House of Lords
House of Commons

Joint Committee on Human Rights

Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills

Third Report of Session 2007-08

Drawing special attention to:

Child Maintenance and Other Payments Bill

HL Paper 28
HC 198

House of Lords
House of Commons

Joint Committee on Human Rights

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Third Report of Session 2007-08

Report, together with formal minutes and appendices

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Joint Committee on Human Rights

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

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

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The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

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), Suzanne Moezzi (Committee Secretary) and Jacqueline Baker (Senior Office Clerk).

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The Committee draws to the special attention of both Houses the Government's Child Maintenance and Other Payments Bill. It would implement the Government's proposals in its White Paper "A new system of Child Maintenance". It provides for the establishment of the Child Maintenance and Enforcement Commission (C-MEC), to assume powers and responsibilities held by the Secretary of State and exercised by the Child Support Agency. It also provides for new powers and faster compensation payments to sufferers from mesothelioma. The Committee has raised various concerns in correspondence with successive Secretaries of State and has received two submissions, all published (paragraphs 1.1-1.7).

The Committee does not consider that C-MEC's proposed enforcement powers raise significant risk of incompatibility with ECHR rights, but it is concerned that safeguards for Convention rights are to be left to secondary legislation. It recommends that safeguards relevant to the protection of individual human rights should be included on the face of primary legislation (paragraphs 1.8-1.12).

In relation to provisions on debt arising from outstanding child maintenance, specifically negotiation or cancellation and rights of parents with care, the Committee may in due course consider whether the final judgment of the European Court of Human Rights in the *Kehoe* case has any implications for the Bill (paragraphs 1.13-1.19). The Committee reiterates its view that certain safeguards for the protection of Convention rights, in this case, the respect for private life, should be on the face of the Bill rather than in secondary legislation (paragraph 1.20).

The Committee recommends that the Government reconsiders whether more detailed safeguards on information sharing provisions could be included on the face of the Bill and the adequacy of safeguards on C-MEC's proposed powers to share information with credit reference agencies (paragraphs 1.20-1.27).

The Committee regrets the Government's reliance on contractual provisions for the protection of human rights of individuals dealing with contractors carrying out C-MEC's functions. It restates its view that this approach is generally unacceptable. It draws attention to the different views put forward by the Minister on protection of Convention rights under this Bill. It calls on the Government to respond without further delay to its Report of March 2007 on the Meaning of Public Authority in the Human Rights Act (paragraphs 1.28-1.32).

The Committee welcomes the Government's decision not to publish any more names of parents convicted of offences related to child maintenance and recommends the ruling out of any naming and shaming scheme unless it is clearly effective, necessary, justified and proportionate (paragraphs 1.33-1.37).

The Committee considers that the following Government bills do not raise human rights issues significant enough to warrant further scrutiny: Channel Tunnel Rail Link (Supplementary Provisions) Bill; Crossrail Bill; Dormant Bank and Building Society Accounts Bill; European Communities (Finance) Bill; Local Transport Bill; National Insurance Contributions Bill.

It is currently scrutinising the following Bills:

- Children and Young Persons Bill
- Climate Change Bill
- Criminal Justice and Immigration Bill
- Education and Skills Bill
- Health and Social Care Bill
- Housing and Regeneration Bill
- Human Fertilisation and Embryology Bill
- Regulatory Enforcement and Sanctions Bill
- Sale of Student Loans Bill.

Bills drawn to the special attention of both Houses

Government Bills

1 Child Maintenance and Other Payments Bill

Date introduced to first House	5 June 2007
Date introduced to second House	4 December 2007
Current Bill Number	HL Bill 12
Previous Reports	None

Background

1.1 This is a Government Bill introduced into the House of Commons on 5 June 2007. It was carried over from the last parliamentary session and was brought to the House of Lords on 4 December 2007. It is expected to have its second reading in the House of Lords on 18 December 2007. The Lord McKenzie of Luton, Parliamentary Under-Secretary-for-State for Work and Pensions, has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998. The Explanatory Notes accompanying the Bill set out the Government's view of the Bill's compatibility with the Convention rights at paragraphs 572– 573.[1]

The Effect of the Bill

1.2 The Government published its White Paper, "A new system of Child Maintenance" in December 2006.[2] This paper was based on the recommendations of the Henshaw Report and recommended the creation of a new non-departmental public body with responsibility for the administration of child maintenance, the Child Maintenance and Enforcement Commission. This Bill makes provision for the implementation of the Government's White Paper proposals.

1.3 The Bill provides for the establishment of the Child Maintenance and Enforcement Commission ("C-MEC").[3] It provides for C-MEC to assume certain statutory powers and responsibilities for child support currently held by the Secretary of State and exercised by the Child Support Agency ("CSA"). It provides for new mechanisms of assessment and additional powers of enforcement.[4] These new powers include:

a) removing the current requirement that a liability order be made by the courts before enforcement action is taken, by permitting C-MEC to make administrative liability orders;

b) removing the requirement to apply to the courts for approval to enforce a liability order through a charging order or third party debt order;

[1] HL Bill 12- EN.

[2] Cm 6979.

[3] Part 1.

[4] Parts 2 – 3.

c) new powers to require the surrender of a non-resident parent's passport or ID card or to apply to the magistrates' court for a curfew to be imposed on such a person if they fail to pay maintenance;

d) powers to collect maintenance directly from defaulting parents' bank accounts (and accounts with other financial institutions).

1.4 The Bill also makes provision to ensure faster compensation payments to sufferers of mesothelioma.[5]

1.5 On 23 February 2007, we wrote to the then Secretary of State for Work and Pensions raising a number of human rights issues raised by the White Paper.[6] We received a response dated 16 March 2007.[7]

1.6 On 12 July 2007, we wrote to the Secretary of State for Work and Pensions, the Rt Hon Peter Hain MP, to raise a number of human rights issues which appeared to arise from the Bill.[8] We received a response on 10 August 2007.[9] We have previously published this correspondence on our website, and drawn it to the attention of the House of Commons before the Report stage debate, to inform parliamentary and public debate.

1.7 During the Bill's passage, we have received two submissions on the compatibility of the Bill with the United Kingdom's human rights obligations: from Professor Nick Wikeley, of the University of Southampton[10] and Mr Stephen Lawson, a solicitor.[11] We publish both of these submissions as appendices to this Report.

Significant Human Rights Issues

1.8 We raised a number of significant human rights issues with the Government during the course of our scrutiny of these proposals.

(a) Enforcement Powers of C-MEC

1.9 We explored the human rights compatibility of a number of the proposed reforms to the enforcement powers available to C-MEC in our pre-legislative scrutiny and in our correspondence with the Minister. These included: a) whether the proposal to require the surrender of defaulting parents' passports by administrative arrangement without prior judicial oversight would be compatible with those parents' rights to respect for their private life and their right to a fair hearing (as guaranteed by Articles 8 and 6 ECHR), and the right to respect for the peaceful enjoyment of their possessions (as guaranteed by Article 1, Protocol 1, ECHR); b) whether proposals to use direct enforcement against defaulting parents bank accounts would be compatible with parents rights to respect for private life and respect for the peaceful enjoyment of possessions; c) whether proposals for appeals against administrative liability orders were compatible with the right to a fair hearing by an

[5] Part 4.
[6] Appendix 1.
[7] Appendix 2.
[8] Appendix 3.
[9] Appendix 4.
[10] Appendix 5.
[11] Appendix 6.

independent and impartial tribunal (as guaranteed by Article 6 ECHR and the common law) and d) whether certain safeguards proposed by the Government for the purpose of safeguarding Convention rights should be left to secondary legislation or contained on the face of the Bill.

1.10 It is our view that none of these issues is likely to lead to a risk of incompatibility with Convention rights which reaches the significance threshold we set for our work in our working practices report.[12] However, we are concerned about the significant number of safeguards for Convention rights to which the Government refers, both in the Explanatory Notes accompanying the Bill, and in correspondence, which will be contained in secondary legislation. For example, the Bill provides for C-MEC to have the power to make administrative orders for the deduction of regular sums of money from individuals' current accounts, or a lump sum from a savings account, for the purposes of securing a payment due under a maintenance calculation. The Explanatory Notes explain that it is the Government's view that these powers do not breach individuals' rights to respect for private life (as guaranteed by Article 8 ECHR). The Government explains:

> These provisions are justified and proportionate. Regulations will stipulate a protected amount, as a maximum percentage of money that can be taken. The deduction orders will be subject to appeal to a magistrates' court or sheriff, and non-resident parents will be able to make a request that the Commission review the order if it, for example, will cause hardship.[13]

1.11 None of these safeguards are on the face of the Bill. Importantly, the right to appeal, is provided for in an enabling power which the Secretary of State is not required to exercise.[14]

1.12 We have consistently taken the view that where safeguards are relevant to the protection of human rights, and the assessment of whether proposals are compliant with our human rights obligations, those safeguards should be included on the face of primary legislation.[15] **We reiterate our recommendation that, where the Government considers a safeguard relevant to the protection of individual human rights, whether Convention rights guaranteed by the Human Rights Act, or otherwise, those safeguards should be included on the face of the relevant primary legislation. For example, provision for rights of appeal against administrative orders should be expressed on the face of the Bill. We may consider the adequacy of the safeguards in any proposed regulations made under the delegated powers in Clauses 19 – 28 of the Bill (which contain the proposed enforcement powers of C-MEC) in due course.**

(b) Debt, Negotiation or Cancellation and Rights of Parents with Care

1.13 The Bill provides the Secretary of State with regulation making powers designed to allow C-MEC to offset certain liabilities for child maintenance.[16] It also provides C-MEC

[12] Twenty-third Report of Session 2005-06, *The Committee's Working Practices*, HL Paper 239 / HC 1575.

[13] HL Bill 12-EN, para 573.

[14] Clause 21, New Section 32B(4) (in respect of deductions from current accounts). Contrast the provision for appeals against lump sum orders: New Section 32G(6). See also New Section 39I which provides the Secretary of State with a further discretion to make provision in relation to these orders, including in relation to appeals.

[15] See for example, Twenty-fifth Report of Session 2005-06, *Legislative Scrutiny: Thirteenth Progress Report,* HL Paper 241/HC 1577, paras 1.11, 1.28 (Safeguarding Vulnerable Groups Bill); Fifth Report of Session 2005-06, *Legislative Scrutiny: Second Progress Report,* para 2.22 (Immigration, Nationality and Asylum Bill).

[16] Clause 29.

with the power to accept part payment of arrears in full and final satisfaction in certain circumstances[17] and to write off certain arrears.[18] The Bill also provides powers to the Secretary of State in relation to the transfer, selling or "factoring" of debt to third parties.[19] We wrote to the Minister, after the publication of the White Paper, to investigate whether this power engaged the rights of children or parents with care under the right to a fair hearing, the right to private or family life or the right to the peaceful enjoyment of possessions. The Minister, in his response to our pre-legislative scrutiny, explained that the Convention did not treat child maintenance administered by a central body as a debt that could be considered a possession, where the parent with care had no right to direct enforcement.[20] This would rule out the application of Article 1, Protocol 1 ECHR, which guarantees the right to peaceful enjoyment of possessions, and Article 6 ECHR, which guarantees the right to a fair hearing, in this context.

1.14 We accept that the Government's analysis is consistent with the analysis of the House of Lords in *Kehoe*, a case that is currently the subject of an application to the European Court of Human Rights.[21] Both of the submissions that we received on this Bill were concerned with the inability of a parent with care to enforce directly child maintenance assessment or awards. Professor Nick Wikeley (who provided an expert opinion in support of Mrs Kehoe's claim) told us:

> The Henshaw Report recommended that this rule should be reconsidered (Cm 6898, pp. 31-32). At present, however, the Bill includes no relaxation of the monopoly rule. This is undoubtedly consistent with the decision in *Kehoe.* It remains to be seen whether the rule survives scrutiny in Strasbourg…In the absence of a right to enforce an award directly, a parent with care is left with few options. She can complain to the Independent Case Examiner. She can in theory bring an application for judicial review but this is not a sensible or viable remedy in many cases. She has, according to the Court of Appeal, no right to sue the CSA in negligence (*Rowley v Secretary of State for Work and Pensions* [2007] EWCA Civ 598). These avenues do not amount to very much and it remains questionable whether in total they are consistent with Article 6 ECHR.[22]

1.15 The Bill exempts from liability in damages any member of C-MEC and any of its committees or staff for anything done or omitted in the exercise or purported exercise of the functions of C-MEC. These provisions do not exclude liability for damages under Section 7 of the Human Rights Act 1998 or liability for any acts or omissions in bad faith.

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[17] Clause 30.

[18] Clause 31.

[19] Clause 32.

[20] 'Parent with care' is used in this context to describe parents who are claiming child maintenance for children in their care.

[21] Appendix 3, pages 12 – 13. The Government relies on the case of *R (Kehoe) v Secretary of State* [2005] UKHL 48. In that case, Mrs Kehoe sought a declaration that the existing enforcement provisions for child maintenance recovery by the CSA were incompatible with Article 6(1) ECHR as they denied the parent with care access to court in connection with disputes as to whether the absent parent had paid or ought to pay sums due under a maintenance assessment. She sought damages under Section 7 HRA in respect of the undue delay of the CSA in taking steps to enforce the child maintenance assessments in her case. The House of Lords rejected her claim, holding that the caring parent had no right of recovery of child maintenance or any right to enforce a claim for child maintenance against an absent or non-resident parent under the existing scheme. Article 6 ECHR did not create such a substantive right.

[22] Appendix 5.

Stephen Lawson argues that these provisions compound the situations in which a parent with care can suffer loss and is without remedy.[23]

1.16 The European Court of Human Rights in Strasbourg has accepted the assessment of the House of Lords in *Kehoe*, that a parent with care who has no right to child maintenance in domestic law cannot use Article 6 ECHR to create such a substantive right. However, the Court has distinguished the right to receive child maintenance from the right to apply for child maintenance from the CSA. The Court has declared admissible Mrs Kehoe's claim that, in so far as that right to apply can be considered a civil right for the purposes of Article 6 ECHR:

> It is necessary to look beyond the appearances of and the language used and to concentrate on the realities of the situation…The applicant was claiming an interference with her means of subsistence, an individual, economic right flowing from specific rules laid down in a statute…and it is irrelevant for that purpose that the claim was to be satisfied by sums paid via the State which had taken on the task of obtaining them from Mr K. […]
>
> As a final remark the Court would point out that the CSA is not itself a judicial body determining disputes about civil rights and Article 6 cannot apply directly to its procedures.[24]

1.17 In the course of this application, the Government continues to argue that the decision of the State on how to administer child benefit remains a "complex socio-economic decision" within the margin of appreciation of the Contracting State. The Applicant, Mrs Kehoe, continues to argue that the Government's approach is formalistic and denies the right recognised by the Court to apply for maintenance, "an individual economic right flowing from specific rules laid down in a statute". As far as we are aware, a date for the hearing in this case has not yet been set.

