



House of Lords
House of Commons
Joint Committee on
Human Rights

**Legislative Scrutiny: 1)
Health and Social Care Bill
and 2) Child Maintenance
and Other Payments Bill:
Government Response**

Twelfth Report of Session 2007-08

Drawing special attention to:

Health and Social Care Bill

Child Maintenance and Other Payments Bill



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*Report, together with formal minutes and
appendix*

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Joint Committee on Human Rights

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

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

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Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Bill Sinton (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Committee Specialists), Jackie Recardo (Committee Assistant), Karen Barrett (Committee Secretary) and Sharon Still (Senior Office Clerk).

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Summary

As part of its programme of scrutiny of bills for significant human rights implications, the Committee draws the special attention of both Houses to (i) the Health and Social Care Bill and (ii) the Government's response to the Committee's Report on the Child Maintenance and Other Payments Bill.

(i) Health and Social Care Bill

This is the Committee's Second Report on the Health and Social Care Bill. In its first Report, the Committee proposed amendments to the Bill to ensure that the Care Quality Commission ("CQC") adopts a human rights based approach to its work and to restore the application of the Human Rights Act to people receiving publicly funded health and social care from private providers. The Committee welcomes the Minister's undertaking to look again at publicly arranged health and adult social care and the Human Rights Act. The Committee expects the Government to confirm how it intends to proceed on this issue in time to allow for a full debate in the House of Lords (paragraphs 1.1 – 1.4).

In this Report, the Committee draws attention to three further issues which raise significant human rights concerns: (1) the protection of public health and the use of compulsory powers; (2) the powers of the Office of the Health Professions Adjudicator; and (3) the scope of the information sharing powers and duties proposed for the CQC by the Bill (paragraphs 1.5 – 1.70).

Public Health and Compulsory Powers

Part 3 of the Bill provides for a major overhaul of the existing mechanisms for dealing with public health risks in England and Wales. The Committee accepts that the Government clearly has a duty to respond to public health risks which pose a threat to public safety. In so far as the Government intends to use this Bill to ensure that public health controls may be tailored in order to ensure they are proportionate, the Committee considers that this Bill has the potential to be a human rights enhancing measure. However, the range of compulsory powers proposed in the Bill significantly engage human rights, including the right to liberty. These proposals must be subject to meaningful parliamentary scrutiny and accompanied by appropriate safeguards to ensure the protection of human rights (paragraphs 1.6 – 1.12).

This part of the Bill includes provisions to grant or enable the use of a range of compulsory powers. Many of the details of how these powers may be exercised are left to secondary legislation. In the Committee's view this is inappropriate for legislation which has serious implications for individual rights (paragraph 1.12).

The Committee is concerned by the breadth of the proposal to enable the relevant Minister to make Health Protection Orders, including Orders which enable decision makers to subject individuals to medical examination, detention, quarantine or isolation. The Committee is particularly concerned about the implications which these powers may have for individual rights, and in particular, the right to liberty. The Committee recommends that the Minister should explain to Parliament why the general power to impose restrictions and requirements on individuals should not be more comprehensively defined in the Bill. The Committee also recommends that safeguards should be included on the face of the Bill. It

recommends that amendments should be brought forward to introduce enhanced safeguards for the protection of human rights. These include:

- Requiring the relevant Minister to consider whether a measure which enables or imposes restrictions or requirements on individuals is not only proportionate to the immediate purpose of that measure, but also to the public health risk it seeks to address;
- Strengthening the test for whether a public health threat is “serious and imminent”;
- Strengthening the proposals in the Bill for parliamentary scrutiny of Health Protection Orders in cases where there may be a need for urgency (i.e. under the proposed emergency procedure) (paragraphs 1.6-1.44).

The Committee makes recommendations to improve the safeguards which are proposed to accompany Public Health Orders made on application by local authorities to a Justice of the Peace. These include proposals to amend the Bill to include a presumption that detention, quarantine and isolation are measures of last resort. The Committee considers that the evidence necessary to support Public Health Orders must include objective, medical evidence of the risk to public health.

The Committee also recommends that the Government provide a further explanation of the evidence behind their view that Public Health Orders which authorise detention, quarantine and isolation should last for up to 28 days, and then should be open to renewal or extension for a period to be specified in secondary legislation. The Committee considers that a short time frame for Orders which impose detention, quarantine or isolation and provisions for review at close intervals would reduce any risk that individuals may be deprived of their liberty in breach of Article 5 ECHR. The Committee asks that the Government provide evidence, including any scientific evidence they rely on, to support the proposed 28 day, extendable, limit. (paragraphs 1.44 – 1.54).

Powers of Office of the Health Professions Adjudicator (“OHPA”)

Subject to the application of the flexible, heightened standard in cases which may involve the removal of the right of a health professional to exercise his or her profession or which may involve allegations of a criminal offence, the Committee accepts the Government’s view that a change in the standard of proof required in Fitness to Practise cases conducted by OHPA is unlikely to lead to an increased risk of incompatibility with the right to a fair hearing (as guaranteed by Article 6 ECHR). The Committee proposes that guidance should be given to Legal Assessors by OHPA to ensure that the appropriate standard is applied in all cases where these circumstances may arise, including on appeal (paragraphs 1.55 – 1.60).

Information sharing powers and duties of CQC

The Committee is concerned that broad information sharing powers and duties proposed for CQC are accompanied by relatively few safeguards for the protection of sensitive personal which CQC and its staff may handle. The Committee suggests a number of amendments to strengthen these safeguards to protect personal information of both service users and staff (paragraphs 1.61 – 1.69).

(ii) Child Maintenance and Other Payments Bill: Government Response

The Committee publishes the Government Response to its Report on the Child Maintenance and Other Payments Bill as an Appendix to this Report (paragraph 2.1).

Government Bills

Bills drawn to the special attention of each House

1 Health and Social Care Bill

Date introduced to first House	15 November 2007
Date introduced to second House	19 February 2008
Current Bill Number	HL Bill 33
Previous Reports	Eighth Report of Session 2007-08 (HL 46/HC 303)

Background

1.1 We published our first Report on this Bill on 6 February 2008.¹ The Bill completed its passage through the House of Commons on 18 February 2008.

1.2 This Bill has a number of provisions with significant human rights implications.² In our earlier Report, we focused on specific amendments which could be made to the Bill, designed to clarify the scope of the Human Rights Act in relation to private sector providers of health and social care and to implement some of the recommendations we made in our report on Older People in Healthcare. These were designed to enhance the protection of the rights of service users in the health and social care sectors, including through enhancing the obligations on the proposed Care Quality Commission (“CQC”) to ensure it takes a human rights based approach to its work and by ensuring that those receiving publicly funded care from a private or voluntary sector care provider would be directly protected by the provisions of the Human Rights Act 1998 (“HRA”). During Report Stage in the House of Commons, the Minister reassured our Chair that the Government intended to consider further action to meet our concerns:

I am sympathetic to ...the concerns expressed by evidence givers and by members of the Public Bill Committee and the JCHR. I undertake to consider the issue of publicly arranged health and adult social care and the Human Rights Act in the context of this Bill with a view to the Government reporting back on that important issue during its passage in the other place.³

1.3 The Minister has undertaken to examine the issue of publicly arranged health and social care provision and the Human Rights Act again in the context of this Bill. We look forward to the Minister’s amendment in good time for a full debate on this issue in the House of Lords.

1.4 On 6 December 2007, we wrote to the Minister raising a number of significant human rights issues. We received his response on 7 January 2008. We published this correspondence with our first Report.⁴ In so far as the purpose of this Bill is to enhance the

¹ Eighth Report of Session 2007-08, *Legislative Scrutiny: Health and Social Care Bill*, HL Paper 46/HC 303 (“First Report”)

² First Report, paragraph 1.2

³ HC Deb, 18 February 2008, Col 59. See also HC Deb, 18 February 2008, Col 61, Col 113

⁴ First Report, Appendices 1 - 3

rights of patients and users of health and social care services, and to protect people from the threats posed by public health risks, it has the potential to be a significant human rights enhancing measure. We consider that this Bill provides an opportunity to ensure that dignity and respect for individual rights is at the heart of public health provision. **A number of Members in the House of Commons shared our serious concern that the Bill does not adequately highlight the importance of a human rights based approach to the work of the CQC.⁵ A clear framework for the protection of the rights and dignity of vulnerable users of health and social care could and should be provided in this Bill and we recommend that the Government bring forward amendments in the House of Lords to remedy this shortcoming.**

1.5 In this Report, we focus on three further matters which we consider raise significant human rights issues: (a) the protection of public health and the use of compulsory powers (Part 3); (b) the powers of the Office of the Health Professions Adjudicator; and (c) the scope of the information sharing powers and duties proposed by the Bill.

(a) Protection of public health and compulsory powers (Part 3)

1.6 The Bill provides for a major overhaul of the existing mechanisms for dealing with public health risks in England and Wales. It amends the provisions of the Public Health (Control of Disease) 1984 Act (“the Public Health Act”) and includes a number of provisions which will either grant or enable the broad use of compulsory powers, including powers of quarantine, detention and compulsory medical examination, either as a result of judicial, executive or administrative decisions.⁶ The Impact Assessment which accompanies the Bill explains that the existing legislation is

[I]nsufficiently equipped to deal effectively with today’s public health concerns.⁷

1.7 Specific deficiencies which the Government has identified in the Public Health Act 1984 include:

- the Act applies only to disease and infection, and does not extend to contamination;
- the Act applies to specific diseases and circumstances, which must be named (“notifiable diseases”) and the Government consider that more flexible powers are required to deal with dangers to public health;
- some existing provisions apply when a person is “suffering” from a disease, rather than when a person is thought to have been, or may have been, infected or contaminated;
- existing provisions include powers to remove and detain persons who are suffering from disease: the Government considers that it will be a human rights enhancing measure to allow a more flexible approach to public health risks.⁸

⁵ HC Deb, 18 February 2008, Cols 45 – 63.

