



House of Lords  
House of Commons  
Joint Committee on  
Human Rights

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**Legislative Scrutiny:  
Welfare Reform Bill;  
Apprenticeships, Skills,  
Children and Learning  
Bill; Health Bill**

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**Fourteenth Report of Session 2008-09**

*Report, together with formal minutes and  
written evidence*

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## Joint Committee on Human Rights

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

All correspondence should be addressed to The Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2467; the Committee's e-mail address is [jchr@parliament.uk](mailto:jchr@parliament.uk)

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# Summary

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We report here on our scrutiny of the Government's Welfare Reform Bill and the Apprenticeships, Skills, Children and Learning Bill. We also further scrutinise the Health Bill.

## **Welfare Reform Bill**

We raise a number of human rights concerns, including the following:

- Proposals to introduce benefits sanctions for drug or alcohol dependent people receiving Employment Support Allowance could interfere with the right to a private life. This section should either be deleted from the Bill or significantly amended.
- The Government's view is that contractors providing services under the proposals of this Bill would be viewed as public authorities, meaning that they would have to comply with the Human Rights Act 1998. The Government needs to explain further whether and how individuals could bring action against those contractors.
- We recommend that the proposals to allow the Child Maintenance Enforcement Commission to make orders to suspend driving licenses or passports be dropped from the Bill.

## **Apprenticeships, Skills, Children and Learning Bill**

We welcome the following as human rights enhancing measures:

- Provisions concerning education for detained young offenders
- The obligation to record the use of force on pupils

We also welcome the desire to provide a clear legal framework for searching pupils in schools for drugs, alcohol and stolen property. However, the Government should publish a rigorous analysis of the evidence of the scale of the problem. This analysis would enable Parliament to make an informed decision about the need for the extended powers, particularly given that these powers will interfere with the right to privacy and to peacefully enjoy possessions.

## **Health Bill: healthcare for refused asylum seekers**

We call on the Government to revise urgently its guidance to NHS trusts about how, and when, to charge refused asylum seekers, in order to meet the recent Court of Appeal's decision that the Guidance was unclear and unlawful. We also recommend that the Government publishes the outcome of its review and its public consultation on access to the NHS for foreign nationals.

We also recommend that people who have claimed asylum can access free primary and secondary care whilst they remain in the United Kingdom.



# Government Bills

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*Bills drawn to the special attention of each House*

## 1 Welfare Reform Bill

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Date introduced to first House	14 January 2009
Date introduced to second House	18 March 2009
Current Bill Number	HL Bill 32
Previous Reports	None

### Introduction

1.1 The Welfare Reform Bill was introduced to the House of Commons on 14 January 2009 and completed its stages in the House of Commons on 17 March 2009. The Bill was introduced to the House of Lords on 18 March 2009 and will have its second reading on 29 April 2009. Lord Mc Kenzie of Luton has made a statement that the Bill is compatible with Convention rights under section 19(1)(a) of the Human Rights Act 1998 (HRA). An explanation of the Government's view on the Bill's compatibility with Convention rights is provided in paragraphs 403 – 463 of the Explanatory Notes accompanying the Bill.<sup>1</sup>

1.2 On 27 February 2009, we wrote to James Purnell MP, the Secretary of State for Work and Pensions, to ask for further information in respect of human rights issues arising from the Bill.<sup>2</sup> We received a response on 19 March 2009.<sup>3</sup> We publish our correspondence with this report.

1.3 Following our recent practice, we published our correspondence on the Bill and called for submissions from interested individuals and bodies. We received a number of submissions on the Bill which we publish with this Report. We welcome the engagement of the public and interested organisations in our legislative scrutiny work.

### Background

1.4 This is the second Welfare Reform Bill which we have considered in as many sessions.<sup>4</sup> It follows the Government consultation paper, *No one written off: reforming welfare to reward responsibility* and a subsequent White Paper, *Raising expectations and increasing support: reforming welfare for the future*.<sup>5</sup> The Bill includes powers to establish a 'work for your benefit' scheme for those unemployed and claiming Job Seekers Allowance (JSA) for longer than 2 years;<sup>6</sup> to allow piloting of extended and personalised 'conditionality' in respect of JSA; and to enable the future abolition of income support and the move of all claimants to either Employment Support Allowance (ESA) or JSA.<sup>7</sup> The Bill proposes

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<sup>1</sup> HL Bill 32 – EN

<sup>2</sup> See below, page 64

<sup>3</sup> See below, page 71

<sup>4</sup> Second Report of 2006-07, *Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill; Welfare Reform Bill; Consumers Estate Agent and Redress Bill; Fraud (Trials without a Jury) Bill; Tribunals, Courts and Enforcement Bill*, HL Paper 34, HC 263

<sup>5</sup> Cm 7363 and Cm 7506

<sup>6</sup> Clause 1

<sup>7</sup> Clauses 2 - 11

specific treatment for JSA claimants affected by drug and alcohol dependency;<sup>8</sup> for the purposes of allowing specific functions to be contracted out<sup>9</sup> and for additional sanctions for non-attendance by JSA claimants at interviews and in cases of benefit fraud and violence against Job Centre staff.<sup>10</sup>

1.5 The Bill also provides for a pilot to study increased control of budgets for disabled people seeking support to participate in work, education or other training programmes;<sup>11</sup> new powers for the Child Maintenance and Enforcement Commission<sup>12</sup> and changes to require unmarried parents to register the birth of their child jointly.<sup>13</sup>

1.6 There are a number of significant human rights issues that arise in the context of this Bill. These divide into three categories: a) Welfare reform; b) Powers of the Child Maintenance Enforcement Commission and c) Birth registration.

## Welfare, benefits and human rights

1.7 The right to social security and the right to an adequate standard of living are both widely recognised in international human rights standards. For example, the Universal Declaration of Human Rights recognises the right to “security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”.<sup>14</sup> The UK is a party to the International Covenant on Economic Social and Cultural Rights (ICESCR), which similarly guarantees the right to an adequate standard of living and to social security. Article 11 ICESCR makes clear that circumstances where an individual is permitted to become destitute would be in breach of the right to an adequate standard of living, which includes “adequate food, clothing and housing...and the continuous improvement of living conditions”.<sup>15</sup>

1.8 In their recent General Comment on the scope of this right, the UN Committee on Economic and Social Rights explained:

The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realise their Covenant rights.<sup>16</sup>

To demonstrate compliance with their general and specific obligations, States parties must show that they have taken the necessary steps towards the realisation of the

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<sup>8</sup> Clause 9

<sup>9</sup> Clause 2, New Section 29, Clause 25

<sup>10</sup> Clauses 10-11, 21-22

<sup>11</sup> Part 2

<sup>12</sup> Part 3

<sup>13</sup> Part 4

<sup>14</sup> Article 22. See also Article 25.

<sup>15</sup> See also Article 9, which protects the right to social security. The right to social security has been subsequently incorporated in a range of international human rights treaties, including in the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5(e)); Convention on the Elimination of All Forms of Discrimination against Women (Articles 11 and 14) and the Convention on the Rights of the Child (Article 26). See also the European Social Charter, Articles 12, 13 and 14. Our predecessor Committee previously explained the legal status of the ICESCR in their report on the Covenant, see Twenty-first Report of 2003-04, *The International Covenant on Economic Social and Cultural Rights*, HL Paper 183, HC 1188, paras 16 – 17.

<sup>16</sup> General Comment No 19, The Right to Social Security, 4 February 2008, E/C.12/GC/19, para 1.



right to social security within their maximum resources, and have guaranteed that the right is enjoyed without discrimination and equally by men and women...

Violations include, for example, the adoption of deliberately retrogressive measures incompatible with the core obligations...the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to social security; active support for measures adopted by third parties which are inconsistent with the right to social security; the establishment of different eligibility conditions for social assistance benefits for disadvantaged individuals depending on the place of residence; active denial of the rights of women or particular individuals or groups.

Violations through acts of omission can occur when the State party fails to take sufficient and appropriate action to realise the right to social security. In the context of social security, examples of such violations include the failure to take appropriate steps towards the full realisation of everyone's right to social security; the failure to enforce relevant laws or put into effect policies designed to implement the right to social security [...].The Covenant is clear that, although States are free to secure its minimum obligations through a variety of means, any failure to meet the minimum standards envisaged will be in violation of the international standards which the United Kingdom has accepted. The Government has recently stressed that it considers that the principle means of securing these rights in domestic law should be through legislation enacted by a democratically accountable Parliament.<sup>17</sup> In our view, in ratifying the Covenant, the UK has made a commitment, binding in international law, to abide by the terms of the Covenant. This requires government, Parliament and the courts to make efforts to ensure the fullest possible compliance with the terms of the ICESCR.<sup>18</sup>

1.9 These broad rights are subject to the principle of progressive realisation within available resources. The right must be secured without discrimination and the State must take deliberate, concrete and targeted steps towards their realisation. The UN Committee has explained that there is a strong presumption in the Convention that retrogressive measures taken in relation to the right to social security are prohibited.<sup>19</sup>

1.10 The European Court of Human Rights ("ECtHR") has long treated contributory benefits as "possessions" for the purpose of Article 1, Protocol 1 ECHR. Any interference with or deprivation of established rights to contributory benefit must strike a "fair balance" between the right of the individual to peaceful enjoyment of their possessions and the public interest and must be "in accordance with law".<sup>20</sup> Although the ECtHR was initially reluctant to extend the protection of Article 1, Protocol 1 ECHR to non-contributory benefits, their recent case-law suggests that all benefits must be treated as possessions protected by the Convention.<sup>21</sup> Individual states do however retain a wide "margin of

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<sup>18</sup> Ibid, paras 64 – 65. We have previously explained that General Comments will be relevant to any Court's interpretation of the Convention. See Eleventh Report of Session 2007-08, Para 30, Footnote 41.

<sup>19</sup> Ibid, para 42.

<sup>20</sup> In order to be "in accordance with law" measures must have a basis in domestic law and be sufficiently precise to allow people to foresee the consequences of their actions.

<sup>21</sup> *Muller v Austria* App No 5849/72, 3 DR 25. The Explanatory Notes accept this analysis and proceed from the basis that contributory and non-contributory benefits must be treated as possessions for the purposes of the ECHR.

appreciation” in respect of the establishment of domestic welfare systems: that is to say, the ECtHR allows states some considerable leeway in how they design their welfare systems.<sup>22</sup>

1.11 Although this margin is wide, it is not unbounded. Social welfare systems must be administered in a way that is not arbitrary and is not based upon unjustified discrimination.<sup>23</sup> Changes to existing benefits also must not be such as to take away the very essence of the right to peaceful enjoyment.

1.12 Two additional human rights issues generally arise in the context of welfare administration: (a) the right to a fair hearing by an independent and impartial tribunal when the right to access benefit or to continue to access benefits is determined (Article 6(1) ECHR) and (b) the positive obligation on the state to ensure that individuals are not exposed to destitution and hardship at a level which will endanger their right to respect for private or family life (Article 8 ECHR) or amount to inhuman or degrading treatment (Article 3 ECHR).<sup>24</sup>

**1.13 Acute political differences often arise in the context of social welfare. Human rights law may not have a clear answer in respect of many of the questions which arise. However, individuals enjoy a minimum right to social security which supports an adequate standard of living. To be human rights compatible, a scheme of social benefits cannot be administered arbitrarily or on a discriminatory basis. In the light of the Government’s view that it is principally for Parliamentarians to secure compliance with the right to social security and the right to an adequate standard of living, we consider that it is important that Parliamentarians subject the Government’s analysis of these provisions to close scrutiny for compliance with these minimum standards.**

1.14 We note that some NGOs have provided evidence that the current rates of welfare support are currently inadequate to meet the basic needs of many claimants and their families.<sup>25</sup> For example, in a recent report on UK poverty and the economic downturn, Oxfam provided the following statistics:

Jobseekers Allowance (JSA) for a newly unemployed person over the age of 25 is £60.50 per week (£47.95 for people aged 16-24). The gap between benefits and earnings has almost doubled since 1979 when benefit increases stopped being linked to earnings increases. If that link was still in place, JSA in 2007 would have been £113.26 per week. Increasing JSA in line with earnings since 1997 would give it a value of £75 per week. Recent research by the Joseph Rowntree Foundation into minimum income standards has shown that a single working-age adult needs an income of at least £153 a week ‘in order to have the opportunities and choices necessary to participate in society.’<sup>26</sup>

1.15 These figures for JSA may be subject to sanctions for failure to comply with conditionality requirements.<sup>27</sup> Some NGOs have expressed their concern that in seeking to

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<sup>22</sup> Ibid; *Stec and others v UK*, App. No. 65731/01, Judgment dated 12 April 2006, paras

<sup>23</sup> Ibid; *Zeman v Austria*, App No 23960/02 Judgment dated 29 June 2006

<sup>24</sup> See the House of Lords decision in *Limbuela*, [2005] UKHL 66.

<sup>25</sup> See for example *Zacchaeus 2000*, Response to Welfare Reform Bill, January 2009

<sup>26</sup> Oxfam GB, *Close to Home, UK poverty and the economic downturn*, March 2009

<sup>27</sup> Conditionality refers to conditions placed on benefits subject to sanctions. Sanctions include reductions in sums of benefit received.

increase conditionality in respect of benefits during a recession, undue and ineffective pressure may be placed on claimants and Job Centre Plus staff.<sup>28</sup> In debates during the Bill's passage through the House of Commons, concerns were raised about the quality of the evidence relied on by the Government to support its proposals.<sup>29</sup> Similarly a number of members raised concerns that proposals designed to increase conditionality of benefits, encouraging claimants into work, were not appropriate in economic circumstances where jobs might become increasingly scarce, placing increasing demand on welfare benefits.<sup>30</sup> Others unsuccessfully proposed amendments to increase the minimum level of benefits available to claimants or to reduce the application of the proposals for conditionality to certain groups, including lone parents.<sup>31</sup>

1.16 In the introduction to the White Paper on which this Bill was based, the Minister explained that the purpose of these reforms is to improve the lives of “hundreds of thousands of people”. He explained that that the reforms are designed to ensure that more people are supported into work and greater support is given to those who are unable to work. In addition, the Government considered that its goals of ending child poverty and achieving equality for disabled people should be “within reach”. He explained the Government's view that there was greater incentive for reform during an economic downturn as reform would “help people through”.<sup>32</sup> We commend the Government's intention to support more people, and in particular people who might otherwise be disadvantaged in the employment market, into work. This is consistent with many international human rights instruments which recognise the right to work<sup>33</sup> and with the right to an adequate standard of living. However, the means which the Government propose to achieve these goals must be assessed by Parliamentarians within the UK's wider international human rights obligations. **These proposals provide a good opportunity for Government to assess the quality of the current welfare reform system against its international human rights obligations. Parliamentarians should be provided with a clear explanation and supporting evidence of how these proposals will support the right of everyone to an adequate standard of living and ensure that our welfare system will operate in a way which is compatible with basic human rights standards.**

## Welfare reform: significant human rights issues

1.17 We wrote to the Minister to raise several significant human rights issues in respect of the Bill: a) ESA and work-related activities; b) Work for benefit; c) Work-related activities; d) Conditionality and drug and alcohol dependency; e) Contracting-out; and f) Personalisation, individual budgets and disabled people.