1.18 In our view, a judgment in this case which confirmed that the right of a parent with care to apply to the CSA for assessment and enforcement of child maintenance was a "civil right" could have significant implications for the provisions in this Bill, not least the provisions on debt, negotiation, cancellation and factoring. Although this Bill would replace the CSA, and would provide for C-MEC to take a more secondary role in relation to child maintenance, by encouraging parents to make their own arrangements, C-MEC will still retain responsibility for assessment and enforcement of child maintenance when individual arrangements have failed or are not in place. During the passage of the Bill through the House of Commons, a number of Members of that House suggested that although the intention of this Bill was to move away from the widely publicised delays in claims to the CSA, the Government should accept that, in practice, C-MEC would inherit a system which had been notoriously difficult to manage.[25]

1.19 **We will consider the final judgment by the European Court of Human Rights in the case of Kehoe on whether the right of a parent with care to apply for assessment and**

[23] Appendix 6. The Committee and its predecessors have considered the Convention implications of exemptions from liability previously. See for example, Twentieth Report of Session 2005-06, *Legislative Scrutiny: Tenth Progress Report,* HL Paper 186/HC 1138 (Compensation Bill).

[24] Application No 2010/06, Admissibility Decision, 26 June 2007.

[25] See for example, HC Deb, 3 December 2007, Col 601.

enforcement of child maintenance by the CSA was a "civil right" for the purposes of Article 6 ECHR, as part of our work monitoring the implementation of judgments by that Court. We may consider whether that judgment has any implications for the proposals in this part and other parts of the Bill in due course.

1.20 In response to our pre-legislative scrutiny, the Government accepted that Article 8 ECHR might be engaged by the proposal to settle, write off or reduce debt. The then Minister explained that these proposals would not operate in a way which would breach the Convention: as in negotiated settlements, where arrears are owed to a parent with care, that parent's consent would be sought before an agreement was reached. Similarly, debts would only be written off where it was "inappropriate" to continue to pursue them, such as "where the parties have reconciled and the parent with care has asked C-MEC not to enforce the debt, or where the liable person has died and there are no funds in the estate". In our letter to the Minister, we asked whether it was appropriate to leave these matters to secondary legislation. The Minister said that while the Government "acknowledged that Article 8 rights might be engaged, we are confident that the limitations placed on the circumstances in which these powers will be applied makes it extremely unlikely that a person's private and family life would be affected". The Minister explained that the Government considered it necessary to maintain "flexibility" for certain matters to be subject to secondary legislation. The Minister stressed that the exercise of these powers will be subject to a determination by C-MEC that it will be unfair or otherwise inappropriate to enforce liability. This is a broad test.[26] **We reiterate our view, expressed above, that in circumstances where the Government refers to safeguards relevant to the protection of human rights, those safeguards should generally be included on the face of the relevant primary legislation. We may scrutinise any proposed regulations made under the delegated powers in this section of the Bill, in due course. We look forward to receiving copies of the draft regulations as soon as they are available.**

(c) Information Sharing Powers (Clause 41, Schedule 6)

1.21 The Bill provides for new information sharing gateways for information held by Her Majesty's Revenue and Customs ("HMRC") which is already shared with the Department for Work and Pensions (DWP) to be directly shared with C-MEC or with any "person providing services to them". Similarly, information held by the Secretary of State for the purposes of functions relating to social security, employment or training may be supplied to C-MEC or any person providing C-MEC with services. Information gathered by C-MEC for the purposes of child support may be shared with HMRC and the Secretary of State.[27] The Explanatory Notes do not address the compatibility of these provisions with the right to respect for private life. Families need Fathers criticised these provisions in their Second Reading briefing on the Bill:

> C-MEC will be empowered to collect income data from HMRC direct. This data will be available to C-MEC employees and anyone employed by a third party providing services to C-MEC in connection with child support (Schedule 6, paragraph 1). This seems to sound a death-knell, frankly, for tax-payer confidentiality. There will be sanctions against anyone from C-MEC or its suppliers who breaches confidentiality,

[26] Clause 31, New Section 41E.

[27] Clause 41, Schedule 6.

> but how much confidence can anyone have that this data will be kept confidential always?[28]

1.22 The Minister's response to the Committee's pre-legislative scrutiny accepted that the creation of these gateways would engage an individual's right to protect his private information (as protected by Article 8 ECHR). That response explained that "it will be necessary for C-MEC to have access to certain information held by DWP and HMRC as well as information already supplied to DWP by HMRC and held on DWP's database in order to achieve the policy intentions, including to improve the process of calculating child support maintenance by using historical tax information". [29]

1.23 The Minister provided a further explanation in his response to our letter on the Bill:

> The provisions in Schedule 6 essentially replicate the existing gateways which are found in social security legislation and the Child Support Act 1991 so that the Commission can access the range of information that is currently available to the existing Child Support Agency and so that the Department, HMRC and the Northern Ireland Department can continue to have access to child support information for the purposes of their functions. As the commission will be a separate legal entity and no longer an extension of the Secretary of State, it is necessary to reformulate these gateways so that the Commission is explicitly covered.[30]

1.24 The Minister explained that although the breadth of the proposed gateways have not changed, the Government envisages that C-MEC is likely to place far greater reliance on the information supplied by HMRC in the exercise of its functions. The Government considers that disclosure of any personal information pursuant to these provisions will be for the purpose of the protection of the rights and freedoms of others, and proportionate. The Minister explained that the provisions will enable a much swifter and more accurate calculation of liability and will mean that people will not have to provide the same information twice to different parts of Government.

1.25 Although there are some safeguards on the face of the Bill, including the application of the criminal offence for unlawful disclosure of information in Section 50 of the Child Support Act 1991, which this Bill will extend to employees, contractors, and employees of contractors,[31] we are concerned that the gateways remain very wide and allow for the broad exchange of information between the named agencies or their associated contractors for any of the broad functions to be undertaken by C-MEC, HMRC or the Department. If this information is processed strictly for the statutory purposes of C-MEC and the HMRC and the departments (i.e. the relevant Secretary of State and the Northern Ireland Department, as outlined in the Bill), in accordance with the Data Protection Act 1998 and the requirements of Section 6, Human Rights Act 1998, it is unlikely that the use of these gateways will give rise to a significant risk of incompatibility.

1.26 However, in light of recent revelations about the serious failings within Government departments, and particularly within HMRC, to meet these standards, we are concerned

[28] Families Need Fathers, Child Maintenance and Other Payments Bill, Second Reading, June 2007, paragraph 20.

[29] Appendix 2.

[30] Appendix 4.

[31] Schedule 7, paragraphs 19 and 20.

that there may not be adequate practical safeguards in place on the ground to ensure that personal information is treated in accordance with the law and specifically in accordance with the individual right to respect for personal information.[32] We and our predecessor committee have consistently raised the need for adequate safeguards to accompany legislative provisions which provide for the creation of databases and other information gathering and information sharing powers in order to ensure compatibility with Article 8 ECHR.[33] **We recommend that the Government reconsiders the adequacy of the safeguards accompanying the proposed information sharing provisions in this Bill, in particular the proposal that C-MEC should rely heavily on information held and processed by HMRC, in order to comply with the individual right to respect for personal information, as guaranteed by Article 8 ECHR. We recommend that the Government should reconsider whether more detailed safeguards could be included on the face of the Bill, such as more detailed provision on when information should be shared, the specific purposes for sharing information (i.e. other than the general statutory functions or general purposes of the relevant agency) and including specific criteria or conditions about the use, storage and disposal of personal information.**

1.27 The Bill also gives C-MEC a broad power to disclose information about non-resident parents to credit reference agencies.[34] The Government has explained that this may impact upon defaulting parents' powers to secure credit and, specifically, to obtain a mortgage. The Bill allows C-MEC to disclose any "qualifying information" to a credit reference agency. Qualifying information is defined very broadly to include any information held by C-MEC for the purposes of the Child Support Act 1991 and which relates to a person liable to pay child support. The Explanatory Notes explain that the Government considers that these provisions engage Article 8 ECHR, but that any interference is justified and proportionate. They explain that information should only be disclosed with consent, unless the relevant person is subject to a liability order. The Government goes on to explain that credit reference agencies will only be able to use information by C-MEC to assess the financial standing of an individual.

1.28 The disclosure of information with consent is unlikely to lead to any risk of incompatibility with the Convention or with Data Protection Act principles. However, it is clear from domestic case law that the application of a civil order or a conviction does not exclude individuals from the protection of Article 8 ECHR. The publication of personal information relating to an order or a conviction (in this case, the imposition of liability or other information, including personal details) must serve a legitimate aim and any interference with the private life of the defaulting parent, their children or any new family must be necessary and proportionate. The Minister relies upon any discretion to disclose being exercised by C-MEC in accordance with its Section 6 Human Rights Act duty to comply with Convention rights. We have consistently been critical of this approach to the protection of Convention rights and re-iterate that where safeguards can be included on the face of primary legislation, they should be included to enhance legal certainty; to make

[32] On 20 November 2007, the Chancellor made a statement announcing that two unencrypted discs containing the personal details, including bank account details of over 7 million families claiming child benefit had been lost in transit between HMRC and the National Audit Office: HC Deb, 20 Nov 2007, Col 1101. The Committee took evidence from Michael Wills MP, Minister for Data Protection on Human Rights Policy and Data Protection on 26 November 2007.

[33] See for example, Eighth Report of 2004-05, paragraph 2.8 (Serious Organised Crime and Police Bill); Nineteenth Report of Session 2003-04, paragraph 110 (Childrens Bill).

[34] Clause 35.

it more likely that the power will be exercised proportionately; and to enable full and proper parliamentary scrutiny of the safeguards proposed. In this case, for example, the Minister explains that the relevant information that may be shared will be prescribed in regulations. The Minister does not explain why the type of information that might be disclosed cannot be specified on the face of the Bill.[35] **We recommend that the Government reconsiders the adequacy of the safeguards accompanying the proposal that C-MEC should have the power to share information, including personal information, with credit reference agencies; and reconsiders 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.**

(d) Contracting-out by C-MEC

1.29 The Bill provides C-MEC with the power to contract out its functions.[36] The Explanatory Notes state that C-MEC will be a public body for the purposes of the HRA and explain that the Government is satisfied that the human rights of individuals interacting with contractors will be adequately protected through the use of contractual provisions.[37] In our Report on the Meaning of Public Authority for the purposes of the Human Rights Act,[38] we reiterated our view that this approach was generally unacceptable. In short, our reasons were: a) contractual provisions vary according to the terms contractors are willing to accept and b) contractual terms between a commissioning body and a contractor cannot generally be enforced by third parties, including the service users they may be intended to protect.

1.30 We wrote to the Minister to draw his attention to our concerns and to ask for a further explanation of the Government's views on this issue. In reply, the Minister explained that due to the statutory language used in the Bill, C-MEC would retain liability for the actions of any person exercising contracted out functions for the purposes of the Human Rights Act. The Minister explained:

> Whenever an authorisation is given, sub-section (4) [*of Clause 8*] provides that anything done in the exercise of that function will be treated as if it had been done by the Commission itself – and the same protection applies to omissions. This is subject only to very narrow exceptions relating to any criminal proceedings brought against the authorised person or to contractual relations between the Commission and that person. Given that the Commission is a public authority for the purposes of the Human Rights Act, anything that is done incompatibly with the Convention rights will be unlawful under section 6(1).[39]

1.31 Although this letter was sent in August 2007, the Explanatory Notes accompanying the Bill on introduction to the House of Lords have not been updated to present this new explanation by the Government of their view, that the rights of service users will be adequately protected.

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[35] Appendix 4.

[36] Clause 8.

[37] HL Bill 12- EN, para 573.

[38] Ninth Report of Session 2006-07, *The Meaning of Public Authority under the Human Rights Act,* HL Paper 77/HC 410, paras 33 – 61; Seventh Report of Session 2003-04, *The Meaning of Public Authority under the Human Rights Act,* HL Paper 39/HC 382; paras 110-124.

[39] Appendix 4.

1.32 We have now received numerous views from Government on how best to protect the Convention rights of individuals who are receiving services from, or subject to statutory powers exercised by, private bodies on a contracted out basis. As we have explained in our two previous Reports on the Meaning of Public Authority for the purposes of the Act,[40] it was clearly the Government's original intention that such individuals would be protected as the providers would be considered to be functional public authorities obliged to act in a manner compatible with Convention rights. In the past year, our Committee has had different explanations of the Government's view on the application of Section 6(3)(b) of the Human Rights Act from different Government departments and from different Ministers within individual departments.[41] We are concerned that the Minister has now chosen to relay one view about the protection of individual Convention rights in the Explanatory Notes prepared for the passage of the Bill and a different one in his correspondence with our Committee.

1.33 We are concerned about the lack of consistency in the Government's approach to the application of the Human Rights Act and the meaning of public function for the purposes of the Human Rights Act. We re-iterate our view that neither contract compliance, nor the extended liability of core public authorities, in this case, C-MEC, are appropriate substitute for the direct application of Section 6 of the Human Rights Act to any body exercising public functions.[42] As we have considered above, C-MEC will have a number of functions which may engage human rights, including the exercise of administrative enforcement powers and powers in relation to data management and protection. In August, the Minister told us that the Government would address our concerns about the adequacy of contract compliance as a means of protecting Convention rights in its response to our most recent Report on the Meaning of Public Authority. Unfortunately, that response is now significantly overdue. [43] **We call on the Government to respond to our March 2007 report on the Meaning of Public Authority without further delay. We urge the Government to re-iterate its original commitment to the broad application of the Human Rights Act to the provision of public services and the exercise of public powers. If the Government's position on the application of the Human Rights Act has changed, we call on the Government to explain fully the reasons for this change and why that view remains consistent with the understanding presented to Parliament during the passage of the Act.**

(e) Naming and Shaming Defaulting Parents

1.34 The White Paper proposed that C-MEC should be encouraged to "publicise successful enforcement activity", including by publishing the names of certain non-resident parents who were successfully prosecuted on their website. The responses to the consultation on

[40] Ninth Report of Session 2006-07, *The Meaning of Public Authority under the Human Rights Act,* HL Paper 77/HC 410, paras 33 – 61; Seventh Report of Session 2003-04, *'The Meaning of Public Authority under the Human Rights Act',* HL Paper 39/HC 382; paras 110-124.