⁶ Clause 116 and Schedule 11. These provisions follow a consultation by the Government earlier this year. *Review of Parts II, V, VI of the Public Health (Control of Disease) Act 1984, A consultation*, Department of Health, 28 March 2007.

⁷ Department of Health, Impact Assessments for the Health and Social Care Bill, November 2007, “*Impact Assessment of Public Health Protection Clauses of the Health and Social Care Bill*”. See also Law Commission, Ninth Law Reform Programme, 2005, paras 4.2 – 4.11

1.8 The Government has explained that its proposals will allow the UK to give effect to the International Health Regulations (2005) (“IHR”) issued by the World Health Organisation, and any subsequent international agreements or recommendations designed to protect public health. The IHR came into force in June 2007 and adopt an “all hazards” approach, that is, they take a precautionary approach and are concerned with measures to provide a public health response to the spread of “any illness or medical condition, irrespective of origin or source, that presents or could present significant harm to humans” (emphasis added).⁹

1.9 The proposed new powers for the protection of public health include:

- Powers for local authorities to ask a justice of the peace (“JP”) to order compulsory health measures in relation to persons, things, or premises (“Public Health Orders”);¹⁰
- Enabling powers for the Secretary of State to make regulations for the purpose of “preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination” (“Health Protection Regulations”).¹¹

These regulation making powers are very broad and include powers enabling the imposition of restrictions on persons, things or premises (“Restrictions or Requirements”). These powers include restrictions on gatherings and events and in certain circumstances may include powers which could also be imposed by a Public Health Order (i.e. including provisions in relation to persons, premises and things) (“Special Restrictions or Requirements”). Health Protection Regulations which impose Special Restrictions or Requirements, or otherwise have “a significant effect on a person’s rights” are made by affirmative resolution or a special emergency procedure. It will be for the Secretary of State to declare whether a measure contains the relevant restrictions or has a “significant effect on a person’s rights”. Under the emergency procedure, the Secretary of State, or the Welsh Ministers in Wales may make regulations without parliamentary approval if the regulations include a statement that “by reason of urgency, it is necessary to make the order”. Such orders will lapse (a) if they are rejected by either House of Parliament, or in Wales, the Welsh Assembly or (b) at the end of 28 days, unless approved.

- The Secretary of State will also have powers to make International Health Protection Regulations (New Section 45B). These powers are similarly broad and allow the Secretary of State, or the Welsh Ministers in Wales, to make provision in relation to the detention of vessels, aircraft, trains or other conveyances, to provide for the medical examination, detention, quarantine and isolation of persons and to give effect to any international agreement or arrangement relating to the spread of infection or contamination.

⁸ Department of Health, Impact Assessments for the Health and Social Care Bill, November 2007, “*Impact Assessment of Public Health Protection Clauses of the Health and Social Care Bill*”.

⁹ Article 2.

¹⁰ Clause 123, New Sections 45G, 45H and 45I, Public Health (Control of Disease) Act 1984) (“Public Health Orders”).

¹¹ Clause 123, New Section 45C.

1.10 The Government rightly accepts that these provisions engage a number of Convention rights.¹² The Government has given particular consideration to provisions “relating to quarantine, isolation, detention, medical examination, and powers of entry in respect of public health investigations.”¹³ The Government considers that the “purpose of these provisions is to protect the public from significant public health risks and the Convention itself envisages that certain rights can lawfully be interfered with on public health grounds. Safeguards, such as limits on the period in respect of detention, quarantine or isolation, are also built into the legislation to minimise impact on individuals”.¹⁴ There is more extensive analysis of the Government’s views on Convention compatibility with Article 5 (the right to liberty), Article 8 (the right to respect for private and family life), Article 11 (the right to freedom of association) and Article 1, Protocol 1 ECHR (the right to the peaceful enjoyment of possessions), in both the Explanatory Notes and the accompanying impact assessment.¹⁵

1.11 These provisions present a significant shift from the existing Public Health Act, which makes specific provision for defined powers for the control of the risks posed by particular, named diseases, to a regime based on broad, flexible, enabling powers for the Secretary of State and broad powers for justices of the peace in response to risks posed by “infection” or “contamination”. The Government clearly has a duty to respond to public health risks in a way which protects the health and safety of its citizens. In so far as the Government intends to use this Bill, and these provisions, to ensure that any public health controls are proportionate to the risk posed, this Bill has the potential to be a human rights enhancing measure. For example, we welcome the decision to increase the involvement of JPs in the decisions which local authorities take in relation to public health measures; to provide alternatives to removal to a hospital for treatment in Public Health Orders; and the decision not to propose powers to compel an individual to undergo medical treatment.¹⁶

1.12 However, compulsory powers which significantly engage human rights must be subject to meaningful parliamentary scrutiny and accompanied by appropriate safeguards to ensure the protection of individual rights. **Many of the details of this Part, including safeguards for individual rights, are left to secondary legislation. It remains our view that it is inappropriate for legislation which has serious implications for individual rights to be based principally on enabling powers with detailed safeguards left to secondary legislation. We outline some examples and proposals for clarification, below.**

Detention, quarantine and isolation: the right to liberty

1.13 The European Convention on Human Rights strongly protects the right to liberty. Article 5(1) provides that no-one shall be deprived of his or her liberty unless the deprivation is carried out in accordance with a procedure prescribed by law and is necessary in a democratic society on one of a limited number of grounds. One of those grounds, set out in Article 5(1) (e) is deprivation “for the prevention of the spreading of infectious diseases”. The case law of the European Court of Human Rights specifies that

¹² EN – HL Bill 33, paras 601 – 603; See also First Report, Appendix 1, pages 28 – 31.

¹³ EN, para 601.

¹⁴ Ibid.

¹⁵ Department of Health, Impact Assessments for the Health and Social Care Bill, *Impact Assessment of Public Health Protection Clauses*, 16 November 2007, Human Rights Impact Assessment, E.1 – E.10.

¹⁶ Human Rights Impact Assessment, Ibid, E.6.

any of the exceptions to the right to liberty in Article 5(1) must be construed narrowly and the Court has been exceedingly reluctant to accept any deviation from the plain meaning of the text of the existing exemptions.¹⁷ The Minister accepts that, although the Bill should provide adequate powers to impose restrictions which do not impose a deprivation of liberty, the Bill does allow for measures which may engage Article 5(1)(e).¹⁸

1.14 The Bill clearly makes provision for the deprivation of liberty in respect of both “infection” and “contamination”, through provision for detention at hospital or elsewhere and through the use of isolation and quarantine measures, without limitation on duration or the circumstances in which an individual may be held.¹⁹

1.15 We asked the Minister to explain the Government’s view that detention for the purposes of preventing the spread of “contamination” would fall within the existing exemption. He told us:

Article 5(1)(e) enables a restriction of liberty to be imposed for the prevention of the spreading of infectious diseases. However, the Convention is a living instrument to be interpreted in the light of current circumstances. Article 3 of the IHR (principles) requires that implementation of the IHR now recognises diseases caused by contamination, the Government considers that Article 5(1)(e) may now be read as allowing the restriction of the right to liberty for the prevention of contamination.

1.16 The European Court of Human Rights exercises extreme caution in expanding the definitions in Article 5(1)(e). It considers that the existing list of exemptions is exhaustive and that any single exemption from Article 5(1) needs to be closely defined in order to protect individuals from arbitrary detention. In order to determine whether the exemption relating to “infectious diseases” covers “contamination”, the Court will look at the ordinary meaning of those words and their object and purpose. The European Court of Human Rights considers that this purpose is two-fold and based upon the categories of persons listed in the exemptions from Article 5(1):

[T]he predominant reason why the Convention allows the persons mentioned in paragraph 1(e) of Article 5 to be deprived of their liberty is not only that they are dangerous for public safety but also that their own interests may necessitate their detention.²⁰

1.17 Any detention permitted by Article 5(1)(e) must be accompanied by adequate safeguards to protect against arbitrary detention:

The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person be detained. This means that it does not suffice that the deprivation of liberty is

¹⁷ *Witold Litwa v Poland*, App No 26629/95, Judgment 4 April 2000, paras 49 – 50, 57 – 63.

¹⁸ EN, paras 605 – 606; See also First Report, Annex 1, Page 30-31; Annex 2, page 46, paras 16 – 19.

¹⁹ EN, para 606; First Report, Appendix 3, pages 45 – 47.

²⁰ *Witold Litwa v Poland*, App No 26629/95, Judgment, 4 April 2000.

executed in conformity with national law but it must also be necessary in the circumstances.²¹

1.18 We accept that public health measures may need to be taken to meet a significant risk caused by contamination by biological, toxic, radioactive or other agents. The provisions for detention, isolation and quarantine in these circumstances must be clearly defined and accompanied by appropriate safeguards to avoid arbitrariness. If this is not done, the European Court of Human Rights would subject any application based on a breach of Article 5(1) to very close scrutiny. With proper safeguards, we think it likely that the European Court of Human Rights would accept the Government’s argument that diseases caused by contamination fall within the listed exemptions to the Convention right to liberty. Without such safeguards, we consider that the Court will be less inclined to accept the Government’s view that the Convention definition of “disease” should cover powers to deprive a person of their liberty as a result of contamination as well as infection.

Enabling detention through Health Protection Regulations

1.19 The Government appears to be seeking a broad power to enable decision makers to impose restrictions and requirements on individuals, including medical examination, detention, quarantine or isolation, by administrative action. These “Special Restrictions or Requirements”, which otherwise could only be ordered by JPs, involve significant interferences with individual rights, including the right to private life and the right to liberty. In our view, the power to detain, or to subject to isolation or quarantine, clearly would include the power to impose restrictions which could amount to a deprivation of liberty covered by Article 5 ECHR.

