the Bill made no provision to deal with the widely recognised problem of nationality discrimination in the civil service, which derive from 300 year old restrictions on the employment of non-UK nationals in civil capacities under the Crown.

1.82 As the law currently stands, 95% of civil service posts in the UK are available to Commonwealth, Irish or EEA nationals but other non-UK nationals are almost entirely excluded from those posts, even if there is no good operational reason for that. As a result, many members of long-standing minority communities in the UK are entirely banned from Government employment, no matter how well qualified they are, and even if they are married to a UK national. The issue was recently the subject of a Private Members Bill, the Crown Employment (Nationality) Bill,⁹⁷ promoted by our Chair, designed to remove this nationality discrimination to the extent that it cannot be justified by the nature of the post, but the bill failed to complete report stage on 19 October 2009. A bill to similar effect has failed to reach the statute book on six previous occasions.

1.83 Such nationality discrimination in access to government employment engages a number of the UK's human rights obligations. By Article 6 of the International Covenant on Economic, Social and Cultural Rights, for example, the UK recognises the right to work, including the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and by Article 2 the UK has undertaken to guarantee the rights in the Covenant without discrimination of any kind as to national origin. The UN Committee on Economic and Social Rights⁹⁸ and the UN Committee for the Elimination of Racial Discrimination⁹⁹ have both commented on the continuing discrimination faced by ethnic minorities in employment in the UK.

1.84 The UK is also a party to an ILO Convention, the Discrimination (Employment and Occupation) Convention 1958,¹⁰⁰ which defines discrimination to include exclusion based on nationality,¹⁰¹ and by which the UK has undertaken to declare and pursue a national

94 EN para. 464.

95 See e.g. the draft Civil Service Bill published by the House of Commons Public Administration Select Committee in 2003; the Government's consultation paper on a draft Civil Service Bill in 2004 (Cm 6373); and the report of the Public Administration Committee on the draft Constitutional Renewal Bill (Tenth Report of 2007-08, HC 499).

96 As stated in The Governance of Britain Green Paper.

97 HC Bill 141 08-09.

98 See e.g. UNCESCR Concluding Observations 2002 at para. 14.

99 See e.g. UNCERD Concluding Observations 2003 at para. 23 (CERD/63/CO/11).

100 ILO Convention C111, 363 UNTS 31.

101 Article 1(1)(a).

policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof,¹⁰² and in particular has undertaken to pursue that policy in respect of employment under the direct control of a national authority.¹⁰³ On the face of it, it is difficult to see how the continuation of such a wide restriction on the employment of non-UK nationals in the civil service can be compatible with those binding undertakings.

1.85 On 3 November 2009, during the Bill’s committee stage, the Government supported amendments to the Bill tabled by our Chair in terms similar to his Private Member’s Bill. The Bill now therefore makes provision for the removal of existing nationality restrictions on Crown employment.¹⁰⁴ **We welcome the Government’s willingness to amend the Bill to address the longstanding problem of nationality discrimination in Crown employment, which enhances the protection of the human rights of non-nationals in the UK.**

(6)The meaning of “public function” in the Human Rights Act

1.86 As we have pointed out in previous reports, the Government has committed itself to bringing forward legislation to fill the gap in the legal protection for human rights as a result of the decision of the House of Lords in the *YL* case, which adopts a very restrictive interpretation of when a private sector entity is performing a “public function”. As a result of that decision, significant numbers of vulnerable users of public services do not enjoy the protections of the Human Rights Act when their service is provided by a private entity. When we have pressed Ministers about the Government’s inaction on this important issue, they have told us that the Government intends to consult on the issue as part of its wider consultation on a “Bill of Rights and Responsibilities”. However, the issue barely features in the Government’s Green Paper on that subject, nor is it part of the Government’s ongoing consultation on a Bill of Rights, nor is there any provision in this Bill. When we asked the Government about when it proposes to fulfil its commitment to fill the gap in the legal protection of human rights left by *YL* if the opportunity is not taken to do so in this Bill, the Government’s response, yet again, was that it “remains firmly committed to consulting on this issue.”

1.87 In our recent report *Any of our business? Human Rights and the UK private sector* we took stock of this issue and concluded that the Government’s delay in addressing this important gap in protection is unacceptable.¹⁰⁵ We were not persuaded that any further public consultation was necessary and we called on the Government to bring forward a legislative solution as soon as possible, pointing out that an interpretative provision could still be inserted into this Bill.¹⁰⁶

1.88 In view of the Government’s seeming paralysis on this issue, we recommend an amendment to this Bill which would close the gap in human rights protection for the users of public services delivered by private providers, by inserting an interpretative provision clarifying the meaning of “public function” in s. 6 of the Human Right Act

102 Article 2.

103 Article 3.

104 Clauses 21-23.

105 First Report of 2009-10, HL 5-I/HC 64-I, at paras 132-150.

106 *Ibid* at paras 149-50.

1998. We emphasise that the purpose of this amendment is purely to restore the broader scope of the Act's protections which we believe was originally intended by Parliament when it enacted the Human Rights Act in 1998. The following amendment is designed to give effect to this recommendation:

Page 20, line 19, insert new clause:

Factors to be taken into account when determining whether a body is a public authority

(1) For the purposes of subsection (3)(b) of section 6 of the Human Rights Act 1998 (c.42) (acts of public authorities), the factors which may be taken into account in determining whether a function is a function of a public nature include:

- the extent to which the state has assumed responsibility for the function in question
- b) the role and responsibility of the State in relation to the subject matter in question
- c) the nature and extent of the public interest in the function in question
- d) the nature and extent of any statutory power or duty in relation to the function in question
- e) the extent to which the state, directly or indirectly, regulates, supervises and inspects the performance of the function in question
- f) the extent to which the state makes payment for the function in question
- g) whether the function involves or may involve the use of statutory coercive powers
- h) the extent of the risk that improper performance of the function might violate an individual's Convention right.

(2) For the avoidance of doubt, for the purposes of subsection (3)(b) of section 6 of the Human Rights Act 1998, a function of a public nature includes a function which is required or enabled to be performed wholly or partially at public expense, irrespective of –

- a) the legal status of the person who performs the function, or
- b) whether the person performs the function by reasons of a contractual or other agreement or arrangement.

(7) The Intelligence and Security Committee

1.89 In *The Governance of Britain* Green Paper, the Government acknowledged that there are concerns about the transparency of the process by which the Intelligence and Security Committee is appointed, operates and reports. The Government committed to considering how the ISC's arrangements could be amended to bring it as far as possible into line with select committees, while maintaining the confidentiality of information where genuinely necessary in the interests of national security.

1.90 In the Government's White Paper, *The Governance of Britain – Constitutional Renewal*, the Government said that it had concluded that it can make significant changes

immediately to improve the transparency and effectiveness of the Committee's operation "in advance of any future legislation the Government brings forward."¹⁰⁷

1.91 We note the changes that have been made to the way in which the members of the ISC are appointed but further proposals to improve the transparency of the ISC are absent from the Bill. We have recently expressed our concern about the adequacy of the parliamentary mechanisms for oversight of the intelligence and security services in the context of current allegations about the UK's complicity in torture.¹⁰⁸ The House of Commons Reform Committee has now recommended that the Chair of the ISC be elected by the House of Commons.¹⁰⁹

1.92 In view of continuing serious concerns about the adequacy of the ISC as a parliamentary mechanism for ensuring the accountability of the intelligence and security services, we recommend that the Intelligence Services Act 1994 be amended to change the formal system of nomination to the ISC and the method of appointment of its Chair, in accordance with the reforms recommended by the House of Commons Reform Committee to the system of election of members and Chairs of House of Commons Select Committees. The following new clause is suggested to give effect to this recommendation:

Intelligence and Security Committee

The Intelligence Services Act 1994 (c.13) is amended as follows:

In section 10 omit subsection (3) and insert '(3) The members and Chairman of the Committee shall be elected in accordance with the system of election of members and Chairmen of the select committees of the House of Commons.'

(8) Royal Marriages and Succession to the Crown

1.93 Two amendments to the Bill tabled by a member of this Committee, Dr. Evan Harris MP, would remove religious discrimination against Catholics in relation to royal marriages¹¹⁰ and discrimination against women in relation to the succession to the throne.¹¹¹

1.94 During the second reading debate on Dr. Harris's Private Member's Bill, the Royal Marriages and Succession to the Crown (Prevention of Discrimination) Bill, on 27 March 2009, the Secretary of State for Justice accepted that the current law is unjustifiably discriminatory against women and Catholics and indicated that the matter would now be given "a higher priority" as a result of the Private Member's Bill. However, the Government opposed the Bill on the basis that the matter was complex, would require consultation with Commonwealth Governments and requires more careful thinking about

107 Cm 7342-I (March 2008) at para. 236.

108 Twenty-third Report of Session 2008-09, Allegations of UK Complicity in Torture, HL Paper 152/HC 230, paras 57-66.

109 First Report of Session 2008-09, Rebuilding the House, HC1117 paras 57-59.

110 NC48.

111 NC49.

the implications for the position of the Church of England as the established church. The Prime Minister subsequently gave a similar indication.¹¹²

1.95 We asked the Government what it had done since 27 March 2009 to fulfil its commitment that it would now give “a higher priority” to ending the current discrimination against Catholics in royal marriages and against women in succession to the throne, and to indicate its proposed timetable for removing that discrimination. In response the Government said that it has continued to explore the issues which would be raised by such a change in the law, but it is not possible to specify a precise timetable because resolution of this issue does not depend on the UK Government alone: the other Commonwealth Governments have an equal right of consideration. Discussions with those other Governments are said to be continuing.

1.96 We note that the amendments provide for the changes only to be brought into force when consultations with Commonwealth Governments have been carried out.

1.97 We consider the amendments concerning royal marriages and succession to the Crown to be human rights enhancing measures. Discrimination against Catholics in the law of marriage is contrary to Article 14 ECHR in conjunction with Article 12 and also arguably contrary to the freedom of religion of Catholics protected by Article 9 ECHR. Male primogeniture in the law of inheritance generally is in our view arguably contrary to Article 14 ECHR in conjunction with Article 1 Protocol 1.¹¹³ On the basis of human rights principles, we recommend that the Government agree to the amendments tabled by Dr. Harris on these issues.

112 HC Deb 25 November 2009 col 532 (“The Act of Settlement is outdated, and I think that most people recognise the need for change”).

113 In 2004 the Constitutional Court of South Africa declared the customary law rule of male primogeniture to be in breach of the South African Constitution, because it discriminated unfairly against women and illegitimate children on grounds of gender and birth: *Bhe v Magistrate Khayelitsha and others* (2005) 1 BCLR 1 (CC).

2 Video Recordings Bill

Date introduced to first House	15 December 2009
Date introduced to second House	7 January 2010
Current Bill Number	HL Bill 22
Previous Reports	None

2.1 The Video Recordings Bill was introduced into the House of Commons on 15 December 2009 and completed all its Commons stages in one day on 6 January 2010. It is due to receive its Second Reading in the Lords on 18 January. The Bill is a fast track piece of legislation which repeals and revives the provisions of the Video Recordings Act 1984 in order to enable them to be notified to the European Commission under the Technical Standards Directive and so secure its enforceability. Due to an oversight at the time of its enactment it was not notified.

2.2 We have received a human rights memorandum from the Department for Culture, Media and Sport¹¹⁴ for which we are grateful and which has assisted with our expedited scrutiny of this Bill.

2.3 The statutory provisions which are being re-enacted by this Bill do raise some significant human rights issues. The legislation seeks to strike a balance between the protection of children and young people against harm on the one hand (in accordance with various international human rights standards including those in the UN Convention on the Rights of the Child) and the right to freedom of expression (which includes the right to receive information and ideas) in Article 10 ECHR and other international standards.

2.4 There is scope for argument about whether the balance which the 1984 Act strikes is the right balance. Some argue that the exemptions contained in the current statutory regime are too wide and therefore expose children to the risk of harm unnecessarily.¹¹⁵ On the other hand there has been litigation about whether the definition of “harm” in the 1984 Act is too broad and needs to be interpreted more narrowly in order to make the legislation compatible with the right to freedom of expression in Article 10 ECHR.¹¹⁶

2.5 The human rights issues raised by this Bill are issues which in our view should be subjected to parliamentary scrutiny, either in the context of the Digital Economy Bill or a relevant Private Member’s Bill. However, in view of those imminent opportunities and the fact that the provisions in the 1984 Act, which serve an important child protection purpose, are currently unenforceable, we accept the Government’s case for fast-tracking this legislation and we therefore do not propose to subject it to further scrutiny.