[41] See for example, the evidence of Baroness Ashton, the then Minister for State for Human Rights and the Department for Communities and Local Government to our inquiry on the Meaning of Public Authority under the Human Rights Act, Ninth Report of Session 2006-07, *The Meaning of Public Authority under the Human Rights Act,* HL Paper 77/HC 410, Written Evidence, Memoranda 18 and 20. See also the evidence of Michael Wills MP, Uncorrected Transcript of Evidence, 26 November 2007, HC-132-i.

[42] Ninth Report of Session 2006-07, *The Meaning of Public Authority under the Human Rights Act,* HL Paper 77/HC 410, paras 33 – 61; Seventh Report of Session 2003-04, *The Meaning of Public Authority under the Human Rights Act,* HL Paper 39/HC 382; paras 110-124.

[43] The Government response to this report was due on 28 May 2007 (two months after publication).

this issue expressed concern about the implications of "naming and shaming" for the children involved and for any new family of the non-resident parent. For example, Barnardo's expressed concern about "unnecessary bullying and stigma".[44] The Government has decided to take forward these plans, but has explained that they "genuinely wish to give non-resident parents an opportunity to comply before any enforcement action is taken".[45]

1.35 The Government adopted this policy, publicising names of parents convicted of offences related to child maintenance on the CSA website during the summer of 2007. Before publication, they wrote to some parents with care to ask whether they would like the details of their case to be publicised. In our view, this policy clearly engages the rights of non-resident parents, their children and any new family, to respect for their private and family life, as guaranteed by Article 8 ECHR. In order to be justified, any "naming and shaming" scheme must be for the purpose of achieving a legitimate aim and the interference must be necessary and proportionate to the achievement of that aim. The domestic courts have considered "naming and shaming" of both offenders and those subject to ASBOs and have stressed the need to consider proportionality on a case by case basis and that the interests of any relevant family members, in particular, affected children, must be taken into account during this assessment.[46] We were concerned that although the Government had received submissions on these important issues, it appears to have failed to identify clearly the purpose served by "naming and shaming"; nor did it appear to have considered whether consultation with the parent with care will be adequate to meet concerns not only for the rights of the child for whom maintenance is sought but also the rights of any children of the non-resident parent's family.

1.36 We wrote to the Minister to ask for an explanation of the Government's views.[47] The Minister replied that the Government accepts that these provisions engage Article 8 ECHR. The Government considers that interference with the non-resident parent's rights "is necessary in the interests of the economic well being of the country and to protect the rights and freedoms of others". The Minister explained that a) it is in the pubic interest that a non-resident parent should pay child support maintenance as there is a legal obligation to do so and b) the scheme is aimed at improving compliance rates and deterring non-compliance by non-resident parents. He went on to explain that in formulating this policy, consideration was given to the private lives of others who might be affected. The Minister wrote that:

> With regard to the non-resident parent's new family, consideration was given to whether there were any facts known by the Agency which would preclude disclosure.

1.37 Unfortunately, the Minister did not explain what this consideration involved and whether and, if so, in what circumstances this consideration could lead to a decision not to "name and shame".

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[44] "A new system of child maintenance: summary of responses", Department for Work and Pensions, para 5.30, Cm 7061.

[45] "A new system of child maintenance: summary of responses", Department for Work and Pensions, para 5.31, Cm 7061.

[46] *Stanley & Ors v (1) Metropolitan Police Commissioner, (2) Brent London Borough; (3)Secretary of State for the Home Department* [2004] EWHC 2229 (Admin); *Ellis v Chief Constable of Essex Police* [2003] EWHC 1321 (Admin).

[47] Appendix 3.

1.38 We welcome the Minister's candid acceptance that the Government's initial assessment of this policy calls into question the potential effectiveness of the naming and shaming scheme. The Government intends not to publish any further names at present, but will keep the question of whether this policy has a role to play, under review.[48] **We welcome the Government's decision not to publish any further names. In order to be compatible with the right to respect for private life, an interference with private life, such as the disclosure or publication of personal information, must be necessary to meet a legitimate aim. If there is evidence that suggests that this policy initiative is ineffective, this undermines any argument that the policy can be operated in a justifiable way. We recommend that the Government, or C-MEC, rules out any naming and shaming scheme until there is evidence that disclosure under the scheme is effective and necessary to meet a legitimate aim and would be a justified and proportionate interference with the rights of non-resident parents and their families to respect for their private lives.**

[48] Appendix 4.

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

Government Bills

2.1 We consider that the following Government bills do not raise human rights issues of sufficient significance to warrant us undertaking further scrutiny of them:

- Channel Tunnel Rail Link (Supplementary Provisions) Bill
- Crossrail Bill
- Dormant Bank and Building Society Accounts Bill
- European Communities (Finance) Bill
- Local Transport Bill
- National Insurance Contributions Bill.

Bills currently being scrutinised by the Joint Committee on Human Rights

Government Bills

3.1 We are currently scrutinising nine Government Bills which appear to us to raise significant human rights issues:

- Children and Young Persons Bill
- Climate Change Bill
- Criminal Justice and Immigration Bill
- Education and Skills Bill
- Health and Social Care Bill
- Housing and Regeneration Bill
- Human Fertilisation and Embryology Bill
- Regulatory Enforcement and Sanctions Bill
- Sale of Student Loans Bill.

3.2 We have written to the Government in relation to most of these Bills. Copies of our letters (and of any replies so far received) can be found on our website.[49] We will be conducting further scrutiny of the issues raised by these Bills and we may report on them in due course in light of the Government's responses to our questions. Up to date information about the Committee's ongoing scrutiny work can also be found on our website.

[49] www.parliament.uk/jchr.

Conclusions and recommendations

1. We reiterate our recommendation that, where the Government considers a safeguard relevant to the protection of individual human rights, whether Convention rights guaranteed by the Human Rights Act, or otherwise, those safeguards should be included on the face of the relevant primary legislation. For example, provision for rights of appeal against administrative orders should be expressed on the face of the Bill. We may consider the adequacy of the safeguards in any proposed regulations made under the delegated powers in Clauses 19 – 28 of the Bill (which contain the proposed enforcement powers of C-MEC) in due course. (Paragraph 1.12)

2. We will consider the final judgment by the European Court of Human Rights in the case of Kehoe on whether the right of a parent with care to apply for assessment and enforcement of child maintenance by the CSA was a "civil right" for the purposes of Article 6 ECHR, as part of our work monitoring the implementation of judgments by that Court. We may consider whether that judgment has any implications for the proposals in this part and other parts of the Bill in due course. (Paragraph 1.19)

3. We reiterate our view, expressed above, that in circumstances where the Government refers to safeguards relevant to the protection of human rights, those safeguards should generally be included on the face of the relevant primary legislation. We may scrutinise any proposed regulations made under the delegated powers in this section of the Bill, in due course. We look forward to receiving copies of the draft regulations as soon as they are available. (Paragraph 1.20)

4. We recommend that the Government reconsiders the adequacy of the safeguards accompanying the proposed information sharing provisions in this Bill, in particular the proposal that C-MEC should rely heavily on information held and processed by HMRC, in order to comply with the individual right to respect for personal information, as guaranteed by Article 8 ECHR. We recommend that the Government should reconsider whether more detailed safeguards could be included on the face of the Bill, such as more detailed provision on when information should be shared, the specific purposes for sharing information (i.e. other than the general statutory functions or general purposes of the relevant agency) and including specific criteria or conditions about the use, storage and disposal of personal information. (Paragraph 1.26)

5. We recommend that the Government reconsiders the adequacy of the safeguards accompanying the proposal that C-MEC should have the power to share information, including personal information, with credit reference agencies; and reconsiders 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. (Paragraph 1.28)

6. We call on the Government to respond to our March 2007 report on the Meaning of Public Authority without further delay. We urge the Government to re-iterate its original commitment to the broad application of the Human Rights Act to the provision of public services and the exercise of public powers. If the Government's

position on the application of the Human Rights Act has changed, we call on the Government to explain fully the reasons for this change and why that view remains consistent with the understanding presented to Parliament during the passage of the Act. (Paragraph 1.33)

7. We welcome the Government's decision not to publish any further names. In order to be compatible with the right to respect for private life, an interference with private life, such as the disclosure or publication of personal information, must be necessary to meet a legitimate aim. If there is evidence that suggests that this policy initiative is ineffective, this undermines any argument that the policy can be operated in a justifiable way. We recommend that the Government, or C-MEC, rules out any naming and shaming scheme until there is evidence that disclosure under the scheme is effective and necessary to meet a legitimate aim and would be a justified and proportionate interference with the rights of non-resident parents and their families to respect for their private lives. (Paragraph 1.38)

Formal Minutes

Monday 17 December 2007

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Dubs	John Austin MP
Lord Lester of Herne Hill	Dr Evan Harris MP
Lord Morris of Handsworth	Virendra Sharma MP
The Earl of Onslow	
Baroness Stern	

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Draft Report [Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills], 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 3.2 read and agreed to.

Summary read and agreed to.

Several Papers were ordered to be appended to the Report.

Resolved, That the Report be the Third 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.

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[Adjourned till Wednesday 9 January 2008 at 2pm.

Appendices

Appendix 1: Memorandum from Prof Nick Wikeley, John Wilson Chair in Law, School of Law, University of Southampton

Introduction

1. I write in my capacity as a law professor at the University of Southampton; my areas of research expertise include child support law and policy. My relevant publications include *Child Support Law and Policy* (Hart Publishing, 2006) and (with Gwynn Davis and Richard Young) *Child Support in Action* (Hart Publishing, 1998); see also N Wikeley et al. *National Survey of Child Support Agency Clients* (DWP Research Report No 152, 2001).

2. I was one of the Specialist Advisers to the House of Commons Work and Pensions Committee for its report on *Child Support Reform* (Fourth Report of Session 2006-07, HC 219-I). I also gave oral and written evidence to the Public Bill Committee which considered the Child Maintenance and Other Payments Bill 2007 earlier this year (Second Sitting, 17 July 2007 and submission CM1). I am currently engaged as a consultant on a major DWP-commissioned child support research project which is being run by NatCen (the National Centre for Social Research).

3. I should also mention that I hold part-time judicial appointments as an appeal tribunal chairman and a Deputy Social Security and Child Support Commissioner. I therefore wish to make it absolutely clear that I am making the observations in this paper in my personal capacity as an academic researcher. Neither the Social Security and Child Support Commissioners nor the Tribunals Service, nor any of their judicial personnel, should be taken to agree with any of the statements or opinions expressed in this paper.

4. I should perhaps add that I have been advocating a number of the reforms which appear in the Bill for some years now, for example the greater use of DEOs as a collection method in child support cases. I have also suggested that consideration be given to the withdrawal of passports as a high level sanction in appropriate cases for serious non-compliance (see my evidence to the Select Committee in June 2004: *The Performance of the Child Support Agency*, Second Report of Session 2004-05, HC 44II – Ev 8-14 and CS08).

5. I therefore have some sympathy for some of the underlying policy objectives behind the Bill, even if I do not agree with all the proposed reforms. There are some measures in the Bill which undoubtedly enhance the recognition of human rights. For example, the proposal in **clause 15** to repeal **section 6** of the Child Support Act 1991 will enhance the autonomy of parents with care on income support and income-related jobseeker's allowance. It will give those parents with care the same options as private clients (those not claiming welfare benefits) and so better protect their Article 8 rights. This note, however, concentrates on those aspects of the Bill which I believe still raise potentially problematic and significant human rights issues. The provisions in the Bill itself which I propose to focus on are principally those relating to enforcement.

6. Part 3 of the Bill comprises extensive amendments to the Child Support Act 1991, mostly in relation to enforcement issues. These relate both to the range of substantive sanctions available to C-MEC and to the enforcement and appeal procedures to be adopted. In my view there are human rights issues raised in both respects. There may well be other human rights issues not highlighted here.

Clause 25: disqualification from holding travel authorisation documents

7. First, as regards substantive sanctions, C-MEC will be able to make an administrative order disqualifying a non-payer from holding or obtaining a travel authorisation (a UK passport and/or an ID card), subject to a right of appeal to the magistrates' or sheriff's court (**clause 25**). The exercise of such powers will almost certainly be challenged under both the ECHR and under EU law. I have discussed this possibility in general terms in my book *Child Support Law and Policy* (published before the Henshaw Report, let alone the Bill, was published). Annex 1 to this note includes an extract from the relevant chapter of the book. I also explain later in that same chapter that the US courts have rejected challenges on constitutional grounds to passport withdrawal in child support non-payment cases.

8. The obvious challenge to such a sanction is on EU freedom of movement grounds, although for the reasons I have indicated in my book my view is that such a complaint will probably not succeed. A challenge to the new powers on ECHR grounds may require a little more ingenuity to get off the ground, not least as the UK Government has not ratified Art 2 of Protocol 4 to the Convention. That said, one can envisage a potential challenge brought under Art 8 or possibly even Art 1 of Protocol 1 (although the latter would face an obvious problem in defining a passport as a possession).

9. Although the UK has not ratified Art 2 of Protocol 4, the UK has of course ratified the ICCPR and has entered no reservation to art 12(2), guaranteeing the right to leave any country, including one's own. The existing provisions for travel restriction orders in UK legislation relate to football hooligans and drug traffickers, where there is an obvious connection between the withdrawal of passports and the public policy goal of preventing further offending. The same arguments may not apply with the same force in the context of child support. I also understand that banning orders for hooligans can only be made after court action. However, experience in both the USA and Australia shows that such powers can be very effective in tacking serious child support non-compliance. Yet the UN Human Rights Committee may take a more stringent view as to whether the restrictions are "necessary" in the context of art 12(3) of the ICCPR.

Clause 26: curfew orders

10. The additional new sanction of curfew orders (**clause 26**) was not proposed by the Henshaw Report (Cm 6894, 2006) and I have to say that there is little evidence that sanctions are deployed in child support systems in other jurisdictions. One obvious risk is that a curfew order might make it impossible for the non-resident parent to exercise contact which has been agreed between the parties or even ordered by the court. The terms of any curfew order must have regard to the defaulter's work, religious or educational commitments (new **section 39K(4)**) but there appears to be no reference to contact arrangements. It may be, of course, that no contact arrangements are in place, but there are

plenty of instances where parties are in bitter disputes over child support and yet contact still manages to be maintained. This omission would seem to raise obvious Article 8 concerns.