1.20 The Bill provides that Health Protection Regulations cannot directly impose any requirement for medical examination, removal to hospital or other places, detention or isolation and quarantine.²² It appears however, that, provided there is a “serious and imminent threat to public health” or that it is contingent on there being such a threat, that Regulations may enable the Secretary of State, Local Authorities or other decision makers to impose any of the Special Restrictions or Requirements. As the Minister explained in correspondence:

Section 45D(3) prohibits such regulations from imposing requirements directly for medical examination, detention, quarantine or isolation. Section 45D(4) does allow these types of measures to be imposed by a decision maker in the event of a serious and imminent threat to public health.²³

1.21 The Minister later confirmed that:

The power to make regulations enabling the imposition of medical examination, removal, detention, quarantine or isolation is aimed at a serious and imminent threat of infection or contamination which may cause significant harm to public health.²⁴

²¹ Ibid, para 78.

²² New Section 45D(3).

²³ First Report, Appendix 1, page 29.

²⁴ First Report Appendix 3, page 50.

1.22 The Minister provided the example of a SARS outbreak where a local authority might be enabled to “consider and decide whether it is proportionate and necessary to require a symptomatic patient to be isolated in hospital” or to require a person “to be quarantined away from their family”.²⁵

1.23 Compulsory powers enabling serious infringements of individual privacy (such as compulsory medical examination) or enabling the deprivation of liberty through detention, quarantine or isolation must be subject to detailed parliamentary scrutiny. They must not be granted by implication, or in ambiguous, obscure provisions which, as a result, may not be scrutinised effectively. In our view the “principle of legality” which is well established in our common law of human rights, requires powers to be read strictly and requires deprivations of liberty to be expressly authorised by Parliament in the regulation making power.²⁶ Despite the express reference to the inclusion of Special Restrictions or Requirements, it is far from clear from the text of the Bill that Health Protection Regulations contingent on a serious and imminent threat to public health are intended to enable the detention or quarantine of persons. Indeed, conflicting views have been expressed on the effect of these provisions.²⁷ **Amendments should be brought forward to clarify the provisions in Clause 124 and New Section 43C during the Bill’s passage through the House of Lords.**

1.24 **If the Bill is designed to empower the Secretary of State, or the Welsh Ministers in Wales, to impose administrative detention, quarantine or isolation, the Government must provide evidence of the need for such a broad, undefined power and there must be clear and effective safeguards on the face of the Bill to ensure that Health Protection Regulations operate in a way which ensures that people are protected from arbitrary detention in breach of the right to liberty.** We discuss whether the proposed general power to make Health Protection Regulations is necessary, and accompanied by appropriate safeguards, below.

Health Protection Regulations

1.25 In response to the Government’s consultation on its proposals to reform the Public Health Act, Liberty were concerned about the breadth of the regulation making powers proposed for the Secretary of State:

The scope of the suggested power is enormous: “to make provision to prevent, protect against, control and provide a public health response to the spread of disease”. This would allow the Secretary of State to make any regulation whatsoever in the public health field, effectively enabling him/her to rewrite the Act. It is not explained and is in any event unclear, why such a broad power is necessary.²⁸

²⁵ Letter dated 7 January 2008 from Ben Bradshaw, Minister of State for Health Services, Department of Health, Annex B. Copy available from Parliamentary Archives.

²⁶ *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115.

²⁷ House of Commons Library, Research Paper 07/81, Health and Social Care Bill, Bill 9.

23 November 2007, para. 37 advises that “the powers to enforce measures such as medical examination or quarantine are only available to JPs not Ministers and are described in new Section 45G(2)(a)-(b)”.

²⁸ Liberty, Response to the Department of Health Consultation: Review of Parts II, V and VI of the Public Health (Control of Disease) Act 1984, June 2007, para 26.

1.26 We asked the Minister to explain why the general powers to make broad Health Protection Orders were necessary in the light of the range of powers proposed for JPs. The Minister explained:

The regulation making powers in section 45C are meant for a different purpose to that for the powers of a justice of the peace...The regulation making powers ...could enable action to be taken in a uniform manner. For example, in the unlikely event that there was a large outbreak of a highly infectious disease (such as Ebola or SARS), rather than allowing local authorities to overwhelm justices of the peace and lose valuable time by seeking orders for all those unwilling to comply voluntarily with measures to control the spread of disease, regulations...might enable a local authority or other relevant health protection authority to place a requirement on a person who was willing to comply.²⁹

1.27 The Minister told us that Health Protection Regulations could cover situations which a Public Health Order could not. There are likely to be at least three types of domestic Health Protection Regulations:

- Regulations relating to information to protect public health (which, it is proposed, will mirror existing provisions requiring monitoring and notification of diseases; but will relate to listed diseases, forms of contamination or symptoms);
- Regulations relating to local authority powers to protect public health (“Permanent preparedness regulations”) and
- Regulations concerning additional safeguards (“Temporary safeguards”).³⁰

1.28 The Minister explained to us that permanent preparedness regulations could include powers for a local authority to require children to stay away from school and the power to disinfect or decontaminate persons, things or premises if asked to do so. It is proposed that Regulations will give local authorities the power to compensate individuals for cooperating voluntarily with public health measures. These provisions would build upon existing powers in the Public Health Act.

1.29 The Minister told us that the powers could also be used to “create temporary additional safeguards in addition to the permanent preparedness regulations and the specific justice of the peace powers”. It is the Government’s intention to use these powers “if it becomes evident that there is a risk to public health for which additional measures are required”. Although the Minister describes these as “temporary”, in response to a serious and imminent threat to public health, he accepts that “provisions initially introduced as an additional safeguard might prove to be useful provisions for permanent preparedness”. Hypothetical examples of how these provisions might be used include the power to cancel or postpone major events; to allow local authorities to consider and decide on the proportionality of isolation or quarantine; and to create offences relating to the use of property which may be responsible for the spread of disease (dental or other medical tools, for example).

²⁹ First Report, Appendix 3, Page 51.

³⁰ Letter dated 7 January 2008 from Ben Bradshaw, Minister of State for Health Services, Department of Health, Annexes A – B. Copies available from the Parliamentary Archives. See also letter dated 7 January 2008, First Report, Annex 2.

1.30 Our concerns focus on the broad power to make Regulations imposing restrictions and requirements on individuals which could significantly interfere with their individual rights, including the right to liberty and the right to respect for private and family life.

1.31 Given the scope of these powers – which includes a power to create offences - there is a surprising lack of detail on the face of the Bill. Little information has been provided about the proposed purpose of these regulation making powers and so far the Government's explanation of why a general power to impose restrictions on individuals is necessary has been limited. We accept that fast, effective and coordinated action may be required to protect the public from serious public health risks. In the absence of further evidence, we are not persuaded that the need for uniform action in response to national threats justifies the type of “blank cheque” powers which the Government proposes, particularly in respect of Special Restrictions or Requirements which could otherwise be made on application to a JP. The Government expects that JPs will be expected to consider applications on a 24 hour ‘emergency’ basis.³¹ Applications may be considered without notifying affected persons, at the discretion of the JP. During Committee Stage in the House of Commons, the Minister confirmed that a JP may make Public Health Orders which apply to large groups of persons or numbers of things and premises, without the need for separate applications.³² Local authorities are required by the Bill to cooperate with each other in deciding which authority should make an application for an Order. The Secretary of State must explain why the Bill should not be amended to limit the powers proposed for the Secretary of State (and the Welsh Ministers in Wales) to specific situations and to include appropriate, tailored safeguards for individual rights. For example, the Minister has outlined in correspondence specific purposes for which these powers may be used:

- Information sharing and monitoring;³³
- Enabling local authorities to make provision in relation to keeping children away from school;³⁴
- Enabling local authorities to make provision in respect of decontamination or disinfection;³⁵
- Enabling local authorities to make provision in respect of compensation for voluntary cooperation in respect of risks to public health;³⁶
- Enabling local authorities to levy or set aside charges to meet their costs incurred in respect of public health risks;³⁷
- Enabling the Secretary of State to take steps to control events and gatherings of groups of people in respect of risks to public health.³⁸

³¹ First Report, Appendix 3, page 50.

³² PBC Deb, 10 Jan 2008, Cols 101 – 102, Q248 .

³³ EN, para 602.

³⁴ First Report, Appendix 3, Page 52. Letter dated 7 January 2008 from Ben Bradshaw, Minister of State for Health Services, Department of Health, Annexes A. Copies available from the Parliamentary Archives.

³⁵ Letter dated 7 January 2008 from Ben Bradshaw, Minister of State for Health Services, Department of Health, Annexes A – B. Copies available from the Parliamentary Archives.

³⁶ Letter dated 7 January 2008 from Ben Bradshaw, Minister of State for Health Services, Department of Health, Annex A. Copies available from the Parliamentary Archives.

³⁷ Letter dated 7 January 2008 from Ben Bradshaw, Minister of State for Health Services, Department of Health, Annexes A – B. Copies available from the Parliamentary Archives.