1.18 The first three of these concerns broadly overlap with the controversial issues raised in debate during the Bill's passage through the House of Commons. For the reasons set out below, we remain concerned that the proposals may be implemented in a way which could lead to a risk of incompatibility with Convention rights, namely the right to respect for private life in Article 8 ECHR (and possibly the right to be free from inhuman and

<sup>28</sup> See for example Child Poverty Action Group, Second Reading Briefing, January 2009.

<sup>29</sup> See for example, HC Deb, 17 March 2009, Cols 795-796

<sup>30</sup> See for example, HC Deb, 17 March 2009, Col 794

<sup>31</sup> See for example, HC Deb, 17 March 2009, Cols 786-790

<sup>32</sup> Cm 7506

<sup>33</sup> See for example, Article 6, ICESCR

degrading treatment in Article 3 ECHR) and the right to enjoy those Convention rights without unjustified discrimination (Article 14 in conjunction with Articles 8 and 3 ECHR).

1.19 Unfortunately, the information available about the operation of these provisions is limited to a skeleton Bill. As is the practice with social security legislation, many relevant details are to be provided in regulations. We asked the Minister for draft regulations and for further information in respect of the Government's plans. The Minister has explained that the Government has not yet completed all of its consultation in respect of some of its proposals and in any event, a number of these proposals will be subject to pilot programmes:

Any regulations drafted now will not necessarily reflect the circumstances approaching the implementation date and therefore may not be representative of the final regulations.<sup>34</sup>

1.20 The Government has produced an 'extended' or 'detailed' delegated powers memorandum, which is intended to give "an indication as to how" the Government anticipates using the regulation-making powers in the Bill.<sup>35</sup>

**1.21 While the detailed delegated powers memorandum provided by the Government aids scrutiny of the proposals in the Bill, it is difficult to scrutinise proposed safeguards for their impact on individual human rights on this basis. We reiterate our previous recommendation that where safeguards are relevant to the Government's view on human rights compatibility, those safeguards should be provided on the face of the Bill. Where the Government's view on compatibility relies on safeguards to be provided in secondary legislation, we recommend that draft Regulations are published together with the Bill. At the very least, the Government should describe in the explanatory material accompanying the Bill the safeguards it proposes to provide.**

**1.22 We remain concerned that the implementation of these proposals in a way which respects individual rights will depend largely on their day to day implementation in a manner which is neither arbitrary nor discriminatory and which does not result in any person being incapable of securing an adequate standard of living.** While a number of the safeguards identified by the Government may lead to a human rights compatible approach, the effectiveness of these safeguards will ultimately be determined by the ability of individual staff members to implement them. We welcome the Government's recognition that, at least in respect of ESA, the work of Personal Advisers will be critical. The role of Job Centre staff and other service providers will be central to the operation of welfare services in a way which respects the rights of claimants. **We consider that appropriate training and guidance will be essential and welcome the Government's commitment to provide this to both Job Centre Plus staff and others.**

1.23 Although the welfare reform provisions in the Bill may be capable of being operated in a way which is compatible with individual rights, we remain concerned that without adequate training and guidance for service providers and Job Centre Plus staff, risks may arise in individual cases. Although we have highlighted some of the circumstances where

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<sup>34</sup> See below, page 71

<sup>35</sup> Department of Work and Pensions, *Welfare Reform Bill – Use of Regulation Making Powers* ("Detailed Delegated Powers Memorandum")

we consider that the proposals present a significant risk of incompatibility, below, it is difficult to assess how the new system will operate in practice. In their General Comment on the right to social security, the UN Committee on the ICESCR has called on States to keep their welfare legislation, strategies and policies under review to ensure that they remain consistent with the requirements of the Covenant.<sup>36</sup> **We recommend that the Government should keep the new reformed scheme of welfare benefits under review and should report to Parliament on the operation of the Welfare Reform Act 2007 and any reforms made as a result of this Bill before the introduction of any further welfare reform is considered. This review should include an assessment of the compatibility of the scheme with the human rights standards set out above, including the effectiveness of any relevant safeguards.**

### ***Employment Support Allowance and work-related activities***

1.24 In our report on the Bill which became the Welfare Reform Act 2007, we considered that making receipt of ESA (which replaced Incapacity Benefit) conditional on requirements such as attendance at “work-related health assessments”, “work-related interviews” and work-related activity did not pose a significant risk of incompatibility with either Article 8 ECHR or Article 1, Protocol 1. Our conclusion was based on safeguards proposed by the Government being in place and being operated in a consistent manner.<sup>37</sup> ESA has been available to new claimants since October 2008. We wrote to the Minister to ask for information on the operation of the safeguards which had been proposed. The Minister told us that it was too early to have any conclusive evidence on how the safeguards were operating, but that no complaints had been made. We received some limited evidence on the operation of these proposals which suggested that the administration of ESA was having a negative impact on some vulnerable groups particularly those with mental health problems.<sup>38</sup> A Senior Welfare Rights Adviser from Wolverhampton City Council told us that the administration of the scheme by Job Centre staff was often ignorant of the needs of people receiving medical care and support in the community and could be confusing and dangerous for claimants:

[M]any of our service users who have a severe and enduring mental illness will be put in the untenable position of ... “either I do what the Job Centre Adviser tells me and keep my benefit, or I do what my consultant psychiatrist tells me and risk losing my benefit”.

In my experience DWP/Job Centre Plus policy makers routinely fail to appreciate both the numbers and severity of illness of those people with severe and enduring mental illness who are living in the community with support from Community Mental Health Teams.<sup>39</sup>

1.25 The CAB consider that sanctions in relation to JSA are currently administered in a way which does not take into account individual claimants with mental health problems or learning disabilities. They consider that further conditionality in respect of JSA and ESA may exacerbate these problems:

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<sup>36</sup> General Comment No 19, The Right to Social Security, 4 February 2008, E/C.12/GC/19, para 67.

<sup>37</sup> Second Report of 2006-07, para 3.18

<sup>38</sup> See below, page 105

<sup>39</sup> See below, page 115

Government indicates that sanctions are a last resort, but CAB advisers report seeing clients who have been sanctioned several times. They are often vulnerable clients with learning disabilities who have failed to understand what is required of them or who haven't attended courses or applied for jobs because the options have been inappropriate to their disabilities or levels of literacy. Without proper probing of claimants' failure to attend and without sufficient Disability Employment Advisers, there is a serious risk that vulnerable claimants will be unfairly and inappropriately sanctioned.<sup>40</sup>

**1.26 The reforms introduced by the Welfare Reform Act 2007 have been in force for a very short period of time. Although we agree that there has been inadequate time for an assessment of the safeguards in place, we are concerned that witnesses have told us that certain vulnerable groups, and in particular, those with mental health problems or learning disabilities, are disadvantaged by the administration of the scheme. We are concerned that the Minister has not provided us with any information on how the Government intends to monitor the effectiveness of existing safeguards. Complaints should not be the Government's only source of information about the administration of ESA, a benefit which is targeted at individuals with a spectrum of health difficulties.**

1.27 The Welfare Reform Act 2007 introduced certain conditionality requirements for people receiving ESA and requiring claimants to complete work-related activities. The Bill proposes to amend that Act in order to create powers to direct ESA claimants to undertake specified activities. The Bill expressly provides that any direction must be reasonable "having regard to the person's circumstances". It is unclear whether advisers will have the tools necessary to assess an individual's circumstances effectively enough to know when a particular activity is appropriate or not. If work-related requirements place an onerous burden on individuals who are not able to meet them as a result of their mental or physical disabilities, or which may exacerbate their health difficulties, they may lead to an increased risk of a breach of that individual's right to respect for their private life, and peaceful enjoyment of their possessions, without discrimination (Article 14 in conjunction with Article 8 and Article 1 Protocol 1 ECHR). Individuals and groups representing claimants and particularly vulnerable claimants expressed concern about individuals being compelled to undertake activities that were not suitable, subject to the threat of sanctions during the passage of the Welfare Reform Act 2007. Mind has expressed similar concerns about these provisions:

The Bill will allow Personal Advisers to decide the appropriate activity a claimant should undertake. It is wholly inappropriate for this power to be used to require a claimant to access healthcare provision, take medication and/or access psychological therapies. To do so would blur the boundaries between health provision and social control.<sup>41</sup>

1.28 We asked the Minister why these new powers were considered necessary, given the limited period of time during which the Welfare Reform Act 2007 has been in force. We also asked for further information on the Government's view that these provisions would be administered in a way which was compatible with the right to respect for private life and

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<sup>40</sup> CAB, Committee Stage Briefing, February 2009

<sup>41</sup> See below, page 105

which would not discriminate on the basis of disability. The Minister explained that the Government considered that these additional powers would give advisers “the tools to ensure that no one is written off”, but did not explain why these new powers were needed in *addition* to those in the Welfare Reform Act 2007. The Government accepts that these provisions may engage Article 8 and Article 14 ECHR, but believes that there is no increased risk of any breach of Convention rights as a result of enabling advisers to direct an individual to undertake a work-related activity subject to sanction:

This is because we will apply a range of safeguards to ensure that vulnerable claimants are not directed into inappropriate activities, or sanctioned where they have good cause for a failure to comply with any requirements placed on them.<sup>42</sup>

1.29 We welcome the Minister’s reassurance that any direction to ESA claimants to undertake a specific work-related activity will be a last resort and that no direction will be given which is not reasonable having regard to that person’s circumstances. We also welcome the Minister’s reassurance that further safeguards will be incorporated in secondary legislation, including that an individual’s circumstances will include any relevant medical circumstances. We also welcome the Government undertaking that advisers will be provided with detailed guidance on what to take into account when directing an individual into a specific activity. The Minister has told us that the Government will review the training and support provided for advisors in the light of these proposed reforms. **Despite the Minister’s reassurances, we remain concerned that the proposal to allow Personal Advisors to direct ESA claimants to undertake specific work-related activities may result in an increased risk that ESA could be administered in a way which could lead to a breach of Convention rights in individual cases. We are concerned by evidence which suggests that vulnerable groups, and particularly those with mental health problems and learning disabilities, are disadvantaged rather than supported by conditionality. While the Minister correctly identifies that the right to appeal a direction will be a valuable safeguard, this will not help any claimant who does not clearly understand why a direction has been given and what the implications of failure to comply will be. We recommend that any training and guidance should expressly address how to identify and engage with people with mental health problems and learning disabilities. This training and guidance should encourage staff to engage proactively with supporters, family and other professionals where necessary, appropriate and consistent with the claimant’s right to respect for private life. Any training and guidance should be prepared in consultation with disabled people and service users groups.**

### ***“Work for your benefit”***

1.30 The Bill will enable the Secretary of State (and the relevant Scottish or Welsh Ministers in Scotland or Wales) to make regulations requiring an individual to participate in work or “work-related activity” as a condition of continuing to receive benefit. The Government intends to pilot requirements for those who have been on JSA for longer than 2 years, to participate in full time work experience for a specified period. The Explanatory Notes explain that these proposals may engage the right to be free from forced or compulsory labour (as guaranteed by Article 4(2) ECHR); the right to be free from inhuman or

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<sup>42</sup> See below, page 71

degrading treatment (as guaranteed by Article 3 ECHR); the right to peaceful enjoyment of possessions (Article 1, Protocol 1 ECHR); the right to respect for private and family life (Article 8 ECHR) and the right to a fair hearing by an independent and impartial tribunal (Article 6 ECHR).

1.31 We agree that Article 4 ECHR does not preclude individual member states setting conditionality requirements in respect of work, refusal of work offers and continuing receipt of employment benefit. In our view, it is unlikely that a requirement to participate in work or work-related activity of the kind proposed would involve the type or severity of treatment likely to engage Article 3 ECHR. It is important in this connection that this requirement will only apply to JSA claimants, who must satisfy the usual job seekers' criteria. "Work for your benefit" will not be rolled out in respect of those who are not capable of work, including people with disabilities who are claiming Employment and Support Allowance (ESA).

1.32 In respect of the right to peaceful enjoyment of possessions, the Explanatory Notes explain that the Government "considers that these provisions are in the public interest and that they strike a fair balance between the interests of individuals and the interests of the community". They stress that two safeguards exist: (a) that someone's benefit will only be withdrawn when they are "judged not to have good cause for failing to comply with requirements" and (b) the Secretary of State may make provision for hardship payments to be made. These are the same safeguards which the Government explains will ensure that an individual claimant will never be treated in a way which breaches their right to respect for private and family life (Article 8 ECHR).

1.33 The detail of this new scheme will be elaborated in secondary legislation. Much of the detail is unavailable and the safeguards are only provided for in basic, enabling provisions. For example, the Bill enables the Secretary of State to set up a hardship fund, but does not require him to do so.<sup>43</sup> It allows the Secretary of State to set the conditions for hardship payments, and to set the relevant amounts, but does not provide any further information.