11. The proposal to bring in curfew orders is problematic in another way. This concerns the comparison with the Children and Adoption Act 2006. Plans to impose curfew orders on residential parents who unreasonably deny contact between children and non-residential parents were abandoned prior to the Children and Adoption Act 2006. Section 4(1) of that Act inserts five new sections into the Children Act 1989 Act (ss.11J-11N), which provide for new enforcement powers in contact disputes. In particular the new section 11J in the 1989 Act provides for enforcement orders, which require the person in breach of a contact order to engage in an unpaid work requirement. The original Draft Children and Adoption Bill also included a proposal for a curfew requirement as a new sanction to tackle non-compliance with court contact orders.

12. However, following criticism from the Joint Committee (*Report of the Joint Committee on the Draft Children (Contact) and Adoption Bill*, Session 2004-05, HC 400-I, HL Paper 100-I, para. 89) and others, the Government at the time acknowledged that electronic tagging would not be a proportionate response to non-compliance with contact orders. As a result it abandoned the proposal (*Reply to the Report of the Joint Committee on the Draft Children (Contact) and Adoption Bill*, Session 2004-05, Cm 6583, paras. 36-37).

13. Non-compliance with court orders for contact and non-compliance with CSA/C-MEC orders are, of course, not the same thing. However, parents will typically see the two issues as inextricably bound up with each other, even though in legal terms they are wholly separate. There is a real risk that the imposition of curfew orders on non-compliant non-resident parents will be viewed as unfair when the same sanction is not imposed on parents with care who unreasonably deny contact. I acknowledge that this may be more of a policy and presentational argument than a purely human rights issue.

Clause 23: administrative liability orders and appeal rights

14. Procedurally the Bill represents a marked shift away from court-based enforcement to administrative recovery action. So, for example, C-MEC will in future be able to issue a liability order by administrative action (**clause 23**). The justification for this change is that applying to court is "a slow process that takes on average more than 100 days to complete" (White Paper, Cm 6979, para. 5.15). Yet it is unclear how far existing delays are due to the courts and how far they reflect e.g. adjournments caused by the CSA's inability to justify the accuracy of its figures. I am not aware of any hard empirical data on such problems which is in the public domain. It must be said that the CSA's existing record on accuracy hardly inspires confidence, which raises real issues of fairness for non-resident parents. One approach might be to stipulate that these powers should not come into force until CSA/C-MEC's overall accuracy rates on maintenance calculations attain a specified level.

15. There will be a right of appeal against the administrative decision to impose a liability order, but to an appeal tribunal and not a court. Puzzlingly, the appeal tribunal "shall not question the maintenance calculation by reference to which the liability order is made" (new **section 20(7A)** of the 1991 Act inserted by **Sched. 7 para 1(6)** to the Bill). This

prohibition appears to have been borrowed from the existing provisions relating to magistrates' and sheriffs' courts, where it makes obvious good sense, as those courts have no power to determine the amount of child support liabilities. Those issues are to be resolved through the specialist appeals tribunals (see the House of Lords' judgment in *Farley v CSA* [2006] UKHL 31). However, the same considerations do not apply in a forum for which the main *raison d'être* is precisely that it hears appeals against child support calculations.

16. The Secretary of State's letter of 10 August 2007, in reply to that from the Committee's Chairman, explains that regulations will allow appeal tribunals to "vary the amount in respect of which the liability order is made" (page 5). The import of this is not entirely clear. Does it mean that the tribunal is limited to correcting obvious arithmetical errors but can not reinvestigate the basis for the award? Presumably it must if the new section 20(7A) of the 1991 Act is to have some meaning.

17. Again, presumably the policy intention is that parents should challenge decisions on maintenance calculations promptly (hence the standard one month time limit). If, much further down the road, there is a decision to impose a liability order, then again that should be appealed promptly. On that basis the two appeals should be heard at different times on different issues.

18. In the real world, however, life will not be that simple. The CSA is at present not always that efficient at reminding parents of their appeal rights. There is also a one year backstop rule for late appeals. There is also the possibility of appeals to the Commissioner and remittals back to tribunals. One can therefore envisage a situation in which a tribunal might at the same point in time have jurisdiction to hear an appeal on an original assessment and on a much later liability order decision relating to the same calculation. Section 20(7A) of the 1991 Act would seem to be an unwarranted fetter on the tribunal's powers in such circumstances. Whether or not this satisfies Art 6, it is not clear that this creates a system which is user friendly for parents.

19. On a related point I would add that the right to challenge a liability order before an appeal tribunal adds to the confusing fragmentation of appeal rights under the 1991 Act. There is a pressing need for these appeal rights to be reviewed and for the present diversity of appellate arrangements to be rationalised. It is not immediately clear that magistrates' courts should have any role in hearing any child support appeals at all, with the possible exception of committals.

The right to enforce child maintenance awards under the 1991 Act

20. There are also two points not covered in the Bill which I believe raise important human rights issues. The first is a relatively narrow and technical point relating to enforcement. The position under UK law at present is clear – the CSA (and in future C-MEC) has a monopoly over enforcing awards made under the 1991 Act. It follows that a parent with care has no standing to bring enforcement proceedings in her own right or in the name of her children. This applies even if the parent with care is a private client (not on benefits) and so has a direct financial interest in recovering maintenance. This position is confirmed

by the decision of the majority of the House of Lords in *R (Kehoe) v Secretary of State* ([2005] UKHL 48).

21. The Henshaw Report recommended that this rule should be reconsidered (Cm 6894, pp. 31-32). At present, however, the Bill includes no relaxation of the monopoly rule. This is undoubtedly consistent with the decision in *Kehoe*. It remains to be seen whether the rule survives scrutiny in Strasbourg (Mrs Kehoe's complaint has been admissible, at least on one ground: Application no. 2010/06 [2007] ECHR 580. I should also declare an interest as I provided an expert opinion for the applicant in the hearing before the House of Lords).

22. In the absence of a right to enforce an award directly, a parent with care is left with few options. She can complain to the Independent Case Examiner. She can in theory bring an application for judicial review but this is not a sensible or viable remedy in many cases. She has, according to the Court of Appeal, no right to sue the CSA in negligence (*Rowley v Secretary of State for Work and Pensions* [2007] EWCA Civ 598). These various avenues do not amount to very much, and it remains questionable whether in total they are consistent with Article 6.

23. I remain of the view that in principle parents with care should have the right, in the last resort, to enforce child support awards through the normal court processes. In practice few will wish to exercise that right but that is little or no excuse for the current state of affairs. It is a sad indictment of the UK system that it imposes a duty on non-resident parents to pay child support but apparently confers no right on the parent with care or children to receive child support.

The absence of a child's right to receive child maintenance

24. The second point I would make is a more general one that develops from this argument. It is notable that the first of the so-called "basic principles" set out in section 1 of the 1991 Act (the parental duty to maintain) is left largely untouched. Many of the changes to the rest of the Act are of the "cut and paste" variety – thus Schedule 3 to the Bill comprises eight pages of amendments to the 1991 Act which may be summarised as "for 'the Secretary of State', read 'the Commission'". The only apparent change to section 1 of the 1991 Act is effected indirectly by updating the definition of 'child' to fit the new child benefit definition (**clause 37**).

25. So if the Bill is enacted in its current form, section 1 of the 1991 Act will continue merely to assert the parental obligation to maintain – there is no statutory recognition of any right on behalf of the child (or indeed parent with care). So although C-MEC's main and subsidiary objectives are to be enshrined in statute, the 1991 Act itself remains silent on the broader goals of the child support system.

26. The failure of the legislation to engage with 'basic principles' disguises a reluctance to articulate the underlying purpose of child maintenance. A rights-based approach sees children as enjoying a right to participate in the standard of living enjoyed by both their parents, irrespective of which parent they are living with. A needs-based approach is concerned merely with apportioning between parents the assumed costs of raising children. Addressing this question is not just a nice theoretical point – it can assist in

solving otherwise intractable policy dilemmas (e.g. as to how to accommodate overnight contact and shared care within a formula system). In my judgment a statutory framework which prioritised the child's right would be more consistent with international obligations under UNCRC and would also conform better with best practice in other jurisdictions. These questions are discussed in more detail in chapter 1 of my book *Child Support Law and Policy* (see especially pp 27-36).

ANNEX 1

Extract from Child Support Law and Policy pp 460-461

Is there a case for additional enforcement measures?

Some of the weaknesses with the existing legislative framework have been discussed in the context of particular enforcement tools. A more fundamental question is whether there is a case to be made for the introduction of additional enforcement measures, such as banning child support defaulters from overseas travel. As explained in more detail below, the US authorities have the power both to refuse applications for passports and to revoke current passports in such cases. We have already seen that the possibility of a statutory power to withdraw a defaulter's passport was canvassed in the White Paper preceding the 2000 Act, but that this option was not pursued at the time. The issue (and withdrawal) of a British passport is a matter for the royal prerogative, and decisions relating to passports are subject to judicial review. The most common reason for refusing, revoking or withholding a passport is because of a risk that the individual will leave the country in order to evade justice.[50] So it remains the case that, at least as far as statute is concerned, it is only British football hooligans, rather than child support defaulters, who may be prevented (albeit temporarily) from travelling abroad.[51]

There may yet be a case for including withdrawal of a non-resident parent's passport as a potential weapon in the Agency's enforcement armoury. This would certainly be welcomed by those parents with care who seek a departure direction on the basis of their ex-partner's lifestyle being inconsistent with his declared income, pointing to his expensive holidays abroad.[52] Non-resident parents would doubtless argue that the refusal or withdrawal of a passport would constitute an unwarranted breach of the father's human rights, but a court might well conclude that, in appropriate cases, it was a proportionate response to the problem of enforcing child support liabilities.[53] However, the Select Committee has recommended that the Department examine the use of travel bans and passport withdrawal as an enforcement tool for non-resident parents who persistently default on their child support commitments.[54] It is therefore relevant to consider the enforcement

[50] Hansard HC Debates (5th Series) Vol 746 col 183 (13 May 1968), cited in *Halsbury's Laws of England* Vol 18(2) 4th Edition Reissue (2000) para 612.

[51] Convicted football hooligans may be made subject to a banning order under s.14B of the Football Spectators Act 1989 (inserted by Football (Disorder) Act 2000, s 1 and Sch 1), which may include a condition requiring the (temporary) surrender of a UK passport (see s 22A) before a game to be played overseas (s 14E(3)); see also the summary powers under ss 21A-21C. These powers were renewed for a further five years by the Football (Disorder) (Amendment) Act 2002.

[52] M Chetwynd et al, *The Departures Pilot Scheme* (DSS In-house report 33, London, 1997) at 32.

[53] The Court of Appeal has held that football banning orders do not contravene either the right to a fair trial under art 6 of the ECHR or the right to freedom of movement: *Gough v Chief Constable of the Derbyshire Constabulary* [2002] EWCA Civ 351, [2002] 2 All ER 985.

[54] n 87 above at para 192.

mechanisms available in comparable jurisdictions, and especially in the United States of America and Australia.

Appendix 2: Letter dated 22 February 2007 from the Chairman to the Rt Hon John Hutton MP, Secretary of State for Work and Pensions

The Joint Committee on Human Rights is considering the compatibility of Child Maintenance White Paper: "A New System of Child Maintenance" with the United Kingdom's human rights obligations. In our recent report on our working practices, we agreed that our scrutiny work would include an element of pre-legislative scrutiny, focusing on Government Green Papers, White Papers and draft Bills raising significant human rights issues. The purpose of this work is to draw the attention of Parliament and Government to potential human rights issues raised by a policy at an early stage.

The Committee would be grateful if you could provide an explanation of the Government's view that the proposals in the White Paper are compatible with the Convention rights guaranteed by the Human Rights Act 1998.

In particular, we would be grateful for an explanation of the Government's views on a number of matters which we consider capable of raising significant human rights issues.

Proposed Enforcement Powers

The White Paper proposes the creation of a new administrative body, C-MEC, which will administer the new Child Maintenance arrangements. The White Paper proposes to extend the enforcement powers available to C-MEC (as compared to those available to the Child Support Agency) and to streamline the way in which they are used (paras 27 – 31, Chapter 5).

1. I would be grateful if you could explain the Government's view that:

b) **requiring the surrender of defaulting parents' passports or subjecting them to a curfew would represent a necessary and proportionate interference with those parents' rights to respect for their private lives (Article 8 ECHR);**

c) **the proposals to permit the surrender of passports by administrative order without prior judicial oversight; to remove judicial oversight of the withdrawal of driving licences; and to remove elements of judicial oversight from the existing system of enforcement – including the requirements to obtain liability orders and charging orders – are compatible with parents' rights to respect for the private lives, their enjoyment of their property or their right to a fair hearing by an independent and impartial tribunal in the determination of their civil rights (Article 6, Article 8, Article 1, Protocol 1, ECHR);**

d) **direct enforcement against the accounts of non-resident parents would be a necessary and proportionate interference with the defaulting parent's right to respect for his private life; and respect for peaceful enjoyment of possessions (Article 8, Article 1, Protocol 1, ECHR).**

Debt Recovery

The White Paper proposes that C-MEC will have the power to accept, in consultation with the parents involved, "reasonable offers" to settle debt. It is proposed to write off some historic debt which the Government consider "cannot be recovered". This includes debts arising from unpaid fees and interest charged under regulations which are no longer in force; debt arising against a deceased parent where the debt cannot be recovered from the estate; and debt occurring where parents have reconciled, or are no longer pursuing the debt concerned. The White Paper proposes to retrospectively revalue some child maintenance payments assessed during 1993-2003 (Child Maintenance White Paper, paras 5.41 – 5.46).

2. I would be grateful if you could explain the Government's view that the proposals on negotiated settlements, writing-off and revaluation of historical debts are compatible with parents' and children's rights to enjoyment of their possessions, and respect for their private life and for the right to a fair hearing by an independent and impartial tribunal as guaranteed by Articles 8 and 6 ECHR and Article 1, Protocol 1 ECHR.

Registration of Births

The White Paper also proposes that the birth registration system should be changed to require both parents' names to be registered following the birth of a child unless it would be unreasonable to do so. The White Paper explains that the Government accepts that this is a difficult issue, and that it will only legislate on this issue when it is sure that robust and effective safeguards can be put in place to protect the welfare of children and vulnerable women. The Convention requires that any discrimination between married and unmarried fathers, in relation to their right to respect for their family life (and the rights of their children), be necessary and proportionate. The White Paper recognises the need to balance the rights of unmarried fathers against the need to respect the rights of mothers and children where the identity of a father may not be known or where a mother has been subjected to rape or another coercive relationship.