1.32 We welcome the decision to outline some of these provisions on the face of the Bill. The Minister told us that the purpose of Health Protection Regulations is to allow both for permanent preparedness regulations and a temporary response to specific public health risks where a consistent response across a wide area is required. The Minister should explain why the general power proposed for these purposes should not be further constrained. For example, the Bill should be amended to provide further details of the type of permanent preparedness regulations or temporary additional safeguards the Government envisages. As the Minister has explained, however, the Government does not immediately intend to bring forward any additional regulations beyond those listed above. This general power is intended as a catch-all provision designed to anticipate any future, potential threat to public health. A general power to enable the imposition of restrictions and requirements on people, and in particular, the power to impose Special Restrictions and Requirements, may have a significant impact on individual rights. **We recommend that the Minister explain to Parliament why the general power to impose restrictions and requirements should not be more comprehensively defined in the Bill. In particular, he should explain why the power to enable the imposition of Special Restrictions and Requirements should not be expressly limited to defined circumstances where a uniform, national response may be necessary to meet a serious and imminent threat to public health.**

1.33 The Minister told us that there were a number of significant limitations to the power to make Health Protection Regulations, which should afford adequate protection for individual rights:

- Health Protection Regulations may only impose a restriction or requirement on an individual where the appropriate Minister “considers” that it is “proportionate to what is sought to be achieved by imposing it”;
- Health Protection Regulations which enable another person to impose a restriction or requirement must require that person to “consider” that the restriction is “proportionate to what is sought to be achieved by imposing it”;
- Special restrictions or requirements may only ever be imposed when there is a serious and imminent threat to public health at the time the requirements are imposed or at the time the regulations are made;
- Regulations which impose Special Restrictions or Requirements must provide for a right of appeal to a magistrates court and for a “right of periodic review” in respect of the continued application of those Special Restrictions or Requirements;³⁹
- Regulations which impose Special Restrictions or Requirements will be subject to Parliamentary scrutiny under the affirmative resolution procedure.⁴⁰

1.34 The Government considers that the ultimate safeguard for the protection of individual rights is provided by Section 6 HRA as it will ensure that “Convention rights will be respected in the exercise of powers given by Parliament”. **We have consistently stressed**

³⁸ First Report, Appendix 3, page 51.

³⁹ EN, paras 602, 608; First Report, Appendix 1, pages 30 – 31; Appendix 3, pages 51 – 54.

⁴⁰ First Report, Appendix 3, page 53.

our view that Section 6 HRA should not be used as a “safety-net” to ensure that broadly drafted powers are exercised in a way which affords respect for individual rights. In order to foster legal certainty and to reduce the risk that individuals rights are unnecessarily endangered, appropriate safeguards should be included on the face of the Bill.

1.35 In our recent report, *The Use of Restraint in Secure Training Centres*, we recommended that all secondary legislation which raises significant human rights implications should always be accompanied by a statement as to compatibility with the ECHR setting out the reasons why the Government considers the instrument to be compatible.⁴¹ **Despite our concerns about their breadth, Health Protection Regulations made under these proposals would benefit from a clear statement from the Government about compatibility with Convention rights, accompanied by sufficient analysis to aid parliamentary scrutiny.**

1.36 **We have the following concerns in relation to the proposed safeguards.**

Proportionality and individual restrictions

1.37 Where a restriction or requirement is imposed which interferes with an individual's rights, such as the right to private life, that restriction must be necessary and proportionate to the risk posed to public health. If the restriction relates to detention, isolation or quarantine which amounts to a deprivation of liberty, it will be permitted only if it is lawful and not arbitrary. This includes an assessment of whether or not detention is imposed as the “last resort” and that other less restrictive measures are incapable of meeting the risk to public health. The Minister has told us that the proportionality provisions on the face of the Bill are not intended to replace the assessment under Section 6 HRA of whether or not a proposed restriction will be compatible with human rights. Instead, this assessment supplements that analysis. The Minister considers that any restriction may be taken as a “step” in a series of actions that “together address a threat to public health”. A restriction must be proportionate to “what it is intended to achieve” and “necessary to meet the threat to public health which the regulations addresses.” We are concerned that despite this subtle distinction, the language on the face of the Bill suggests that the analysis is limited to whether the decision maker subjectively considers that what he is doing is proportionate to what he seeks to achieve. **We recommend that the provisions are amended to remove the subjective element from the analysis of proportionality and to require that any restriction or requirement imposed is proportionate to its aims, including both to its immediate goal and the threat posed to public health.**

Restrictions contingent on a “serious and imminent threat to public health”

1.38 The Minister has explained that the analysis of a threat level will be entirely a matter for the Secretary of State or the decision maker who is empowered to impose additional restrictions. This is a subjective test of a threat to the public and one which the courts will be reluctant to question on judicial review. Although the Government envisages that these measures will be “temporary” and that “it will normally be appropriate to remove the

⁴¹ Eleventh Report of Session 2007-08, *The Use of Restraint in Secure Training Centres*, HL Paper 65, HC 378, para 45.

measures” once the serious and imminent risk has passed, the Minister has explained that some regulations may turn out to be “useful” and if they remain proportionate, they should remain in place. The “serious and imminent threat” test only applies to Special Restrictions or Requirements imposed on persons, or to powers which enable the imposition of those restrictions. These same powers, when exercised by a JP, may only remain in force for a specified maximum time period before they lapse and must be removed or renewed.⁴²

1.39 The assessment of the proportionality of any measure which interferes with the individual rights the Government accepts are engaged includes an assessment of whether the measure remains necessary. Similarly, any restriction including the deprivation of liberty will become arbitrary and unlawful when it ceases to become necessary.

1.40 We consider that the restriction of certain Health Protection Regulations to circumstances where there is a “serious and imminent threat” is an important one. However, this safeguard is undermined by the failure to include on the face of the Bill provisions which (a) impose a renewable maximum time limit on the time a person may be subject to Special Restrictions or Requirements imposed by Health Protection Regulations; (b) make clear that Special Restrictions or Requirements must be lifted when they are no longer either necessary or proportionate to meet the serious and imminent threat they are designed to meet, and (c) provide a clearly defined mechanism of review in order to ensure that the restrictions continue to be necessary and proportionate to the risk or threat posed to public health.

Appeals and review

1.41 The requirement that Health Protection Regulations which impose a Special Restriction or Requirement must provide for an appeal to a magistrates court and for a “right of periodic review” is an important and valuable safeguard. However, we are concerned that substantive details of these rights are to be left to secondary legislation and need not be consistently applied in relation to each set of Health Protection Regulations. Will an individual be able to request a variation or removal of a restriction and appeal against that decision? Similarly, no detail is provided as to how a “right of periodic review” will work in practice, including by whom the review will be conducted and whether the review may lead to the lifting of the relevant restrictions. All of these provisions are relevant to the value of any proposed appeal or periodic review and we consider that they should be specified on the face of the Bill. **The Government must provide a satisfactory justification for their views that some of the basic details of these important safeguards should be left to secondary legislation or otherwise such safeguards should be on the face of the Bill.**

Parliamentary scrutiny

1.42 Although there is an opportunity for parliamentary scrutiny of regulations made under the affirmative resolution procedure, such scrutiny of wide-ranging Health Protection Regulations will be of limited value because little time for debate is allowed and amendments are not permitted. In any event, the affirmative resolution procedure will not apply where the relevant Minister makes a declaration that the Regulations contain no

⁴² New Section 45L

Special Restrictions or Requirements and has no other “significant effect on a person’s rights”. This is a subjective test, which appears to be unique to this Bill. **We do not think that it is appropriate for a Minister subjectively to determine the process for parliamentary consideration of measures which may engage individual rights on a case by case basis. Where individual rights may be engaged, the relevant provisions should be contained in primary legislation and subject to full parliamentary scrutiny. Failing that, the affirmative resolution procedure should always apply to any categories of regulations which may engage individual rights.**

1.43 We are concerned that there will be no effective parliamentary oversight of the use of these powers when the emergency procedure proposed is used.⁴³ We recognise that the purpose of this procedure to ensure that there is a rapid response to the implications of a public health crisis. The emergency procedure for Health Protection Regulations appears to provide even less opportunity for parliamentary scrutiny than the provisions of the Civil Contingencies Act 2004. That Act provides that the Government may make certain emergency provision by Regulation, where there is an “emergency” as defined by the Act. The Health and Social Care Bill provides that the Secretary of State may make Health Protection Regulations using the emergency procedure if he makes a declaration of his “opinion, that by reason of urgency, it is necessary” to use that procedure. Regulations under the Civil Contingencies Act will lapse after 7 days if not approved (including with amendments); the Bill provides for Health Protection Regulations to remain in force for 28 days and makes no provision for amendment, only approval or rejection. The 28 day period will not include any time during which Parliament is prorogued, dissolved or in recess for more than four days. The Bill does not require Parliament to be recalled during a recess to approve Health Protection Regulations, in contrast to the provisions of the Civil Contingencies Act 2004, which provides for the recall of Parliament from recess within five days of an emergency being declared. This could mean that an emergency Health Protection Order, enabling medical examination, detention, quarantine and isolation could be made in late July, at the start of Parliament’s long summer recess, and remain in place, without parliamentary authority, until November. This is clearly unacceptable. **We consider that, in the light of the types of emergency which the Government considers these regulations may be necessary to meet (for example a nationwide outbreak of Ebola, SARS or another life-threatening illness) the emergency procedure in this Bill should be amended to reflect the provisions of the Civil Contingencies Act 2004.**

Public Health Orders

1.44 We welcome the decision to increase judicial involvement in public health protection and to introduce provisions which will allow a judge to take a more flexible approach to Public Health Orders. We consider that this approach is more likely to provide an effective balance between the need for a speedy response to a threat to public health and individual rights.

1.45 Given the new breadth of powers available to JPs under the Bill, we asked the Minister if the Government was satisfied that the proposed powers contained adequate safeguards to ensure protection for individual rights, including the right to liberty and the right to

⁴³ New Section 45R

respect for private life and physical integrity. The Government consider that the powers of JPs are accompanied by appropriate safeguards, including:

- A Public Health Order may only be made where necessary to reduce or remove the risk to public health;
- An Order “could provide for the least intrusive measures...which will achieve the permitted public health aim”;
- Rights to apply for variation or revocation of a Public Health Order are provided and appeal will be available under the Public Health Act to the Crown Court.⁴⁴

1.46 We consider that these are all important safeguards. However we have some remaining concerns which we address below.