114 Written Evidence, p65

115 See e.g. the Video Recordings (Exempt from Classification) Bill, a Ten Minute Rule Bill to be introduced by Andrew Dismore MP.

116 See e.g. *R v Video Appeals Committee of the British Board of Film Classification, ex p. the British Board of Film Classification*, unreported, CO/4074/99 (16 May 2000); *R (British Board of Film Classification) v Video Appeals Committee* [2008] EWHC 203 (Admin), [2008] LLR 380.

Conclusions and recommendations

Constitutional Reform and Governance Bill

Purposes and effect of the Bill

1. We welcome a number of aspects of the Bill as human rights enhancing measures, in particular the repeal of the provisions concerning protest around Parliament in the Serious Organised Crime and Police Act 2005, or as measures enhancing opportunities for effective human rights scrutiny in Parliament, such as the provisions in the Bill concerning the ratification of international treaties. However, from a human rights perspective we are disappointed that the Bill does not reflect the much more ambitious scope of the Prime Minister's original statement about constitutional reform to the House of Commons in July 2007, which included a commitment to exploring the possibility of a new UK Bill of Rights, building on the Human Rights Act, as part of a wider programme of constitutional reform: a subject which we enquired into and reported favourably on in 2008 in our Report *A Bill of Rights for the UK?* We are also disappointed that the Bill does not take the opportunity to address a number of longstanding issues of human rights concern, such as the restrictive judicial interpretation of the meaning of "public function" in the Human Rights Act 1998 which continues to deprive significant numbers of vulnerable users of public services of the protection of that Act. (Paragraph 1.6)

Protest around Parliament

2. We welcome the Government's decision to legislate to repeal sections 132 to 138 SOCPA and, in particular, to amend the Public Order Act to deal with protest around Parliament. This is consistent with much of the evidence we received during our policing and protest inquiry and gives effect to the recommendations which we made in our Reports on this issue. As we have previously stated, sections 132 to 138 have proved too heavy-handed in practice, are difficult to police, and lack widespread acceptance by the public. We also welcome the Government's decision to reduce the area around Parliament in which special requirements will apply to 250 metres as this constitutes a more proportionate response which is less intrusive on individual rights to freedom of association and expression. However, some details of the proposed replacement provisions give us cause for concern, as they are, in parts, widely drafted and may result in legal uncertainty. (Paragraph 1.12)
3. We agree with the Minister that it is vitally important that the police, parliamentarians and protesters are clear about the level of access to Parliament which is envisaged. This accords with the evidence we heard and the recommendations we made in our Policing and Protest Report. We note that conditions may be imposed which are necessary "in the [senior police] officer's reasonable opinion". However, we are concerned that the "reasonable" opinion of an officer is a subjective test which raises the risk of uncertainty as to what an individual officer will or will not deem to be "reasonable" in the circumstances. This may lead to

confusion for protesters, police officers and those seeking access to the Parliamentary estate. (Paragraph 1.17)

4. We welcome the Minister's commitment to publishing guidance to the Metropolitan Police in a Home Office Circular on the operation of the new powers. Such guidance should make clear the kinds of conditions which it is reasonable for an officer to impose. The new legislation on protest around Parliament will also apply to locations away from Westminster where Parliament or a parliamentary committee meets and consequently guidance should be available to police officers across the UK. We reiterate our recommendation that clear, up to date and accurate guidance on policing protest, in a variety of circumstances, is needed for police officers throughout the country and urge ACPO and the Home Office to ensure that the various manuals on policing protest are rapidly updated to take account of the proposed new powers in this Bill. We share Her Majesty's Inspector's view that practical methods of disseminating information to officers in a timely manner need to be developed to avoid a repetition of the time lag which has occurred in relation to the revision of the current ACPO manuals. (Paragraph 1.19)
5. We welcome the Government's commitment to making available the draft text of the order specifying the requirements for access to Parliament in time for the Committee stage debate. This facilitates Parliament's ability to scrutinise the provisions for human rights compliance. We accept that there may be some need for flexibility, and we look forward to seeing the exact terms of the draft order to see if our concerns about legal certainty are met. (Paragraph 1.22)
6. We welcome the fact that the purpose of the order making power is clearly defined in terms of maintaining access to and from the Palace of Westminster (or a specified building being used by Parliament) and that the scope of any discretions conferred by the order on the police must also be limited by that overriding purpose of maintaining access. However, we are concerned about the vagueness of the language used in paragraphs 14ZA(5) and 14ZC(8) of Schedule 5 and the possibility of open-ended and broadly drafted discretions being conferred on police officers by these provisions. We agree that officers policing an event will have to exercise their discretion as to how the specified requirements for maintaining access should be met. The exercise of that discretion could relate, for example, to the precise entrances to Parliament which should be kept open, but only insofar as it is necessary in order to maintain access to and from the Palace of Westminster or a specified building. We recommend that the Bill be amended to reduce the scope for any possible uncertainty about the discretions which may be conferred on the police by the order specifying the requirements for maintaining access. (Paragraph 1.24)
7. We agree with the Government's view that it is desirable, in terms of legal certainty and clarity for police and protesters alike, for the same or similar provisions to apply throughout the country in relation to protest and that as few distinctions between different protests should be created as possible. However, in view of the particular significance of Parliament as a venue for protest and the historic problems which have arisen in policing protest in this area, we consider that it is appropriate for a more precise list of conditions to be set out in relation to public processions around Parliament. We recommend that the Bill be amended to include an exhaustive list of

conditions which may be applied to public processions around Parliament. (Paragraph 1.28)

8. Alternatively, in the interests of legal certainty, we recommend that the Government publish in the relevant guidance a comprehensive list of the sorts of conditions that may be imposed on processions under this section. (Paragraph 1.29)

Ratification of treaties

9. We therefore welcome in principle the implementation of the Government's proposal to try to increase parliamentary involvement in the ratification of treaties. (Paragraph 1.38)
10. We welcome the Government's unequivocal statement of its intention to continue the practice of laying an Explanatory Memorandum at the same time as the treaty. However, we recommend that the laying of an Explanatory Memorandum at the same time as the treaty be an express requirement in the Bill which must be met before a treaty can be ratified. (Paragraph 1.41)
11. We recommend that the Government undertake to send copies of all treaties with human rights implications to the JCHR, along with their Explanatory Memoranda, as soon as they are laid under clause 24(1). (Paragraph 1.42)
12. We remain of the view we expressed in our report on the Prisoner Transfer Treaty with Libya, that when a select committee states that it intends to scrutinise a treaty, ratification should be delayed until the committee's inquiry has concluded. We recommend that the Bill be amended to require the Minister to lay a statement explaining why any request for an extension of the 21 day sitting period has been refused. (Paragraph 1.46)
13. We recommend that the ministerial power to disapply the new regime in exceptional cases be removed from the bill. (Paragraph 1.48)
14. We welcome the Government's unequivocal statement of its intention to continue the practice of laying an Explanatory Memorandum at the same time as the treaty. However, we recommend that the laying of an Explanatory Memorandum at the same time as the treaty be an express requirement in the Bill which must be met before a treaty can be ratified. (Paragraph 1.49)

The right to a fair hearing and access to court in the determination of civil rights

15. We therefore recommend that the Bill be amended to provide that the First Commissioner and other Civil Service Commissioners may only be removed by HM the Queen on an Address by each House of Parliament. (Paragraph 1.51)
16. As we have repeatedly pointed out to Government departments, where the Government argues that a provision in a Bill is compatible with Article 6(1) ECHR because of the combination of the availability of judicial review and the procedures before the original decision-maker, we cannot assess the provision's compatibility with Article 6(1) ECHR unless we know exactly what those procedures are going to

be. In the absence of this information we cannot advise Parliament about the degree of risk that the Bill may lead to the removal of Commissioners in breach of Article 6(1) ECHR. (Paragraph 1.54)

17. We consider the provisions in the Constitutional Reform Act 2005 concerning the removal of judicial office holders to be a good model for the protection both of the Article 6(1) rights of the office holders and for the constitutional principle of civil service independence. We recommend that the Bill be amended to require that the Minister's power to remove Civil Service Commissioners and the First Commissioner from office be exercisable only after the Minister has complied with prescribed procedures and to provide a power to make regulations prescribing the procedure to be followed. We also recommend that the Government publish at least the outline of the procedure that it envisages should be followed before removal of Civil Service Commissioners and the First Commissioner (Paragraph 1.55)
18. We recommend that the Government amend the Bill, either to prescribe the minimum content of the procedures for the investigation and consideration of complaints by the Commission, or to provide a power to make regulations prescribing such minimum procedural protections, in order to ensure that the civil servant who is the subject of a complaint about a breach of the code receives a fair hearing, including access to an independent and impartial court or tribunal. (Paragraph 1.63)
19. We therefore recommend that the Government amend the Bill, either to prescribe the minimum content of the procedures for the investigation and consideration by the Commission of complaints about selection competitions, or to provide a power to make regulations prescribing such minimum procedural protections, in order to ensure that those involved in a dispute about the fairness and openness of a selection receive a fair hearing, including access to an independent and impartial court or tribunal (Paragraph 1.67)
20. The provisions in the Bill concerning the removal, expulsion and suspension of members of the House of Lords raise a difficult issue about the relationship between common law fairness and parliamentary privilege. Members are entitled to be treated fairly, but the House of Lords is entitled to set its own procedure. We accept that the procedures adopted by the House of Lords in its new Code of Conduct satisfy the common law requirements of fairness (Paragraph 1.72)
21. We accept that these provisions raise a difficult issue about the relationship between Article 6(1) ECHR and parliamentary privilege. The Government accepts that the power to remove these office holders engages Article 6(1) ECHR and that Parliament is under an obligation to adopt a procedure that is fair in the circumstances, but parliamentary privilege demands that it is for Parliament itself to devise those procedures. Where Article 6 applies there must also be a right of access to a court or tribunal to challenge removal, but this is also in tension with the traditionally recognised privileges of Parliament. There is nothing in the Human Rights Act to require Parliament to address these issues, but parliamentary privilege will not provide a sufficient defence to a challenge brought before the European Court of Human Rights in Strasbourg and we therefore recommend that the Leader of the

House of Commons bring forward proposals which are Article 6(1) compliant and make provision for a right of access to a court or tribunal. (Paragraph 1.76)

Time limits for human rights actions against devolved administrations

22. We accept the analysis of the compatibility of these provisions in the Explanatory Notes. (Paragraph 1.80)

Nationality discrimination in Crown employment

23. We welcome the Government's willingness to amend the Bill to address the longstanding problem of nationality discrimination in Crown employment, which enhances the protection of the human rights of non-nationals in the UK (Paragraph 1.85)

The meaning of "public function" in the Human Rights Act

24. In view of the Government's seeming paralysis on this issue, we recommend an amendment to this Bill which would close the gap in human rights protection for the users of public services delivered by private providers, by inserting an interpretative provision clarifying the meaning of "public function" in s. 6 of the Human Rights Act 1998. We emphasise that the purpose of this amendment is purely to restore the broader scope of the Act's protections which we believe was originally intended by Parliament when it enacted the Human Rights Act in 1998. (Paragraph 1.88)

The Intelligence and Security Committee

25. In view of continuing serious concerns about the adequacy of the ISC as a parliamentary mechanism for ensuring the accountability of the intelligence and security services, we recommend that the Intelligence Services Act 1994 be amended to change the formal system of nomination to the ISC and the method of appointment of its Chair, in accordance with the reforms recommended by the House of Commons Reform Committee to the system of election of members and Chairs of House of Commons Select Committees. (Paragraph 1.92)

Royal Marriages and Succession to the Crown

26. We consider the amendments concerning royal marriages and succession to the Crown to be human rights enhancing measures. Discrimination against Catholics in the law of marriage is contrary to Article 14 ECHR in conjunction with Article 12 and also arguably contrary to the freedom of religion of Catholics protected by Article 9 ECHR. Male primogeniture in the law of inheritance generally is in our view arguably contrary to Article 14 ECHR in conjunction with Article 1 Protocol 1.117 On the basis of human rights principles, we recommend that the Government agree to the amendments tabled by Dr. Harris on these issues. (Paragraph 1.97)

117 In 2004 the Constitutional Court of South Africa declared the customary law rule of male primogeniture to be in breach of the South African Constitution, because it discriminated unfairly against women and illegitimate children on grounds of gender and birth: *Bhe v Magistrate Khayelitsha and others* (2005) 1 BCLR 1 (CC).