1.34 The Bill makes provision for the Secretary of State to allow for the payment of incidental expenses, but does not make clear whether this would include incidental expenses paid by the claimant to enable them to participate in the work or work-based activity (for example, travel costs).<sup>44</sup>

1.35 We welcome the decision of the Government to provide more information on each of these proposed safeguards in the detailed delegated powers memorandum. For example, the Government intends to model its hardship provisions on existing hardship provisions, which would exclude all but those in a 'vulnerable group'.<sup>45</sup> It explains that the pilot regulations will contain certain circumstances which will provide an automatic good cause for failure to participate and will provide Job Centre Plus decision makers with flexibility to take decisions in relation to each individual's circumstances.<sup>46</sup>

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<sup>43</sup> Clause 1(8), New Section 17A (8)

<sup>44</sup> Ibid, New Section 17B(1)

<sup>45</sup> Para 31

<sup>46</sup> Para 29



1.36 We consider that these proposals could all provide valuable safeguards, but that much will depend on how these proposals will work in practice. Some NGOs, individuals and Members of the House of Commons have argued the Government has ignored its own evidence that these proposals will not encourage people back into work or that in any event, these proposals are inappropriate for current economic conditions.<sup>47</sup> **We consider that changes to welfare support designed to meet the right to social security and the right to an adequate standard of living should be supported by evidence. We are concerned by the suggestions that the Government’s proposals are not supported by their own comparative research. We welcome the Government’s decision to pilot its “Work for your benefit” programme before its proposals are rolled out on a wider scale. We recommend that the pilots should monitor the implications of the proposals for individual rights, including the right to respect for an adequate standard of living, the right to respect for private and family life and the right to enjoyment of those rights without discrimination.**

### ***Parents and “work-related activities”***

1.37 The Bill also enables the Secretary of State to make regulations requiring other benefits claimants and their partners to participate in “work-related activity” and circumscribing the circumstances when couple claimants can receive ESA as opposed to JSA. One of the principal points of debate in the House of Commons related to the implications of work-related activity and other conditionality for parents.<sup>48</sup> Until recently, lone parents with children under 16 could claim income support. In November 2008, this scheme changed to require all lone parents with a youngest child over 12 to claim JSA instead. This means they must be ‘available for and actively seeking work’ to receive support. The Government intends that by 2010, all claimant parents with a youngest child over seven must be available for and actively seeking work. The Government intends this Bill to provide a framework to allow parents claiming income support and income based JSA or ESA to be required to participate in work-related activity designed to prepare them for work, subject to sanctions for failure to participate.

1.38 The detailed delegated powers memorandum explains that the Government intends that income-related support or ESA should continue to be available for couples in a household where there is a child under seven. It also makes clear that it is the Government’s intention that after 2010, lone parents with children under seven will also continue to receive income support.

1.39 Schedule 1 makes provision for parents of children under seven to be subject to some conditions to prepare them for work or work-related activities. It makes clear that only parents with children younger than one year old will be entirely exempt from preparation for work. These provisions are intended to be piloted in Pathfinder districts. Parents with a child aged one or two will be required to attend a work focused interview and agree an action plan, but will not be required to undertake any other activities. Parents with a child aged three to six will be required to “work closely with their adviser and design their own

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<sup>47</sup> See also, for example, HC Deb, 17 March 2009, Col 796-797

<sup>48</sup> See for example, HC Deb, 17 March 2009, Cols 810-814

routeway back to work”. This will include requirements to attend work focused interviews, agree an action plan and undertake specific work related activity.<sup>49</sup>

1.40 A significant time was spent in the House of Commons debating the impact of these proposals and amendments were proposed and rejected which would have increased the age when lone parents would be required to prepare for work from one to three or five years old. NGOs, individuals and members have argued that these proposals will not encourage people back into work or work-related activity, but will instead unfairly sanction parents who have no access to appropriate, accessible and affordable childcare.<sup>50</sup>

1.41 During Report Stage, the Minister explained that the purpose of these proposals was to support parents back into work and to reduce child poverty.<sup>51</sup> While we commend these aims, we consider that the administration of welfare benefits in respect of lone parents with children must take into account the welfare of the children concerned and the fact that the majority of lone parents are women. We consider that if these proposals were administered in a manner which failed to adequately take into account the need for adequate, accessible and affordable childcare, they could have a disproportionate and potentially discriminatory impact on lone mothers. **We welcome the Minister’s reassurance that no parents on JSA will be sanctioned if they fail to participate in “work for your benefit” because they cannot access appropriate childcare and that the absence of childcare will be taken into account when discussing the details of other work related activities for parents.**

1.42 These provisions are subject to the same concerns set out above. There is a lack of detail in the Bill itself to enable the Committee to assess whether the safeguards proposed by the Government are really adequate to avoid a risk that individuals will face hardship amounting to a breach of the right to respect for private and family life or even, in extreme cases, inhuman and degrading treatment. The detailed delegated powers memorandum explains that the Government will not extend these proposals until after the evaluation of their operation in the Pathfinders districts. **We recommend that these proposals are closely evaluated for their impact on lone parents and particularly any disproportionate impact on women and parents who may not be able to access appropriate and affordable childcare.**

### ***Conditionality and drug and alcohol dependency***

1.43 The Bill creates the power for regulations to impose additional requirements on ESA and JSA claimants where “they are dependent on, or have a propensity to misuse any drug” and “such dependency or propensity is a factor affecting their prospects of obtaining or remaining in work”.<sup>52</sup> These provisions may also be extended to those dependent on alcohol or with a propensity to similar dependency. The Government has very recently confirmed its intention to explore the extension of this regime to alcohol dependency.<sup>53</sup> These regulations may require a claimant to:

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<sup>49</sup> See also, Detailed Delegated Powers Memorandum, paras 95-107.

<sup>50</sup> See for example, HC Deb, 17 March 2009, Cols 807-808, 829-830

<sup>51</sup> Ibid Col 829-831

<sup>52</sup> Clause 9, Schedule 3

<sup>53</sup> BBC News Online, *Alcoholics could see their benefits cut*, 14 April 2009

- attend an interview to determine whether he or she is dependent on or has a propensity to misuse any drug and if so, whether this may be a factor in affecting his or her work prospects;
- take part in an assessment by a qualified person to ascertain dependency and its effects;
- take a drug test to help determine dependency.

1.44 Failure to participate in any of these steps may lead to benefit sanctions, including the withdrawal of JSA or the reduction of ESA for up to six months. If drug dependency or propensity to misuse drugs, which affects the claimant's ability to work is established, the claimant may be required to submit to treatment, to participate in further interviews or to take other such steps as may be specified, subject to benefit sanctions for failure to participate without good cause.

1.45 These regulations may also make provision for or in connection with authorising the supply of information held by the police, the probation service or any other prescribed person to the Secretary of State. In effect, these provisions would permit the Secretary of State to enable Job Centre Plus or other benefits staff to gather information about an individual's drug use or treatment, or the effect that this could have on their ability to work, from police, the probation service or any other person. This third category is particularly broad and does not provide any exclusion that would prevent benefits staff from seeking information from medical professionals or others involved in a claimant's ongoing treatment. Regulations may also empower individuals receiving information about an individual's drug dependency to share it with others (although information provided for the purposes of a benefits claim would not be admissible for the purposes of supporting a criminal prosecution).

1.46 Article 8 ECHR provides protection for the individual against compulsory medical treatment and provides guarantees in respect of the disclosure of medical information.<sup>54</sup> It is of particular concern that the Explanatory Notes provide very little explanation of the Government's view that the steps authorised by the proposed regulations will be justified and proportionate to a legitimate aim. In particular, the Government has provided no evidence to support its assertion that benefit compulsion will lead more claimants suffering from drug dependency into treatment. This is in contrast with a number of NGOs that have asserted that these proposals are more likely to force drug dependant claimants into destitution.<sup>55</sup> It is particularly worrying that the Explanatory Notes do not specify any of the safeguards that the Government considers will make these provisions compliant with Article 8 ECHR:

The Government will put safeguards in place so that [the regulations] will not affect a person's private life and therefore does not contravene Article 8. The Government is satisfied that Article 8 rights are safeguarded, though it takes the view that if it were found that there was an interference it could be justified on the grounds that it was

<sup>54</sup> See for example, *Herczegfalvy v Austria* (1992) 15 EHRR 437; see also *Z v Finland* (1997) 25 EHRR 371

<sup>55</sup> See for example, Drugscope, Press Release, DrugScope responds to publication of Welfare Reform White Paper, December 2008. Release, *Welfare Reform Bill A Briefing Paper for Members of the House of Lords*, April 2009; Liberty, *Briefing and Amendments for Report stage on the Welfare Reform Bill in the House of Commons*, March 2009.

done in accordance with the law and necessary in a democratic society in pursuance of the legitimate aim of safeguarding the economic well being of the country.<sup>56</sup>

Information provisions are considered to be compatible for similar reasons.

1.47 We accept that the protection of public funds by excluding “undeserving” or ineligible claimants from social protection schemes may be a legitimate aim for the purposes of Article 8(2) ECHR. However, where the Government proposes to authorise an interference for this purpose, it must provide justification and appropriate evidence that the interference is necessary and proportionate to meet that aim. This should include evidence of a rational connection between the interference and the aim and that the interference is not disproportionate to the steps taken towards that aim. We asked the Minister for further information in relation to the Government’s views on compatibility. We are concerned that the Minister’s evidence focused principally on the dangers posed by drugs, rather than the ability of these proposals to reduce drug dependency and encourage people back into work or other economic activity. The Minister states that “there is international evidence to support the link between compulsion and increased engagement with drug treatment”, but provides no further information. This is in direct contrast with the evidence of the Royal College of Psychiatrists, which said:

The College faculty of Addictions has expressed considerable disquiet at the conditionality provisions while welcoming the attempt to assist drug users with their addiction. The issues affecting people with addictions will not improve treatment compliance or the chances that people will obtain and remain in work. On the contrary, they may drive people deeper into poverty and marginalisation. Being coercive in nature the provisions have the potential to undermine the therapeutic relationship between clinician and client.<sup>57</sup>

1.48 We welcome the limitations in the Bill requiring the Secretary of State to report to Parliament before these provisions are extended beyond a pilot programme. In our view, the Government has not provided evidence to support its view that the proposed interference with individual rights is necessary and bears a rational connection to the purpose which it proposes to achieve. On the contrary, we are concerned by the significant evidence of the Royal College of Psychiatrists that these proposals may be counter-productive and could drive some drug users further into dependency and destitution. We are not persuaded that evidence to support the Government’s position should be sought during a pilot programme which could pose a significant risk to individual privacy rights. We are particularly concerned that these proposals – and many potentially significant safeguards – are to be contained in secondary legislation. Although the delegated powers memorandum provides some further indication of the safeguards proposed, it lacks the detail necessary to ensure us to ascertain how these proposals will operate in practice. **We recommend that these proposals are deleted from the Bill, unless clear evidence is provided to support the Government’s view that the interference proposed with the right to respect for private life is necessary and will be accompanied by appropriate safeguards. In any event, we consider that the Bill should be amended to remove (a) the potential for drug testing subject to be undertaken subject to sanction; (b) the**

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<sup>56</sup> EN, para 421

<sup>57</sup> See below, page 109

**power to direct individuals to undergo specific treatment subject to sanction and (c) the proposals in the Bill for extensive information sharing regulations, particularly the proposal for Job Centre Plus officials to pass information gathered under these provisions onto third parties. We propose amendments to give effect to these recommendations, below.**

Page 14, line 17, leave out Clause 9

Page 69, line 21, leave out Schedule 3

Page 79, line 9, leave out paragraph 3

Page 80, line 29, leave out paragraph 5

Page 81, line 11, leave out paragraph 6 and insert:

“Regulations may make provision for or in connection with a rehabilitation plan to address a person’s dependency on, or propensity to misuse, any drug.”

Page 81, line 17, leave out ‘to be imposed on a person’

Page 83, line 17, line 5, at end, insert:

“(–) Regulations under paragraph 6 may not impose a sanction in respect of failure to comply with treatment unless recommended by a person having the necessary qualifications or experience and consented to by the person to be subject to the treatment.”

### ***Personalisation, individual budgets and disabled people***

1.49 Part 2 of the Bill makes provision for the introduction of pilots to allow direct payments to be paid to people with disabilities in relation to certain support services, including services (a) for the provision of further education, (b) for facilitating the undertaking of further education or higher education; (c) training; (d) support for the purposes of facilitating employment; (f) to enable independent living at home and (g) to enable individuals to overcome barriers to participation (Clauses 28 – 39). These proposals are in addition to earlier pilots of individual budgets for community care, which were previously conducted by the Department of Health. In so far as these proposals are designed to support people with disabilities to greater independence and control and more active participation in the workplace, we welcome them.

1.50 However, we have long called for clarity in respect of the meaning of “public authority” in Section 6 of the Human Rights Act and we are concerned that the Government does not have a clear view on how the protection of the HRA 1998 will operate in respect of public services provided by direct payment.<sup>58</sup> Section 6 requires public authorities to act in a way which is compatible with the Convention rights set out in the Schedule to the Act. The term “public authority” includes “any person certain of whose

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<sup>58</sup> Ninth Report, Session 2006-07, *The Meaning of Public Authority under the Human Rights Act*, HL Paper 77, HC 410 and Seventh Report, Session 2003-04, *The Meaning of Public Authority under the Human Rights Act*, HL Paper 39, HC 382.

functions are functions of a public nature.”<sup>59</sup> What constitutes a “function of a public nature” is not further defined in the Human Rights Act. In our second report on *Meaning of Public Authority*, we recommended that:

... the Government should be prepared to acknowledge that the position in law is currently uncertain. This uncertainty should inform parliamentary debate on whether delegation or contracting out is an appropriate means of dealing with the provision of relevant services, and whether it is desirable to make clear on the face of a Bill that a body is a public authority for the purposes of the HRA.<sup>60</sup>

1.51 A series of court cases, culminating in the judgment by the Law Lords in *YL v Birmingham City Council and others*<sup>61</sup> in June 2007, has subsequently narrowed what was widely understood to be the scope of the Human Rights Act. By a majority of 3 to 2, the Law Lords ruled that the person concerned could not bring a claim against her private sector care home under the HRA, in relation to the infringement of her right to respect for her private life and home under Article 8 ECHR. Her claim lay solely against the local authority which funded her care. The Government introduced an amendment to the Health and Social Care Bill in the last Session to ensure that publicly funded residents in private sector care homes come within the ambit of the Human Rights Act: but the position in relation to other contracted-out services is not clear. A Government consultation paper on the subject has been promised but has not yet appeared. We have recently criticised the Government’s failure to deal with this issue in its Green Paper *Rights and Responsibilities: developing our constitutional framework*.<sup>62</sup>

1.52 Services purchased through a direct payment may engage an individual in a position of trust and in activities in a person’s home and private life. They may be discharging functions which would otherwise be the responsibility of a government body or agency, paid for by public funds. We wrote to the Minister to ask whether the Government considers that private providers of services funded through direct payments are to be treated as public authorities under the HRA and if it does, why it did not make this clear on the face of the Bill. If it does not consider that such providers should be treated as functional public authorities, we also asked the Minister to explain how (and against whom) it proposes that individuals will be able to seek redress for breaches of their human rights.