Public Health Orders and detention

1.47 The Public Health Act currently provides that before a JP makes an order to remove a person to hospital, he must consider whether:

the circumstances are such that proper precautions to prevent the spread of infection cannot be taken, or that such precautions are not being taken⁴⁵

1.48 If the JP is currently considering an order for detention in hospital, he must consider whether appropriate accommodation is available outside of detention, where proper precautions for the spread of disease could be taken.⁴⁶

1.49 Although the Bill provides that the JP must consider whether an order is necessary in order to “reduce” or “remove” risk to public health, there is no priority given to the list of orders which he may impose. The European Court of Human Rights has expressly stated that detention for the purpose of preventing the spread of disease must only occur as a matter of “last resort”.⁴⁷ The Government have expressly stated that the purpose of providing a broad list of potential Orders is to allow for a proportionate response short of deprivation of liberty. Public Health Orders may be considered in a short time frame and without representations by the person who will be detained. Against this background, **we consider that the protection of the individual right to liberty would be enhanced by the express acknowledgement on the face of the Bill that detention, isolation and quarantine are measures of last resort which should only be imposed if no other measures are capable of effectively reducing or removing the risk to public health.**

1.50 We welcome the proposal that all Public Health Orders should be subject to a limited time frame. The Bill provides that Public Health Orders which provide for detention, isolation or quarantine may last for no more than 28 days before they must be renewed. It is not clear why the Government has specified a period of 28 days and no explanation is given in the Explanatory Notes accompanying the Bill. We consider the time frame proposed for compulsory detention without further judicial scrutiny should be short and

⁴⁴ EN, paras 605 – 608; First Report, Appendix 3, pages 47 – 48.

⁴⁵ Public Health Act, Section 37.

⁴⁶ Public Health Act, Section 38.

⁴⁷ *Einhorn v Sweden*, App No 56529/00, Judgment 25 January 2005, paras 41 – 44.

justified by reference to the necessity for Orders to remain in place for up to four weeks without further automatic review. In the absence of further evidence, including scientific or medical evidence, 28 days may seem arbitrary. An individual should not be subject to detention, isolation or quarantine for the purposes of the protection of public health without regular reviews and the approval of such action by a judicial authority. There is currently no maximum period after which an Order may not be renewed or extended on the face of the Bill. As presently drafted, people, including families with children, could potentially be subject to detention, isolation or quarantine for years on the basis of extended or renewed 28-day Public Health Orders. The Secretary of State is empowered to make regulations which may specify a maximum period of extension, but he is not required to do so. We recognise that there may be difficulties in setting an arbitrary period after which a period of detention, isolation or quarantine must lapse. However, we consider that a mechanism for ensuring that detention may not continue indefinitely should be on the face of the Bill. We consider that a shorter time frame for detention before automatic review and a provision for review at close intervals would decrease the risk that an individual would be unlawfully deprived of their liberty in breach of Article 5 ECHR. We consider that this will be particularly important where those detained, isolated or in quarantine are children. **We recommend that the Bill be amended to provide greater protection for persons against the continued arbitrary application of a series of Orders without review, particularly where those Orders relate to detention, isolation or quarantine.** One way of ensuring closer judicial oversight, without the need for an individual to lodge an appeal, would be to reduce the proposed limit on Public Health Orders and to introduce subsequent automatic reviews of any renewed or extended Public Health Order. Although these proposals would increase the administrative burdens on local authorities, Public Health Orders requiring detention, isolation and quarantine are expected to be very rare and these types of orders will have a particularly significant effect on individual rights and may amount to a deprivation of liberty. We will publish amendments to reduce the maximum duration of Public Health Orders imposing detention, quarantine or isolation to 14 days, with the requirement for automatic review by a JP at 7 day intervals thereafter. **We will propose these amendments to enable this issue to be debated in Parliament and to hear the Government's justification for its current position, particularly in the light of any scientific advice.**

1.51 It will be for the Secretary of State to set the maximum time limit for Public Health Orders which do not include provisions for detention, isolation and quarantine. The other Orders which can be made include requiring a person to abstain from work and restrictions on whom they may have contact. These provisions clearly may have a broad effect on an individual's right to respect for private and family life and their rights of association. We consider that there is a strong case for also including a maximum time frame for the imposition of these Orders on the face of the Bill. We propose that the power of the Secretary of State to set a maximum period of extension for any Public Health Order should be subject to the affirmative resolution procedure.

Evidence to support public health orders

1.52 The Bill proposes that the Secretary of State, or the Welsh Ministers in Wales should have the power to make Regulations which deal with the evidence that must be before a JP

before he can be satisfied that a Public Health Order is necessary.⁴⁸ We asked the Minister what evidence the Government envisaged these Regulations would cover, and why it was appropriate for this power to be in the Bill rather than to specify specific types of evidence on the face of the Bill. The Minister explained that it was the Government's view that the level of evidence required for a Public Health Order should be such that it:

does not hinder local authorities in their duty to protect the public from health threats, but is high enough to ensure that action is not taken inappropriately.⁴⁹

1.53 We agree that the level, and type, of evidence necessary to support a Public Health Order should be linked to the level of the threat posed to public health. It must also be closely linked to the degree which an Order will interfere with an individual's rights, including the right to physical integrity and the right to liberty. Under the current Public Health Act, a JP must have medical evidence before issuing an order for medical examination. He may only order removal or detention to hospital where a person is "suffering" from a disease. This will clearly require medical evidence. In light of the expansion of the powers of the JP proposed by this Bill, we are concerned that the type of evidence required to show that a person may be or may be contaminated; that they may pose significant harm to public health; or as to the risk that they may infect or contaminate others must include medical evidence. The European Court of Human Rights requires objective evidence of this type for lawful detention pursuant to Article 5(1)(e) when mental health or other health issues are concerned.⁵⁰ We consider that both the imposition and continuation of Public Health Orders must be based on objective medical evidence. **We are concerned that there is no provision on the face of the Bill for Public Health Orders to be based on objective medical evidence. The Bill should be amended to require Regulations made under New Section 45G(7) to include a requirement that no Public Health Order may be made, or remain in force, without objective medical evidence.**

1.54 The Minister explained that these provisions are not on the face of the Bill, but that the first set of Regulations dealing with this matter will be subject to the affirmative resolution procedure.⁵¹ He explained that in future, the nature of the evidence that should be required may need to be altered to take account of new diseases and new methods of disease detection. **We expect that any draft Regulations proposed under this Part of the Bill should be made available well in advance of their being laid before Parliament to allow for full debate. We look forward to receiving a copy of these draft Regulations when they are available.**

(b) Powers of the Office of the Health Professions Adjudicator

1.55 Part 2 of the Bill creates a new body, the Office of the Health Professions Adjudicator (OHPA), and provides that OHPA will take over the operation of Fitness to Practise Panels from the GMC (in relation to doctors) and the General Optical Council (in relation to opticians).⁵² The Bill also provides for the standard of proof applied during these hearings

⁴⁸ New Section 45(G)(7).

⁴⁹ First Report, Appendix 3, page 47.

⁵⁰ *Winterwerp v Netherlands*, (1979) 2 EHRR 387, para 39; *Einhorn v Sweden*, App No 56529/00, Judgment 25 January 2005, paras 41 – 44. See also Fourth Report of Session 2006 – 07, *Legislative Scrutiny: Mental Health Bill*, para 6.

⁵¹ The Bill provides that any subsequent Regulations, or amendments to those Regulations may be introduced subject to the negative resolution procedure (See New Section 45(Q)(1) (2)(c)).

⁵² Clause 95.

to be changed from the criminal standard (beyond reasonable doubt) to the civil standard (on a balance of probabilities).⁵³

1.56 Article 6 ECHR provides that everyone should have the right to a fair hearing when a decision determines their civil obligations or involves a criminal accusation. The Court does not require that any particular standard of proof is applied, provided the overall proceedings are fair and, where the proceedings involve determination of a criminal charge, the additional safeguards for due process in Article 6(2) (the presumption of innocence) and Article 6(3) (additional due process rights, such as the right to examine and cross examine witnesses) apply.⁵⁴ In criminal cases, however, the Court has emphasised that “any doubt should benefit the accused”.⁵⁵ In *Albert le Compte*,⁵⁶ the European Court of Human Rights refused to determine whether disciplinary proceedings involved the determination of a criminal charge. Instead, the Court gave directions that in some circumstances, the potential outcome of the proceedings might be so serious as to require the same guarantees as if the proceedings involved the determination of a criminal charge. It is the Government’s view that, when considering more serious cases, panels will generally apply the “enhanced” civil standard of proof. The Minister explains that it is the Government’s view that our courts consider that this standard is unlikely to lead to a different result than the application of the criminal standard.

1.57 The BMA have raised concerns about the fairness of these changes.⁵⁷ We wrote to the Minister to ask for a further explanation of the Government’s view that the introduction of a civil standard would lead to a fair trial in cases which (a) involved accusations of conduct which could also amount to a criminal offence and (b) could lead to an individual being prevented from continuing in his or her profession. In response the Minister explained that there are three stages involved in a hearing by a Fitness to Practise Panel (the role that will be played by OHPA). At the first stage, the Panel will establish the relevant facts, after hearing evidence. It is at this stage that it is proposed that the standard of proof should shift from the criminal to the civil standard. After the facts have been established, the Panel will determine whether the facts are sufficiently serious to justify a finding that fitness to practise has been impaired (Stage 2). Lastly, the Panel will decide what sanction is justified in the circumstances (including whether removal from the register is appropriate) (Stage 3).⁵⁸

1.58 The Minister explained that in determining whether to apply a heightened standard of proof at the fact-finding stage, any Fitness to Practise panel would need to work within the law. The Bill provides for the appointment of Legal Assessors who the Government consider will help ensure that, in practise, the appropriate, higher standard is applied where necessary:

The Courts recognise that the civil standard is flexible and that the more serious the allegation, the less likely that it occurred and, hence the need for stronger evidence before the decision-maker can conclude that the allegation is true; therefore, the

⁵³ Clause 107.