Video Recordings Bill

27. The human rights issues raised by this Bill are issues which in our view should be subjected to parliamentary scrutiny, either in the context of the Digital Economy Bill or a relevant Private Member's Bill. However, in view of those imminent opportunities and the fact that the provisions in the 1984 Act, which serve an important child protection purpose, are currently unenforceable, we accept the Government's case for fast-tracking this legislation and we therefore do not propose to subject it to further scrutiny. (Paragraph 2.5)

Formal Minutes

Tuesday 12 January 2010

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	Dr Evan Harris MP
Baroness Falkner of Margravine	Fiona Mactaggart MP
Lord Morris of Handsworth	Mr Virendra Sharma MP
The Earl of Onslow	Mr Edward Timpson MP

Draft Report (*Legislative Scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill*), 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 2.5 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Fourth Report of the Committee to each House.

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

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 24 November.

[Adjourned till Tuesday 26 January 2010 at 1.30pm

List of written evidence

- 1 Letter to Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, dated 26 October 2009
- 2 Letter from Rt Hon Michael Wills MP, Minister of State, Ministry of Justice, dated 17 November 2009
- 3 Voices in the Wilderness UK
- 4 Department of Culture, Media and Sport (on the Video Recordings Bill)

Written Evidence

Letter from the Chair of the Committee to Rt Hon Jack Straw MP, Lord Chancellor and Secretary of State for Justice, dated 26 October 2009

Constitutional Reform and Governance Bill

The Joint Committee on Human Rights is considering the Constitutional Reform and Governance Bill and would be grateful for your answers to a number of questions concerning its human rights compatibility and the opportunities it presents to enhance human rights.

(1) Protest around Parliament

As you will be aware, the Committee expressed concerns about the human rights compatibility of the provisions in the Serious Organised Crime and Police Act 2005 (“SOCPA”) when they were originally enacted and in its recent report on policing and protest called for a fundamental reform of the legal regime governing protest around Parliament. It is likely to welcome the repeal of ss. 132-138 of SOCPA and the reduction of the area around Parliament in which special requirements will apply. However, it has a number of questions about the details of the proposed replacement provisions which are, in parts, widely drafted and may therefore give rise to legal uncertainty.

Schedule 4 allows a senior police officer to give directions where a public procession or public assembly takes place within 250 metres of Parliament or a specified building. These directions impose conditions on those organising or taking part in a procession or assembly which “in the officer’s reasonable opinion, are necessary” for ensuring that certain specified requirements are met.

- 1. Please provide examples of the types of conditions which the Government considers will be reasonable and necessary.**
- 2. What Codes of Practice, training, policy and guidance will be issued to senior police officers about the operation of their discretion?**
- 3. Is it proposed that the ACPO manual on *Keeping the Peace* will be updated to provide guidance to police officers in advance of these powers coming into force?**

The Secretary of State is granted a wide order making power to specify requirements that must be met to maintain access to and from the Palace of Westminster or a specified building in secondary legislation, such as the number or location of entrances to be kept open or access routes around Parliament.

- 4. Why has the Government chosen to set out the requirements which may be specified by the Secretary of State for the purposes of maintaining access to and from Parliament or a specified building in a non-exhaustive rather than an exhaustive list?**

5. Why does the Bill enable the Secretary of State to do this by regulation, rather than set out those requirements on the face of the Bill, so as to ensure legal certainty?

The Bill also vaguely states that “an order under this section may confer discretions on the senior police officer”.

6. Please clarify precisely what discretions the Government envisages will or may be conferred on senior police officers by paragraphs 14ZA(5) and 14ZC(8).

Although all conditions which may be imposed are limited to those which maintain access to and from the Palace of Westminster or a specified building, a distinction is drawn in the Bill between public processions and public assemblies. In relation to *public processions*, a non-exhaustive list of conditions which may be imposed is set out in the Bill. These include conditions regarding the route of procession or prohibiting it from entering a public place. In relation to *public assemblies*, however, the Bill sets out an exhaustive list of conditions which may be imposed, namely, the place, maximum duration and maximum number of persons at the assembly. Schedule 4 also includes a new provision which effectively applies the provisions on public assemblies and processions around Parliament to any building outside of the Palace of Westminster which is used to hold meetings of the House or any of its Committees (“a specified building”).

The human rights part of the Explanatory Notes state that “insofar as the conditions may only pertain to the place of the demonstration, its maximum duration and the maximum number of persons who may constitute it, they are proportionate in respect of legitimate aims”.¹¹⁸ However, these conditions only relate to public assemblies (i.e. static demonstrations), not to public processions, where no limit on the conditions which may be imposed is set out in the Bill, save that they must meet the aim of maintaining access to and from Parliament or a specified building. The Explanatory Notes suggest that the directions which can be made under section 14ZA are much more limited than those under the SOCPA regime as they only relate to one aim and therefore:

... the Government considers that this is a legitimate aim, namely the proper and secure functioning of Parliament. Since directions are limited in scope and in geographical effect (section 14ZB), the Government’s view is that they are a proportionate interference with individual rights.¹¹⁹

7. Please explain why the Bill does not set out the conditions which may be imposed on a public procession in an *exhaustive* list.

(2) Ratification of treaties

As you will be aware, the Committee has committed itself to examining international treaties with human rights implications before their ratification, in order to increase parliamentary understanding and involvement in the ratification process.¹²⁰ The

¹¹⁸ EN, para. 451.

¹¹⁹ EN, para. 454.

¹²⁰ See e.g. Reports on Protocol 14, the Council of Europe Convention on the Prevention of Terrorism, and the UN Convention on the Rights of Person with Disabilities.

Committee is therefore likely to welcome in principle the implementation of the Government's proposal to put parliamentary involvement in the ratification of treaties on a statutory footing. Although the enhanced opportunity for parliamentary scrutiny of treaties is likely to be welcomed, the Committee has a number of questions about the detail of the proposed new statutory regime.

8. Will the Government amend the Bill to require that the Explanatory Memorandum accompanying the treaty should be laid at the same time as the treaty itself,¹²¹ so as to facilitate the proper review of the treaty during the 21 day period?

9. Will the Government undertake to notify relevant Committees when the treaty has been laid, to enable those Committees to embark early on their scrutiny?

10. (a) Why should the House of Lords' powers in relation to treaties be any less than those of the House of Commons? (b) Is there any constitutional convention which suggests that the Lords' powers in relation to matters of this kind are to be any less than those of the Commons? (c) Was any such distinction ever recognised in practice under the Ponsonby Rule?

11. Should the Minister be required to lay a statement explaining why any request for an extension of the 21 day sitting period has been refused?

12. (a) What is the justification for including a power for a Minister to disapply the new statutory regime in exceptional cases?¹²² (b) What sort of exception does the Government have in mind? (c) Are there any examples of treaties which have been ratified without being laid before Parliament (since the advent of the Ponsonby Rule in 1924)?

(3) The right to a fair hearing and access to court in the determination of civil rights

The Bill contains a number of different provisions which engage, or may engage, the right in Article 6(1) ECHR to a fair hearing in the determination of civil rights, which has been interpreted by the European Court of Human Rights to include a right of access to a court.

(a) Removal of Civil Service Commissioners

The Bill provides¹²³ for the removal from office of the Civil Service Commissioners, including the First Commissioner, by HM the Queen on the recommendation of the Minister if one of four specified conditions is met.¹²⁴ The Bill does not specify the procedure to be adopted in removing the First Commissioner or Commissioner from

121 Clause 21(1).

122 Clause 23.

123 Schedule 1, para. 5(3).

124 *Ibid.*, para. 5(4)(a)-(d).

office. The Explanatory Notes to the Bill, however, state that “it is envisaged that the procedure will be specified in the terms of appointment.”¹²⁵

The Government accepts, rightly, that the removal from office of the First Commissioner or Commissioner is likely to engage Article 6(1) ECHR as it is likely to constitute the determination of a civil right within the meaning of that Article.¹²⁶ However, it considers that the combination of the procedure which will be set out in the terms of appointment, and the fact that the decision of the Minister recommending removal would be amenable to judicial review, is sufficient to satisfy the requirements of Article 6(1) ECHR.

As the Committee has repeatedly pointed out, where the Government argues that a provision in a Bill is compatible with Article 6(1) ECHR because of the combination of the availability of judicial review and the procedures before the original decision-maker, the Committee cannot assess the provision’s compatibility with Article 6(1) ECHR unless it knows exactly what those procedures are.

13. Will the Government agree to amend the Bill so as to specify the detail of the procedure to be used in removing the First Commissioner or Commissioners from office; or at the very least publish the detail of the procedure which it intends to set out in the Commissioners’ terms of appointment?

In the absence of this information the Committee cannot advise Parliament about the degree of risk that the Bill may lead to the removal of Commissioners in breach of Article 6(1) ECHR.

(b) Complaints about breaches of the Codes of Conduct by civil servants

The Bill provides for civil servants to complain to the Civil Service Commission about breaches of the codes of conduct for the civil service and for the diplomatic service.¹²⁷ The procedures for the making of such complaints and for the investigation and consideration of them by the Commission are not specified by the Bill, but are left to the Commission itself to determine.¹²⁸ After considering a complaint, the Commission may make recommendations about how the matter should be resolved.¹²⁹

The Government’s view is that the consideration of breaches of the codes of conduct by the Commission does not engage the right to a fair hearing and access to a court in Article 6(1) ECHR for two reasons. First, it does not involve the determination of a “civil right” within the meaning of that Article, because “the Codes will set out the standards of behaviour expected of civil servants based on the core values of the Civil Service rather than create any civil rights.”¹³⁰ Second, the Commission’s role after consideration of a complaint is

125 EN para. 435.

126 Ibid..

127 Clause 9(2) and (3). A civil servant may complain to the Commission if they have reason to believe that they are being, or have been, required to act in a way that conflicts with the relevant code of conduct, or that another civil servant is acting, or has acted, in a way that conflicts with the code.

128 Clause 9(5)(a).

129 Clause 9(5)(b).

130 EN para. 438.

limited to making recommendations and is therefore not likely to be considered as being “determinative” of any civil rights even if such rights were in play.¹³¹

Even if the Commission’s consideration of breaches of the codes constituted the determination of a civil right within Article 6(1) ECHR, in the Government’s view the requirements of that Article would be satisfied anyway, because of the combination of the procedures which the Commission will determine for the investigation and consideration of complaints, and the fact that the act of the Commission in making a recommendation would be amenable to judicial review.¹³²

The Committee is scrutinising carefully the Government’s analysis of the Article 6(1) compatibility of the provisions in the Bill concerning complaints about breaches of the codes. In particular it is considering whether the Commission’s investigation and consideration of at least some complaints are capable of affecting civil rights; whether it is realistic to suggest that the Commission does not “determine” any civil rights; and whether the combination of the procedures before the Commission and the possibility of judicial review can be said to satisfy the requirements of Article 6(1) ECHR when the Committee has no information about what those procedures will be.

14. Would civil rights be in play in cases where the complaints about a breach of the code by a civil servant involve allegations of such serious misconduct that an adverse recommendation by the Commission will have serious consequences for that individual’s reputation and inevitably affect their employment status or future prospects?

15. Do you agree that the Commission’s decision that the code of conduct has been breached in such cases would in practice be determinative of the civil servants’ civil rights, whether or not the Commission’s recommendation about how the matter should be resolved is followed?

16. Will the Government prescribe, either in the Bill or in regulations, the minimum content of the procedures for the investigation and consideration of complaints by the Commission in order to ensure that the civil servant who is the subject of the complaint receives a fair hearing, including access to court?

(c) Complaints about selections for appointment to the Civil Service

The Bill also provides¹³³ for a person to complain to the Civil Service Commission if they have reason to believe that a selection for an appointment breached the requirement¹³⁴ that selections be made on merit on the basis of a fair and open competition. As with the provision concerning complaints to the Commission about breaches of the codes, the Bill

131 EN para. 439.

132 EN para. 440.

133 Clause 13(2) and (3).

134 In clause 10(2).

does not specify the procedures for the investigation and consideration of such complaints by the Commission: this is left to the Commission itself to determine.¹³⁵

The Government makes essentially the same argument here as in relation to complaints about breaches of the codes. First, there is no “civil right” in play because “selections for appointment do not amount to a ‘civil right’.” Second, even if such rights were in play, there is no “determination” of them because the Commission’s role is limited to making recommendations after considering the complaint.¹³⁶ And third, the requirements of Article 6(1) would be satisfied in any event by the combination of the procedures before the Commission and the possibility of judicial review of the Commission’s decisions.¹³⁷

17. Is a decision that a selection for appointment has not been made on merit capable of affecting other civil rights, such as the job of the person who was appointed, or, in the case of the person not appointed, the right not to be unlawfully discriminated against in access to employment or promotion?