3. I would be grateful if you could explain:

a) **What safeguards the Government considers may need to accompany the proposal to require that both parents' names be registered on a child's birth certificate in order to protect the right of vulnerable mothers to respect for their private life (Article 8 ECHR); and**

b) **Whether the proposal to exempt from the proposed requirement in circumstances where it would be "unreasonable" would contain adequate safeguards to protect the right to respect for family life of both unmarried fathers and their children (Articles 6, 8 and Article 14 ECHR).**

Information Sharing

The White Paper proposes to simplify the maintenance assessment process by basing the process of assessment on latest year tax information, as opposed to current earnings, unless there is evidence that the non-resident parent's income has changed by at least 25%. The

key change in this proposal from the current scheme is that the assessment process will not depend upon information provided by the non-resident parent, but instead information will be gathered from HM Revenue and Customs (para 4.19). The White Paper proposes to consider allowing C-MEC to make use of information exchanged with, or drawn from, financial institutions and credit reference agencies for the purpose of enforcing maintenance payments (paras 5.20 – 5.24).

4. I would be grateful if you could explain the Government's view that:

a) **the proposal to base assessment on historical tax information obtained through new information sharing gateways (established between HM Customs and Excise and C-MEC or the Department for Work and Pensions) will be accompanied by adequate safeguards to ensure parents' rights to control access to their personal information (as guaranteed by Article 8 ECHR and the Data Protection Act 1998);**

b) **the proposals for enhanced information sharing with third parties, including financial institutions and credit reference agencies, for the purposes of enforcement are compatible with parents' rights to control access to their personal information.**

Appendix 3: Letter dated 16 March 2007 from Lord McKenzie, Parliamentary Under Secretary of State, Department for Work and Pensions

Thank you for your letter dated 22 February 2007 asking for an explanation of the Government's views that the proposals in the White Paper "A New System of Child Maintenance" are compatible with the Convention rights guaranteed by the Human Rights Act 1998.

The Government welcomes the Committee's interest in these matters but would respectfully ask the Committee to note that the consultation period for the White Paper has only just closed and the responses remain under consideration. At this point, therefore, I cannot confirm in detail what precise proposals will be taken forward in the forthcoming Bill. These proposals are also, of course, subject to Parliamentary approval. Bearing this in mind, I set out the Government's views to the Committee's questions as requested.

Proposed Enforcement Powers

1 (a) explain the Government's view that requiring the surrender of defaulting parents' passports or subjecting them to a curfew would represent a necessary and proportionate interference with those parents' rights to respect for their private lives (Article 8 ECHR);

Curfews

Under the proposals contained in the White Paper, it is proposed that the Secretary of State may make an application to the Magistrates' Court for the imposition of a curfew to be enforced via electronic tagging if a liable person fails to pay child maintenance. Breaching the curfew order would normally result in the liable person facing a prison sentence.

Article 8

The Government accepts that curfew orders may, in certain circumstances, interfere with the Article 8 rights of a liable person. However, the Government is satisfied that any such interference would be lawful and can be justified as a necessary and proportionate response. Provision for the imposition of curfew orders is proposed to be made by means of primary and, as necessary, secondary legislation. This would satisfy the requirement that the interference be *"in accordance with the law"*.

The measure would also be in pursuit of a legitimate aim. The proposal contributes to the overall objective of securing payment of child support maintenance as it is designed to prevent avoidance of financial responsibilities. The refusal, on the part of certain liable persons, to pay the amount that they owe, has serious consequences for the parent with care and his or her ability to provide for their children.

The Secretary of State currently has the power to apply for a committal order for persistent and wilful non-payment of child support maintenance, which is a more severe measure. A curfew order should be regarded as a serious but intermediate measure. When applied in appropriate cases, it is intended to create a strong incentive for the liable person to pay, while not impeding his or her ability to do so by causing him or her to lose his job or means of making a living. It should also act as a deterrent. The extension of the range of alternatives to committal to include the imposition of curfews also aligns with Home Office policies to reduce the prison population. It is therefore in our view entirely proportionate.

Subject to Parliamentary approval, it is also the intention that the legislation should enable the court when imposing an order to avoid any disproportionate interference with the subject's religious beliefs, work or education. In addition, there will be a range of other enforcement measures available to ensure the most appropriate measures are taken in any particular case.

Passports

In relation to the proposal for the surrender of passports and article 8, we would refer you to the answer below.

1 (b) (i) explain the Government's view that the proposals to permit the surrender of passports by administrative order without prior judicial oversight; to remove judicial oversight of the withdrawal of driving licences – are compatible with parents' rights to respect for their private lives, their enjoyment of their property or their right to a fair hearing by an independent and impartial tribunal in the determination of their civil rights (Article 6, Article 8 and Article 1 of the First Protocol).

Article 6

The Government acknowledges that the proposals detailed in the White Paper in relation to the surrender of passports and the withdrawal of driving licences may engage Article 6, at least in certain cases. Assuming Article 6 is engaged, we are of the view that the proposed system is capable of being exercised in compliance with the requirements of that article.

Under these proposals, the first decision would be an administrative one. It is anticipated there would be a full right of appeal against the administrative decision to the Magistrates' Court on fact and/or law. The administrative decision would not take effect until the time for appealing has expired. Where an appeal has been filed, the interim decision would be stayed pending the hearing of that appeal. Thus, the person affected would have the opportunity to access to an independent and impartial tribunal **before** any civil right was directly affected by the withdrawal of the licence.

An interim decision will not take effect until the time for making an appeal has expired. On the appeal, the Magistrates' Court would be able to decide the issue *de novo* with the benefit of representations from both the Secretary of State and/or the liable person. Accordingly, the right of appeal is on any view to a Court of "full jurisdiction": see *Bryan*[55] *v UK*. It is also proposed that there be an appeal by way of case stated to the High Court on law and/or jurisdiction from a decision of the Magistrates' Court. It is envisaged that providing C-MEC with a power to impose these enforcement measures will encourage compliance as many liable persons currently go to great lengths to obstruct/delay court proceedings.

The Work and Pensions Select Committee recognised the potential value of measures such has these and recommended that the Department examines the administrative removal of driving licences and passport withdrawal as a child support maintenance enforcement tool for those who persistently default on their child support maintenance commitments. They noted that these measures have proved to be successful in other countries.

In 2005, the Committee considered proposals to disqualify a liable person from holding or obtaining a driving licence by an administrative process. While the Committee wished to protect the position of the child involved, it was, in their view, necessary to reverse the widely held view that the Agency was a 'push-over': they believed any short-term pain would be compensated by long-term gain if the withdrawal of driving licences were more prevalent. The Committee recommended that the Department for Work and Pensions investigate the feasibility of driving licence removal from non-compliant liable persons becoming an administrative rather than a judicial process, and the use of such power at a much earlier stage in enforcement, as has been the practice in some States in the US since the mid-1990s.

Furthermore, the Work and Pensions Select Committee, in their second report on the performance of the Agency, recommended in 2005 that *"the Department further examines the use of travel bans and passport surrender as a child support enforcement tool for the Non-Resident Parents who persistently default on their child support commitments."* The Committee were also keen to hear of different forms of enforcement used in other countries. In the USA, where a non-resident parent owes more than $5,000, action can be taken under the Personal Responsibility and Work Opportunity and Reconciliation Act 1996 to refuse, revoke, or restrict a passport. A similar measure is available in Australia where, since June 2001, the Australian Child Support Registrar has the power to make a departure prohibition order (DPO) where a non-resident parent using the Agency's collection service is in arrears. The making of a DPO is an administrative procedure which prevents the non-resident parent from leaving Australia unless all child support debts have

[55] *Bryan v UK* (application 1917/91) (1995) 21 EHRR 342, [1996] 1 PLR 47.

been discharged or satisfactory arrangements to do so have been made. Since the DPO legislation came into effect, the CSA has collected A$850,936 from the 90 DPOs issued. The further advantage of revoking passports is that it is enforcement tool that can be applied to both the employed and self-employed.

Article 8

We accept that the proposal in relation to passports and driving licences may in cases engage Article 8 but that in any particular case where Article 8 is engaged, any interference with that right is considered to be justified (again, for the protection of the rights and freedoms of others) and proportionate. Many liable persons deliberately avoid making payments of child support maintenance and these measures are designed to ensure that children receive child support maintenance more quickly. We would emphasise that these measures are targeted at those who will not rather than those who cannot pay child support maintenance. It will still be necessary to establish wilful refusal or culpable neglect by the liable person. The policy intention is that other lesser mechanisms will have been attempted first with respect to the liable person in this or other child support maintenance cases.

We would also propose procedural requirements and other safeguards to protect against the removal of the licence/passport in an arbitrary and disproportionate manner. These would also ensure that the impact of the decision is directed at the objective of achieving compliance and that the imposition of the measure will not be counterproductive to this objective. Once arrears have accrued, a liability order will need to be obtained and further notification sent to the liable person seeking payment of the outstanding arrears. The notification would also advise the liable person that in default of payments of outstanding arrears, further enforcement measures such as disqualification from driving or the surrender of a passport may be undertaken to recover the outstanding child support maintenance. The liable person will be invited to make representations. The notification will also confirm the number of payments made by the liable person within a given period and the extent of the arrears. These measures are for a limited period and may be lifted upon payment of arrears due.

In making a decision, the decision maker will need to assess whether there has been wilful refusal or culpable neglect on the part of the liable person. The decision maker will also need to make an assessment of the liable person's ability to pay; consider whether the liable person needs his driving licence and/or passport in the course of his employment; consider what other lesser methods of enforcement have been taken and whether those methods have been ineffective or were inappropriate. The decision maker will need to decide whether it is reasonable in all the circumstances to pursue a disqualification from holding or obtaining a driving licence/surrender of the passport – taking into account any representations made by the liable person or other relevant information available and having regard to the welfare of any child affected by the decision (see section 2 of the Child Support Act 1991).

The liable person will have a full right of appeal on fact and/or law to the Magistrates' Court. If an appeal is filed, then the enforcement measure would be stayed pending the outcome of any appeal. In the circumstances, we consider that this proposal is capable of being operated in a manner which is compatible with Article 8.

The rationale for these measures is to enable swifter, more effective enforcement, and at a lower cost. The Agency suggests that the current court process for withdrawal of driving licence/committal can take up to two years. The Agency estimates that an administrative system could reduce this. This proposal will support the drive to take quicker and firmer action against those who fail to fulfil their responsibilities to their children.

There are well-documented, and not infrequent, cases of liable persons going to extreme lengths in order to avoid payment of child support maintenance. Based on experience over many years, the Agency's Operational Improvement Plan (February 2006) posits that approximately 30% of non-resident parents who have a child support maintenance liability do not pay. Giving the power to impose these measures directly to the body administering child support greatly strengthens their hand in dealing with the liable person. The liable person will know that if he does not cooperate, this action may be taken. This has more immediacy than a threat of court action at some distance in the future, which may increase pressure to cooperate.

It is envisaged that the threat of imminent action will be significantly more effective in securing compliance, notwithstanding the fact that an interim decision will be stayed pending appeal. It is envisaged that this will contribute to changing the culture of expectation around non-compliance and reinforce the message of intolerance of non-compliance, indicating that strong measures will be taken to deal with it swiftly.

Article 1 of Protocol 1

In relation to the proposal for the surrender of passports, we do not consider that Article 1 of Protocol 1 is engaged. Passports are issued under the Royal Prerogative. They are the property of the Crown not the passport holder and even if the surrender of passports can be said to engage Article 1 of Protocol 1, we consider the proposals are compatible for the reasons set out below in relation to driving licences.

In relation to driving licences, although we believe it is possible that Article 1 of Protocol 1 might be engaged in certain cases we consider that this proposal strikes a fair balance between the interests of the community and the requirement to protect individuals' rights. These enforcement measures are designed to be applied against liable persons who wilfully refuse and persistently neglect to pay child support maintenance. It is reasonable and proportionate to have effective machinery to recover debt which is owed by the liable person to children and which remains unpaid *(Denson[56])*.

It is important to note that under these proposals it is envisaged that both the Secretary of State/Child Maintenance and Enforcement Commission (C-MEC) and Magistrates' Court will at different stages of this process have a discretion as to whether to disqualify a liable person from driving; that discretion will have to be exercised in a manner which is compatible with the Convention rights; the liable person will have the opportunity to make written/oral representations; the safeguards already outlined above will apply; and any disqualification will be for a limited period and may be lifted on payment of arrears due.

[56] *R (on the application of Denson) v Child Support Agency* [2002] EWHC 154 (Admin), [2002] 1 FCR 460.

1 (b) (ii) explain the Government's view that the proposals to remove elements of judicial oversight from the existing system of enforcement – including the requirements to obtain liability orders and charging orders – are compatible with parents' rights to respect for their private lives, their enjoyment of their property or their right to a fair hearing by an independent and impartial tribunal (Article 6, Article 8 and Article 1 of Protocol 1).

Article 6

The Government acknowledges that these proposals raise issues for consideration in relation to parents' rights under Article 6 of the Convention. It is accepted that the making of an administrative order equivalent to a liability order or charging order is likely to concern a determination of the individual's civil rights and obligations. However, decisions that affect an individual's civil rights and obligations can be made administratively by a body, such as C-MEC, provided there is a right of appeal sufficient to render the proceedings as a whole compatible. In determining the sufficiency of the review procedures, regard should be had to the subject of the decision, the manner in which the decision is arrived at, and the nature of any dispute, including the grounds on which it might be contested (*Bryan*).

In acknowledging that Article 6 may be engaged, the following safeguards are relevant. There would be an appeal on grounds of fact or law to an impartial and independent tribunal. The proposed appeal is likely to be limited only in that the grounds may exclude those matters relating to the maintenance calculation, in the same way that appeals against liability orders are currently limited. The reason for this restriction is that matters relating to the maintenance calculation already have their own right of appeal to the appeal tribunal. The aim of this restriction is to avoid the duplication of appeals.

Where the right of appeal against the making of the relevant order has been exercised by a liable person, enforcement of that order is likely to be stayed pending the resolution of that appeal. You may also wish to be aware that the House of Commons Work and Pensions Select Committee recently considered these proposals and recommended that, if C-MEC is granted powers to make administrative orders, they should be accompanied by safeguards to ensure against inaccuracy and a swift, effective and independent appeal process. The Committee also noted that the welfare of the child should continue to be taken into account in relation to decisions on enforcement.