⁵⁴ See for example *G v France*, App No 11841/86; 57 D.R. 100.

⁵⁵ *Barbera, Messegue and Jabardo v Spain* (1989) 11 EHRR 360, para 77.

⁵⁶ (1982) 4 EHRR 1.

⁵⁷ <http://www.bma.org.uk/ap.nsf/Content/HealthAndSocialCareBillReg>.

⁵⁸ First Report, Appendix 3, Page 61.

greater the unlikelihood of what is alleged the more cogent the evidence is required to be to prove that it did happen. The relevant panel of OHPA will be bound by case law and will have access to legal assessors [...]. Legal assessors will be appointed for the purpose of giving advice to the OHPA's fitness to practise panels on questions of law. The legal assessors will be able to provide advice regarding such matters as to the application of the standard of proof required. Thus, in cases of alleged serious misconduct which could also amount to criminal offences, the relevant panel of OHPA would, as the case law provides, adopt the heightened civil standard and would need to have strong and cogent evidence justifying a finding that the factual allegations are proven.⁵⁹

1.59 The BMA accepts that the proposed change is lawful. They remain concerned however that a change in the standard of proof could result in "unjustified adverse findings against doctors". They are concerned that this change is "not only be unfair to doctors but will compromise their clinical independence".⁶⁰

1.60 We agree with the Government's analysis that, provided the heightened civil standard is applied in the most serious cases, it is unlikely that a serious risk of incompatibility with the right to a fair hearing will arise. Provided that a hearing is otherwise fair, and the heightened standard is applied, we consider that it is unlikely that the right to a fair hearing will be undermined through the application of the civil standard alone. We welcome the proposal that Fitness to Practise Panels should be advised by Legal Assessors who will advise on legal standards, including the appropriate standards of proof and the requirements of the right to a fair hearing. **Given the importance of the role to be played by Legal Assessors, it is important that they are provided with appropriate guidance and training on the requirements of Article 6 ECHR and the need to identify the most serious cases where a heightened standard of proof may be required. In any case where the allegations involved may lead to a serious sanction (such as removal from the register), including on appeal, or which may also amount to a criminal offence, a Fitness to Practise Panel must apply the higher standard.**

(c) Information sharing: duties and disclosure

1.61 Clause 54 allows CQC to make information publicly available in relation to the provision of NHS Care or adult social services or the carrying on of regulated activities. This power is subject to Clause 72 which makes it an offence to disclose confidential information which identifies an individual. Clauses 62 – 68 and Schedule 4 make provision for CQC to interact with other bodies, including co-operation and providing assistance. Clause 72 makes it an offence knowingly or recklessly to disclose confidential information in so far as it relates to, and identifies, an individual. Clause 73 includes a number of broad defences to this offence which include that the disclosure was made to any person or body in circumstances where the accused reasonably believed that disclosure "was necessary or expedient for the person or body to have information for the purpose of exercising functions of that person or body under any enactment". It will also be a defence if the disclosure was made for the purpose of "facilitating the exercise of any of the Commission's functions". Clause 74 relates to the disclosure of information by CQC in the

⁵⁹ Ibid.

⁶⁰ <http://www.bma.org.uk/ap.nsf/Content/HealthAndSocialCareBillReg>.

course of exercising its functions. Disclosure of personal information will only be expressly permitted if it does not identify the individual concerned or if it is disclosed with consent. In other cases, the information may be disclosed, despite any common law rules of confidence, including “to any person or body in circumstances where it is necessary or expedient for the person or body to have the information for the purpose of exercising the functions of that person or body under the enactment” or where the “disclosure is made for the purpose of facilitating the exercise of any of the Commission’s functions”. The Bill also requires the CQC to prepare a Code of Practice on confidential personal information (Clause 76).

1.62 Clause 116 enables the Secretary of State and the Welsh ministers to make provision requiring “designated bodies” to co-operate with each other in connection with the sharing of information which relates to the conduct and performance of health care workers. The Regulations may include certain prescribed conditions for disclosure.

1.63 Although the Explanatory Notes deal with the specific disclosure of information in relation to individual health care workers and their conduct, they make no reference to other information sharing by CQC in the general pursuit of its functions. We asked the Minister for a further explanation of the Government’s view that these provisions would operate in a way which adequately protects the right to respect for personal information (as protected by Article 8 ECHR). The Minister explained that these provisions extend the application of the existing powers exercised by the Healthcare Commission to CQC and ensure that existing practice by CSCI continues. He explained:

People working for the Commission will need to be aware of the sensitive nature of the information they deal with in carrying out their duties. [...] These provisions, including the permitted disclosures under Clause 73...place appropriate restrictions on the Commission’s ability to disclose personal information.

1.64 The Minister stressed that CQC would be required to consult on its draft Code of Practice on the disclosure of personal information. We recognise that these provisions are largely modelled on existing provisions and that the need for a statutory Code of Practice may provide some valuable additional protection to personal information. We have a few remaining concerns, in light of the broad powers to be exercised by CQC; the sensitivity of the information it will handle and recent failings on the part of Government to ensure the security of personal information.

1.65 The first of these concerns relates to the breadth of the proposed defence to the offence of disclosure of confidential information. We are concerned that the operation of the defence may entirely undermine the deterrent effect of the proposed disclosure offence. The Bill provides for CQC to cooperate in a wide range of circumstances with third parties, including unnamed and unspecified public bodies. At its widest, it will be a defence for any member of CQC staff who discloses personal information without consent, to show that they reasonably believed that the disclosure was made to that person or body in circumstances where it was necessary or expedient for the purposes of exercising their statutory functions. The Bill proposes that if the defence is raised which is “sufficient to raise an issue”, then it will be for the prosecution to show beyond reasonable doubt that it is not applicable to the case. This new standard of proof is not modelled on existing provisions which apply to the Healthcare Commission. **We are concerned that the**

Minister relies on the proposed offences which will apply to disclosure of information to illustrate how strongly the CQC and its staff will be concerned by the need to protect personal information. The Minister should be asked to explain why it is necessary to have a broad defence based on reasonable belief in the expediency of providing material to a person or body in pursuit of their statutory functions.

1.66 We also asked the Minister of the compatibility with the Convention of the proposed new general duty of disclosure in relation to the conduct of health care workers (Clause 116). The Minister explained that this new duty was being introduced to meet recommendations of recent high profile cases where organisations or agencies had failed to work together effectively to “join-up” information in order to protect patients from harm. The Minister explained:

The purpose of the proposed new powers to make regulations, making provision in connection with the sharing of information, etc, is to strengthen the responsibilities and powers of healthcare organisations to collaborate in handling information of this kind, while maintaining safeguards for the human rights of health professionals.⁶¹

1.67 We welcome the Government’s decision to pursue the aim of these proposals: improved and more effective patient protection against abuse or neglect. However, as the Explanatory Notes rightly identify, there is an element of balance involved in whether a disclosure will be proportionate to the risk which it seeks to meet. This balance is one which will need to be carefully applied in practice to ensure compatibility with Convention rights. With this in mind, we are concerned that the Minister told us that it was the Government’s view that any “actual or potential risk” to patient safety would outweigh the right to respect for privacy in any circumstances. The Government propose that there will be a number of safeguards in Regulations and in Guidance to ensure that disclosure will not breach the Convention. These include:

- Information on the type of information that can and cannot be shared;
- Circumstances when information should not be shared, for example where the information does not relate to “conduct or performance”;
- Steps which must be taken (including considering individual rights) before disclosure is considered; and
- Other safeguards.

1.68 Additional details in the form of guidance or on the face of the Regulations will add important safeguards to ensure that this very broad general duty is pursued in a way which balances the need to protect patient safety with the right of healthcare workers to enjoy respect for their Convention rights, and in particular, their right to privacy. **We are disappointed that draft copies of these Regulations have not been made available in time to inform parliamentary debate.**

1.69 The limitation of the proposed Regulation making power to circumstances in which the worker is likely to constitute a threat to the health and safety of patients is an additional safeguard. Regulations may also cover the disclosure of other information about conduct

⁶¹ First Report, Appendix 3, page 63.

or performance, however where that information is requested by “any other designated body”, without the need to show any threat to patient safety. **The Minister should be asked to explain why the ability to disclose information in response to a request should not also be limited by reference to a threat to patient safety.**

Amendments to the Bill

1.70 We will publish amendments to the Health and Social Care Bill in a future legislative scrutiny Report to enable some of the issues we have raised to be debated in the House of Lords.

2 Child Maintenance and Other Payments Bill: Government Response

Date introduced to first House	7 November 2007
Date introduced to second House	4 December 2007
Current Bill Number	HL Bill 35
Previous Reports	Third Report of Session 2007-08 (HL 28/HC 198)

2.1 We publish as an appendix to this Report the response we received from Lord McKenzie of Luton, Parliamentary Under Secretary of State, Department of Work and Pensions, dated 28 January, to our Report on the Child Maintenance and Other Payments Bill.⁶² We are grateful to the Minister for providing us with this response.

⁶² Appendix 1.