18. Do you agree that the Commission’s decision that a selection for appointment breached the merit principle would in practice be determinative of the civil servants’ civil rights, whether or not the Commission’s recommendation about how the matter should be resolved is followed?

19. Will the Government prescribe, either in the Bill or in regulations, the minimum content of the procedures for the investigation and consideration of complaints by the Commission in order to ensure that the civil servants affected receive a fair hearing, including access to court?

The Government’s assertion in this Part of the Bill, that Article 6(1) does not apply in relation to complaints to the Civil Service Commission, appears to be based on the assumption that disputes relating to the recruitment, careers and termination of civil servants are as a general rule outside the scope of Article 6(1) ECHR. The Committee is concerned that such a view about the general non-applicability of Article 6(1) to civil servants does not appear to take account of recent developments in ECHR jurisprudence, in particular the case of *Vilho Eskelinen v Finland*, which clearly starts from a presumption that Article 6(1) applies to the employment of civil servants.

20. What account has been taken of the judgment of the European Court of Human Rights in *Vilho Eskelinen v Finland*,¹³⁸ which clearly starts from a presumption that Article 6(1) applies to the employment of civil servants?

21. Why, in the light of that case, does the presumption that Article 6(1) applies to disputes concerning the employment of civil servants not apply to the mechanisms in the Bill for resolving disputes through the Civil Service Commission?

¹³⁵ Clause 13(3)(b).

¹³⁶ EN para. 441.

¹³⁷ EN para. 442.

¹³⁸ (2007) 45 EHRR 43.

(d) Removal, expulsion and suspension of members of the House of Lords

The Bill provides for the removal of members of the House of Lords if any of a number of specified conditions are met,¹³⁹ and enables the House of Lords to discipline its members through either expulsion or suspension.¹⁴⁰ Members of the House of Lords have the common law right to be treated fairly. This was recently explicitly recognised and put into practice in the investigation by the Sub-Committee on Members' Interests into the allegations against four members alleged to have agreed to accept money in exchange for moving amendments to legislation.¹⁴¹ However, there is nothing in the Bill to require such fair procedures. During the recent passage of the Parliamentary Standards Bill, the Government agreed to an amendment tabled in the House of Lords designed to ensure that the procedures to be laid down for the conduct of investigations into MPs must be "fair".¹⁴²

22. What would be the Government's view of an amendment to this Bill to make clear that the procedures for investigating allegations of misconduct must be fair to those being investigated?

(e) Removal of Comptroller and Auditor General and of Chair of National Audit Office

The Bill provides for the removal from office of both the Comptroller and Auditor General¹⁴³ and the chair of the National Audit Office¹⁴⁴ by HM the Queen on an Address of each House of Parliament.

In both cases the Government appears to accept that the right to a fair hearing in Article 6(1) ECHR, as well as the common law right to procedural fairness, would apply.¹⁴⁵ However, the Bill is silent on the procedure which should be used prior to such removal, and the Government says that in the event of either provision being used, Parliament would need to devise a procedure which offers appropriate safeguards to ensure that the removal from office is carried out fairly and in accordance with Article 6(1). Establishing the details of such a fair procedure, the Government argues, is a properly a matter for Parliament.

In the absence of any information as to what procedure would be followed prior to any decision to remove, the Committee cannot advise Parliament as to whether these provisions are compatible with the requirements of Article 6(1) ECHR and of common law fairness.

23. Why does the Bill does not prescribe at least a minimum of procedural safeguards to ensure that the office holders receive a fair hearing and why is there no provision for a right of access to a court?

139 Clause 27 and Schedule 3, Part 1.

140 Clause 28.

141 See Second Report from the Committee for Privileges 2008-09, Annex at paras 11-27 (describing the procedural safeguards accorded to those being investigated).

142 HL Deb 20 July 2009 cols 1439-41.

143 Clause 41(2).

144 Schedule 6, para. 10(1).

145 EN paras 473 and 477.

(4) Nationality discrimination in Crown employment

The provisions in Part 1 of the Bill have been preceded by a long period of public and parliamentary debate about the desirability of comprehensive legislation for the Civil Service,¹⁴⁶ and are intended to implement the Government's proposal to "enshrine the core principles and values of the Civil Service in law."¹⁴⁷ They make no provision, however, to deal with the widely recognised problem of nationality discrimination in the civil service, which derive from 300 year old restrictions on the employment of non-UK nationals in civil capacities under the Crown.

As the law currently stands, 95% of civil service posts in the UK are available to Commonwealth, Irish or EEA nationals but other non-UK nationals are almost entirely excluded from those posts, even if there is no good operational reason for that. As a result, many members of long-standing minority communities in the UK are entirely banned from Government employment, no matter how well qualified they are, and even if they are married to a UK national.

Such nationality discrimination in access to government employment engages a number of the UK's human rights obligations. By Article 6 of the International Covenant on Economic, Social and Cultural Rights, for example, the UK recognises the right to work, including the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and by Article 2 the UK has undertaken to guarantee the rights in the Covenant without discrimination of any kind as to national origin. The UN Committee on Economic and Social Rights¹⁴⁸ and the UN Committee for the Elimination of Racial Discrimination¹⁴⁹ have both commented on the continuing discrimination faced by ethnic minorities in employment in the UK. The UK is also a party to an ILO Convention, the Discrimination (Employment and Occupation) Convention 1958,¹⁵⁰ which defines discrimination to include exclusion based on nationality,¹⁵¹ and by which the UK has undertaken to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof,¹⁵² and in particular has undertaken to pursue that policy in respect of employment under the direct control of a national authority.¹⁵³

On the face of it, the Committee has difficulty seeing how the continuation of such a wide restriction on the employment of non-UK nationals in the civil service can be compatible with those binding undertakings.

24. Please explain how the present law is compatible with these international human rights obligations.

146 See e.g. the draft Civil Service Bill published by the House of Commons Public Administration Select Committee in 2003; the Government's consultation paper on a draft Civil Service Bill in 2004 (Cm 6373); and the report of the Public Administration Committee on the draft Constitutional Renewal Bill (Tenth Report of 2007-08, HC 499).

147 As stated in The Governance of Britain Green Paper.

148 See e.g. UNCESCR Concluding Observations 2002 at para. 14.

149 See e.g. UNCERD Concluding Observations 2003 at para. 23 (CERD/63/CO/11).

150 ILO Convention C111, 363 UNTS 31.

151 Article 1(1)(a).

152 Article 2.

153 Article 3.

25. Why is the problem of unjustified nationality discrimination in access to Crown employment not dealt with in Part 1 of this Bill?

(5) The meaning of “public function” in the Human Rights Act

The Government has committed itself to bringing forward legislation to fill the gap in the legal protection for human rights as a result of the decision of the House of Lords in the *YL* case. That gap was filled as far as the care home sector is concerned by the Government’s amendments to the Health and Social Care Bill. The Committee welcomed those amendments but pointed out that it left a significant gap in legal protection in the many other sectors of the public services in which the issue also arises. When pressed by the Committee on this question, Ministers have told the JCHR that the Government intends to consult on the issue as part of its wider consultation on a “Bill of Rights and Responsibilities”. However, the issue barely features in the Government’s Green Paper on that subject, nor is it part of the Government’s ongoing consultation on that subject, nor is there any provision in this Bill. The Committee will shortly return to this issue in its forthcoming Report on Business and Human Rights.

26. Please explain when the Government proposes to fill the continuing gap in the legal protection for human rights left by the House of Lords decision in the *YL* case, in public service sectors other than the care home sector, if the opportunity is not taken to do so in this Bill?

(6) The Intelligence and Security Committee

In *The Governance of Britain* Green Paper, the Government acknowledged that there are concerns about the transparency of the process by which the Intelligence and Security Committee is appointed, operates and reports. The Government committed to considering how the ISC’s arrangements could be amended to bring it as far as possible into line with select committees, while maintaining the confidentiality of information where genuinely necessary in the interests of national security.

In the Government’s White Paper, *The Governance of Britain – Constitutional Renewal*, the Government said that it had concluded that it can make significant changes immediately to improve the transparency and effectiveness of the Committee’s operation “in advance of any future legislation the Government brings forward.”¹⁵⁴ The Committee notes the changes that have been made to the way in which the members of the ISC are appointed but further proposals to improve the transparency of the ISC are absent from the Bill. As you will be aware, the JCHR has recently expressed its concern about the adequacy of the parliamentary mechanisms for oversight of the intelligence and security services in the context of current allegations about the UK’s complicity in torture.¹⁵⁵

27. In view of continuing serious concerns about the adequacy of the ISC as a parliamentary mechanism for ensuring the accountability of the intelligence and

¹⁵⁴ Cm 7342-1 (March 2008) at para. 236.

¹⁵⁵ Twenty-third Report of Session 2008-09, Allegations of UK Complicity in Torture, HL Paper 152/HC 230, paras 57-66.

security services, please indicate what further changes to the ISC are currently under consideration to address this problem?

(7) Royal Marriages and Succession to the Crown

The Royal Marriages and Succession to the Crown (Prevention of Discrimination) Bill, a Private Member's Bill introduced by Dr. Evan Harris MP, a member of the JCHR, would remove discrimination against Catholics in relation to royal marriages and discrimination against women in relation to the succession to the throne. During the Second Reading debate on the Bill on 27 March 2009, you accepted that the current law is unjustifiably discriminatory against women and Catholics and indicated that the matter would now be given "a higher priority" as a result of the Private Member's Bill, but you opposed the Bill on the basis that the matter was complex, would require consultation with Commonwealth Governments and requires more careful thinking about the implications for the position of the Church of England as the established church. Debate on the Second Reading of the Bill was adjourned and is not now expected to resume.

28. Please explain precisely what the Government has done since 27 March 2009 to fulfil its commitment that it would now give "a higher priority" to ending the current discrimination against Catholics in royal marriages and against women in succession to the throne?

29. Now that the Government has had more than 6 months to consider the consequences for the established Church if the discrimination against Catholics in royal marriages were removed, what does it consider those consequences to be?

30. Please specify the precise timetable which the Government proposes for the removal of what it accepts to be unjustified discrimination against women and Catholics in the law governing royal marriages and the succession.

Letter to the Chair of the Committee from Rt Hon Michael Wills MP, Minister for Human Rights, dated 17 November 2009

Constitutional Reform and Governance Bill

Thank you for your letter dated 26 October 2009, to Jack Straw. I am responding as the Bill Minister. I am very grateful for the Joint Committee on Human Rights ("JCHR") considering this Bill and look forward to its report.

This letter considers the questions which your letter asks in turn. It refers to the clause and Schedule numbering of the Bill as introduced on 20 July.

(1) Protest around Parliament

The letter begins by suggesting that the JCHR is likely to welcome the repeal of sections 132 to 138 of the Serious Organised Crime and Police Act 2005, but has questions about the details of the replacement provisions. The letter expresses concerns that the provisions may be, in parts, widely drafted and give rise to legal uncertainty.

It may assist the JCHR if I explain that Schedule 4 to the Bill builds on the regime concerning public processions and public assemblies that exists in Part 2 of the Public Order Act 1986 (processions and assemblies). The regime varies depending on whether the demonstration is a public procession or a public assembly.

- i. Concerning public processions, section 12 of that Act permits a senior police officer to give directions imposing conditions as are necessary to prevent “disorder, damage, disruption or intimidation”. Those conditions may include “conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions”.
- ii. Concerning public assemblies, section 14 of that Act permits a senior police officer to give directions imposing conditions as are necessary to prevent “disorder, damage, disruption or intimidation”. The conditions must be conditions as to the place at which the assembly may be held, its maximum duration or the maximum number of persons who may constitute it.

The JCHR may wish to note the limited additional aims that Schedule 4 to the Bill serves within this existing public order framework. In essence, Schedule 4 adds a further public order objective that is to be achieved in addition to the prevention of “disorder, damage, disruption or intimidation” – namely: to maintain access to and from the Palace of Westminster. Otherwise, Schedule 4 repeats the language of Part 2 of the Public Order Act in relation to the conditions that may be imposed. This involves a non-exhaustive list of possible conditions for public processions and an exhaustive list of possible conditions for public assemblies.