Article 8

It should be noted that the courts have previously found that the decision to make a liability order under section 33(2) of the Child Support Act 1991 does not engage the right to private life (*Denson*). A liability order, and the steps associated with it, did not engage article 8 as they could not in any sensible way be said to impinge on private life.

The courts have accepted that arrangements relating to the assessment and collection of maintenance payments from liable persons do not by their nature directly affect family life (see for instance, *Logan*[57] and *Burrows*[58]). However, it is accepted that the effect of

[57] *Logan v UK* (1994).

[58] *Burrows v UK* (1995).

decisions taken under legislation in individual cases may do so, depending on the nature and degree of the interference. If Article 8 is engaged, it is suggested that any interference with that right is capable of being justified for the protection of the rights and freedoms of others. The child support regime as a whole is a response to a pressing social need. It is important that, where necessary, effective action can be taken promptly to enforce the obligation to pay maintenance.

The requirement to obtain a liability order via the courts is to be removed in order to speed up the enforcement process. Making this process administrative should significantly reduce the time taken to enforce the collection of arrears. Currently, before enforcement action can be taken, the Child Support Agency has to apply for a Liability Order which provides legal recognition of the debt. According to Agency figures, it is estimated that on average it takes 106 days to process and obtain a Liability Order from the Magistrates' Court. Swift and effective enforcement is required to prevent the build-up of arrears and to collect those arrears which are outstanding. The new administrative Order is intended to enable significantly faster action and it should reduce costs, in terms of staff time and court fees.

Article 1 Protocol 1

The courts have also found that the decision to make a liability order does not engage the right to peaceful enjoyment of possessions (*Denson*). A liability order is merely a pre-requisite to other modes of enforcement and therefore does not deprive a person of his possessions. It is suggested that the same reasoning can be applied to the administrative equivalent.

Due to the consequences which may follow the making of an administrative enforcement order or charging order, it is accepted that in some circumstances Article 1 of Protocol 1 may be relevant. Where in any particular case there might be an interference with this right of the non-resident parent, it is suggested that it will be justified on public interest grounds. The measures are being introduced to make the enforced collection of child support maintenance quicker. They will only apply in cases where the non-resident parent has not complied with his or her obligations to pay child support maintenance under the legislation. The maintenance owed by the liable person will be due to the person with care of the qualifying child and/or the Secretary of State (if, under current social security legislation, the person with care is receiving benefit). It is reasonable and proportionate to have effective machinery in place to recover a debt which is properly owed by the liable person and has not been satisfied (*Denson*).

It should also be recognised that even if the Government were to introduce legislation to provide for administrative charging orders, there is no intention to remove the court's role in relation to forcing the sale of property.

1 (c) explain the Government's view that direct enforcement against the accounts of non-resident parents would be a necessary and proportionate interference with the defaulting parent's right to respect for his private life and respect for peaceful enjoyment of possessions (Art 8, A1P1).

The Government accepts that even if Article 8 and Article 1 of Protocol 1 are not generally engaged by these proposals, they may be in relation to some individual cases. However, it is expected that any proposals will include a right of appeal on grounds of fact and law against any decision to enforce against a non-resident parent's bank account to an independent and impartial tribunal. It is also envisaged that there will be safeguards to avoid or alleviate hardship which might be caused by the enforcement action.

In cases where there may be an interference, it is suggested that this is likely to be justifiable for the reasons given above. It is considered reasonable and proportionate to have effective machinery in place to recover a debt which is properly owing by the liable person which has not been paid.

The main purpose for the introduction of these orders is to increase the speed and success with which the Agency can obtain arrears owing from sums held on behalf of the liable person. In order for the Agency currently to obtain money held in a liable person's bank account, it needs to go through various steps. The first is an application for a liability order, which on average takes 106 days. Once the liability order is obtained, it is necessary to obtain an order from the County Court allowing the liability order to be enforced as a county court judgement. Once this order is granted, it must then apply for a third party debt order in relation to the monies in the account. This process takes several months on top of the time already taken to obtain the liability order, by which time the liable person has often withdrawn the money as he or she has had sufficient notice of the steps the Agency is taking to obtain it.

Debt Recovery

2) explain the Government's view that the proposals on negotiated settlements, writing-off and revaluation of historical debts are compatible with parents' and children's rights to enjoyment of their possessions, and respect for their private lift and for the right to a fair hearing by an independent and impartial tribunal as guaranteed by Articles 8 and 6 ECHR and Article 1, Protocol 1 ECHR.

Article 8

It is accepted that Article 8 might be engaged in relation to the proposals to settle, write off or reduce debt. However, if it is engaged, the Government considers that the way in which these proposals will operate will not breach that article. The ultimate objective of all of these proposals is to maximise the payment of child support maintenance. In negotiated settlements, where arrears are owed to the parent with care, it is anticipated that the parent with care's consent will always be sought before an agreement is reached. In so far as there may be amounts of debt written off, this will only be done where it would be clearly inappropriate to pursue it, for instance where the parties have reconciled and the parent with care has asked C-MEC not to enforce the debt or where the liable person has died and there are no funds in the estate. IMA revaluation simply involves reducing an inflated, punitive assessment to a level which is likely to reflect a realistic assessment and bear a closer relationship to the liable person's ability to pay.

The intention behind the policy of negotiating settlements, revaluing and writing off debts is to provide more flexibility to resolve long-standing arrears where it is extremely unlikely

that the full amounts will be paid. It is hoped that by doing this, not only can some arrears be paid to parents with care but by being able to "wipe the slate clean" there is a fresh opportunity to set up arrangements for more secure, regular future payments. It is also hoped that the proposals will free up resources which currently have to be devoted to pursuing money which there is very little chance of recovering. It will then be possible to prioritise resources more effectively to enable more efforts to be made to pursue child maintenance due. Also, section 2 of the Child Support Act 1991 will continue to apply to the exercise of discretion in these decisions, so that regard has to be had to the impact of the decision on the welfare of any child likely to be affected.

Article 1 of the First Protocol

The Government is of the view that these proposals do not engage Article 1 of the First Protocol. As established by the decision of the House of Lords in *Kehoe* , the parent with care has no right directly to institute the process of recovery from the non-resident parent. There is no entitlement to maintenance, and hence, no "possession" within the meaning of the Article.

Even if it could be argued that once the assessment has taken place, there is something akin to a debt due to the parent with care, it is still not accepted that it would amount to a possession. The Court took the view in the *Kopecky* case that "the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a "possession" within the meaning of Article 1 of the First Protocol".

Finally, even if it were the case that Article 1 of the First Protocol were engaged by the proposals, it is the Government's view that, as in relation to Article 8, the action to be taken can be justified as being in the public interest and a proportionate measure.

Article 6

As indicated above, the decision of the House of Lords in the *Kehoe* case established that the parent with care does not have a direct, enforceable right to child support maintenance. Hence, Article 6 is not considered to be engaged by the current proposals. However, even if Article 6 were to be engaged, the Government is satisfied that its requirements would be met as procedural safeguards would be put in place to ensure a fair process. For instance, parents with care would be given the opportunity to make representations where appropriate and their consent sought in relation to negotiated settlements.

Registration of births

3 (a) explain what safeguards the Government considers may need to accompany the proposal to require that both parents' names be registered on a child's birth certificate in order to protect the right of vulnerable mothers to respect for their private life (Article 8 ECHR); and

(b) explain whether the proposal to exempt from the proposed requirement in circumstances where it would be "unreasonable" would contain adequate safeguards to protect the right to respect for family life of both unmarried fathers and their children (Articles 6, 8 and Article 14 ECHR).

Work on birth registration is currently in its early stages, but we recognise the need to ensure that the policy strikes the right balance between the rights of mother, father and child, including rights to privacy and family life under Article 8 rights.

The starting point is that public policy should promote child welfare. Interventions in children's lives should assume that, it is usually beneficial for both parents to be involved in their children's upbringing and, in the normal course of events, both parents' names should be recorded in the birth register. This approach is supported by evidence to suggest that early acknowledgement of paternity leads to better outcomes for children, in terms of ongoing parental contact and maintenance. This approach will usually ensure right to privacy and family life and be compatible with article 8.

However, as a safeguard to the rights of vulnerable mothers, the Government acknowledges that there may be circumstances where there should be an exception to the rule that both parents should be named on the birth certificate. We would anticipate that sole registrations would continue, for example, where a mother did not know the identity of the father, was raped or where the father was violent or abusive.

Equally, we recognise that in order to protect the rights of the father to family life, we should not simply allow one parent to veto joint registration without question. Currently where issues arise over paternity, it is open to either the mother or the putative father to apply to the courts for a declaration of parentage, and/or the father can apply for an order granting him parental responsibility for the child. Where a court makes a declaration of parentage, an application can be made to the Registrar for the birth certificate to be amended to include the father's name. We anticipate that any potential new system would recognise that, as now, there are some complex situations that are best resolved by the courts.

Information Sharing

4 (a) explain the Government's view that the proposal to base assessment on historical tax information obtained through new information sharing gateways (established between HM Customs and Excise and C-MEC or the Department for Work and Pensions) will be accompanied by adequate safeguards to ensure parents' rights to control access to their personal information (as guaranteed by Article 8 ECHR and the Data Protection Act 1998).

The Government fully accepts that the proposal to base assessments on historical tax information obtained through new information sharing gateways between HMRC, DWP and C-MEC will give rise to a number of issues under Article 8 ECHR and the Data Protection Act 1998.

These issues have been considered at length over a number of years because existing legislative provision enables information to be shared between HMRC and DWP[59] . The

[59]There are a range of legal powers which underpin the supply of information from HMRC to DWP, in particular under the Social Security Administration Act 1992 (c.5) ("SSAA") which include section 121E (supply of contributions etc information by Inland Revenue), section 122 ,(disclosure of information by Inland Revenue) , section 122ZA , (supply of tax information to assess certain employment or training scheme); section 122B, (supply of other government information for fraud prevention and verification); section122D, (supply of information by authorities administering benefits) , and also Schedule 5 of the Tax Credit Act 2000, which relates to the use and disclosure of information; section 3 of the Social Security Act 1998 and Paragraph 1A of Schedule 2 of the Child Support Act 1991.

creation of these gateways is necessary for both Departments to carry out their functions, including the calculation of child support maintenance. Assuming proposals go forward, it will be necessary for C-MEC to have access to certain information held by DWP and HMRC as well as information already supplied to DWP by HMRC and held on DWP's database, in order to achieve the policy intentions including to improve the process of calculating child support maintenance by using historical tax information. The policy intention is to ensure the speedy, more accurate calculation of child support maintenance. This should increase the likelihood of maintenance payments being made to the parent with care sooner and reduce any build-up of arrears. In cases where non-resident parents do not cooperate, a calculation can be made from tax records, where available, and a reasonably accurate calculation made. Currently such cases attract a default maintenance decision which is not necessarily as high as one based on actual income.

It will not be necessary to increase the amount of information that is currently provided by HMRC, but to legislate to ensure that C-MEC and its agents and contractors receive the information which is necessary and expedient to carry out its functions lawfully.

In accordance with HMRC's principles of data supply it is anticipated that any new legislative gateway will not only control the onward disclosure of any information, whether to a public or private body, but also adhere to the principle that confidentiality should follow the information and make it a criminal offence[60] for there to be any disclosure of the information without lawful authority. C-MEC will be fully aware that it will need to make sure that personal data is only used in a way consistent with the carrying out of its responsibilities and will have to ensure operational procedures are in place to protect against loss, misuse or unnecessary dissemination.

4 (b) explain the Government's view that the proposals for enhanced information sharing with third parties, including financial institutions and credit reference agencies, for the purposes of enforcement are compatible with parents' rights to control access to their personal information.

The Government acknowledges that rights under Article 8 are likely to be engaged by these proposals and considers that any interference with such rights would be justified and proportionate. In relation to the obtaining of information, the purpose of the proposals is to allow C-MEC to obtain the information it needs to carry out its functions effectively. In relation to the sharing of information with credit reference agencies, the purpose of the disclosure is to encourage compliance with the obligation to pay child support maintenance.

The following safeguards are relevant. When obtaining information, C-MEC will only be able to require the disclosure of information which is relevant to the carrying out of its functions. In sharing information with credit reference agencies, consent from non-resident parents will be sought unless the non-resident parent has not complied with his or her obligations to pay maintenance and is the subject of a liability order or its administrative equivalent. It is also worth noting that existing liability orders can currently be included on the Register of Judgments, Orders and Fines and so are available to the public. There are also likely to be criminal offences which will apply to the misuse of any

[60] Section 123 SSAA and section 50 of the Child Support Act 1991 makes any unauthorised disclosure of information a criminal offence.

data disclosed by C-MEC, and requirements under the Data Protection Act 1998 will continue to apply.

Appendix 4: Letter dated 12 July 2007 from the Chairman to the Rt Hon Peter Hain MP, Secretary of State for Work and Pensions

The Joint Committee on Human Rights is considering the compatibility of the *Child Maintenance and Other Payments Bill* with the United Kingdom's human rights obligations. The Committee would be grateful if you could provide a further explanation of the Government's view that the proposals in the Bill are compatible with the Convention rights guaranteed by the Human Rights Act 1998. In particular, we would be grateful for an explanation of the Government's views on a number of matters which we consider capable of raising significant human rights issues.

a) New Enforcement Powers for C-MEC

The Bill creates a presumption that a deduction of earnings order will be used as the first method of collecting child maintenance. The Government accepts that these provisions may engage Article 8 ECHR as such orders will alert an individual's employer to his liability for child maintenance. The Government considers that these provisions are justified because there are adequate safeguards in place. The Bill provides that C-MEC must consider whether there is a "good reason" not to make a deduction from earnings order. A "good reason" is to be defined by the Secretary of State in Regulations. These proposals will be piloted before their introduction (Clause 19). The Bill also provides C-MEC with powers to collect amounts of maintenance and arrears from a non-resident parents current or savings accounts. (Clauses 21-22). The Government accepts that these provisions also engage the right to private life. The Explanatory Notes explain that the Government consider that the proposals are justified and proportionate. They note that safeguards such as the stipulation that a "maximum percentage of money" in an account will be protected will be provided in Regulations.

(1) Why does the Government consider that it is appropriate to leave these matters to secondary legislation, if they are relevant to compliance with Article 8 ECHR?

I would be grateful if you could provide us with a draft copy of the Regulations as soon as they are available.