1.53 The Minister explained:

The relevant services which might be included are deliverable under a variety of statutory provisions with different statutory outcomes. As a result, there is potential for the powers in the Bill to be used to enable disabled people to use direct payments to meet a broad range of needs according to statutory outcomes. The expectation is that, while some of the purchased services will be public functions others, are likely to be essentially private in nature.

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<sup>59</sup> Section 6(3)(b) Human Rights Act 1998.

<sup>60</sup> Ninth Report, Session 2006-07, para. 66.

<sup>61</sup> [2008] 1 AC 95.

<sup>62</sup> Eleventh Report of Session 2008-09, Para 1.25

The question of whether a body falls within s.6(3)(b) HRA will depend on the nature of the function that they are performing. Clearly it will not be possible to address this issue until the Government has decided the issue of to which services the right to direct payment will attach. Until the Government has made a decision as to which relevant services are to be included in the right to control and which services might be purchased by disabled persons as “equivalent services”, it is not possible to say with certainty that all private providers will necessarily be public authorities for the purposes of section 6 of the Human Rights Act. It would be inappropriate to do so, on the face of the Bill. We do not wish to be unduly restrictive at this point, given that the aim of the provisions is to be as flexible and helpful as possible. However, the Government remains fully conscious of the need to protect individual human rights in any particular circumstances.<sup>63</sup>

1.54 We welcome the Minister’s frank acknowledgement that the Government has not yet decided which services may be purchased or facilitated by direct payments. We also welcome the Government’s acknowledgement that in its view, in some circumstances, enabling the use of direct payments may limit an individual’s capacity to seek redress under the HRA 1998. If a service is provided by a public authority, that service must be provided in a way which is compatible with Convention rights. If it is purchased privately, albeit using public money, the claimant will need to show that the provider was performing a public function in order for the HRA 1998 to apply. The Minister explained the Government’s view that in some circumstances, the HRA will not apply. This is in direct contrast to the Government’s view that direct payments for services which would otherwise be provided by the NHS would be subject to the application of the HRA 1998. **We regret the ongoing confusion about the scope of the meaning of public authority for the purposes of the HRA 1998. We welcome the Government’s undertaking to ensure that in making “right to control” regulations the Government will ensure that the human rights of individual disabled people will be protected and that they will have a clear right to redress if the service purchased is properly a public function. However, we consider that, for the avoidance of doubt, the Bill should be amended to make clear that any service which would otherwise have been provided by the Secretary of State or another public authority shall be considered a public function for the purposes of HRA 1998. In the absence of a wider public consultation on the meaning of public authority for the purposes of HRA 1998, we consider that this will provide an appropriate opportunity for a debate on the implications of the duty to act compatibly with Convention rights for private providers providing services purchased using direct payments. We propose a simple amendment for the purposes of debate, below.**

Page 41, line 20, insert the following new clause:

*Relevant services and the application of the Human Rights Act 1998 (c.42)*

“Where any relevant service would otherwise be provided by the appropriate authority or the providing authority, or on their behalf, pursuant to any enactment or through financial assistance provided from public funds, the provision of that service or any provision made to secure that service shall be a public function for the purposes of Section 6 of the Human Rights Act 1998 (c. 42).”

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<sup>63</sup> See below, pages 80

### **Contracting out**

1.55 This part of the Bill provides broad powers for contracting out functions which would otherwise be exercised by Job Centre Plus or other benefits officials, including in respect of the setting of appropriate work-related activity and determining what might be reasonable in an individual set of circumstances.<sup>64</sup> The Government intends ‘work for benefit’ programmes to be operated principally through contracts with third sector and commercial providers. The Committee has previously asked the Government whether it was appropriate for the Government to contract out this type of function on the basis that the privately owned body exercising the functions may not be considered to be performing a public function and therefore not subject to the duty to comply with Convention rights (Section 6 HRA 1998). In its response to correspondence on similar powers in the Bill which became the Welfare Reform Act 2007, the Minister explained that it was the Government’s view that the Secretary of State would retain responsibility for Convention rights, but would ensure that any contract made would “take account of” the Secretary of State’s responsibilities under the HRA 1998. The Committee reported that this approach to contracting was unsatisfactory.<sup>65</sup>

1.56 We asked the Minister whether providers of services contracted out under these proposals would be performing public functions. As explained above, when performing public functions, a person or organisation is considered a public authority for the purposes of the HRA 1998 and individuals will be able to bring proceedings against them for any breach of Convention rights. The Minister told us that the functions referred to in Clause 2 of the Bill “are clearly ones of a public nature”. However, he added that:

The Government considers that authorised person exercising functions pursuant to Section 2G(1) and (2) would be regarded as functional public authorities. Section 2G(7) provides (subject to exceptions set out in subsection (8)) for acts done by authorised persons to be treated as done by the Secretary of State. So, for example, where it was alleged that a contractor carrying out a work-focused interview had contravened a benefit claimant’s Article 8 rights, that person could bring proceedings against the Secretary of State.<sup>66</sup>

**1.57 We welcome the reassurance of the Government that contractors providing services under the proposals in the Bill would be functional public authorities for the purposes of the HRA 1998. We are concerned however that the Minister has suggested that the Bill includes a saving clause that will ensure that individuals may only bring claims under the HRA 1998 against the Secretary of State. We are not certain whether it is the Government’s view that individuals would be able to bring a claim against both the service provider and the Secretary of State or whether the Secretary of State would step into the shoes of the provider for the purposes of any claim under the HRA 1998. We consider that any provision which proposes to alter the ordinary application of the HRA 1998 should be accompanied by clear explanatory notes and appropriate justification. We recommend that the Government provides a further explanation of its view. We consider that where individual contractors are providing services which amount to a public function for the purposes of the HRA 1998, they should be subject**

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<sup>64</sup> New Section 2G.

<sup>65</sup> Second Report of 2006-07, Para 3.32.

<sup>66</sup> See below, page 77.



to Section 6 HRA 1998 (and the duty to act in a Convention compatible way) and individuals should be able to exercise each of the remedies in the HRA 1998 against them directly, as Parliament intended. If it is proposed that a savings clause should divert claims to the Secretary of State, the Secretary of State must assume liability as if ‘stepping into the shoes’ of the provider. We do not consider that it would be appropriate for the Secretary of State to rely on a lack of knowledge of the conduct of the provider or that the conduct of the provider was incompatible with the terms of the service contract in order to deprive an individual service user of an effective remedy for a breach of their Convention rights. We suggest the following amendment.

Page 8, Line 25, at end insert the following subsection:

“( )Anything done or omitted to be done by or in relation to an authorised person (or an employee of that person) in, or in connection with, the exercise or purported exercise of the function concerned is to be treated as the exercise of a public function for the purposes of the Human Rights Act 1998 (c.42).”

1.58 The British Humanist Association told us that it was concerned that services provided by religious groups subject to contract could take place in a discriminatory way. In a recent speech to the Evangelical Alliance, the Secretary of State for Communities and Local Government launched a ‘conversation’ about a charter for excellence for faith groups providing public services, including the type of services which might be contracted out under the proposals in the Bill. She said:

The charter would mean that faith groups who are paid public money to provide services promising to provide those services to everyone, regardless of their background. And promising not to use public money to proselytise.<sup>67</sup>

1.59 We asked the Minister to explain how the Government intended to ensure that contractors avoided discrimination in the administration of services. The Minister explained that any contractors would be subject to existing anti-discrimination law and that additional contract compliance measures would be taken to prevent discrimination. The Minister explained that DWP would carry forward existing best practice and that the Secretary of State could terminate the contract of anyone failing to comply with these contractual obligations. The BHA told us that neither of these arguments met its concerns:

We would like to draw the Committee’s attention to the fact that religious organisations have exemptions from equality legislation which allow them to discriminate in their employment practices and in the way they provide services in some circumstances, on the grounds of religion or belief or of sexual orientation, even when contracting to provide welfare or other public services.

It should be noted that we see contracts – however tight the stipulations are – as a poor second best to legislation for protecting employees and service users from discrimination, for promoting equality, and for protecting human rights – all of which may be especially necessary should the contractor be a religious organisation.<sup>68</sup>

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<sup>67</sup> Speech to Evangelical Alliance, February 2009

<sup>68</sup> See below, page 89

1.60 We most recently considered the right to respect for religion and belief and the provision of public services in our report on the Health Bill. We confirmed our view that the right to respect for religion and belief did not permit public employees to discriminate in the provision of public services, despite specific statutory provisions for conscientious objection in some very limited circumstances.<sup>69</sup> In our report on the Sexual Orientation Regulations, we stressed our view that any exemption from prohibitions against discrimination in public services to permit discrimination by religious organisations would risk incompatibility with the right to enjoy respect for private life without discrimination. In any event, such an exemption would not be required by the right to respect for religion or belief as it would not protect belief, but a particular manifestation of that belief.<sup>70</sup>

**1.61 We welcome the reassurance of the Secretary of State for Communities and Local Government that faith groups should not be permitted to discriminate in the provision of public services provided under contract or to use public money to proselytise.<sup>71</sup> We consider that this is consistent with the acceptance of the Government that providers of services contracted out under the proposals in the Bill will be functional public authorities under a duty to act compatibly with Convention rights protected by the HRA 1998. We recommend that any guidance to service providers provide clear direction on discrimination and particular guidance on religion and belief in the provision of public services.**

## **Powers of the Child Maintenance Enforcement Commission (CMEC)**

1.62 Clause 42 of the bill gives the CMEC the power to make an administrative decision to disqualify a non-resident parent from holding a travel authorisation or driving licence if he fails to pay child maintenance due under the Child Support Act 1991. We are not aware of any similar administrative powers to suspend driving licences or passports for the purposes of sanctions, unrelated to administration by the DVLA or the Passport Agency.

1.63 The Government accepts that these provisions may engage the right to a fair hearing, the right to respect for private life and the property rights of non-paying parents. The Explanatory Notes explain:

In so far as Article 6 is engaged, the Government is satisfied that there is no breach. There will be a full right of appeal to a magistrates court or sheriff, and the order will be suspended until the outcome of the appeal is known.<sup>72</sup>

1.64 The Child Maintenance and Other Payments Act 2008 gives CMEC the power to apply for these disqualification orders to a magistrates court. These powers are not yet in force. The Government originally intended CMEC to exercise these powers administratively, subject to a right of appeal, and proposed this structure in the Bill which became the Child Maintenance and Other Payments Act 2008. The House of Lords Constitution Committee considered that the power to remove passports from UK citizens

<sup>69</sup> Eleventh Report of 2008-09, *Legislative Scrutiny: Health Bill; Marine and Coastal Access Bill*, HL Paper 69, HC 396, para 1.20.

<sup>70</sup> Sixth Report of 2006-07, *Legislative Scrutiny: Sexual Orientation Regulations*, HL Paper 58, HC 350, paras 50 – 53.

<sup>71</sup> The right to be free from discrimination extends to staff and is recognised in EU anti-discrimination legislation, where discrimination in employment is prohibited, except where justified by reference to a genuine occupational requirement.

<sup>72</sup> EN, para 453

should be subject to direct judicial oversight.<sup>73</sup> An amendment suggested by the Chair of that Committee led to the Bill being changed to remove the right of CMEC directly to impose disqualification orders.<sup>74</sup>

1.65 Resolution and Families Need Fathers have raised some concerns about the change now proposed in the current Bill:

Fundamentally, they conflict with the citizen's direct access to the courts when the state could be seen to be acting in a way clearly against the person's interests and their right to a fair trial.

If the Commission make these Orders administratively, there are no safeguards to have the matter properly considered. If the Orders are made administratively, they are effectively being made by Civil Servants, who may be quite junior in position and, again, there are no 'checks and balances'. The Bill attempts to deal with this by providing that the seizure will only take place by an administrative decision if the individual decides not to appeal to the court. But that is well short of direct and full access to the court. Many of the individuals concerned may be poorly equipped to take sound advice from the legal profession or elsewhere when confronted with the threat to confiscate any of these documents.<sup>75</sup>

1.66 The common law right to a fair hearing may require that an individual is invited to make representations before an order is made and that they are given adequate notice of the intention of CMEC to make a disqualification order. The Bill only provides for the non-resident parent to be given notice of the order when it is made. In addition, in light of the importance of the right to appeal, we consider that this notice should specifically inform individuals of their right to appeal and that the order will not come into force until the appeal is exhausted.

1.67 Resolution and Families Need Fathers told us that administrative failures could undermine the fairness of any process operated by CMEC:

[T]he provisions depend crucially on CMEC's ability to communicate effectively with the persons whose licence or documents they are confiscating... We understand an individual will have the opportunity to submit an appeal, but this is effectively reversing the burden of proof to the paying party to demonstrate why the Order should not remain in place.<sup>76</sup>

1.68 We wrote to the Minister to raise these concerns and to ask for further information on the Government's view that these proposals will be compatible with the right to a fair hearing, as guaranteed by the common law and Article 6(1) ECHR. The Minister told us that a non-resident parent will be informed in writing that the Commission is considering making such an order and will be given the opportunity to make representations, principally in writing or over the telephone. CMEC will take a number of factors into account in determining whether or not to make an order. In determining whether a non-

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<sup>73</sup> Third Report of Session 2007-08, *Child Maintenance and Other Payments Bill*, HL Paper 27.

<sup>74</sup> HL Deb, 7 Feb 2008, GC 665.

<sup>75</sup> See below, page 100

<sup>76</sup> See below, page 100

resident parent has “wilfully refused or culpably neglected to pay maintenance”, CMEC will consider:

- the history of the case, including any previous payment patterns; and
- whether county court enforcement mechanisms, including the use of bailiffs, third party debt orders or interim charging orders have been attempted or ruled inappropriate.

In addition, before making an order CMEC will consider:

- the welfare of any child affected by the decision (including the children of the family of the non-resident parent); and
- representations made by the non-resident parent, including in respect of the impact of the order on his or her capacity to earn a living.