In this, the Government considers that it is acting in accordance with the recommendations of the JCHR, see paragraph 137 of its report *Demonstrating respect for rights? A human rights approach to policing protest*.¹⁵⁶ There, the JCHR recommended that protest around Parliament should be governed by the Public Order Act regime and that that Act “should be amended to enable conditions to be placed on static protests where they seriously impede, or it is likely that they will seriously impede, access to Parliament”. Of course, Schedule 4 would modify the Public Order Act in relation to both processions and assemblies, and to this extent goes further than that JCHR recommendation. However, the Government considers that leaving public processions untouched by Schedule 4 would leave a serious gap in the law and provide an obvious route for protestors to avoid the modified regime.

Given that the Government is merely importing the existing public order framework for the particular purpose of maintaining access to Parliament and following a JCHR recommendation, it does not consider that Schedule 4 is widely drafted or would give rise to any legal uncertainty.

Question 1: Please provide examples of the types of conditions which the Government considers will be reasonable and necessary [for the purpose of Schedule 4].

As already noted, the drafting in Schedule 4 concerning the types of conditions that can be imposed is the same as that which appears concerning conditions on public processions

and assemblies in Part 2 of the Public Order Act. For this reason, the Government envisages that the types of conditions that will be reasonable and necessary will be the same types of conditions that can be imposed on processions and assemblies in the rest of the country under the Public Order Act. These conditions would have to be necessary for ensuring that the specified requirements in relation to access are met.

For example, the Government considers that it may be reasonable and necessary for police to require demonstrators to keep a path clear so that people can access certain entrance points to Parliament. This might be to enable pedestrians to access Parliament but also to enable vehicles to access Parliament. This could involve a re-routing of a procession or a re-positioning of an assembly should numbers be large enough to obstruct access to Parliament.

Question 2: What Codes of Practice, training, policy and guidance will be issued to senior police officers about the operation of their discretion?

We intend to issue a Home Office Circular to the Metropolitan Police and others which will contain guidance on the exercise of the new powers. It is important that the police, Parliamentarians and those wishing to demonstrate around Parliament are clear about what maintaining access to and from the Palace of Westminster means. We shall set out in this guidance the considerations which the police will need to take into account before giving directions which are reasonably believed to be necessary to maintain access to the Palace of Westminster.

The Home Office is already in discussions with the Metropolitan Police about these new powers. Although training will ultimately be a matter for them, the Home Office is actively involved in ensuring that the powers are understood and is happy to assist in widening this understanding.

Question 3: Is it proposed that the ACPO manual on *Keeping the Peace* will be updated to provide guidance to police officers in advance of these powers coming into force?

The manual on *Keeping the Peace* produced by the Association of Chief Police Officers (“ACPO”) is currently being revised and is unlikely to be published until later next year. Given that the exercise of the new powers will be undertaken primarily by officers from the Metropolitan Police, we intend to provide separate specific guidance for the Metropolitan Police on the new powers by way of the Home Office Circular mentioned above. We will consult ACPO on the need to flag the new provisions in the current revision of the manual on *Keeping the Peace*.

Question 4: Why has the Government chosen to set out the requirements which may be specified by the Secretary of State for the purposes of maintaining access to and from Parliament or a specified building in a non-exhaustive rather than an exhaustive list?

Question 5: Why does the Bill enable the Secretary of State to do this by regulation, rather than set out those requirements on the face of the Bill, so as to ensure legal certainty?

I deal with these two questions together. These questions relate to the specification of the requirements that must be met in relation to maintaining access to and from the Palace of

Westminster. New section 14ZA (and equivalent in new section 14ZC) would enable those requirements to be set out in secondary legislation. That legislation could include the entrances which are to be kept open and the access routes for pedestrians and vehicles.

The Government has adopted this approach to ensure that we retain the flexibility necessary to ensure that the regime we put in place can adapt to the reality of changing circumstances. If the requirement to keep entrance A open is put in primary legislation, that would require further primary legislation to amend which entrance is specified. Such an amendment might be required quickly if, for example, entrance A was out of operation for any reason. Rather than try to cater for every possible scenario that may arise on the face of the Bill, the Government has chosen to set out the detailed requirements in secondary legislation.

Equally, the Government considers that this approach actually enhances the legal certainty behind these provisions. It would have been an option, in view of the need for some flexibility, for Schedule 4 simply to provide police with a general public order objective to be met (for example, ensure access to and from Parliament) without further qualification. This, in fact, was the recommendation of the JCHR in its report *Demonstrating respect for rights? A human rights approach to policing protest*.¹⁵⁷ However, the Government considers that the order-making power will enable clear and specific requirements to be set out in legislation.

Although the list of matters that may be included in the order specifying requirements for access is a non-exhaustive list, the Government considers that this is reasonable given that the requirements to be specified are subject to the limitation that they must relate to maintaining access to and from the Palace of Westminster (or specified building in new section 14ZC).

In order to enhance the scrutiny of this order-making power, the Government intends to make available to the committee of the whole House a draft version of the order when these provisions are reached.

Question 6: Please clarify precisely what discretions the Government envisages will or may be conferred on senior police officers by paragraphs 14ZA(5) and 14ZC(8).

The Government envisages that the requirements may be to keep at least one entrance open for pedestrian and vehicle access to the Palace of Westminster at all times. It is not necessarily practical to say that one particular entrance is the “open entrance” at all times and it may be necessary for the senior police officer to consider which entrance, in all the circumstances of the moment, is the most practical one to keep open. It is this type of discretion that the Government envisages will or may be conferred on senior police officers.

Additionally, each demonstration will throw up a range of different factors in terms of the vulnerability of individuals or character of the demonstration. Clearly police officers need to use discretion in enforcing legislation in order to strike the appropriate balance between securing access, facilitating protest, protecting life and keeping the peace.

The discretion that could be conferred on the senior police officer would be exercised in the context of the other limitations on the order-making power. In particular, the Order would have to relate to the maintaining of access to and from the Palace of Westminster.

Question 7: Please explain why the Bill does not set out the conditions which may be imposed on a public procession in an *exhaustive* list.

As discussed above, the current Public Order Act regime does not set out the conditions which may be imposed on a public procession in an exhaustive list, whereas there is an exhaustive list of conditions that can be imposed on public assemblies. Accordingly, Schedule 4 simply reflects the existing position under the Public Order Act.

The Government considers that processions do raise different issues compared to static assemblies and therefore that it is harder to come up with a definitive list of conditions which will cover all eventualities with a moving group. The difference in treatment also reflects the desirability of having tighter controls on the conditions that can be placed on public assemblies compared to public processions. This distinction is reflected in other parts of Part 2 of the Public Order Act. For example, public processions may be prohibited, section 13. There is no equivalent to this section in relation to public assemblies.

On this basis the Government decided to mirror the approach in the rest of the country as we could see no reason in this context to make the regime around Parliament different from the regime elsewhere in the country.

(2) Ratification of treaties

Question 8: Will the Government amend the Bill to require that the Explanatory Memorandum accompanying the treaty should be laid at the same time as the treaty itself, so as to facilitate the proper review of the treaty during the 21 day period?

There are no plans to amend the Bill to require the Government to lay an Explanatory Memorandum at the same time as laying a copy of the treaty. It is the Government's intention to continue the practice, established in 1997, that an Explanatory Memorandum should accompany every treaty laid under the Ponsonby Rule. This means that each treaty laid under clause 21 will also have a memorandum laid with it.

The Government does not consider it necessary to convert this practice into a statutory requirement. The Government made a clear commitment in 1997 and has adhered to it consistently. It is and will continue to be in the Government's own interest to explain to Parliament its reasons for proposing to ratify a treaty. Given the legal effects that the Bill will confer on a vote by either House against ratification, it will be even more important in the future for Government to provide this information to Parliament to ensure that its case is set out clearly. The Explanatory Memorandum is one particular mechanism for providing background to Parliament. It would be preferable not to set this in stone in a way that might inhibit the evolution of new and better ways of achieving the same goal in future.

Question 9: Will the Government undertake to notify relevant Committees when the treaty has been laid, to enable those Committees to embark early on their scrutiny?

The Government is happy to reiterate its undertaking, first given in 2000 to the House of Commons Procedure Committee,¹⁵⁸ that copies of all treaties laid will also be sent to the relevant select committee at the same time. This is now established practice. As you letter notes, the Government has made a particular commitment to facilitate the involvement of the JCHR where a treaty raises significant human rights issues.¹⁵⁹

Question 10: (a) Why should the House of Lords' powers in relation to treaties be any less than those of the House of Commons? (b) Is there any constitutional convention which suggests that the Lords' powers in relation to matters of this kind are to be any less than those of the Commons? (c) Was any such distinction ever recognised in practice under the Ponsonby Rule?

The House of Lords has a vital role to play in providing expert advice on treaties, but the legislation should reflect the different roles the Commons and Lords play in the parliamentary process. In particular, the current drafting reflects the primacy of the House of Commons as the chamber which is democratically elected. The Government considers it inappropriate for the House of Lords to be able to veto ratification of a treaty where the House of Commons does not wish to exercise such a veto. The requirement in the Bill for the Government to lay a statement before both Houses if it still wished to proceed with ratification of a treaty after the Lords had voted against it would force the Government to reflect further on its position, address the views of the Lords, and explain its proposed actions.

This approach is consistent with the current balance of power between the two Houses of Parliament as a matter both of law and convention. For example:¹⁶⁰

The Parliament Act 1911 provides that money bills may receive Royal Assent without approval of the House of Lords. The House of Lords may also delay, but not ultimately veto other public bills which are first introduced in the Commons, other than if they extend the life of a Parliament.

- iii. The Salisbury-Addison convention provides that in the House of Lords, a manifesto Bill is, amongst other things, accorded a second reading and is not subject to "wrecking amendments".
- iv. If the Commons disagree to Lords amendments on the grounds of financial privilege, by convention the House of Lords should not send back amendments which invite the same response.

Copies of Command Papers are laid before both Houses under the Ponsonby Rule, and either House can debate and vote on a treaty. But since the Ponsonby Rule does not provide for a legally binding vote by either House the question of a legal distinction between the powers of the Commons and Lords does not arise. Under the present system, the response of the Government to a negative vote in either House is a matter for political judgement.

¹⁵⁸ See the Government Response to the Second Report of the Committee: Parliamentary Scrutiny of Treaties (Second Special Report 1999-2000) HC 990.

¹⁵⁹ Joint Committee on Human Rights: Government Responses to Reports from the Committee in the last Parliament (Eighth Report of 2005-06) HL Paper 104 HC 850.

¹⁶⁰ See further An Elected Second Chamber: Further reform of the House of Lords (July 2008) Cm 7438, Chapter 5.

This matter was considered by the Joint Committee on the Draft Constitutional Renewal Bill. That committee agreed with the Government's proposals as it concerned the balance of power between the two Houses, at least while the House of Lords retains its current composition.¹⁶¹

Question 11: Should the Minister be required to lay a statement explaining why any request for an extension of the 21 day sitting period has been refused?

The Government does not consider that there should be a statutory requirement for a Minister to lay a statement in circumstances where a request for an extension of time has been refused. According to current practice based upon the Government's undertaking given in 2000, requests for an extension of time come from a select committee.¹⁶² It is likely that when a Minister lays a statement under clause 22 to extend the period, he or she will be doing so following such a request from a select committee. Should the Minister decide to refuse the select committee's request in whole or in part or discuss the matter further with the committee, it would be open to the select committee to bring the correspondence to Parliament's attention.

Question 12: (a) What is the justification for including a power for a Minister to disapply the new statutory regime in exceptional cases? (b) What sort of exception does the Government have in mind? (c) Are there any examples of treaties which have been ratified without being laid before Parliament (since the advent of the Ponsonby Rule in 1924)?

Clause 23 reflects long-established practice whereby, in exceptional cases where it is not possible to complete the usual laying procedure, alternative means to consult and inform Parliament may be used. The use of such procedures has in fact been very rare. Examples of alternative procedures that have been used include a statement during a debate, a written ministerial statement and, on one occasion in 1942, the (rapid) passage of a Bill. Where Parliament is in recess, clearly different methods have to be used such as a letter to or a meeting with the Chair of the relevant select committee or the Leaders of the Opposition. The appropriate steps will of course vary according to the subject matter of the treaty, the level of parliamentary interest and the circumstances of the urgency.