The Bill removes the need to secure a liability order from the court before pursuing any further enforcement action, as is currently required. It is proposed that C-MEC have the power to impose administrative liability orders subject to appeal to an independent tribunal. The Committee have previously asked the Government to explain why this administrative action would be compatible with Article 6 ECHR and the right to a fair hearing. The Explanatory Notes accept that Article 6 ECHR will be engaged, but rely on the right of appeal to an independent tribunal for compliance with the Convention. The Bill provides for such an appeal, but leaves the composition and powers of that tribunal to secondary legislation. It is impossible to assess whether a particular appeals process complies with the right to a fair hearing without information on the composition of the appeal body and their powers (Clause 23).

(2) Why is the Government persuaded that the rights to appeal provided for in the Bill will be adequate to ensure that where the civil rights and obligations of non-resident parents are determined, they will have access to a hearing by an independent and impartial tribunal?

(3) Why does the Government consider that it is appropriate to leave these matters to secondary legislation, if they are relevant to compliance with Article 6 ECHR?

I would be grateful if you could provide us with a draft copy of the Regulations as soon as they are available.

b) Debt, Negotiation and Cancellation etc

The Bill provides the Secretary of State with regulation making powers designed to allow C-MEC to set off liabilities. It also provides C-MEC with the power to accept part payment of arrears in full and final satisfaction in certain circumstances (Clause 30) and to write off certain arrears (Clause 31). The Bill also provides powers to the Secretary of State in relation to the transfer, selling or "factoring" of debt to third parties (Clause 32). We wrote to the Minister, after the publication of the White Paper to investigate whether this power engaged the rights of children or parents with care under Article 6 (the right to a fair hearing), Article 8 (the right to private or family life) or Article 1, Protocol 1 (the right to the peaceful enjoyment of possessions). The Minister, in his response to our pre-legislative scrutiny, explained that the Convention did not treat child maintenance administered by a central body as a debt which could be considered a possession, where the beneficiary parent had no right to direct enforcement. This would rule out the application of Article 1, Protocol 1 ECHR and Article 6 ECHR in this context. This is an accurate analysis of the limited Convention case law on the management of child maintenance.

Although the Government accept that Article 8 ECHR may be engaged in some circumstances by these provisions, they explain that the circumstances where debt would be written off would be extremely limited, for example where parties have reconciled or where the parent with care has asked C-MEC not to enforce the debt or where the liable person has died and there are no funds in the estate. The Bill does not limit the powers of C-MEC in this way, but generally leaves the power to set conditions or limits to the regulation making powers of the Secretary of State.

(4) Why does the Government consider that it is appropriate to leave these matters to secondary legislation, if they are relevant to compliance with Article 8 ECHR?

I would be grateful if you could provide us with a draft copy of the Regulations as soon as they are available.

c) Information Sharing Gateways

The Bill provides for new information sharing gateways for information held by Her Majesty's Revenue and Customs (HRMC) which is already shared with DWP to be directly shared with C-MEC or with any "person providing services to them". Similarly, information held by the Secretary of State or the Northern Ireland Department for the purposes of functions relating to social security, employment or training may be supplied to C-MEC or any person providing C-MEC with services. Information gathered by C-

MEC for the purposes of child support may be shared with HRMC, the Secretary of State or the Northern Ireland Department. The Explanatory Notes do not address this issue.

The Minister's response to the Committee's pre-legislative scrutiny accepted that the creation of these gateways would engage an individual's right to protect his private information (as protected by Article 8 ECHR). That response explained that "it will be necessary for C-MEC to have access to certain information held by DWP and HMRC as well as information already supplied to DWP by HMRC and held on DWP's database in order to achieve the policy intentions, including to improve the process of calculating child support maintenance by using historical tax information".

The Bill does not limit the exchange of information to historical tax information and allows for a two-way flow of information between C-MEC and HMRC and between C-MEC and the Secretary of State for the purposes of fulfilling any of those authorities' functions. This is far broader than the gateway considered in the Minister's earlier response.

(5) We would be grateful if you could explain why the Government considers that the gateways created by the Bill are compatible with Article 8 ECHR and, specifically, why the Government considers the broad information sharing powers proposed are necessary and proportionate to meet the objectives of the Bill.

The Bill also gives C-MEC a broad power to disclose information about non-resident parents to credit reference agencies (Clause 35). The Government has explained that this may impact upon defaulting parents' powers to secure credit, and specifically, to obtain a mortgage. Clause 35 allows C-MEC to disclose any "qualifying information" to a credit reference agency. Qualifying information is defined very broadly to include any information held by C-MEC for the purposes of the Child Support Act 1991 and which relates to a person liable to pay child support. The Explanatory Notes explain that the Government consider that these provisions engage Article 8 ECHR, but that any interference is justified and proportionate. They explain that information should only be disclosed with consent, unless the relevant person is subject to a liability order. The Government goes on to explain that credit reference agencies will only be able to use information by C-MEC to inform the financial standing of an individual. The disclosure of information with consent is unlikely to lead to any risk of incompatibility with the Convention or with Data Protection Act principles. It is clear from domestic case-law that the application of a civil order or a conviction does not exclude individuals from the protection of Article 8 ECHR. The publication of personal information relating to the order or the Conviction (in this case, the imposition of liability or other information, including personal details) must serve a legitimate aim and any interference with the private life of the defaulting parent, their children or any new family must be necessary and proportionate.

(6) We would be grateful if you could explain the Government's view that the disclosure of information on individuals subject to a liability order is compatible with the right to private and family life enjoyed by the defaulting parent, their children or any new family.

d) Contracting Out

The Bill provides C-MEC with the power to contract out its functions (Clause 8). The Explanatory Notes accept that C-MEC will be a public body for the purposes of the HRA and explain that the Government is satisfied that the human rights of individuals interacting with contractors will be adequately protected by the use of contract compliance. In our recent Report on the Meaning of Public Authority for the purposes of the HRA, we reiterated our view that this approach was generally unacceptable.[61] In short: a) contractual provisions vary according to the terms contractors are willing to accept and b) contractual terms between a commissioning body and a contractor cannot generally be enforced by third parties, including the service users they may be intended to protect. In evidence to us, Government representatives, including the former Lord Chancellor, have presented an inconsistent view of whether or not the Government considers contract compliance an adequate means of protecting human rights.[62]

(7) We would be grateful if you could give reasons for your view on the adequacy of contract compliance as a means of protecting Convention rights;

(8) We would be grateful if you would explain:

(a) Whether or not your view is limited to the circumstances in which C-MEC might be empowered to contract our their functions; and

(9) Whether your view represents a cross-government consensus on the adequacy of contract compliance as a means of protecting Convention rights.

e) "Naming and Shaming" defaulting parents

The Child Maintenance White Paper proposed that C-MEC should be encouraged to "publicise successful enforcement activity", including by publishing the names of certain non-resident parents who were successfully prosecuted on their website. The responses to the consultation on this issue expressed concern about the implications of "naming and shaming" for the children involved and for any new family of the non-resident parent. For example, Barnardo's expressed concern about "unnecessary bullying and stigma". The Government have decided to take forward these plans, but have explained that they "genuinely wish to give non-resident parents an opportunity to comply before any enforcement action is taken". It does not appear that any legislative reforms are necessary to allow the Government to take this action, so this issue is not affected by the publication of the Bill.

These proposals engage the rights of non-resident parents, their children and any new family to respect for their private and family life. In order to be justifiable, any "naming and shaming" scheme must be for the purpose of achieving a legitimate aim and the interference must necessary and proportionate to the achievement of that aim. The domestic courts have considered "naming and shaming" of both offenders and those subject to ASBOs and have stressed the need to consider proportionality on a case by case basis and that the interests of any relevant family members, in particular, affected children, must be taken into account during this assessment. It is clear that the Government has received submissions on these important issues, but they have not clearly identified the

[61] Ninth Report of Session 2006– 07, paras 33 – 61, 118 – 123.

[62] See for example, Thirty Second Report of Session 2005-06, paras 86 – 92 and Seventh Report of Session 2003-04, paras 78 – 85.

purpose served by "naming and shaming" nor have they considered whether consultation of the parent with care will be adequate to meet concerns not only for the rights of the child for whom maintenance is sought but also the rights of any children of the non-resident parent's family.

(10) Why does the Government consider that the publication of the personal details of defaulting parents a) serves a legitimate aim and b) will be accompanied by adequate safeguards to protect the private lives of children and other family members associated with the defaulter (as required by Article 8(2) ECHR).

Appendix 5: Letter dated 10 August 2007 from the Rt Hon Peter Hain MP, Secretary of State for Work and Pensions, to the Chairman

Thank you for your letter dated 12 July 2007 asking for a further explanation of the Government's view that the proposals in the Bill are compatible with the Convention rights guaranteed by the Human Rights Act 1998. Below, I set out the Government's views to the Committee's questions as requested.

At various points in your letter you request that a draft copy of Regulations be provided as soon as they are available. We aim to be able to provide some regulations in draft for the Committee sessions in October. However, where this is not possible, we will provide Committee members with detailed information about how we intend that these regulation-making powers in the Bill be used.

In drawing up regulations, the Department, and subsequently the Commission, will consult in detail with stakeholders, as has been the case during the development of the White Paper that led to this Bill. In particular, we will work closely with external stakeholders such as One Parent Families, the Child Poverty Action Group, Families Need Fathers, Resolution, the Scottish Law Association, Relate, and Citizens Advice, as well as the relevant authorities in Northern Ireland. Stakeholders have themselves emphasised that the Department needs to take the time to ensure that the legislative detail is correct.

New Enforcement Powers for C-MEC

Many of the new enforcement powers may in some cases engage Article 8. However, any interference with Article 8 rights is considered to be justified and proportionate. The child support regime as a whole is a response to a pressing social need. It is important, in the public interest, that, where necessary, effective action can be taken promptly to enforce the legal obligation to pay child support maintenance.

(1) Why does the Government consider that it is appropriate to leave these matters to secondary legislation, if they are relevant to compliance with Article 8 ECHR?

We do not consider that leaving these matters to secondary legislation will compromise the compatibility of our proposals. There is no doubt that the secondary legislation will be sufficiently clear and accessible to comply with the Convention. In making any regulations, we are required to comply with our obligations under the Human Rights Act. Some safeguards are to be found in secondary legislation as this enables the Department to

respond to changing circumstances, which is essential to the provision of an effective and efficient service.

The Committee draws attention to clause 19 of the Bill (use of deduction from earnings orders as basic method of payment). This provision may engage Article 8 as such orders will alert a person's employer to their liability for child maintenance. As a safeguard, the clause requires that any regulations which provide for deductions from earning orders to be specified as an initial method of collection must also include provision that they not be used in any case where there is "good reason" not to do so. Matters relating to "good reason" are to be prescribed in regulations by the Secretary of State. In determining whether there is good reason, the decision maker will have to do so in accordance with such regulations. The clause does not specifically allow the Secretary of State to define good reason. The Secretary of State can prescribe matters which must, or must not, be taken into account by the decision maker when determining whether there is good reason. He can also prescribe circumstances in which good reason should be taken as existing or not existing.

The use of deduction from earnings orders as an initial method of collection is to be piloted. Research regarding the operation of the pilot scheme is currently ongoing with employers and other interested groups. This research will feed into those matters and circumstances which may be prescribed in relation to the determining of good reason. The operation of the pilot itself may also identify other matters and circumstances which should be prescribed in relation to the consideration of good reason. One of the key points of the pilot is that we test the effectiveness of the proposals and learn from it. Allowing the matters and circumstances around "good reason" to be prescribed in secondary legislation provides the necessary flexibility and allows the Department to respond to matters which arise in the course of the pilot and, later, through the operation of the provisions in practice.

The Committee also refers to clauses 21 and 22 (current account and lump sum deduction orders), which may also engage Article 8. Deduction orders can only be used in cases where the non-resident parent has failed to pay an amount of child maintenance due. In relation to current account deduction orders, provision will be made in regulations for the rate of the regular deduction under the order, likely to be monthly, not to exceed a specified amount. This specified amount will be linked to a percentage of the non-resident parent's assessed income. This follows the existing practice in relation to deduction from earnings orders, where the rate of protected earnings is set out in the Child Support (Collection and Enforcement) Regulations 1992 (S.I. 1992/1989). The percentage of assessed income to be specified is still actively being considered, particularly bearing in mind the move from net to gross income. Providing for the amount to be specified in regulations allows the Department to respond to changing circumstances, taking into account such matters as inflation and fluctuating financial markets.

(2) Why is the Government persuaded that the rights to appeal provided for in the Bill will be adequate to ensure that where the civil rights and obligations of non-resident parents are determined, they will have access to a hearing by an independent and impartial tribunal?

(3) Why does the Government consider that it is appropriate to leave these matters to secondary legislation, if they are relevant to compliance with Article 6 ECHR?

Clause 23 gives the Commission the power to make a liability order administratively where a person has failed to pay an amount of child maintenance. The requirement to obtain a liability order via the courts is being removed in order to significantly speed up the enforcement process and collection of arrears. It is estimated that on average it currently takes over 100 days to process and obtain a liability order from the court. Swift and effective enforcement is required to prevent the build up of arrears and to collect those arrears which are outstanding.

A person against whom an administrative liability order is made will be able to appeal to an appeal tribunal against the making of the order. The appeal tribunal which is referred to is that which currently hears appeals made under section 20 of the Child Support Act 1991 against decisions of the Secretary of State relating to the maintenance calculation. This clause adds to those decisions which are appealed to that tribunal. The appeal tribunal is an independent and impartial tribunal which complies with the requirements of Article 6.

The Secretary of State may only make Regulations with respect to the period within which the right of appeal must be exercised and the powers of the appeal tribunal in relation to the appeal. It is envisaged that period within which the appeal right must be exercised will be 28 days from the date the order is made. Regulations will, as a minimum, allow the appeal tribunal to quash the order, vary the amount in respect of which the liability order is made and strike out the appeal at an early stage if it is not made on one of the specified grounds. The detail around the exercise of appeal rights and the powers of a court or tribunal in relation to such appeals are often left to secondary legislation. An example can be found at section 32(5) to (7) of the Child Support Act 1991. The Secretary of State, in making such Regulations, must comply with obligations under the Human Rights Act.

Debt, Negotiation and Cancellation etc

(4) Why does the Government consider that it is appropriate to leave these matters to secondary legislation, if they are relevant to compliance with Article 8 ECHR?

The Committee draws attention to clauses 29 to 32 of the Bill, which provide a range of powers to enable the Commission to deal with child maintenance debt. These powers will result in an existing liability being reduced or extinguished or offset against another liability or another payment. While we have acknowledged that Article 8 rights might be engaged, we are confident that the limitations placed on the circumstances in which these powers will be applied makes it extremely unlikely that a person's private and family life would be affected.