1.69 The Minister told us that guidance would be developed and communicated to staff, prior to these provisions taking effect, on the process which staff should follow when making an order. Unfortunately, there is no provision on the face of the Bill for this process to be followed, nor is there any statutory requirement for adequate guidance to be issued to staff. In addition, CMEC is empowered to contract out many of its functions. We expressed our concern in our report on the Bill which became the Child Maintenance and Enforcement Act 2008, that these contractors may not be subject to the duty to act compatibly with Convention rights. These sanctions could, in principle, be imposed by a private contractor, subject only to appeal and with limited rights to protection for Convention rights. In light of the potential impact of these provisions, we are concerned that there is no clear statutory process which must be followed before an order is made either by CMEC or by a third party contractor. **We consider that, should the Government proceed with these provisions, the Bill should be amended to clarify the procedure which should be followed by CMEC when considering an order which could remove a person’s driving licence or passport, including the requirement to give the non-resident parent notice of the intention to consider an order and their right to make representations, including in respect of the appropriateness of other sanctions and the effect of any order on their capacity to earn a living. However, for the reasons which we set out below, we consider that in the absence of further explanation by the Government, these proposals should be deleted from the Bill.**

1.70 We consider that these proposals engage the right to a fair hearing as protected by Article 6(1) ECHR. We accept the Government’s view that there are a number of valuable safeguards provided by the potential for appeal to the Magistrates Court:

- The Bill provides for a full right of appeal to an independent and impartial tribunal, the Magistrates Court;
- This appeal will be a full reconsideration of the decision to impose an order to disqualify someone from driving or to remove their passport;
- The only grounds that they will not be able to consider concern liability orders and the assessment of maintenance, which are subject to separate appeal mechanisms;

- The order will not take effect until after the opportunity for appeal has expired or any appeal lodged has been determined.

1.71 The right to a fair hearing, as guaranteed by Article 6(1) ECHR guarantees the right to *effective* access to an independent and impartial tribunal. It is clear, in our view, that without access to a full, effective hearing by an independent and impartial tribunal, the imposition of an order by CMEC alone would be incompatible with the right to a fair hearing. CMEC is neither independent or impartial for the purposes of the ECHR or domestic common law.

1.72 The obligation to secure effective access may require the State to remove any barriers or deterrents to the exercise of a right to a hearing or it may require the State to provide support, including financial support, to facilitate access.<sup>77</sup> The Bill provides for CMEC to recover their costs when an order is affirmed or *varied*. This could mean that an individual could partially win at appeal, by having the order varied, but could not recover their costs. Under ordinary costs rules, an individual will generally recover any costs of an appeal if they are successful. In the case of a variation, where both parties' cases succeed "in part", the court generally retains discretion over how the costs burden should be distributed. The Minister told us that the Government did not agree that the proposals in the Bill relating to costs could undermine the value of an appeal to the non-resident parent. He explained that it was the Government's view that "any costs imposed will be at the discretion of the courts."

1.73 The Bill would requires costs to be awarded in favour of CMEC in any circumstances where the order is not revoked. Where an order is overturned on appeal, the court will have the discretion to award costs in favour of CMEC, if the court is satisfied that it would be reasonable to do so. We welcome the Minister's reassurance that the intention in the Bill is to make clear that courts will have the discretion to award costs against an appellant if he or she acts unreasonably. Unfortunately, we are concerned that the language in the Bill appears to suggest that in most circumstances CMEC should recover costs, even in circumstances where an appeal has changed the original order significantly. In any event, the requirement that an individual should meet the initial costs of an appeal in order to secure the right to a fair hearing in respect of a sanction represents a significant change from the current position. **We are concerned that the costs provisions in the Bill create a significant disincentive to non-resident parents who might seek to appeal. We are concerned that this may create an unnecessary barrier to the right to a hearing by an independent and impartial tribunal, inconsistent with the requirements of Article 6 ECHR. We recommend that, if these proposals are not dropped, the Bill should be amended to ensure that the discretion to award costs in favour of either party remains with the court and that, generally, a non-resident parent will be able to recover their costs in respect of a successful appeal.**

1.74 The Administrative Justice and Tribunals Council (AJTC) has expressed its concern about these proposals.<sup>78</sup> It calls for these proposals to be dropped or for an appeal to lie to the First-tier Tribunal rather than the magistrates courts:

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<sup>77</sup> See for example *Krenz v Poland*, App No 28249/95, Judgment dated, 19 June 2007

<sup>78</sup> Letter from Lord Newton of Braintree to James Purnell MP, dated 18 March 2009.

The dual effect of these provisions, therefore, is to downgrade the level of decision making in these cases, whilst at the same time providing an appeal mechanism which is less accessible than for other social security and child support cases. The AJTC is particularly concerned that decisions like these, which affect the fundamental liberties of individuals should not be taken by relatively junior administrators and would urge that responsibility for such matters should remain with the courts.

Providing for a right of appeal in these cases to the courts creates inconsistency in the treatment of appeals between different classes of decisions of the CMEC. Moreover, the AJTC objects in principle to the introduction of an appeal right which creates a financial disincentive for anyone wishing to exercise their right. It is perhaps worth noting that around 45% of appeals against other child support agency to the First-tier Tribunal are overturned by tribunals, raising concerns about the standard of decision making at the agency.

1.75 The AJTC correctly identifies that the majority of appeals from decisions of CMEC will be to the First-tier Tribunal and that the tribunals system is designed to be accessible and affordable to appellants who will not incur costs at their hearings. However, at present, CMEC must apply to the magistrates for certain enforcement measures. These include orders in respect of committal, curfew, suspension of passports and driving licences. The Bill proposes that some of these powers should now be exercised administratively, subject to oversight of the magistrates. Different due process standards apply under Article 6 ECHR according to whether the decision in question relates to the determination of a “civil right or obligation” or a “criminal charge”.

1.76 In our view, the decision to suspend a licence or passport would clearly involve the determination of a civil right or obligation, in so far as it would remove an otherwise lawfully obtained licence or travel document and would interfere with an individual’s right to respect for private life and could interfere with his or her ability to work or conduct a business.

1.77 However, in cases involving the determination of a “criminal charge”, the full protection of criminal due process protections will apply, including the presumption of innocence and the right to representation, if necessary through access to legal aid. The European Court of Human Rights has held that the higher standard of protection must apply in respect of committal hearings. In *Benham v UK*, the ECtHR determined that the power of the magistrates to commit someone to prison for “wilful refusal to pay or culpable neglect” in respect of liability order for community charges involved the determination of a criminal charge.<sup>79</sup> By this rationale, safeguards applicable to criminal proceedings must apply in respect of committal proceedings for non-payment of maintenance by a non-resident parent. We consider that the decision to require CMEC to apply to the magistrates court – which has relevant experience of enforcing criminal standards and penalties – for certain enforcement orders is consistent with this requirement. Although the ECtHR recognises that alternative administrative arrangements may be appropriate for the determination of some minor criminal charges, these arrangements are subject to close scrutiny, must be subject to a full, accessible appeal to an independent and impartial

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<sup>79</sup> (1996) 22 EHRR 293. The proceedings were in breach of Article 6(3) as the applicant had not been able to access legal aid.

tribunal applying appropriate criminal safeguards and may only apply in respect of very minor offences and relatively minor penalties.<sup>80</sup>

1.78 Whether other enforcement proceedings should attract a higher criminal standard of protection is not clear. The ECtHR considers (a) the domestic status of proceedings, (b) the nature of the ‘offence’ (including whether the measures are applied generally or to a specific group, whether they are enforced by a public body, whether there is a “punitive” or “deterrent” element to the process and whether the imposition of any penalty involves the determination of culpability); and (c) the severity of the penalty. We consider that the imposition of a curfew on a non-resident parent could involve a “criminal charge” or would require similar safeguards to be in place.<sup>81</sup> Not least, the breach of a curfew order may lead to a custodial sentence.<sup>82</sup> **We have previously expressed our concern in respect of the increasing use of previously criminal sanctions and powers in an administrative context. For the avoidance of doubt, in our view, CMEC or its contractors should never assume primary responsibility for enforcement through committal or curfew.**

1.79 The treatment of disqualification orders is less straightforward. We note that:

- CMEC will apply the same culpability test applied in *Benham*, although to a targeted group of individuals (defaulting non-resident parents); and
- the White Paper which proposed these provisions made clear that their principal purpose was to “sanction” or punish defaulting parents.<sup>83</sup>

1.80 While the penalties imposed are not as restrictive as committal or curfew, they may have a significant impact on individuals, in particular where a licence or passport is necessary for the non-resident parent’s work or business. In respect of travel, the right to leave and enter one’s country of nationality is recognised in a number of international human rights instruments, including the Universal Declaration of Human Rights<sup>84</sup> and Article 2 of the Fourth Protocol of the ECHR (to which the UK is not a party). Against this background, it is likely that a high standard of scrutiny must be applied to any Order issued by CMEC in order to comply with the right to a fair hearing. In reconsidering whether the non-resident parent has “wilfully refused to pay” or is “culpably negligent”, Article 6 may require that any doubt should lie with the non-resident parent. On appeal, the court may be required to treat the hearing as if it were an application by CMEC, requiring evidence the Order has been properly made. Against this background, we can see little value in the proposed changes to outweigh the potential for injustice in cases where sanctions are imposed administratively and non-resident parents are deterred from pursuing an appeal in light of the costs involved.

1.81 We note that the White Paper which originally proposed these changes indicated that in 2005-06, the Child Support Agency (CSA) prepared 1,007 cases for court, seeking either committal or an order in respect of a non-resident parent’s driving licence. Of 577 cases

<sup>80</sup> *Ozturk v Germany* (1985) 6 EHRR 409; *Lautko v Slovakia* (1998) 33 EHRR 25.

<sup>81</sup> The House of Lords has recognised that although the imposition of curfews associated with control orders does not on balance involve the determination of a criminal charge, that the protection of Article 6(1) entitles the person subject to the control order to procedural protection commensurate with the gravity of the potential consequences. *Secretary of State for the Home Department v MB*, [2007] UKHL 46, paragraph 24.

<sup>82</sup> *R (McCann) v Crown Court at Manchester* [2002] UKHL 39.

<sup>83</sup> Cm 6979 paras 5.26 – 5.27

<sup>84</sup> Article 13(2)

which were heard by the court, 3 committal orders were made; 393 suspended committal orders; 3 cases resulted in driving disqualification orders and 36 in suspended orders. The White Paper accepted that these figures represented an improvement: the CSA had traditionally been slow to use enforcement powers. One of the purposes of reform is to send the message that sanctions will be imposed more frequently. We note that previously, the involvement of the court ensured that committal or disqualification was regularly suspended in its effect. While we recognise the legitimate policy aim of securing appropriate support for children by non-resident parents, it would be inappropriate to introduce new administrative sanctions with the principal goal of deterring individuals from pursuing a fair hearing to which they are lawfully entitled.

**1.82 We recommend that the Government should clarify whether or not it considers that these proposals involve the determination of a civil obligation or a criminal charge for the purposes of Article 6 ECHR. In our view, the appeal proceedings must necessarily involve a higher degree of scrutiny, with the burden of proof on CMEC to justify the propriety of the disqualification order proposed. We consider that in practice, these hearings will vary little from the current proposal for an application by CMEC for an order. The proposal to introduce an administrative stage only reduces the likelihood that non-resident parents will, in practice, have the disqualification or suspension tested by an independent and impartial tribunal. We recommend that these proposals should be removed from the Bill.**

### Joint responsibility for birth registration

1.83 The Bill would establish new provisions to deal with birth registration. It would change current rules on birth registration to deal with registration of children born to parents who are not married to each other, or in a civil partnership. The new provisions would effectively create a presumption for joint registration of any birth, together with the names of both parents, subject to some exceptions. The mother would have a duty to register any birth within 42 days. Generally, she would be required to provide prescribed information to the registrar about the father. This obligation would not apply where the child has died, or in the case of still-birth, or where a man has already provided his details to the registrar and the mother acknowledges that this man is the father.<sup>85</sup>

1.84 The mother would not be under a duty to provide information where: i) the child has no father, as it has been born using donor sperm in a case where the HFEA does not recognise anyone as the father; ii) the child's father has died; iii) the mother does not know the identity of the father; iv) the mother does not know the whereabouts of the father; v) the father lacks mental capacity; vi) where the mother has reason to fear for her safety or that of her child if the father is contacted in relation to the registration of the birth and vii) in any other circumstances as may be prescribed.

1.85 Provision is made for a father to register his name against a birth, subject to later acknowledgement by the mother, either before or after the birth. Similar provision is made for a father to refuse to acknowledge parenthood. In both circumstances, a birth may need to be subject to sole registration, subject to further determination of paternity by a court.

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<sup>85</sup> Clause 46, Schedule 6.



1.86 Failure to comply with the relevant regulations will be an offence and may result in a fine of up to £200. Such failure could include a failure by a mother to provide information when required to do so, failure by a father to acknowledge or deny parenthood or failure by a mother to respond to a registration by a father with an acknowledgement or denial.

1.87 If a mother provides false information to the registrar, she might be subject to prosecution for perjury and liable to be sentenced to either a fine or imprisonment up to seven years. In order to be liable to prosecution, a person must wilfully provide a false answer, declaration or statement to the registrar, knowing it to be false. Although the Bill amends the Perjury Act specifically to include the duty of the mother to provide information, officials have explained to the House of Commons library that otherwise providing false information (for example, by a man pretending to be a father) would automatically be covered by the offence.<sup>86</sup>

1.88 The Government accepts that these provisions will engage the separate private and family life rights of mothers, fathers and children, and believes that “interference with the mother’s Article 8 rights in requiring her to provide information about the father is appropriately balanced against the child’s Article 8 right to know about his parentage and the father’s right to respect for his family life under Article 8.”

1.89 The Explanatory Notes explain that additional safeguards exist for vulnerable mothers not to have to provide information about the father. Similarly, the Government explains its view that any interference with the father’s right to private life, as a result of the requirement that the mother disclose information about him is justified. The reasons for justification are very similar to those cited above: principally to protect the right of the child to know both parents and to encourage unmarried fathers to be involved in the lives of their children.