The Government has no intention of invoking exceptional procedures in any kinds of situation for which it would not currently consider alternative procedures under the Ponsonby Rule. But trying to specify precise conditions for the use of this exceptional procedure in legislation would be unworkable. It is impossible to predict in advance what those circumstances might be since by their very nature they tend to arise through exceptional combinations of a range of factors.

There are very few examples of treaties that have been ratified without being laid before Parliament in some form since the Ponsonby Rule began in 1924 – although consistent adherence to the Rule only began in 1929. The Consultation Document on War Powers and Treaties (published on 25 October 2007) gives examples to illustrate the variety of alternative procedures that have been used but only one of these, the Mutual Defence

¹⁶¹ Joint Committee on the Draft Constitutional Renewal Bill, Draft Constitutional Renewal Bill (Session 2007-08) HL Paper 166-I; HC Paper 551-I.

¹⁶² Above n 158.

Agreement with the United States in 1950, was signed and accepted without having first been laid before Parliament; on this occasion the Prime Minister approached the Leaders of the Opposition and the Liberal party and showed them the text of the Agreement beforehand. Two other examples (Muscat Commercial Treaty 1939 and the Agreement for the Admission of Germany to the European Danube Commission 1939) where the texts were not laid prior to ratification date from before the Second World War.

(3) The right to a fair hearing and access to court in the determination of civil rights

Question 13: Will the Government agree to amend the Bill so as to specify the detail of the procedure to be used in removing the First Commissioner or Commissioners from office; or at the very least publish the detail of the procedure which it intends to set out in the Commissioners' terms of appointment?

The Bill provides limited grounds on which the First Commissioner or a Commissioner may be removed by the Minister for the Civil Service. Paragraph 5(4) of Schedule 1 to the Bill provides that the conditions that must be met are:

- a) the person is absent from three successive meetings of the Commission without the Commission's approval;
- b) the person is convicted of an offence;
- c) the person becomes bankrupt; or
- d) the person is unfit or unable to carry out the functions of the office.

We consider that the removal of the First Commissioner or a Commissioner is likely to engage Article 6(1) as it is likely to constitute the determination of a civil right within Article 6(1) but that the combination of the procedure to be adopted in removal and the possibility of judicial review of the decision of the Minister would satisfy the requirements of Article 6.

It is not considered necessary to determine the procedure to be used in removing the First Commissioner or Commissioners from office on the face of the Bill. The process that is adopted must be fair in the context of the conditions that must be met.

Question 14: Would civil rights be in play in cases where the complaints about a breach of the code by a civil servant involve allegations of such serious misconduct that an adverse recommendation by the Commission will have serious consequences for that individual's reputation and inevitably affect their employment status or future prospects?

Question 15: Do you agree that the Commission's decision that the code of conduct has been breached in such cases would in practice be determinative of the civil servants' civil rights, whether or not the Commission's recommendation about how the matter should be resolved is followed?

As set out in the Explanatory Notes to the Bill we do not consider that the Commission's consideration of breaches of the codes engages Article 6(1).

The Commission's role is to consider complaints that a civil servant is being required to act in a way which conflicts with the codes or where they believe that another civil servant has acted in a way which conflicts with the codes. The codes will not create any civil rights but rather set out the standards of behaviour expected of civil servants based on the core values of the civil service. After considering a complaint the Commission may make recommendations about how the matter should be resolved. Consequently, the Commission's actions will not be decisive of a civil right.

There is clear authority for this proposition in the judgment of the Strasbourg court in *Al-Fayed v United Kingdom* (1994) 18 EHRR 393. That case concerned a report by two Government investigators which was published and which concluded that the applicants had misrepresented their origins, wealth and business resources. The court held that the mere fact that an official investigation had made findings detrimental to the applicants did not bring that investigation within the scope of Article 6, because the report was not dispositive of any legal right or obligation.

The letter raises the question of the effect of a recommendation on an individual civil servant's reputation. As noted in the Explanatory Notes, the Commission's recommendations are likely to be made confidentially to the department and civil servants concerned. If a breach of the codes was found and a recommendation made on how the matter should be resolved the department would also have to comply with relevant employment law in determining what, if any, action to take against a civil servant. Further – in common with what they will be required to do under paragraph 17 of Schedule 1 to the Bill – the Commission currently report the outcome of all settled appeals in their annual report. The name of the department and the name of the civil servant who brought the appeal are not given in that report. That report contains summary information as to the nature of complaints.

We do not consider that Article 6(1) is engaged in the circumstances referred to by the JCHR in Questions 14 and 15.

Question 16: Will the Government prescribe, either in the Bill or in regulations, the minimum content of the procedures for the investigation and consideration of complaints by the Commission in order to ensure that the civil servant who is the subject of the complaint receives a fair hearing, including access to court?

The Bill requires the Commission to determine procedures for the making of complaints and for the investigation and consideration of complaints by the Commission (clause 9(5)(a)). Notwithstanding the fact that the Commission's consideration of breaches of the codes does not engage Article 6(1) such procedures must be fair. Furthermore, the act of the Commission in making a recommendation would be amenable to judicial review. We do not consider it necessary for the procedures to be prescribed on the face of the Bill.

Question 17: Is a decision that a selection for appointment has not been made on merit capable of affecting other civil rights, such as the job of the person who was appointed, or, in the case of the person not appointed, the right not to be unlawfully discriminated against in access to employment or promotion?

Question 18: Do you agree that the Commission's decision that a selection for appointment breached the merit principle would in practice be determinative of the

civil servants' civil rights, whether or not the Commission's recommendation about how the matter should be resolved is followed?

It is an Employment Tribunal, not the Commission, which would have jurisdiction to determine whether someone had been unlawfully discriminated against in applying for employment in, or promotion within, the civil service.

The Commission's role is to consider complaints that a selection for appointment breached the requirement that selections be made on merit on the basis of a fair and open competition. We do not consider that consideration of these complaints engages Article 6 as it does not involve the determination of a civil right. In particular, selections for appointment do not amount to a civil right. Further, the Commission's role after considering the complaint is limited to making recommendations.

Question 19: Will the Government prescribe, either in the Bill or in regulations, the minimum content of the procedures for the investigation and consideration of complaints by the Commission in order to ensure that the civil servants affected receive a fair hearing, including access to court?

I would refer the Committee to my response to Question 16.

Question 20: What account has been taken of the judgment of the European Court of Human Rights in *Vilho Eskelinen v Finland*, which clearly starts from a presumption that Article 6(1) applies to the employment of civil servants?

We do not consider Article 6(1) to be engaged in relation to the matters the Commissioners will consider, namely; complaints in relation to codes of conduct for civil servants and complaints that a selection for appointment has breached the requirement that selection be made on the basis of merit and fair and open competition. This is for the reasons set out above and in the Explanatory Notes.

The case of *Eskelinen* is not a material consideration behind these reasons. This is because that case concerned the question of whether Article 6 was applicable in a case involving a salary dispute involving certain civil servants. The judgment sets out the test for the circumstances in which a State can rely on a person's status as a civil servant in excluding the protection embodied in Article 6. The point being made by the Government about applicability of Article 6 in relation to the Commission's investigations is different. As noted above, it relates to the fact that the Commission is only making recommendations, rather than anything to do with the status of the civil servants concerned.

Question 21: Why, in the light of that case, does the presumption that Article 6(1) applies to disputes concerning the employment of civil servants not apply to the mechanisms in the Bill for resolving disputes through the Civil Service Commission?

The judgment of the European Court of Human Rights in *Eskelinen* said there was no justification for the exclusion of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements of civil servants from the guarantees of Article 6(1). Again we do not consider that the matters considered by the Commission engage Article 6(1). The codes of conduct set out the standards of behaviour expected of civil servants based on the core values of the civil service rather than creating civil rights and selections

for appointment do not amount to a civil right. Further, the powers of the Commission are limited to making recommendations. Consequently, the Commission's actions will not be determinative of a civil right.

Question 22: What would be the Government's view of an amendment to this Bill to make clear that the procedures for investigating allegations of misconduct must be fair to those being investigated?

The object of Part 3 of the Bill, where it concerns conduct and discipline matters, is to provide the House of Lords with powers that it lacks. The Government considers that the procedures put in place by the House of Lords concerning the disciplining of its members is properly a matter for that House. Specifying the procedure to be followed by a House of Parliament on the face of the legislation would interfere with the privilege of both Houses to set their own procedures.

Even so, the Government is confident that the current procedures in the House of Lords are fair. In particular, members are accorded the procedural safeguards mentioned in the Explanatory Notes, see paragraph 448. These include the fact that concerning investigations by the Sub-Committee on Lords' Interests into breaches of the code of conduct members of the House "have the right to safeguards as rigorous as those applied in the courts and professional disciplinary bodies". Members also have a right of appeal to the Committee for Privileges. The recent investigation of the Sub-Committee on Lords' Interests mentioned in your letter is a case in point. I think that members of the House of Lords regarded that investigation as according to the highest standards of fairness.

You mention that the Government agreed to an amendment to the Parliamentary Standards Bill to ensure that the procedures to be laid down for the conduct of investigations into MPs must be "fair". The crucial distinction in that case was that the procedures are those to be determined by the Independent Parliamentary Standards Authority ("the IPSA").¹⁶³ The IPSA is a statutory body. In the debate in the Lords on the Parliamentary Standards Bill, the Government emphasised – and indeed was pressed by many members to confirm – that the Bill did not impinge on or affect the internal procedures of the Houses of Parliament.¹⁶⁴

Question 23: Why does the Bill not prescribe at least a minimum of procedural safeguards [in relation to the Comptroller and Auditor General] to ensure that the office holders receive a fair hearing and why is there no provision for a right of access to a court?

The independence of the Comptroller and Auditor General, which allows him to make judgements on the use made of public funds free from external considerations, is of supreme importance. Once appointed, changes cannot be made to the terms of his appointment during his period in office. Removing a Comptroller and Auditor General from office is something which should only happen in the most exceptional of circumstances. For that reason, removal is a matter for the Sovereign, on an address from

¹⁶³ See section 9(9) of the Parliamentary Standards Act 2009.

¹⁶⁴ See, in particular, the speech of the Attorney General in the House of Lords on 20 July 2009 (starting at column 1420).

the two Houses of Parliament. That arrangement has been in place now for almost 150 years.

Specifying what procedure the Houses should follow in making such an address risks breaching the privilege of Parliament to devise its own procedures. The terms of the addresses could similarly be expected to fall outside the jurisdiction of the courts. It is possible, however, that events preliminary to the giving of an address, whether in Parliament or outside it, might be covered by the protections of Article 6 and the common law right of procedural fairness. The Government, however, does not believe that it would be appropriate to prescribe a more detailed mechanism for the removal of the Comptroller and Auditor General in the Bill. It believes that to the extent these protections and rights are engaged, they are sufficiently protected by the obligation for Parliament to adopt a procedure that is fair in the circumstances.

(4) Nationality discrimination in Crown employment

Question 24: Please explain how the present law is compatible with these international human rights obligations.

Question 25: Why is the problem of unjustified nationality discrimination in access to Crown employment not dealt with in Part 1 of this Bill?

In light of recent developments I will deal with Questions 24 and 25 together.

It is correct that 95% of civil service posts in the UK are already open to nationals from Commonwealth countries, the European Economic Area (EEA), Switzerland and Turkey and certain family members of EEA, Swiss and Turkish nationals irrespective of their nationality. Further, where certain conditions are satisfied, other non-UK nationals may obtain an alien certificate under the provisions of the Aliens' Employment Act 1955 to work in a civil capacity under the Crown.

The Crown Employment (Nationality) Bill, a handout private members' bill, has been brought forward on a number of occasions; most recently on the 26 January 2009 with the sponsorship of the Chairman of the JCHR. This private members' bill would remove the remaining nationality restrictions in respect of employment or holding of office in a civil capacity under the Crown and would empower a Minister of the Crown to make rules in respect of nationality requirements of certain categories of posts allowing posts to be reserved to UK nationals. The Government supported the private members' bill.

Given that the provisions of the private members' bill were being considered by Parliament it was not appropriate to address these matters in the Bill, introduced on 20 July 2009. Unfortunately there was insufficient parliamentary time for that Bill to complete report stage on 19 October 2009 and it was subsequently withdrawn.

On 3 November 2009, during committee stage of the Bill, the committee of the whole House considered amendments which you had tabled which would have added provisions which are similar to the private members' bill to Part 1. I am happy to say that the Government supported these amendments and that the committee added these provisions to the Bill. The Government is presently considering, amongst other things, whether any

technical modifications are required to those provisions to ensure that they are a fit with the rest of Part 1. Any such amendments will be brought forward at report stage.