Conclusions and recommendations

1. The Minister has undertaken to examine the issue of publicly arranged health and social care provision and the Human Rights Act again in the context of this Bill. We look forward to the Minister's amendment in good time for a full debate on this issue in the House of Lords. (Paragraph 1.3)
2. A number of Members in the House of Commons shared our serious concern that the Bill does not adequately highlight the importance of a human rights based approach to the work of the CQC. A clear framework for the protection of the rights and dignity of vulnerable users of health and social care could and should be provided in this Bill and we recommend that the Government bring forward amendments in the House of Lords to remedy this shortcoming. (Paragraph 1.4)
3. Many of the details [Part 3] of this Part, including safeguards for individual rights, are left to secondary legislation. It remains our view that it is inappropriate for legislation which has serious implications for individual rights to be based principally on enabling powers with detailed safeguards left to secondary legislation. We outline some examples and proposals for clarification, below (Paragraph 1.12)
4. The Bill clearly makes provision for the deprivation of liberty in respect of both "infection" and "contamination", through provision for detention at hospital or elsewhere and through the use of isolation and quarantine measures, without limitation on duration or the circumstances in which an individual may be held. (Paragraph 1.14)
5. We accept that public health measures may need to be taken to meet a significant risk caused by contamination by biological, toxic, radioactive or other agents. The provisions for detention, isolation and quarantine in these circumstances must be clearly defined and accompanied by appropriate safeguards to avoid arbitrariness. If this is not done, the European Court of Human Rights would subject any application based on a breach of Article 5(1) to very close scrutiny. With proper safeguards, we think it likely that the European Court of Human Rights would accept the Government's argument that diseases caused by contamination fall within the listed exemptions to the Convention right to liberty. Without such safeguards, we consider that the Court will be less inclined to accept the Government's view that the Convention definition of "disease" should cover powers to deprive a person of their liberty as a result of contamination as well as infection. (Paragraph 1.18)
6. Amendments should be brought forward to clarify the provisions in Clause 124 and New Section 43C during the Bill's passage through the House of Lords. (Paragraph 1.23)
7. If the Bill is designed to empower the Secretary of State, or the Welsh Ministers in Wales, to impose administrative detention, quarantine or isolation, the Government must provide evidence of the need for such a broad, undefined power and there must be clear and effective safeguards on the face of the Bill to ensure that Health

Protection Regulations operate in a way which ensures that people are protected from arbitrary detention in breach of the right to liberty. (Paragraph 1.24)

8. We recommend that the Minister explain to Parliament why the general power to impose restrictions and requirements should not be more comprehensively defined in the Bill. In particular, he should explain why the power to enable the imposition of Special Restrictions and Requirements should not be expressly limited to defined circumstances where a uniform, national response may be necessary to meet a serious and imminent threat to public health. (Paragraph 1.32)
9. We have consistently stressed our view that Section 6 HRA should not be used as a “safety-net” to ensure that broadly drafted powers are exercised in a way which affords respect for individual rights. In order to foster legal certainty and to reduce the risk that individuals rights are unnecessarily endangered, appropriate safeguards should be included on the face of the Bill. (Paragraph 1.34)
10. Despite our concerns about their breadth, Health Protection Regulations made under these proposals would benefit from a clear statement from the Government about compatibility with Convention rights, accompanied by sufficient analysis to aid parliamentary scrutiny. (Paragraph 1.35)
11. We recommend that the provisions are amended to remove the subjective element from the analysis of proportionality and to require that any restriction or requirement imposed is proportionate to its aims, including both to its immediate goal and the threat posed to public health. (Paragraph 1.37)
12. We consider that the restriction of certain Health Protection Regulations to circumstances where there is a “serious and imminent threat” is an important one. However, this safeguard is undermined by the failure to include on the face of the Bill provisions which (a) impose a renewable maximum time limit on the time a person may be subject to Special Restrictions or Requirements imposed by Health Protection Regulations; (b) make clear that Special Restrictions or Requirements must be lifted when they are no longer either necessary or proportionate to meet the serious and imminent threat they are designed to meet, and (c) provide a clearly defined mechanism of review in order to ensure that the restrictions continue to be necessary and proportionate to the risk or threat posed to public health. (Paragraph 1.40)
13. The requirement that Health Protection Regulations which impose a Special Restriction or Requirement must provide for an appeal to a magistrates court and for a “right of periodic review” is an important and valuable safeguard. However, we are concerned that substantive details of these rights are to be left to secondary legislation and need not be consistently applied in relation to each set of Health Protection Regulations. (Paragraph 1.41)
14. The Government must provide a satisfactory justification for their views that some of the basic details of these important safeguards should be left to secondary legislation or otherwise such safeguards should be on the face of the Bill. (Paragraph 1.41)

15. We do not think that it is appropriate for a Minister subjectively to determine the process for parliamentary consideration of measures which may engage individual rights on a case by case basis. Where individual rights may be engaged, the relevant provisions should be contained in primary legislation and subject to full parliamentary scrutiny. Failing that, the affirmative resolution procedure should always apply to any categories of regulations which may engage individual rights. (Paragraph 1.42)
16. We consider that, in the light of the types of emergency which the Government considers these regulations may be necessary to meet (for example a nationwide outbreak of Ebola, SARS or another life-threatening illness) the emergency procedure in this Bill should be amended to reflect the provisions of the Civil Contingencies Act 2004. (Paragraph 1.43)
17. We consider that the protection of the individual right to liberty would be enhanced by the express acknowledgement on the face of the Bill that detention, isolation and quarantine are measures of last resort which should only be imposed if no other measures are capable of effectively reducing or removing the risk to public health. (Paragraph 1.49)
18. We recommend that the Bill be amended to provide greater protection for persons against the continued arbitrary application of a series of [Public Health] Orders without review, particularly where those Orders relate to detention, isolation or quarantine. (Paragraph 1.50)
19. We will propose these amendments to enable this issue to be debated in Parliament and to hear the Government's justification for its current position, particularly in the light of any scientific advice. (Paragraph 1.50)
20. We are concerned that there is no provision on the face of the Bill for Public Health Orders to be based on objective medical evidence. The Bill should be amended to require Regulations made under New Section 45G(7) to include a requirement that no Public Health Order may be made, or remain in force, without objective medical evidence. (Paragraph 1.53)
21. We expect that any draft Regulations proposed under this Part of the Bill should be made available well in advance of their being laid before Parliament to allow for full debate. We look forward to receiving a copy of these draft Regulations when they are available. (Paragraph 1.54)
22. We agree with the Government's analysis that, provided the heightened civil standard is applied in the most serious cases [by Fitness to Practice Panels], it is unlikely that a serious risk of incompatibility with the right to a fair hearing will arise. Provided that a hearing is otherwise fair, and the heightened standard is applied, we consider that it is unlikely that the right to a fair hearing will be undermined through the application of the civil standard alone. (Paragraph 1.60)
23. Given the importance of the role to be played by Legal Assessors, it is important that they are provided with appropriate guidance and training on the requirements of Article 6 ECHR and the need to identify the most serious cases where a heightened

standard of proof may be required. In any case where the allegations involved may lead to a serious sanction (such as removal from the register), including on appeal, or which may also amount to a criminal offence, a Fitness to Practise Panel must apply the higher standard. (Paragraph 1.60)

24. We are concerned that the Minister relies on the proposed offences which will apply to disclosure of information to illustrate how strongly the CQC and its staff will be concerned by the need to protect personal information. The Minister should be asked to explain why it is necessary to have a broad defence based on reasonable belief in the expediency of providing material to a person or body in pursuit of their statutory functions. (Paragraph 1.65)
25. We are disappointed that draft copies of these Regulations [which will provide the detail of how the general duty of disclosure proposed in the Bill will work] have not been made available in time to inform parliamentary debate. (Paragraph 1.68)
26. The Minister should be asked to explain why the ability to disclose information in response to a request should not also be limited by reference to a threat to patient safety. (Paragraph 1.69)

Formal Minutes

Tuesday 26 February 2008

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness

The Earl of Onslow

Baroness Stern

John Austin MP

Dr Evan Harris MP

Mr Virendra Sharma MP

Draft Report [Legislative Scrutiny: 1) Health and Social Care Bill and 2) Child Maintenance and Other Payments Bill: Government Response], 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 2.1 read and agreed to.

Summary read and agreed to.

A Paper was ordered to be appended to the Report.

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

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

[Adjourned till Monday 3 March at 4pm.]

Appendix

Letter from Lord McKenzie of Luton, Parliamentary Under Secretary of State for Work and Pensions, dated 28 January 2008

1. I refer to the report of the Joint Committee on Human Rights on the Child Maintenance and Other Payments Bill, published on 3rd January 2008. I am grateful for the detailed consideration the Committee has given to the Bill. With respect to the Committee's specific recommendations, the Department's position is as follows.

Enforcement powers of C-MEC

2. In paragraphs 1.9 to 1.12 of the report the Committee discusses some of the new enforcement powers C-MEC will have and reiterates its recommendation that where the Government considers a safeguard relevant to protection of individual human rights, those safeguards should be included on the face of the relevant primary legislation. Specific reference is made to provision for appeal rights against administrative orders requiring the deduction of sums from bank accounts. In the Bill, the right of appeal is currently provided for in an enabling power which the Secretary of State is not required to exercise. Amendments to the Bill will be tabled which make the inclusion of the rights of appeal in the relevant regulations mandatory.

3. Other significant amendments to the provisions in clauses 21 and 22 of the Bill regarding the deduction of regular and lump sum amounts are to be tabled as the Bill progresses through the Parliamentary process, which we would like to bring to the Committee's attention. These amendments will remove restrictions which appear on the face of the Bill in relation to the types of account to which deduction orders can be applied. These amendments are being made to meet concerns expressed in debate in the Commons, that non-compliant non-resident parents will simply change the type of account they use to defeat the enforcement mechanisms. The amendments will allow for regulations to prescribe for any exceptions. Amendments are also to be made to provide that any regulations made under any powers inserted by clauses 21 and 22 of the Bill will be subject to the affirmative procedure. This will provide Parliament with the opportunity to properly consider any regulations made under these powers.

4. Regulations subject to the affirmative procedure will be required to allow deduction orders to be made in relation to an account which a non-resident parent holds jointly with one or more other persons. It is accepted that the making of a deduction order in relation to such an account could amount to an interference with the rights of the joint account holder, particularly those rights falling within Article 8 and Article 1 to the first Protocol. However, the Department is of the view that any such interference can be justified in the general public interest and in the interest of others, for example, parents with care to whom child maintenance is due.