1.90 Mixed views have been expressed about these changes. Some doubts were expressed about the efficacy of this policy in response to the Government’s White Paper. For example, Local Authorities Coordinators of Regulatory Services (LACORS) expressed some concern that registrars would be turned into investigators by the legislation. Rights of Women have expressed some concerns about the use of compulsion to extract information from women:

Forcing women to justify why they do not want to name a father on a birth certificate is not acceptable. Such an approach, rather than encouraging responsible fatherhood, would in fact penalise and potentially humiliate women.<sup>87</sup>

1.91 The Fatherhood Institute takes a different view:

The legislation may actually help some vulnerable mothers: in the past, a violent or otherwise seriously problematic unmarried father could simply be ‘left-off’ the birth certificate, no questions asked. Now if a mother must identify him as a risk in order to prevent his registration, this makes the situation visible and provides an

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<sup>86</sup> Welfare Reform Bill, House of Commons Library Research Paper, 09/09, 23 January 2009.

<sup>87</sup> Ibid, pp. 42-43

opportunity for support to be provided to both of them: to ensure her safety and to engage with him on behaviour change, or through the criminal justice system.<sup>88</sup>

1.92 Refuge has also expressed concerns about a compulsion based registration process. It does not believe that this approach strikes the right balance between the rights of all parties involved in a birth and that the safeguards proposed may put vulnerable women and children at risk. The Church of England has expressed concerns that the new scheme will place a heavy burden on mothers without any clear benefit, and is disproportionate to the problem identified by the Government:

[Currently] only 20,250 children are solely registered and not in contact with their fathers. Given that the proposals are to a great extent, concerned with legitimate exemptions to the requirement for joint registrations, the benefits of the legislation stand to affect an even smaller number. The cost of this will be borne, not only by registrars and the courts, but also those mothers who have genuine reasons for exemption from joint registration who will face considerable additional bureaucracy (in contradiction to the expressed aim of supporting vulnerable women).

1.93 Maternity Action wrote to tell us that they welcomed these provisions in so far as they were intended to enable a child to know the identity of its parents and to facilitate contact with both parents. They expressed concern that the Bill did not adequately address the question of parental responsibility and violent fathers. A father will have the right to register his name against the birth and will automatically secure parental responsibility. Maternity Action argue that parental responsibility should continue to be limited to circumstances where an application is made to the court when a mother declares that she has reason to fear for her safety or that of her child if the father were to acquire parental responsibility.<sup>89</sup>

1.94 During Committee Stage in the House of Commons, a number of amendments were tabled in respect of the exemption permitting mothers to withhold information about the father of her child when she has reason to fear for her safety or that of her child. Some members argued that the provisions in the Bill did not go far enough to protect women and children from domestic violence and, for example, that the exemption should extend to cover violence against other children.<sup>90</sup> Others argued that the exception was too widely drawn, noting that protection of victims of domestic violence should be secured through alternative means, including the criminal law, not by excluding a father's name from a birth certificate.<sup>91</sup>

1.95 Law Centre (Northern Ireland) told us that they thought that the new scheme should be welcomed, but that the safeguard in the new regulations would:

Need to ensure that given the delicate nature of many of the exemption criteria, considerable care is taken to ensure that no further distress is caused to the mother or the alleged father during the registration process. Careful consideration needs to

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<sup>88</sup> Ibid, p. 43

<sup>89</sup> See below, page 104

<sup>90</sup> PBC Deb, 3 March 2009, Col 256

<sup>91</sup> Ibid, Col 253

be given to how exemptions are applied and the appropriate burden of proof discharged in order to obtain an exemption from registration.<sup>92</sup>

1.96 We wrote to the Minister to ask a number of questions about how these proposals would work in practice, including for further information about the Government's view that these proposals will not lead to a breach of the rights of women to respect for their private lives. The Minister accepts that these proposals may interfere with a mother's right to respect for private life (as guaranteed by Article 8 ECHR), but explains that the interference imposed by the new duties must be balanced against "the father's Article 8 rights to be involved in his child's life and the child's right to know his parents' identity". We asked the Minister to provide further information about the evidence base to show that these proposals would achieve the Government's aim of enhancing the involvement of fathers in their children's lives and of protecting the right of the child to know its parents. He told us:

We are seeking, through this policy, to encourage more men to understand and accept their responsibilities as a father. We want both mothers and fathers to recognise that a child has a right to be formally acknowledged by both parents and indeed this act of acknowledging the child is one of the first steps of responsible parenthood.

[...]

We are aiming through this policy to encourage and support the development of a long term involvement on the part of a father in his child's life, and the benefits of parental involvement. We do of course recognise that joint birth registration is merely a starting point for such a relationship, but we believe it is an important and positive milestone for achieving this. Evidence from US research with fragile families demonstrates that early acknowledgement of paternity has significant benefits for both ongoing father-child contact and financial support for the child.

1.97 The Minister explained:

- The Government has decided to make the provision of information compulsory and liable to prosecution for perjury in order to enhance the effectiveness of its proposed policy. It considers that in the small number of cases where a woman registers the birth of her child independently (around 7 % of births or 50,000 children), there may be a significant number of cases where the father and mother of the child are not cooperating and that women would not provide this information without threat of sanction.
- The Government has extended the application of the Perjury Act to the provision of information about unmarried fathers. It considers that this is appropriate as the provision of other false information about a birth is also subject to prosecution for perjury. The Government considers that fathers who falsely provide information about their fatherhood of a child (i.e. by maliciously or falsely attempting to register as a father) would also be liable to prosecution for perjury.

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<sup>92</sup> See below, page 101

- The registrar’s role is to “record the information which he or she is provided with, not to challenge or question it”. However, the Minister went on to explain that “in cases, where there are suspicions about the information being provided, the registrar would seek to resolve these with the person concerned in order to enable the birth to be registered”. The Minister provided a further explanation of the Government’s view on how these proposals will work in practice:
- The mother attending the register office will, as now, be required to provide certain information concerning the birth. In cases where she is seeking an exemption from the duty to provide information about the child’s father (where she is not registering jointly with him) she will need to make a declaration to this effect. We are working with registrars themselves to develop the precise form which such a declaration will take, however a woman who makes a declaration that an exemption applies will not be probed further on this.
- The Government intends that information about the exemptions will be given as part of the process of registration. Registrars are to be fully trained and existing guidance revised to take account of these changes.
- In the Government’s view, there will be few circumstances where a prosecution for perjury against a mother providing information about a father will be in the public interest. The Minister told us that if a woman in fear of domestic violence falsely stated that she did not know the father of her child, in the Government’s view, prosecution would not be in the public interest. The Minister gives two examples where prosecution might be appropriate: (a) when a woman falsely names a man in an attempt to secure citizenship for her child and (b) when a woman falsely names a man in order to harass him.

1.98 The European Court of Human Rights affords States a broad margin of appreciation in respect of their arrangements in respect of birth registrations and the determination of paternity. Article 8 ECHR does however protect the private life and family life interests of unmarried fathers by requiring States to have some mechanism in place by which they may have their paternity legally recognised. Similarly, the right of a child to know his or her parentage is part of his or her right to respect for private life (Article 8 ECHR). However neither of these rights are unbounded and may be limited by the right of the mother to respect for her private and family life and the right of her child to be free from harm (Article 8 ECHR). The State must strike a “fair balance” between each of the interests concerned. Although the ECtHR has determined that in paternity cases, the determination of a fair balance will be weighted in favour of the interests of the child, this may have a different outcome in different cases. In some cases, the ECtHR has recognised that the interests of a child justified the refusal of the registration of his or her biological father on his or her birth certificate<sup>93</sup> and in others, the child’s interest in her genetic heritage was weighted in favour of establishing paternity and a paternal relationship.<sup>94</sup>

<sup>93</sup> *Yousef v The Netherlands*, App No 33711/96, paras 66-74

<sup>94</sup> See for example *Sahin v Germany*, App No 30943/96, where there was a violation of Article 8 ECHR where the court had failed to take into account the interests of a child in examining access rights. Similarly see *Lebbink v The Netherlands*, App No 45582/99, where the interests in recognising biological paternity – and a putative family relationship – had not been recognised in the process of the domestic courts.

1.99 The Court has recognised that a number of legitimate mechanisms for the registration of births exist across the Council of Europe and have recognised systems which allow anonymous births or which only permit registration of unmarried fathers after the consent of the mother or an order of the court. In our view, there is nothing in existing case-law or in the evidence presented by the Minister to suggest that the existing system of birth registrations is operating in a manner which will lead to a significant risk of a breach of Convention rights.

**1.100 We are disappointed that the Government has provided little evidence to show that these new provisions will lead to more fathers acknowledging paternity and subsequently performing an active role in their children's lives. This change of policy represents a significant change of approach to birth registrations and potentially criminalises any woman who refuses to name the father of her baby. In the absence of clear and compelling evidence that this change will yield improvements in the lives of children who would otherwise be registered solely by their mother, we regard this as an unwarranted interference in the personal privacy and private life of the mother.**

**1.101 We note the decision to provide exemptions for women who are uncertain about the identity of the father of their child or his whereabouts and those who fear violence. Similarly, we note the provisions which will allow both mothers and fathers to challenge assertions of paternity by refusing to acknowledge a proposed registration. We note the recognition that certain cases may only be resolved by a judicial determination, including in respect of parental responsibility. We consider that without these safeguards, there would be a significant risk that these provisions would fail to strike an appropriate balance between the family and private life rights of mothers, fathers and their children in individual cases.**

1.102 Although these changes will affect a relatively limited number of births, they may apply in cases where women are vulnerable, young and/or relatively inexperienced in dealing with administrative authorities. We consider that it would be inappropriate for registrars to be charged with questioning women in detail about their previous sexual experiences or challenging the likelihood that women are able to determine and identify the father of their child and that increasingly intrusive questioning would enhance the risk of a breach of the mother's right to respect for private and family life in any individual case. **We welcome the Government's indication that registrars will take a limited role in questioning the answers given by a woman. We are concerned that the Minister has indicated that this role may change in 'suspicious' cases. If the Government proceeds with these proposals, we consider that clear and detailed training and guidance on the operation of these provisions will be necessary in order to ensure that they operate in a way which maintains the delicate balance between the rights of parents and their children. We note the Government's indication that these provisions will be piloted before they are implemented on a wider scale, but question the practicalities and fairness of piloting, particularly if the pilot proves to be unsuccessful and is not implemented nationwide. We recommend that any regulations under these provisions should not be made without close consultation with registrars, parents, children and their organisations. We recommend that similar consultation takes place as part of the evaluation of any pilot programme and before the implementation of any relevant training and guidance for registrars.**

## 2 Apprenticeships, Skills, Children and Learning Bill

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Date introduced to first House	4 February 2009
Date introduced to second House	
Current Bill Number	HL Bill 78
Previous Reports	None

### Background

2.1 The Apprenticeships, Skills, Children and Learning Bill is a Government Bill introduced in the House of Commons on 4 February 2009. It had its Second Reading on 23 February 2009 and completed its Committee stage on 26 March 2009. No date has been set for its Report stage.

2.2 We wrote to the Minister on 10 March 2009 raising a number of questions about the human rights compatibility of certain aspects of the Bill. The Minister responded by letter dated 25 March 2009. The correspondence is annexed to this Report.<sup>95</sup>

### Purposes of the Bill

2.3 The Bill has a number of different purposes, many of which do not engage any human rights. The main purposes with human rights implications are the transfer to LEAs of responsibility for the education of detained children and young people; the extension of the power to search pupils at school; the recording and reporting of uses of force on pupils at school; the provision for the drawing up of children and young people's plans; and the placing of Children's Centres on a statutory footing.

### Explanatory Notes

2.4 The Explanatory Notes to the Bill contain a reasonably full explanation of the human rights compatibility of the Bill.<sup>96</sup>

2.5 Prior to publication of the Bill, in response to our call for evidence on the Government's Draft Legislative Programme, the Department sent us a human rights memorandum outlining the consideration given to the human rights issues raised by the main policy proposals in the Bill, including explanations of why the Government believes that any interferences with Convention rights are justified and proportionate.<sup>97</sup> In most instances this explanation is more detailed than that which appears in the Explanatory Notes accompanying the Bill.

**2.6 We welcome the human rights memorandum sent to us by the Department for Children, Schools and Families before the publication of the Bill and we encourage other departments to follow the same practice in future.**

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<sup>95</sup> See below, page 120 & 122

<sup>96</sup> EN paras 830-853.

<sup>97</sup> See below, page 122

## Significant human rights issues

### (1) Education for detained young offenders

2.7 The Bill imposes new obligations on Local Education Authorities (LEAs) in respect of the education of detained young offenders. LEAs with young offender accommodation in their area (“host authorities”) will be required to secure that enough suitable education and training is provided to meet the reasonable needs of the children and young people who are subject to youth detention in their area.<sup>98</sup>

2.8 Young offenders are currently excluded from the duties and powers given to LEAs under the Education Acts.<sup>99</sup> The Bill will also change this position so that detained young offenders are subject to the Education Acts.<sup>100</sup> The aim is that their education, so far as is practicable, matches that of children and young people in the mainstream education system.

2.9 The Bill also imposes responsibilities on the LEA where a detained young person is ordinarily resident (“home authorities”) to monitor the education and training of a detained child or young person from their area and to take such steps as they consider appropriate to promote that person’s fulfilment of his or her learning potential, both while they are in custody and on their release.<sup>101</sup>

2.10 These are measures which positively enhance human rights. As the Explanatory Notes state, they “further implement the right to education in Article 28 of the UNCRC by improving both access to, and the quality of, education available for juvenile offenders.”<sup>102</sup> Although this is not mentioned in the Explanatory Notes, the measures also significantly reduce the risk that the present law is incompatible with the right of detained children under the ECHR not to be discriminated against in their enjoyment of the right to education (under Article 2 of the First Protocol to the ECHR in conjunction with Article 14).

2.11 Our predecessor Committee enquired into the Government’s justification for not providing children in detention with a statutory right to education in its 2003 inquiry into the UN Convention on the Rights of the Child.<sup>103</sup> It asked the Minister whether this was compatible not only with the UNCRC but also with the right of detained children under the ECHR not to be discriminated against in their enjoyment of the right to education.

2.12 It did not find the Government’s reasons persuasive and concluded that “the persistence of the Government’s resistance to placing the educational rights of young offenders on a statutory footing is a contravention of the UK’s international obligations.”<sup>104</sup> The Committee recommended that, “as a matter of urgency, the Government bring forward legislative proposals to provide children in custody with a statutory right to education ... equal to that enjoyed by all other children.” The Government rejected the

<sup>98</sup> Clause 47, inserting new s. 18A into the Education Act 1996.