(5) *The meaning of “public function” in the Human Rights Act*

Question 26: Please explain when the Government proposes to fill the continuing gap in the legal protection for human rights left by the House of Lords decision in the *YL* case, in public service sectors other than the care home sector, if the opportunity is not taken to do so in this Bill?

The Government recently addressed this issue in detail in its response to the Committee’s Ninth Report of Session 2006-7, which was published on 29 October 2009.

In that report it noted that:

The Government intended to consult on the scope of the Human Rights Act 1998, as presently defined by “public authority” in section 6, as part of the Green Paper published as *Rights and Responsibilities: developing our constitutional framework*.

However, the Green Paper developed in such a way that the inclusion of a discussion about the Human Rights Act, to which the Government remains committed, was not appropriate. Furthermore, the Government is considering the recent judgment of the Court of Appeal in *R (Weaver) v London & Quadrant Housing Trust*, which may be heard in due course by the Supreme Court. The Government nevertheless remains firmly committed to consulting on this issue.

(6) *The Intelligence and Security Committee*

Question 27: In view of continuing serious concerns about the adequacy of the ISC as a parliamentary mechanism for ensuring the accountability of the intelligence and security services, please indicate what further changes to the ISC are currently under consideration to address this problem?

Parliament established the Intelligence and Security Committee (“ISC”) in the Intelligence Services Act 1994. The Committee is the statutory provision for parliamentary scrutiny of the expenditure, administration and policy of the security and intelligence agencies. The Government believes that Parliament has been well served by the ISC since its inception.

The Governance of Britain - Constitutional Renewal White Paper (Cm 7342), put forward a number of proposals to improve the transparency, accountability and effectiveness of the ISC. Following their approval by both Houses, the Government was able to implement those measures immediately without need for legislation. The Government has not ruled out the possibility of further measures but the aim of the reform package was to increase transparency and make scrutiny of the Agencies more effective without compromising national security. If the Government identifies further measures that would make a significant difference to the quality of the oversight the ISC can provide, the Government will then act accordingly. In the meantime, the Government refers the JCHR to its response to its report, *Allegations of UK complicity in torture*.¹⁶⁵

¹⁶⁵ The Government Reply to the Joint Committee on Human Rights report *Allegations of UK Complicity in Torture* (October 2009) Cm 7714.

(7) Royal Marriages and Succession to the Crown

Question 28: Please explain precisely what the Government has done since 27 March 2009 to fulfil its commitment that it would now give “a higher priority” to ending the current discrimination against Catholics in royal marriages and against women in succession to the throne?

Question 29: Now that the Government has had more than 6 months to consider the consequences for the established Church if the discrimination against Catholics in royal marriages were removed, what does it consider those consequences to be?

Question 30: Please specify the precise timetable which the Government proposes for the removal of what it accepts to be unjustified discrimination against women and Catholics in the law governing royal marriages and the succession.

As you acknowledge, I made clear in the debate on Evan Harris’s Bill that this was a complex matter which would require consultation with Commonwealth Governments and would require careful thinking about the implications for the position of the Church of England as the established church.

Since the debate on 27 March, the Government has continued to explore the issues which would be raised by legislation to reform the present rules on Catholic marriage and the succession of women to the Throne. This has included exploration of the legal position in relation to those other countries of which Her Majesty is Queen and discussions with their representatives. As you will realise, this is somewhat untested ground. The only possible precedent is with the abdication of Edward VIII in 1936. However, in 1936 only Australia, Canada and New Zealand of the present realms were independent countries. Although the Statute of Westminster had been passed by the UK Parliament in 1931, it had not been adopted by all the realms at that point. Moreover, since then the ability of the realms to legislate for themselves and the inability of the UK Parliament to legislate on their behalf has been strengthened.

In relation to the position of the Church of England, as you will be aware, the issue relates to the encouragement given to the Catholic partner in the marriage to have any children brought up as Roman Catholics. This raises the possibility that, at some point in the future, the Throne might be held by someone who is forbidden, by the rules of their own Church, to enter into communion with the Church of England.

Because resolution of this issue does not depend on the UK Government alone, it is not possible to specify a precise timetable to which we would hope to work. Although the legislation which would need amending is UK legislation, the other realms have an equal right of consideration. Discussions with the other realms are continuing.

Memorandum submitted by Voices in the Wilderness UK

Voices in the Wilderness UK has been campaigning in solidarity with the people of Iraq since 1998. As a group based in the UK, our focus has principally been the foreign policy of the UK government – economic sanctions, invasion and occupation – policies that have had devastating effects on the people of Iraq. We have organised numerous non-violent

protests in the vicinity of Parliament, and elsewhere, to raise awareness amongst the general public, and those in Parliament and government, about these issues.

We firmly believe that it is the responsibility of a country's citizens to engage with public policy and that it is the responsibility of the state not to interfere unduly with that process. Protest and dissent are a necessary part of this engagement and, as such, are vital to a democratic society. The work of any campaign relies on public expressions of opinion, and public protest is an important part of that. See our submission to the JCHR inquiry into Policing and Protest for our concerns about the policing of protest and the effect of the Serious Organised Crime and Police Act 2005 (SOCPA) in particular¹⁶⁶.

While we welcome the repeal of s132-138 SOCPA contained within the Constitutional Reform and Governance Bill (CRG Bill), we are concerned about the alternative legislation that has been proposed.

There already exists legislation to deal with situations that threaten access to Parliament

The proposed legislation is stated to be restricted to situations which threaten access to Parliament. We consider, however, that there already exists legislation to deal with such situations. Police powers to restrict a demonstration because of 'serious disruption to the life of the community' are contained within the Public Order Act 1986 (POA) and cover the community of Parliament and therefore access to Parliament. No additional legislation should be necessary.

We oppose the use of secondary legislation in this area

Schedule 4 of the CRG Bill amends the POA by adding a new section 14ZA relating to public processions or assemblies. The Secretary of State may make an order by statutory instrument specifying '*requirements that must be met in relation to maintaining access to and from the Palace of Westminster*'. We are concerned that both 'requirements' and 'maintaining access' are not defined in the primary legislation and it is not clear why there should be a need to vary the legislation over time with the possibility that additional 'requirements' be made in secondary legislation.

Additionally, the proposed section 14ZC of the POA would allow for the Secretary of State to make an order specifying 'requirements' that must be met to maintain access to a '*specified building during any week in which the specified building is, or is planned to be, used by a House of Parliament for the purpose of holding meetings*'. Again we are concerned how such secondary legislation may be used and consider that the broad time limit of a week will lead to unnecessary restrictions being put in place.

The POA currently sets out limited reasons why conditions may be imposed on public processions and demonstrations. The proposed legislation sets no limits on the reasons as new 'requirements' may be designated by the Secretary of State. It also introduces unlimited reasons why conditions may be imposed in relation to public processions, stating that 'the conditions that may be imposed under this section include conditions as to the route of the procession...' (14ZA(7)).

166 See Evidence 196, <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47ii.pdf>

We are concerned about the lack of clarity created by the proposed legislation

The lack of definition within the proposed legislation and the use of secondary legislation to add further restrictions will lead to a lack of clarity for the public about what the law is and how it will be applied.

Furthermore, it is not clear how important details relating to restrictions will be handled. This will affect the public's understanding of the situation. For example, how far in advance must orders issued by the Secretary of State be published and for what time limit may they apply? What are the methods by which the public can learn of the current restrictions in place in the area around Parliament or other buildings provided for in Section 14ZC? The SOCPA legislation is an example of how, whilst the general restrictions on protest have been well known, the specific detail of the law and the extent of the designated area have often not been correctly understood and this has led to the widely held perception that all protest in the area is banned. Information that is important for the public to know has been buried on websites and people only become aware of it once they have fallen foul of the law.

On the ground, it is not practicable to organise a demonstration which may be seriously curtailed by an order made in secondary legislation which the organisers may have previously been unaware of.

There is clear evidence that people have been dissuaded from taking part in, or organising, protests around Parliament because of the risk of getting a criminal conviction under SOCPA. The presence of any additional powers around Parliament restricting freedom to protest is likely to continue to have a chilling affect on public expression as people decide it is too risky to participate.

We consider that a designated area of up to 250m is far too extensive for the purposes of the legislation

The limit to 'the area around Parliament' to which the proposed powers would apply, to be defined by the Secretary of State in secondary legislation, extends well beyond Parliament and covers all of parliament Square and a significant part of Whitehall (including the area around Downing Street – another important location for demonstrations). The idea of a protest 'exclusion zone' and the associated uncertainty about the right to protest in that area, will continue to exist. If the stated aim is to ensure access to Parliament, the designation of an area of this size is not necessary.

We are concerned that there is too much scope for the legislation to be enforced in a partisan and inconsistent manner

The proposed section 14ZA allows for a senior police officer to impose conditions if they are of the 'reasonable opinion' that they are necessary to ensure that the 'requirements' laid out by the Secretary of State in secondary legislation are met. We believe that this allows a wide interpretation of 'requirements' that are themselves not clearly laid out in primary legislation and are subject to change.

There is clear evidence that the SOCPA legislation was enforced inconsistently and often applied in a partisan manner. Some unauthorised protests have been dealt with severely while other unauthorised protests have been allowed to go ahead. On the face of it, it appears that the police are making political judgements as to which protests are acceptable. Elsewhere, there is much evidence to suggest that such discretionary powers are often used to limit or stop protest from the outset. The proposed extensions to the POA will add a further element of uncertainty onto what are already often prohibitive restrictions.

We consider that the SOPCA legislation has had a negative impact on freedom of expression elsewhere and we are concerned that extended POA powers could also be misappropriated

Since the restrictions on protest around Parliament were introduced in 2005, we have seen evidence of changing attitudes towards freedom of association and freedom of expression in other parts of the country. For example, a recent campaign by the police in Liverpool to remove political groups from the centre of the city appears to have been greatly but erroneously influenced by the regime of authoritarianism that SOCPA introduced¹⁶⁷. We hope that the repeal of s132-138 of SOCPA will send out a clear message that the measures introduced to restrict protest around Parliament are no longer acceptable but we are also concerned that extended POA powers may be misapplied in a similar way.

We consider that convictions under s132-138 SOCPA should be quashed

A number of people have received criminal records for taking part in, or organising, unauthorised demonstrations near Parliament. Some are taking their cases to the European Court of Human Rights. Given the discredited nature of the restrictions on protest introduced by SOCPA and the repeal of those provisions, we would like to see convictions under s132 SOCPA quashed.

Conclusion

We consider that a repeal of s132-138 of SOCPA is necessary and that no alternative and additional arrangements that restrict protest around Parliament should be put in place. This would help to re-establish a situation in which people feel able to freely assemble and express their opinions without fear of arrest because of their location near Parliament.

We are particularly concerned that the use of secondary legislation, that has not been ratified by Parliament, is undemocratic and creates a lack of clarity for the public and leaves the door open for further restrictions on protest to be put in place. This is likely to lead to the same situation as there was under SOCPA, i.e. that people are unaware of what their actual rights are and finding out what they are requires much research and reliance on information from police officers.

¹⁶⁷ Correspondence from a Merseyside Police sergeant to campaigners: 'Any unauthorised protests will be investigated and legislation applied. I am sure you see the merits of a regularly organised society, which benefits the residents and visitors to the city. An environment where any group of people are allowed to conduct random demonstrations or protests without control or organisation can quickly escalate to anarchy.'

We would therefore like to see section 32(2) and schedule 4 removed from the CRG Bill.

We consider that, given the powers that already exist to place restrictions on protest across the country, and the considerable damage that the SOCPA restrictions have done to the perception of freedom of assembly and expression, the opportunity should be taken to put into legislation a more strongly worded presumption in favour of the right to protest peacefully. Recent developments in the policing of protests, which have been well documented, suggest that the police often take a negative attitude towards a protest from the outset and that they consider expressions of active dissent as outside of 'normal' activity.

Finally, we believe that those in positions of power and whose activities have a great affect on all our lives are a natural focus for protests and should not be shielded from dissent. Any restrictions must comply with human rights legislation and must be limited, transparent and not subject to change.

November 2009

Memorandum on the Video Recordings Bill submitted by the Department of Culture, Media and Sport

Introduction

This memorandum is provided by the Department for Culture, Media and Sport in respect of the Video Recordings Bill. It sets out the reasons why the Department considers that the Bill is compatible with the European Convention on Human Rights. A declaration of compatibility has been made by Mr Sion Simon, Minister for Creative Industries, in respect of the Bill.