5. Additional safeguards will apply in any case where a deduction is to be made in relation to a joint account. Considering further the rights of the joint account holder, it is intended that they would have all the rights of the non-resident parent in relation to deduction orders. The Commission will be placed under an obligation to inform the joint account

holder of any intention to make an order for regular deductions from a joint account and to take into account any representations from the joint account holder in deciding whether or not to make the order. The Commission will also be under an obligation to notify the joint account holder of any orders made in relation to the account. In making any deduction order against a joint account, the Commission must be satisfied that the amount for which it is made is fair in all the circumstances, taking into account, amongst other things, the respective contributions of the parties. Other matters to be taken into account will be prescribed in affirmative regulations.

6. The joint account holder is to have a right of appeal against a periodic deduction order and final lump sum order. The joint account holder is also to have the right to request a review of any periodic order and the right to request that the Commission consent to the release of monies from an account frozen under the lump sum deduction provisions. Rights of appeal against the Commission's decision in either of these cases would also exist. The intention is that the Bill will make it clear that where regulations applying deduction orders to joint accounts are made, they must include these rights of appeal.

Debt, Negotiation or Cancellation and Rights of Parent with Care

7. With regard to paragraph 1.19 of the report, the Committee's intention to consider the final judgment of the European Court of Human Rights in the case of Kehoe and whether it has any implications for the proposals in the Bill in due course is noted. The Committee will appreciate that the Department is unable to comment further on this matter at this time as the judgment from the Court is still awaited.

8. In paragraph 1.20 of the report of the Committee reiterates its view that in relation to these provisions safeguards relevant to the protection of human rights should generally be included on the face of the relevant primary legislation. In relation to this matter the Committee may wish to know that following reconsideration of this matter amendments are to be made to clause 32 (transfer of arrears) to ensure that the regulations include a requirement that the consent of the parent with care to whom the arrears are owed be sought before entering into a negotiated settlement. A similar provision is also being considered in relation to the selling of debt on the face of clause 30 (power to accept part payment of arrears in full and final satisfaction). No such amendment is intended to be made in relation to clause 31 (write-off). The considerations here are different and a requirement to obtain consent in every case would defeat the policy intention. The intention is to resolve those cases where debt has been suspended and further action is either inappropriate or unfair to the non-resident parent. This test is on the face of the Bill in addition to the requirement for the particular circumstances in which debt may be written-off to be prescribed in affirmative regulations. Those circumstances will for the most part reflect the parent with care's direct wishes (for example, where the Commission has been asked to cease action to recover the debt) or will be cases where there is no longer anything that can be done to recover the debt (for example, where the non-resident parent has died) or where consent cannot be obtained (for example, where the parent with care has died).

9. Please find attached, for information, copies of the Regulations⁶³ which have been drafted under the current versions of the powers in clauses 30 and 31. These drafts were made available when the Bill was in Committee in the House of Commons.

Information Sharing Powers

10. In paragraph 1.21 of the report the Committee states that the Explanatory Notes do not address the compatibility of the information sharing gateways in clause 41 of, and Schedule 6 to, the Bill with the right to respect for private life. The Department can confirm that the Explanatory Notes, when next published, will be updated to include this.

11. We note the Committee's view in paragraph 1.25 that if the information is processed strictly in accordance with the requirements of the relevant legislative provisions it is unlikely that the use of the information gateways will give rise to a significant risk of incompatibility. However, in light of recent events regarding the security of information held by Government Departments, the Committee recommends in paragraph 1.26 that the adequacy of the safeguards accompanying the proposed information sharing provisions in the Bill be reconsidered, including the proposal that C-MEC should rely heavily on information held and processed by HMRC.

12. The Department has carefully considered what the Committee has said in this respect. However, we are confident our proposals strike the right balance between the individual's right to respect for their personal information and improving administrative processes and information gathering, so as to get money more quickly to children.

13. The Committee also recommends that the Government should reconsider whether more detailed safeguards could be included on the face of the Bill, such as more detailed provisions on when information should be shared, the specific purposes for sharing information and specific criteria or conditions about the use, storage and disposal of personal information. The intention of Schedule 6 is to provide C-MEC with access to the same information that has proved vital to the Secretary of State's functions under child support legislation. The Department does not believe that the face of the Bill is the right place to set out practical security arrangements and data handling processes. These matters, by their very nature, require flexibility and the ability to respond, pro-actively and reactively, to the changing operational reality. By confining these matters to primary legislation we would risk tying C-MEC to outdated and counter-productive security measures, which may not be fit for purpose.

14. As the Committee notes in its report, the processing of information by Government departments (and C-MEC) must comply with the requirements of the Data Protection Act. It is the Department's view that the requirements of that legislation and the provisions in the Bill provide adequate safeguards to ensure that any information sharing which takes place under the gateways in this Bill will be compatible with Article 8.

15. As noted by the Committee, the staff of C-MEC and those persons providing services to it will be subject to the offence of unauthorised disclosure of information in section 50 of the Child Support Act 1991. However, in response to the Committee's concerns about the

⁶³ Not published here.

practical safeguards surrounding information sharing between HMRC and C-MEC, we can provide the following additional information.

16. Data security is a top priority to every Government Department and it is expected to be a priority for C-MEC. The Department and HMRC are currently reviewing their IT and data security arrangements to ensure that the processing of information continues to be carried out fairly and lawfully and strictly in accordance with the Data Protection Act in the light of recent events.

17. The Department plans to ensure that C-MEC follows through on any recommendations made by the review and will, if necessary, do this by using its powers to issue guidance and directions to the Commission. The information received by C-MEC from HMRC will be subject to government security arrangements which include the following:

- all significant bulk data transfers should wherever possible be conducted by automated electronic transfer;
- if a data transfer by removable media is unavoidable such media should be securely encrypted at the appropriate level;
- any significant bulk transfer should have the approval of a senior member of staff.

18. In paragraph 1.28 of the report, the Committee recommends that the Government reconsiders the adequacy of the safeguards accompanying the proposal that C-MEC should have the power to share information with credit reference agencies and whether more detailed safeguards could be included on the face of the Bill, such as more detailed provisions on the type of information that might be disclosed.

19. The Department has considered the Committee's recommendation in relation to clause 37 (disclosure of information to credit reference agencies). However, we remain of the view that it is unnecessary to place additional safeguards on the face of the Bill. The Commission will only be able to share qualifying information with a credit reference agency. Qualifying information is that which is held by the Commission for the purposes of the Act in relation to a person who is liable to pay child support maintenance and which is of a prescribed description. As such, that information which the Commission can supply under this provision will be set out in regulations.

20. The Department is currently carrying out research with credit reference agencies and financial institutions on the potential effect of sharing information about a person's child maintenance payment history with credit references agencies on their ability to obtain credit. This is so as to ensure that the rationale behind these provisions is solid before information sharing commences. That rationale being that non-payment of child support maintenance will negatively affect a person's ability to obtain credit and that compliance with the obligation to pay maintenance could positively affect that same ability. As part of that research, the question of which pieces of information it is necessary to disclose to achieve the objective of the policy is also being considered. The Committee may be interested that an initial date evaluation was published by the Department, on 15th January 2008. A copy of the date evaluation can be found at www.dep.gov.uk/asd/asd5/wp2008.asp. However, this evaluation does not consider in any detail that information which would

need to be disclosed to credit reference agencies. Further research is ongoing and the Department is fully engaged with the Information Commissioner in relation to this matter.

21. The Department is unable to provide a list of the information which will be prescribed for the purposes of this clause in the bill at the present time. However, it is envisaged that the information necessary to be disclosed is likely to include the name, address, date of birth and payment history of the person liable to make payments of child support maintenance.

Contracting-out by C-MEC

22. With regard to paragraph 1.31 of the report, we confirm that the Explanatory notes relating to contracting out will be updated at the next opportunity to include the additional explanations put forward in the correspondence with the Committee. We note the Committee's concerns in relation to contracting out more generally and the request in paragraph 1.33 of the report for the government to respond to the Committee's Report on the Meaning of Public Authority. We can confirm that the Ministry of Justice will be responding shortly.

Naming and shaming Defaulting Parents

23. The Committee's response to the government decision not to publish any further names of defaulting parents is noted and appreciated. The Government, and C-MEC in the future, would not introduce any scheme naming defaulting parents unless it was of the view that such a scheme was necessary to meet a legitimate aim and would be justified and proportionate interference with the rights of those affected.

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty-First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379

Session 2006-07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350

Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human Rights Act	HL Paper 77/HC 410
Tenth Report	The Treatment of Asylum Seekers: Volume I Report and Formal Minutes	HL Paper 81-I/HC 60-I
Tenth Report	The Treatment of Asylum Seekers: Volume II Oral and Written Evidence	HL Paper 81-II/HC 60-II
Eleventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 83/HC 424
Twelfth Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 91/HC 490
Thirteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 105/HC 538
Fourteenth Report	Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)	HL Paper 106/HC 539
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 112/HC 555
Sixteenth Report	Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights	HL Paper 128/HC 728
Seventeenth Report	Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers	HL Paper 134/HC 790
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume I- Report and Formal Minutes	HL Paper 156-I/HC 378-I
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume II- Oral and Written Evidence	HL Paper 156-II/HC 378-II
Nineteenth Report	Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning	HL Paper 157/HC 394
Twentieth Report	Highly Skilled Migrants: Changes to the Immigration Rules	HL Paper 173/HC 993
Twenty-first Report	Human Trafficking: Update	HL Paper 179/HC 1056
Session 2005-06		
First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004-05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the	HL Paper 104/HC 850

	Committee in the last Parliament	
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/ HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547
Twenty-third Report	The Committee's Future Working Practices	HL Paper 239/HC 1575
Twenty-fourth Report	Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention	HL Paper 240/HC 1576
Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
Twenty-sixth Report	Human trafficking	HL Paper 245-I/HC 1127-I
Twenty-seventh Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626
Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)	HL Paper 276/HC 1714
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716