<sup>99</sup> Education Act 1996, s. 562.

<sup>100</sup> Clause 48, reversing the effect of s. 562 Education Act 1996 for detained children and young people.

<sup>101</sup> Clause 49, inserting new s. 562A into the Education Act 1996.

<sup>102</sup> EN para. 834.

<sup>103</sup> Tenth Report of Session 2002-03, *The UN Convention on the Rights of the Child*, HL Paper 117, HC 81 at paras 56-59.

<sup>104</sup> *Ibid.* at para. 59.

Committee's recommendation on the basis that it "would not be helpful".<sup>105</sup> The Committee, in its commentary on the Government Response, reminded the Government of its obligation, under both the UNCRC and the Human Rights Act, to provide an equal right to education.<sup>106</sup>

2.13 In its October 2008 Report on the UK, the UN Committee on the Rights of the Child again recommended that the UK "provide for a statutory right to education for all children deprived of their liberty."<sup>107</sup> Clauses 47-50 of the Bill make this provision.

**2.14 We welcome as positively human rights enhancing measures the provisions in the Bill concerning education for detained young offenders.**

2.15 However, we were concerned about the extent to which the Bill as introduced ensured equal access to special needs provision for children in detention. In its 2003 inquiry into the UNCRC, our predecessor Committee received evidence of a Youth Justice Board audit indicating that as many as 50% of all young people in custody would qualify as having special educational needs (SEN), but that only 1% had formal SEN statements entitling them to special provision. The Committee found that the position of young offenders with special educational needs was "of particular concern" and therefore recommended that the Government legislate to provide a statutory right, not just to education, but to access special needs provision equal to that enjoyed by all other children.<sup>108</sup>

2.16 The Bill as introduced provided that when deciding whether education or training is suitable to meet the detained child's reasonable needs, the host LEA must in particular have regard to any special educational needs or learning difficulties the person may have.<sup>109</sup> This fell far short, however, of a statutory duty on the host LEA to ensure that provision is made to meet any recognised special educational needs that a detained child or young person may have, or the delivery of all of the special educational provision set out in the relevant part of any SEN statement which the detained child or young person has.

2.17 At Second Reading the Secretary of State gave his assurance that the Government will take forward this issue "with great seriousness" and the Government subsequently tabled amendments in Committee the effect of which, the Government claims, "significantly strengthens the requirements relating to persons in juvenile custody with special educational needs."<sup>110</sup> The Government's amendments are explained in the Minister's response to our letter.

2.18 The Government's proposed amendments include a requirement that host LEAs use their "best endeavours" to secure that appropriate special educational provision is made for those detained persons who had a statement of special educational needs maintained for them prior to their detention in juvenile custody.<sup>111</sup> Appropriate special educational provision is defined as (a) the special educational provision that, immediately before the

<sup>105</sup> Eighteenth Report of Session 2002-03, *Government's Response to the Committee's Tenth Report of Session 2002-03 on the UN Convention on the Rights of the Child*, HL Paper 187, HC 1279, Appendix 1.

<sup>106</sup> *Ibid.* at para. 18.

<sup>107</sup> UN Committee on the Rights of the Child, *Concluding Observations on the UK*, CRC/C/GBR/CO/4 (3 October 2008).

<sup>108</sup> Tenth Report of Session 2002-03, above, at paras 58-59.

<sup>109</sup> New s. 18A(2)(b) Education Act 1996, as inserted by clause 47.

<sup>110</sup> Sarah McCarthy-Fry, Parliamentary Under-Secretary of State for Schools and Learners, PBC 17 March 2009, col. 368.

<sup>111</sup> Proposed new s. 562C(3) Education Act 1996



beginning of the detention, was specified in the statement, (b) educational provision corresponding as closely as possible to that which was specified in the statement, or (c) if it appears to the host LEA that the special educational provision specified in the statement is no longer appropriate, such special educational provision as reasonably appears to the host authority to be appropriate for the person. Asked in Committee about whether a “best endeavours” obligation was rather weakly worded, the Minister explained:<sup>112</sup>

... it reflects the fact that it will not always be possible to supply the exact provision in the statement and it is the same as the duty on governing bodies of maintained schools. We will be issuing guidance on what it means.

2.19 A statement may provide, for example, that a young person should attend a particular named school, and by virtue of the fact that the young person is detained that will not be possible.

2.20 Other provisions in the Government amendments are intended to ensure continuity in provision for special educational needs notwithstanding a period in detention. So, for example, where a person already has a statement of special educational needs, the authority maintaining the statement will be required to keep the statement while the person is detained,<sup>113</sup> and provision is made for the transfer of SEN statements and to ensure that the host LEA is aware that an authority was maintaining a statement for the person prior to their detention.<sup>114</sup> Provision is also made to ensure that home LEAs are aware when a child is released from custody and that the child’s statement of SEN is revived and reviewed on their release.

2.21 The Government states that it believes it is essential that education and training in custody meets the reasonable needs of children and young people detained there, “as far as it is practicable within the custodial environment.” However, it points out that it is also necessary to consider the practicalities of arranging and delivering highly specialised and discrete provisions for persons in custody, the majority of whom spend only short periods there.<sup>115</sup>

**2.22 We accept that it is not necessarily practical for all of the duties imposed on LEAs in the Education Acts to apply to the education and training of detained children, because of the constraints imposed by custody and the length of time for which children are usually detained. We welcome the Government’s amendments to the Bill concerning the special educational needs of detained children and young people. We agree that they amount to a significant strengthening of the legal framework for the meeting of the special educational needs of this group of children and young people amongst whom such special needs are particularly prevalent.**

## ***(2) Power to search pupils for alcohol, illegal drugs and stolen property***

2.23 School staff currently have the power to search pupils and their possessions for offensive weapons without the pupil’s consent.<sup>116</sup> The Bill will extend this power so as to

<sup>112</sup> PBC 17 March 2009 col. 368.

<sup>113</sup> Proposed new s. 562C(2) Education Act 1996.

<sup>114</sup> Proposed new s. 562F Education Act 1996.

<sup>115</sup> PBC 17 March 2009 col. 371.

<sup>116</sup> Education Act 1996 s. 550AA.

include the power to search pupils and their possessions for alcohol, illegal drugs and stolen property, and to seize anything which the person carrying out the search has reasonable grounds for suspecting is a prohibited item or is evidence in relation to an offence.<sup>117</sup>

2.24 The powers to search and seize include a number of safeguards. For example, there must be reasonable grounds for suspecting that the pupil has a prohibited item; only the head teacher or a person authorised by the head teacher can carry out the search; and the person carrying out the search cannot require the pupil to remove any clothing other than outer clothing, must be of the same sex as the pupil and may only carry out the search in the presence of another member of staff also of the same sex as the pupil.

2.25 The Explanatory Notes to the Bill correctly acknowledge that the power to search for prohibited items interferes with pupils' rights to respect for their privacy under Article 8(1) ECHR and that the power to seize items found on a search interferes with pupils' right to peaceful enjoyment of their possessions under Article 1 Protocol 1.<sup>118</sup> However, they state that the Government is satisfied that any interference with those rights will be justified and proportionate. It is said to be justified on the basis of public safety and the prevention of disorder or crime and (in the case of the power to search for stolen property) protection of the rights of the owner of the property. It is said to be proportionate in light of the safeguards which accompany the powers. The Departmental memorandum further explains that the existing power, of instructing a pupil to turn out their pockets with the possibility of a disciplinary penalty being imposed for not complying, is not sufficient because it "does not result in the object being discovered."

2.26 The Explanatory Notes are correct that such powers to search for and seize alcohol, drugs and stolen property are in principle capable of being justified interferences with pupils' rights, and the safeguards contained in the Bill are likely to be adequate to ensure that the power is used proportionately. Neither the Explanatory Notes nor the Departmental memorandum, however, refer to any evidence demonstrating the necessity for the new power. Sir Alan Steer's 2005 Report of the Practitioners' Group on School Behaviour and Discipline recommended that "the DfES should monitor, evaluate and publish a report on the use of the new legal power to search pupils without consent for weapons. In the light of that report, they should review whether the right to search should be extended in due course to include drugs and stolen property." The material provided by the Government accompanying the Bill did not refer to any such review having been carried out, or any other evidence of the need to extend the existing power.

2.27 We therefore wrote to the Minister to ask what evidence exists that there is a problem concerning alcohol, illegal drugs and stolen property on school premises; what evidence there is of the scale of that problem and of the underlying trend; and what evidence there is that the current powers to address the problem are inadequate.

2.28 The Minister replied that alcohol, controlled drugs and stolen property were identified by behaviour expert Sir Alan Steer as the items that schools were most likely to need to search for, in his July 2008 Report on pupil behaviour issues, following consultations with

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<sup>117</sup> Clause 235(1), inserting new sections 550ZA-550ZD into the Education Act 1996 and clause 237(1), inserting new sections 85AA-85AD into the Further and Higher Education Act 1992.

<sup>118</sup> EN paras 846-851.

practitioners and their representative organisations. This reflected concerns expressed by the Practitioners' Group on School Behaviour and Discipline in their 2005 Report, which highlighted problems of pupils carrying drugs or stolen property. The Government also relies on data concerning exclusions from schools: it says, for example, that in 2006/07 there were 400 "drug and alcohol related" permanent exclusions (4.6% of the total) and 210 permanent exclusions for theft (2.4%); and of the fixed period exclusions recorded, 8,180 (1.9%) were drug and alcohol related and 9,440 (2.2%) were for theft. In a 2008 survey of 1500 teachers from the NUT, 20% of respondents reported witnessing possession of drugs within their school.

2.29 We are surprised not to have been provided with clear evidence of the scale of the problem of drugs, alcohol and stolen property actually being present on school premises. Figures on the number of "drug or alcohol related exclusions" does not help us ascertain how frequently such items are actually present in schools, since such exclusions may related to the use of drugs or alcohol outside school. In the absence of such clear evidence of the scale of the problem, it is very hard to assess the necessity for the new powers.

2.30 In Public Bill Committee,, it was suggested that a much wider power to search should be provided and the necessity for such detailed safeguards was called into question.<sup>119</sup> The Government resisted these suggestions on the basis that the approach in the Bill, of precisely defining the scope of the power and providing specific safeguards, is to ensure that any potential interference with a pupil's right to respect for their privacy under Article 8 ECHR is reasonable and proportionate.<sup>120</sup> In our view the approach taken in the Bill is correct. In the United States this week, the Supreme Court is considering whether a school which strip searched a 13 year old girl to see if she was carrying ibuprofen pills breached her constitutional right not to be subject to unreasonable searches.<sup>121</sup> The Court is being asked to provide clear guidelines for school administrators about school searches. While there is an important role for the courts to play in ensuring the human rights compatibility of laws, we think Parliament should always take the opportunity to define as precisely as possible the scope of powers that could affect human rights and to include detailed safeguards on the face of legislation to ensure that such powers are exercised proportionately. **We therefore welcome the Government's aspiration to provide a clear legal framework for searching pupils in schools, with clearly defined powers and safeguards. This should enhance legal certainty for both staff and pupils and therefore advances human rights. However, interferences with Convention rights must be shown by evidence to be necessary. Giving teachers what are effectively police powers to search children and young people, and to seize their property, without the accompanying training in the exercise of such powers or detailed codes of practice regulating their exercise, is a significant step which ought not to be taken lightly.**<sup>122</sup> We accept that making such powers available to school staff is in principle capable of justification if they can be shown to be necessary, and we welcome the inclusion of detailed safeguards on the face of the Bill. However, we recommend that the Government publish a more rigorous analysis of the evidence which demonstrates the scale of the problem of drugs, alcohol and stolen property being present on school

<sup>119</sup> PBC 26 March 2009 cols 821-34

<sup>120</sup> Sarah McCarthy-Fry, *ibid* cols 830-1

<sup>121</sup> *Redding v Eastern Arizona College*.

<sup>122</sup> The Committee expressed similar concerns about conferring police powers on immigration officers in the context of the UK Borders Bill.

premises, so that Parliament can make an informed decision about the necessity for the extended powers.

### ***(3) Obligation to record significant incidents involving use of force by staff on pupils***

2.31 The current law authorises school staff to use such force as is reasonable in the circumstances for the purpose of preventing a pupil from committing any criminal offence, causing personal injury to, or damage to the property of, any person, or prejudicing the maintenance of good order and discipline at the school.<sup>123</sup>

2.32 In our report on the Bill which became the Education and Inspections Act 2006, we expressed our concern about the breadth of the power of members of staff to use force on pupils in schools, and in particular the width of a power to use reasonable force in order to prevent the "prejudicing of good order and discipline".<sup>124</sup> We were concerned that such a widely defined purpose might give rise in practice to a risk of disproportionate use of force, in breach of the right to respect for private life and to dignity and physical integrity recognised under Article 8 ECHR.

2.33 The Government's response to this concern has been to issue guidance to schools on the use of this power: *The Use of Force to Control or Restrain Pupils* (November 2007). More detailed guidance also exists about the use of "restrictive physical interventions" for staff working with pupils with severe behavioural difficulties.

2.34 The Bill introduces new recording and reporting requirements on the use of force in schools and FE colleges.<sup>125</sup> It requires the governing body of a school in England to ensure that a procedure is in place for recording significant incidents where a member of staff has used force on a pupil and to take reasonable steps to ensure that the procedure is followed by staff at the school.<sup>126</sup> The procedure must provide that such incidents are both recorded in writing and reported to the pupil's parents as soon as possible after the incident. The governing body must have regard to guidance issued by the Secretary of State for the purposes of recording and reporting significant incidents of the use of force.

**2.35 We welcome the new obligation to record the use of force on pupils as a positive, human rights enhancing measure. The availability of reliable data about the incidence of the use of force in schools is an important safeguard against the abuse or disproportionate use of that power, as it enables it to be independently monitored.** There is no equivalent provision in primary legislation requiring the recording and reporting of the use of restraint in juvenile secure settings and we have frequently had to remind the Government of its voluntary undertaking to publish quarterly reports of the number of incidents.

2.36 The Children's Rights Alliance for England ("CRAE") has suggested that the Bill presents an opportunity to consider the use of force in schools more generally in light of recent developments concerning restraint in child custody, in particular the Court of

<sup>123</sup> Education and Inspections Act 2006, s. 93. Equivalent provision is made for Further Education institutions in s. 85C of the Further and Higher Education Act 1992 (inserted by the 2006 Act).