General Assessment of compatibility with Convention rights potentially engaged by the Bill

The Bill consists of two clauses and a Schedule and its sole aim is to repeal and revive provisions of the Video Recordings Act 1984 (the "VRA 1984"), following notification of that Act to the European Commission in accordance with the Technical Standards Directive (83/189/EEC, the "Directive"), as amended by 88/182/EEC and 94/10/EC; and codified by 98/34/EC. The purpose of the Directive is to facilitate the free movement of goods in the EU. It lays down a procedure for the provision of information in the field of technical standards and regulations. Under the Directive Member States are required to notify draft technical regulations to the Commission before they are brought into force to enable the Commission and the Member States to have an opportunity to propose amendments to a draft measure in order to remove or reduce barriers which it might create to the free movement of goods. Certain provisions of the VRA 1984, and the labelling regulations made under section 8 of that Act, comprise "technical regulations" as defined in the Directive and are therefore required to be notified to the Commission via the procedure set out therein.

The Bill provides for the repeal of sections 1 to 17, 19, 21 and 22 of the Video Recordings Act 1984, which are revived again on commencement of the 2010 Act, following notification of those provisions to the European Commission on 10th September 2009. The Schedule to the Act makes transitional provision.

The offences set down in the VRA 1984 are currently unenforceable. Until the 1984 Act is repealed and revived by the Bill no new prosecutions may be brought, current prosecutions have had to be dropped and prosecutors cannot oppose appeals made in time against past prosecutions. It is therefore considered imperative that the 1984 Act is revived quickly in order to close the gap in enforcement powers, and the fast track procedure is adopted for this Bill.

The Bill is short and limited in purpose, and on consideration of its clauses and the Schedule, the Department does not consider any issues arise as regards compatibility with the European Convention on Human Rights. In so far as any ECHR issues arise with regards to the Video Recordings Act 1984 itself, these are set out below.

The Committee is provided with this Memorandum, and with a copy of the Explanatory Notes to the Bill, which set out the Departments' analysis of the individual clauses, and also gives details of the Departments' analysis of the overall compatibility of the Bill with the European Convention on Human Rights.

Overview of the Video Recordings Act 1984

The Video Recordings Act 1984 (c.39) (as amended by the Video Recordings Act 1993 (c.24) and by the Criminal Justice and Public Order Act 1994 (c.33)) provides a system for the classification of films and some video games, contained on physical media such as DVD's, or video cassettes (or other storage media). The Act also provides for the regulation and control of the distribution of such "video recordings" in the UK with the object of limiting the extent to which they may be allowed to depict certain matters as specified in sections 2(2) and (3) of the VRA 1984. Section 2(2) and (3) concern depictions of matters such as human sexual activity, acts of gross violence, human genital organs or urinary or excretory functions, or techniques likely to be useful in the commission of offences.

The regulation of video recordings under the VRA 1984 is effected by a system of classification and labeling and the prohibition, subject to exemptions, of the supply of recordings without a classification certificate or in breach of a classification certificate, to persons under a certain age elsewhere than in specified premises or in breach of labeling requirements.

The issue of classification certificates as defined by section 7 of the VRA 1984 is the responsibility of the "designated authority" being a person or persons designated by the Secretary of State in accordance with section 4 and 5 of the Act. Matters to which the designated authority is to have special regard in making any determination as to the suitability of a video work for a classification certificate are specified by Section 4A. Provision for the review by the designated authority of determinations made by them before the coming into force of section 4A as to the suitability of a video work is made by section 4B. Section 8 of the VRA 1984 empowers the Secretary of State to make regulations requiring an indication as to the classification certificate issued to be included on a video

recording containing that work on the recording's container or casing. Unless the video work or supply is exempted under section 2 or 3 respectively it is an offence to supply, or offer to supply, and to have in possession for the purpose of supplying, an unclassified video recording. The VRA 1984 creates further offences in relation to the supplying of a recording in breach of classification certificate; the supply of a recording otherwise than in licensed sex shop; the supply of a recording in breach of labeling requirements and the supply of recording with a false indication as to its classification. Section 14A creates a general defence to offences under the 1984 Act and sections 15 to 16D deal with time limit for prosecutions, offences by bodies corporate, enforcement and extension of the jurisdiction of magistrate's courts. Powers of entry, search and seizure are contained in section 17 and section 21 provides for forfeiture of video recordings by the court.

Thus, under the VRA 1984, a DVD or other video recording cannot be supplied/sold in the UK unless it complies with the classification and labeling requirements set out in the Act. The penalties vary depending on the particular breach but generally the offender is liable to pay a fine or serve a term of imprisonment. Enforcement of the offences is primarily via local Trading Standards officers; although police and customs and excise officers may also be involved in identifying breaches under the Act, which will then be prosecuted via the criminal courts.

Detailed Assessment of the compatibility with convention rights potentially engaged by the Video Recordings Act 1984

The Articles which are potentially engaged by provisions contained in the Video Recordings Act 1984 are Article 6, Article 8, Article 10, and Article 1 of the First Protocol.

Classification of video works

Article 10 is potentially engaged as follows. The right protected by Article 10 encompasses the freedom to receive and/or impart information and ideas (including negative or offensive information¹⁶⁸). Article 10 affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. The designated body (currently, the British Board of Film Classification) is concerned with classifying video works, which includes the provision of age ratings to apply to those works and advice on what is contained within the work. It is arguable that the classification requirement interferes with the Article 10 rights of producers and publishers to impart information to the public.

Article 10 is a qualified right, and interference with this right is compatible with the Convention if prescribed by law and necessary in a democratic society in the interests of a legitimate aim (for example the protection of health or morals and/or the prevention of crime and disorder). The system of regulation and control provided by the VRA 1984 form a range of domestic standards which represent an acceptable balance between the rights of producers and publishers to distribute their work and the legitimate interest in the protection of health or morals, and the prevention of crime or disorder. One of the purposes of the classification of video games is to better protect children and young adults

168 *Handside v UK* (1979) 1 EHRR 737.

from the impact of age-inappropriate material and thus to protect the health and morals of those children.

The provisions of the VRA 1984 also potentially engage Article 1 of the First Protocol. The measures may affect the profitability or viability of the producers and publishers of video works and games, and therefore their economic interests connected with the running of those businesses. Article 1 of the First Protocol is a qualified right, and interference with that right is compatible with the Convention if in accordance with the law and necessary in the public interest. The VRA 1984 strikes an appropriate balance between the rights of businesses to operate freely, and the need to protect public health and morals. The impact of the VRA 1984 is not to prevent businesses from operating freely, but to ensure that they operate freely within a system of regulation that is aimed at better informing parents and consumers about what they will be viewing, having special regard to the ready availability of video recordings and video games to children and young adults. The public interest lies in the protection of children and young adults from viewing games or other video recordings which may be unsuitable for their age or stage of development.

Appeals from classification decisions

Article 6 is potentially engaged as follows. The designated persons who make decisions on classification are the principal office holders of the British Board of Film Classification (BBFC). In designating those persons, the Secretary of State must be satisfied that adequate arrangements will be made for an appeal from classification decisions. The Secretary of State requires that the appeal body set up to hear such appeals is structurally independent of that organisation, in that no members of the BBFC sit on the appeal body. The Department accepts that an appeal from a determination as to whether a video work is suitable for classification and if so, the determination of the classification (age rating) that applies to it, is a civil right for the purposes of Article 6.

The Department has considered whether the appeal system set up falls within the category examined by the European Court of Human Rights in *Tsfayo v United Kingdom*¹⁶⁹. However, the Department considers that the system set up in this case can properly be distinguished from *Tsfayo*. This is primarily because the appeal body is structurally independent from the designated persons who will make the initial decision as to classification. In addition the appeal right in operation under the VRA 1984 is not solely concerned with determinations of fact; and judicial review is also available against the decision of the appeal body.

Offences

The VRA 1984 provides for a series of offences. For those offences the primary burden of proof rests with the prosecution to establish all the elements of each offence; but defences are available to an accused requiring the defendant to prove, on reasonable grounds, his knowledge or belief of certain facts or circumstances pertaining at the time of the offence.

The Department has carefully considered these provisions, bearing in mind that the Video Recordings Act was enacted in 1984, prior to the Human Rights Act 1998. The Department

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has considered, in particular, whether the offences to be applied under the VRA 1984 infringe against the presumption of innocence enshrined in Article 6(2) of the Convention. As part of this consideration, the Department recalls that it is established by Strasbourg and domestic jurisprudence that Member States are permitted to “penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence”¹⁷⁰, and thus Article 6(2) does not create an absolute prohibition against burdens of proof being placed on an accused.

The VRA 1984 is aimed at preventing the supply and distribution of video works, in breach of classification systems set up for the protection of the public, particularly children. The Department considers that in this context it is reasonable to provide a defence to the offences set out in the VRA 1984 that rests on the knowledge or belief of a particular accused at the time he committed the offence. Rights under Article 6(2) are, notwithstanding their importance, qualified rights, and it is acceptable under the Convention to make provisions which potentially infringe those rights as long as they are justified and proportionate measures. The Department considers that placing a burden of proof on an accused to prove his state of knowledge or belief is such a justified and proportionate measure in these circumstances. An accused charged with an offence under the VRA 1984 has a full opportunity to demonstrate his belief or knowledge at the time of the commission of the offence. It is reasonable and proportionate to place this burden upon the accused, given that those matters are solely within his/her knowledge, or are matters to which he/she, more than the prosecution, has access. The facts and circumstances within the accused own knowledge, his state of mind and the reasons why he held the belief in question, his sources of information and supply are known only to him. Conversely it would be unrealistic and unworkable to expect the prosecution to prove such matters. Therefore to place a burden on the defendant to prove on the balance of probabilities that the accused acted honestly, and reasonably believed in the lawfulness of what he did at the time of the commission of the offence is compatible with Article 6(2).

The Department considers further that, given the legitimate aim being pursued, the general public interest in maintaining the robustness of the classification system particularly to protect children from access to inappropriate material, and the nature of the penalties to which a person convicted of one of the offences would be subject, placing a burden of proof on an accused as to his reasonable knowledge/belief is proportionate. The Department considers that the imposition of a burden on the defendant in these circumstances is both necessary and justified; it is defined within reasonable limits; it is proportionate and a proper balance has been struck between the interests of the public and the interests of the defendant.

Enforcement of classification provisions

Article 8 is potentially engaged as follows. Section 17 of the VRA 1984 sets out entry, search and seizure provisions. The purpose of these provisions is to prevent crime and/or to protect the rights of others. Judicial authorisation governs the use of the powers set out in section 17 of the VRA 1984; a justice of the peace must authorise a constable to enter and search premises and he can only do so if he is satisfied on oath that there are reasonable grounds for suspecting that an offence under the Act is being committed, and that there is

170 *Salabiaku v France* (1988) 13 EHRR 379, at paragraph 27.

evidence that the offence is or has been committed are on those premises. A constable may only seize property in these circumstances if he has reasonable grounds to believe that that property may be required as evidence in relation to criminal proceedings under the Act. The Department considers therefore that the VRA 1984 sets out adequate and effective safeguards to ensure that there is no abuse of the powers, and that the law governing the searches and subsequent seizure of property is clear, accessible and subject to judicial oversight. In those circumstances, the Department considers that the provisions amount to an acceptable balance between Article 8 rights, and the public interest in upholding, by criminal sanction if appropriate, the classification system.

Article 1 of the First Protocol is potentially engaged as follows. Section 21 of the VRA 1984 provides for the forfeiture of any video recording where a person is convicted of any offence under the Act and it is ordered by a court that the goods are to be forfeited. Rights under Article 1 of the First Protocol are qualified rights. It is acceptable under the Convention to interfere with such rights provided that the interference is prescribed by law and is necessary in the public interest. Where a criminal offence has been committed and goods are seized that were the subject of those proceedings, it is in the public interest to dispose of such property to further prevent the commission of offences and the spread of illegal material. The court cannot make a forfeiture order unless it gives the owner of the goods (or any person with an interest in the goods) an opportunity to be heard or to say why the order should not be made. An order cannot be made until after the time to appeal against a conviction has expired and, if an appeal has been instituted, that appeal has been determined. The Department considers that this provision represents an acceptable balance between the private rights of persons adversely affected by the loss of their possessions through forfeiture and the public interest in the proper operation of the classification system and the enforcement of that system through proper legal process.

Conclusion

In view of all the above considerations, it is considered that the Video Recordings Bill is compatible with the Convention.

December 2009

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