A number of issues have been left to secondary legislation. This is because they are matters of detail or complexity that are more suited to secondary legislation or where some degree of flexibility is desired. For example, in clause 29 the kinds of payments which are to be set off against a non-resident parent's liability are best described in regulations and we may wish to change or add to these at a future date. Clause 30 provides the power to accept part payment. The regulations under that clause will include a requirement to obtain the consent of the person with care if the arrears would have been paid to them. We consider

that this requirement is best left to regulations as the question whether arrears are due to the Secretary of State or to the person with care is not an entirely straightforward one. However, it is right that Parliament should have the opportunity to scrutinise the regulations and for that reason the first set made under the powers provided by clauses 30 to 32 will be affirmative.

It appears that the Committee is mainly concerned with clause 31, which includes the power to write-off arrears. This is essentially a tidying up measure. It is not the intention to write-off debt that the parent with care wants recovered. Before the Commission can take the decision to write-off any debt it must fall within the prescribed circumstances. These will essentially be where the person with care has asked the Commission to cease acting (for example, because the parties have reconciled or the child has died) or where the person with care or the non-resident parent has died and the opportunity to recover the arrears has passed. The regulations prescribing the circumstances will always be affirmative.

There is then a second test, which is in the primary legislation, that it appears to the Commission that it will be unfair or otherwise inappropriate to enforce liability in respect of the arrears. In the case of a person with care who has asked for action to cease on their case, they will have ample opportunity to change their minds and ask for the debt to be recovered. But if they do not do so, there comes a point where, in the interests of certainty, the Commission may take the decision to write-off the debt. It is at that point that they will apply the 'unfair or otherwise inappropriate' test. The regulations will make appropriate provision for the parent with care to be consulted before any decision is taken. We are confident that these safeguards are sufficient to prevent any breach of Article 8.

Information Sharing Gateways

(5) We would be grateful if you could explain why the Government considers that the gateways created by the Bill are compatible with Article 8 ECHR and, specifically, why the Government considers the broad information sharing powers proposed are necessary and proportionate to meet the objectives of the Bill.

Schedule 6 to the Bill sets out the information sharing gateways which are considered necessary for the Commission to exercise its functions. These provide for the sharing of information between the Commission (and persons providing services to the Commission) and HMRC, the Secretary of State (DWP) and the Northern Ireland Department. The provisions in Schedule 6 essentially replicate the existing gateways which are found in social security legislation and the Child Support At 1991 so that the Commission can access the range of information that is currently available to the existing Child Support Agency and so that the Department, HMRC and the Northern Ireland Department can continue to have access to child support information for the purposes of their functions. As the Commission will be a separate legal entity and no longer an extension of the Secretary of State, it is necessary to reformulate these gateways so that the Commission is explicitly covered.

Although Schedule 6 does not widen the existing gateways, in order for the Commission to achieve the policy aim of using historical tax data in the calculation of child maintenance, it will be necessary for it to place greater reliance on the information supplied by HMRC.

It is acknowledged that the information sharing gateways between HMRC, the Secretary of State and the Northern Ireland Department and the Commission are likely to fall within the general ambit of Article 8 but to the extent that there is any interference with Article 8(1), it is considered that the provisions are necessary and proportionate. This is because the Government is of the view that any disclosure and use of this information will be made in accordance with the law in pursuing a legitimate aim. It is considered necessary for the protection of the rights and freedoms of others and is proportionate as a means of pursuing that aim.

The aim of the provisions is to enable a much swifter and more accurate calculation of liability by using historical tax data. This will make the new system of child maintenance more efficient and effective from the beginning when an application is made. It will mean that many clients do not have to provide the same information twice to different arms of government. This will reduce the cost to the taxpayer of operating the system by using information already held on DWP and HMRC data bases. It will also reduce the burden on third parties, such as employers, from whom information has in the past been sought and which has not always been provided promptly or been accurate.

In addition to this it is believed that these information sharing gateways will increase the likelihood of maintenance payments being made sooner and reduce any build up of arrears. In cases where the non-resident parent does not co-operate with the Commission, an accurate calculation can be made from tax records or from data held by the Department. In addition to this such information will enable non-compliant, non-resident parents to be traced and ensure that appropriate and timely enforcement action is taken which will reduce arrears and ensure child maintenance flows regularly and quickly.

It must be noted that the criminal offence of unlawful disclosure of such information is extended to any member of, or of the staff of, the Commission and any person who provides, or is employed in the provision of, services by the Commission (sub-paragraphs (14) and (15) of paragraph 1 of Schedule 7 to the Bill).

(6) We would be grateful if you could explain the Government's view that the disclosure of information on individuals subject to a liability order is compatible with the right to private and family life enjoyed by the defaulting parent, their children or any new family.

Clause 35 provides the Commission with the ability to supply certain information about a non-resident parent to a credit reference agency. As identified by the Committee, one of the circumstances in which the Commission can do this is where a liability order is in force against that person. The purpose of this disclosure of information to credit reference agencies is to encourage compliance with the obligation to pay child support maintenance. It is acknowledged that rights under Article 8 may be engaged by these proposals. However, any interference with such rights is considered to be justified.

The disclosure will be made in accordance with the law and in pursuit of a legitimate aim (the protection of the rights and freedoms of others). The proposals are considered to be proportionate. The Commission has discretion as to whether to share a person's information with credit reference agencies. The Commission will have to consider whether in any individual case the sharing of information is justified. In any case where the

disclosure could not be so justified, the Commission, as a public authority, would be under an obligation to exercise its discretion so as not share the information.

The type of information relating to a person that can be shared by the Commission will be prescribed in regulations. Also, the information which is disclosed to a credit reference agency can only be used by that agency for the purpose of furnishing information relevant to the individual's financial standing. Where a person makes full payment of the amounts owing under a liability order, that person's information will no longer be shared, unless there is consent to the continued supply.

Existing liability orders can currently be included on the Register of Judgments, Orders and Fines. This Register is available to the public, including credit reference agencies.

Contracting out

(7) We would be grateful if you could give reasons for your view on the adequacy of contract compliance as a means of protecting Convention rights.

(8) We would be grateful if you could explain whether or not your view is limited to the circumstances in which C-MEC might be empowered to contract out their functions.

(9) We would be grateful if you could explain whether your view represents a cross-government consensus on the adequacy of contract compliance as a means of protecting Convention rights.

Clause 8 allows the Commission to authorise a person to exercise any of the Commission's functions, but it ensures that the Commission will retain responsibility for the functions carried out by that person. Whenever an authorisation is given, sub-section (4) provides that anything done in the exercise of that function will be treated as if had been done by the Commission itself - and the same protection applies to any omissions. This is subject only to very narrow exceptions relating to any criminal proceedings brought against the authorised person or to contractual relations between the Commission and that person. Given that the Commission is a public authority for the purposes of the Human Rights Act, anything that is done incompatibly with the Convention rights will be unlawful under section 6(1) of the HRA and the victim will able to bring a claim under that Act against the Commission. Clause 8 accordingly ensures that the Commission will retain liability for any non-compliance with the HRA in the exercise of its functions, regardless of whether it performs those functions itself or contracts them out to an authorised person. The position of third parties will therefore remain unaffected by reason of a contractor exercising the function. In the Government's view, this provides proper protection for Convention rights.

In the Government's view, clause 8 and other statutory provisions of like effect provide proper protection for Convention rights. The Government will address the adequacy of contact compliance as a means of protecting Convention rights in other contexts (such as that which arose in the case of *YL v Birmingham City Council*) in its response to the Committee's Ninth Report of this Session on the Meaning of Public Authority under the Human Rights Act.

(10) Why does the Government consider that the publication of the personal details of defaulting parents a) serves a legitimate aim and b) will be accompanied by adequate safeguards to protect the private lives of children and other family members associated with the defaulter (as required by Article 8(2) ECHR).

A small number of non-resident parents have been named on the Child Support Agency's website. Those named have been convicted by a court of failing to give the Child Support Agency the information necessary to make an assessment of child support maintenance. The non-resident parent is given plenty of opportunity to supply the Child Support Agency with the information necessary to make an assessment. Where the non-resident parent chooses not to supply information the Agency may take action in accordance with its legal powers to prosecute the non-resident parent. The Agency does not prosecute as a first resort, giving the non-resident parent ample time to supply information. Where the non-resident parent chooses not to co-operate and is convicted of failing to provide information, publishing that parent's name on the Agency website is not in breach of Article 8(2) of the ECHR.

Interference with the non-resident parent's Article 8 rights is necessary in the interests of the economic well being of the country and to protect the rights and freedoms of others. Many parents with care are in receipt of state benefits or are on low incomes. If a non-resident parent does not pay child support maintenance the costs of supporting those children falls on others. Consideration also needs to be given to the rights of parents with care and qualifying children. It is in the public interest that a non-resident parent should pay child support maintenance as there is a legal obligation to do so. The naming of non-resident parents on the Agency's website is aimed at improving the compliance rates of the non-resident parents concerned in supplying information and making maintenance payments and deterring non-compliance by other non-resident parents.

In naming non-resident parents consideration was given to the private lives of others which might be affected. In relation to the interests of the parent with care and the qualifying children, the consent of the parent with care was sought to publishing of the non-resident parent's name on the website. With regard to the non-resident parent's new family, consideration was given to whether there were any facts known by the Agency which would preclude disclosure.

Careful consideration has been given to the responses to this policy from stakeholders and others and to the initial impact that this policy has had since the first set of names were published on the website last month. Initial consideration has shown that the number of visits to the relevant section of the Agency's website peaked on the day the policy was launched. However it quickly returned to previous levels, suggesting low levels of patronage of this part of the website and therefore questioning the potential effectiveness of the policy. In light of this no further names will be published at this time and the question of whether this policy has a role to play in the future will be kept under consideration.

Appendix 6: Memorandum from Stephen Lawson, Solicitor, Forshaws Solicitors LLP

It has been suggested that I should make some submissions to your Committee with regard to the "Human Rights" issues relating to the Child Support Bill. With due humility I submit the following: -

Background

I am a Solicitor in private practice. I am the current Secretary of Apil – yet I am also a member of the Resolution National Committee for Maintenance/issues. I have previously submitted evidence to the House of Commons Work & Pensions Committee Child Support Reform Enquiry – 4th Report of Session 2006/2007. I write in a personal capacity. I undertake a great deal of Child Support work.

1. "Duty of Care & Negligence"

It has been confirmed by the decision of Rowley –v- Secretary of State for Work & Pensions that the CSA does not owe any legal duty of care to anyone – this arm of Government is therefore free to make as many reckless mistakes as it wants causing untold financial loss to individuals with no legal remedy. Financial loss is caused by CSA "negligence" in a variety of ways – the most common being in relation to negligent assessment (for example where an NRP receives income from two sources – this may be known to the CSA but only one source of income is, (unknown to the parent with care) included in the eventual assessment). Alternatively delays in enforcement can cause financial loss – e.g. if a non-resident parent owns a home, the CSA obtain a Liability Order but fail to obtain a Charging Order – the parent with care may ask the CSA on numerous occasions to obtain a Charging Order to protect "her" position – yet the CSA may "negligently" fail to take this step allowing the non-resident parent to sell the home and dissipate the proceeds. In these situations a parent with care can suffer loss and is without remedy. The Bill (Schedule 1 clause 24) extends this principle of lack of duty to individually employees – a measure of protection which that is not given to other individuals going about their daily lives – for example, Doctors, Nurses, Lorry Drivers, Solicitors!! – all of whom can be sued personally for individual loss. This problem was recognised by Lord Justice Walker and Baroness Hale in the case of Smith –v- Secretary of State for Work & Pensions who said "…. I see considerable force in the argument that a state which prevents a parent with care from claiming child support through the ordinary Court system has a positive obligation to provide an effective alternative system. The state has a positive obligation under Article 8 of the European Convention to take steps which permit the child's integration in his own family… the child can scarcely benefit from family life if there is not enough to live on". These comments were "obiter" – and are not legally binding – the issue however remains.

2. Enforcement

It is understood that the Commission intends to adopt an "incremental" approach to enforcement – so that, for example, if a non-resident parent does not pay maintenance then the CSA could obtain a Curfew Order. If that did not work then the CSA may chose

to remove his passport, disqualify him from driving or seek to put him in prison (as a last resort). There is a real argument here to say that a non-resident parent is being punished effectively for the same "crime" – i.e. the non payment of maintenance – e.g. if an individual is "punished" by the removal of his driving licence how can he then be "punished" again in respect of the same non payment? If the CSA does not intend to adopt an incremental approach then there seems little to be gained by having all of these new powers.

3. Deduction from Earning Orders

I have no concern at all about the use of Deduction from Earnings Orders in respect of payments as and when they fall due – I do however have great concern about the use of Deductions from Earnings Orders when they include not only the payments as they fall due – but also a sum of money towards "arrears". It is to be appreciated that arrears do not always arise through the fault of either of the relevant parents – by way of illustration I am personally involved in one case where the parent with care applied to the CSA for a maintenance assessment in 1993. The CSA have, throughout, known the whereabouts of the NRP who is employed as a Civil Servant. It was not until January 2007 that the CSA completed an assessment. By that time there were, obviously, substantial arrears which were then "backdated" to 1993. At present the CSA have great powers of discretion with regards to the amount to be taken from an individual's wages. The Secretary of State has not given effect to the Will of Parliament and does not apparently intend to do so. In Section 32 (5) of the Child Support Act 1991 the Secretary of State was given power to allow a person to appeal to a Magistrates Court if he was aggrieved by the making of a Deduction from Earnings Order against him *or by the terms of any such Order* (my emphasis). Unfortunately the Secretary of State never gave effect to this power but only allows an appeal if the Order is defected or if the payments in question do not constitute earnings (see Regulation 22 of the Child Support (Collection and Enforcement) Regulations 1992. It is essential therefore to realise that the State has been given power to take away an individuals income. There is complete discretion as to how much income to take and the individual in question is left with no right of appeal to an independent Tribunal. It is contended that this is in breach of Article 1 of the first Protocol of the European Convention on Human Rights.

Summary

These are the 3 main points that concern me. I would like to raise arguments to the effect that because of delay in many cases individuals have been deprived of their right to a "fair trial" – but it appears to be recognised that child support work does not amount to a "trial" and so this argument is effectively a "non starter".

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

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:	HL Paper 156-I/HC 378-I

	Volume I- Report and Formal Minutes	
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 Committee in the last Parliament	HL Paper 104/HC 850
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/HC1575
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