<sup>124</sup> Eighteenth Report of Session 2005-06, *Legislative Scrutiny: Ninth Progress Report*, HL Paper 177, HC 1098, at para. 52.

<sup>125</sup> Clauses 239 and 240.

<sup>126</sup> Clause 239, inserting new subsection 93A into the Education and Inspections Act 2006.

Appeal’s recent decision that the use of physical restraint is not permissible for the purposes of good order and discipline because it violates the child’s right to dignity and physical integrity in Articles 3 and 8 of the ECHR, interpreted in light of the UN Convention on the Rights of the Child.<sup>127</sup> CRAE argue that in light of that judgment the power to use reasonable force to prevent a pupil from prejudicing good order and discipline<sup>128</sup> ought to be repealed.

2.37 We do not think that the repeal of the provision concerning the use of reasonable force in schools is strictly required by the Court of Appeal’s judgment. The regulations which were quashed by the Court of Appeal in that case purported to give Secure Training Centres the power to use force against detained children and young people “for the purpose of ensuring good order and discipline”. The use of force for that purpose in schools is expressly prohibited: the 2006 Act provides that the provision authorising the use of force “does not authorise anything to be done in relation to a pupil which constitutes the giving of corporal punishment.”<sup>129</sup>

2.38 It is likely, however, that the Government’s guidance to schools on the use of force against pupils will require reconsideration in the light of these recent developments concerning the use of restraint. We asked the Government whether and, if so, how it intends to revise its 2007 Guidance on the use of force by staff in schools in light of the recent developments concerning the use of restraint in juvenile secure settings, including the Court of Appeal’s recent judgment, the independent review of the use of restraint in juvenile secure settings, and the Government’s response to that review.

2.39 The Government confirmed that it will be reissuing the 2007 Guidance on the use of force by staff in schools to take account of the new provisions in the Bill and of relevant developments arising from the review of the use of restraint in juvenile secure settings. The issues arising from the review of the use of restraint in juvenile secure settings that the Government intends to reflect in the revised guidance include:

- Making clear that certain restraint techniques should not be used because of the particular physical risks they pose to children and young people
- Recording being done within 24 hours
- Reporting arrangements to include an opportunity for the child or young person to give their views
- The importance of reporting concerns to external agencies such as other local authority children’s services, the local Children’s Safeguarding Board, the Health and Safety Executive, youth offending teams and the police where a child or young person may be at risk of significant harm

2.40 The Government also intends the revised guidance to reiterate and as appropriate strengthen references to consulting with and informing staff, pupils and parents about the use of force policy; good school practice in assessing the frequency and severity of incidents that are likely to occur; and the importance of schools assessing carefully the training needs

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<sup>127</sup> *R (C) v Secretary of State for Justice* [2008] EWCA Civ 882 (28 July 2008).

<sup>128</sup> Section 93(1)(c) Education and Inspections Act 2006.

<sup>129</sup> *Ibid.*, s. 93(4).

of staff, including the need for refresher training. The guidance will also suggest that, where young people move between a school and a juvenile setting, there should be an appropriate exchange of information.

**2.41 We welcome the Government’s decision to revise the 2007 Guidance on the use of force by staff in schools in the light of recent developments and we look forward to being given an opportunity to comment on the human rights compatibility of the draft guidance before it is finalised.**

#### **(4) UNCRC as strategic framework for Children’s Plans**

2.42 The Bill places Children’s Trust Boards on a statutory footing<sup>130</sup> and empowers the Secretary of State to require a Children’s Trust Board to prepare and publish a strategic Children and Young People’s Plan.<sup>131</sup>

2.43 In its 2008 Concluding Observations on the UK, the UN Committee on the Rights of the Child, commenting on the UK Government’s overall strategy for implementing the UNCRC, welcomed the fact that the UNCRC had been referred to in the Children’s Plan for England, but expressed its continuing concern “that the Convention is not regularly used as a framework for the development of strategies throughout the State party and at the lack of an overarching policy to ensure the full realization of the principles, values and goals of the Convention.”<sup>132</sup>

2.44 Our predecessor Committee, in its Report on the Bill which became the Children Act 2004, was critical of the failure of that Act to use the UNCRC as the overarching framework of provision for children in UK law.<sup>133</sup> We agree with that criticism and we therefore asked the Government what, if any, would be its objection to the Bill being amended to require Children’s Trust Boards (a) to have regard to the need to implement the UNCRC when preparing its Children and Young People’s Plan and (b) to consult with children and young people in the preparation of their plans, as envisaged by Article 12 of the UNCRC.

**2.45 We welcome the Government’s commitment that children and young people should be consulted when the Children and Young People’s Plan is being drawn up, and the fact that this will be made a requirement in the new regulations governing the adoption of such Plans.**<sup>134</sup>

2.46 We are disappointed, however, by the Government’s refusal to adopt the UNCRC as the strategic framework for Children’s Plans. In its response to our question the Government states that it considers it “unnecessary to have any specific provision falling on the Children’s Trust Board to have regard to the UNCRC when preparing its plan.” The reason it gives is that the UK complies with its obligations under the UNCRC through a mixture of legislative, executive and judicial action, and is content that its legislation is consistent with the provisions of the Convention. It says that the broader issue of

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<sup>130</sup> Clause 188(2), inserting new s. 12A into the Children Act 2004.

<sup>131</sup> Clause 188(3), substituting new s. 17 of the Children Act 2004.

<sup>132</sup> UNCRC Concluding Observations, above, at para. 14.

<sup>133</sup> Nineteenth Report of 2003-04, *Children Bill*, HL Paper 161, HC 537, at paras 14-21.

<sup>134</sup> Under s. 17 of the Children Act 2004, inserted by cl. 188 of this Bill.

embedding the UNCRC into UK policy and practice is covered in the Green Paper on a Bill of Rights and Responsibilities, and it would prefer to consider any further legislative steps in the light of that consultation.

2.47 The Green Paper on a Bill of Rights and Responsibilities welcomes public debate on whether children’s rights should be included in any Bill of Rights and Responsibilities,<sup>135</sup> and considers that such a Bill “could contain a right for children to achieve well-being, whatever their background or circumstances.”<sup>136</sup> It acknowledges that the UNCRC is “the overarching international treaty for children’s rights ratified by almost all UN member states. However, it contains no proposal for further embedding the UNCRC into UK policy and practice. If anything, the Green Paper appears sceptical of the value of such a proposal, preferring to emphasise that the goal of achieving improved outcomes for children are pursued in distinctive ways across the UK, and indicating that any Bill of Rights and Responsibilities should allow for recognition that responsibility for many aspects of child wellbeing is devolved.”<sup>137</sup>

**2.48 We are not persuaded by the Government’s reasons for not taking the opportunity in this Bill to embed the UNCRC further in policy-making. The Bill’s provisions on the drawing up of Children and Young People’s Plans provide an opportunity for the Government to respond positively and constructively to the concern of the UN Committee on the Rights of the Child that the Convention is not regularly used as a framework for the development of children’s strategies. We recommend that the Bill be amended so as to require Children’s Trust Boards to have regard to the need to implement the UNCRC when preparing its Children and Young People’s Plan and suggest an amendment below to achieve this.**

Clause 188, page 103, line 44, insert:

(6) A Children’s Trust Board must have regard to the need to implement the UN Convention on the Rights of the Child when preparing a children and young people’s plan.

## **(5) Children’s Centres**

2.49 The Bill provides a statutory footing for Children’s Centres for the first time by imposing a new requirement on local authorities to ensure that arrangements made to secure that early childhood services in their area are provided in an integrated way includes arrangements for sufficient provision of children’s centres to meet local need.<sup>138</sup>

2.50 The departmental memorandum refers to emerging evidence that demonstrates the success of Children’s Centres in improving outcomes for young children and their families, reducing inequalities between the most disadvantaged and the rest, and in helping to bring an end to child poverty. It states that establishing children’s centres in legislation will safeguard these benefits for children and allow the principles set out in the UNCRC in respect of child development, welfare and health, social equality and education to continue to be met.

<sup>135</sup> *Rights and Responsibilities: developing our constitutional framework* CM 7577 (March 2009), paras 3.66-3.75.

<sup>136</sup> *Ibid.* at para. 3.71.

<sup>137</sup> *Ibid.* at para. 3.70.

<sup>138</sup> Clause 189, inserting new s. 5A into the Childcare Act 2006.

**2.51 We welcome the Bill's provisions concerning children's centres as human rights enhancing measures which are likely to contribute towards the progressive realisation of the rights of children under the UNCRC.**



## 3 Health Bill

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Date introduced to first House	15 January 2009
Date introduced to second House	
Current Bill Number	HL Bill 31
Previous Reports	None

3.1 We recently reported on those aspects of the Health Bill which, in our view, raised human rights concerns.<sup>139</sup> We now consider the issue of healthcare for a particularly vulnerable group: refused asylum seekers. This is a significant issue which was brought to our attention by a number of witnesses to our inquiry and has recently been the subject of legal challenge in the Court of Appeal,<sup>140</sup> but which we were not able to deal with in our first Report on this Bill.

### Healthcare for refused asylum seekers

3.2 The National Health Service Act 2006 requires the Government to provide a comprehensive health service so as to secure an improvement in the prevention, diagnosis and treatment of illness. There is a presumption that such services will be free but there is a power to make charges to those who are not ordinarily resident in the UK. In 1989, Regulations were introduced requiring NHS Trusts to charge “overseas visitors” for secondary care (hospital treatment) subject to various exemptions.<sup>141</sup> Asylum seekers and refused asylum seekers who had been in the UK for 12 months were unaffected at that time. However, in 2004, the Regulations were amended so that many more overseas visitors, including refused asylum seekers, became liable for hospital charges. The Department of Health produces non-statutory guidance to NHS Trusts on how to implement the charging Regulations.

3.3 Reporting on the *Treatment of Asylum Seekers* in 2007, we concluded that the charging Regulations had:

... caused confusion about entitlement, that interpretation of them appears to be inconsistent and that in some cases people who are entitled to free treatment have been charged in error. The threat of incurring high charges has resulted in some people with life-threatening illnesses or disturbing mental health conditions being denied, or failing to seek, treatment.<sup>142</sup>

3.4 We also considered the difficulties that refused asylum seekers faced in accessing primary care (treatment by a General Practitioner).<sup>143</sup> We noted the Department of Health’s public consultation on proposals to change the rules of entitlement of overseas visitors to NHS primary care services which concluded in August 2004.<sup>144</sup> At the time of

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<sup>139</sup> Eleventh Report of Session 2008-09, *Legislative Scrutiny: Health Bill; Marine and Coastal Access Bill*, HL Paper 69, HC 396.

<sup>140</sup> *R (YA) v Secretary of State for Health* [2009] EWCA Civ 225.

<sup>141</sup> National Health Service (Charges to Overseas Visitors) Regulations 1989.

<sup>142</sup> Tenth Report of Session 2006-07, *The Treatment of Asylum Seekers*, HL Paper 81-I, HC 60-I, para. 134.

<sup>143</sup> *Ibid*, paras 153-159.

<sup>144</sup> Department of Health, *Proposals to Exclude Overseas Visitors from Eligibility to Free NHS Primary Medical Schemes*, 14 May 2004.

our inquiry, Ministers were “still considering the results of the public consultation and the issues which that raised before announcing the way forward”.<sup>145</sup> We concluded:

We have seen evidence that the current arrangements for access to GPs result in the denial of necessary primary healthcare for many refused asylum seekers and their children. We believe that in many cases this is in breach of the ECHR rights to be free from inhuman or degrading treatment, to respect for private life and to enjoy Convention rights without unjustified discrimination, and also in some cases to the right to life. Moreover, consequent increased reliance on A&E services as a substitute is more expensive, increases A&E pressures and flies in the face of the general NHS policy of moving care away from A&E and hospitals and into primary care, closer to the patient. We recommend that primary healthcare be provided free to those who have claimed asylum, including those whose claim has been refused, pending their voluntary return or removal.<sup>146</sup>

3.5 We also noted, with concern, that the Department of Health did not collate information centrally on the costs and benefits of charging refused asylum seekers for secondary healthcare.<sup>147</sup> We concluded:

Under the ECHR, discrimination in the enjoyment of Convention rights on grounds of nationality requires particularly weighty justification. The restrictions on access to free healthcare for refused asylum seekers who are unable to leave the UK are examples of nationality discrimination which require justification. No evidence has been provided to us to justify the charging policy, whether on the grounds of costs saving or of encouraging refused asylum seekers to leave the UK. We recommend that free primary and secondary healthcare be provided for all those who have made a claim for asylum or under the ECHR whilst they are in the UK, in order to comply with the laws of common humanity and the UK’s international human rights obligations, and to protect the health of the nation.

...

The timetable for reviewing the regulations on charging for healthcare is unsatisfactory and has exacerbated the confusion around entitlement. The consultation on primary care was closed in 2004 but no analysis has been published. We recommend that the Government collect evidence of the impact of the 2004 Charging Regulations on patients, NHS costs and NHS staff, and that it carry out a race equality impact assessment and a public health impact assessment of these Regulations using data obtained to inform future policy decisions.<sup>148</sup>

3.6 In its response to our Report, the Government referred on a number of occasions to an ongoing review of policy about access to healthcare for asylum seekers.<sup>149</sup> A review was announced on 7 March 2007 in *Enforcing the Rules: A new strategy to ensure and enforce*

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<sup>145</sup> Department of Health evidence quoted at; *ibid*, para. 154. In January 2009, 274 of 276 received responses to the consultation were made public by the Department of Health.

<sup>146</sup> *Ibid*, para. 158.

<sup>147</sup> *Ibid*, para. 166.

<sup>148</sup> *Ibid*, paras. 170 & 171.

<sup>149</sup> Seventeenth Report of Session 2006-07, *Government Response to the Committee’s Tenth Report; The Treatment of Asylum Seekers*, HL Paper 134, HC 790.

*compliance with our immigration law.* In July 2008, Ministers at the Department of Health and Home Office told us that “the review is due to be completed shortly and will be followed by a full public consultation.”<sup>150</sup> However, neither the outcome of the review, nor the public consultation have yet been published.

3.7 During the debates in Grand Committee on the Health Bill, Baroness Tonge proposed a probing amendment to enable refused asylum seekers to access free healthcare.<sup>151</sup> Responding, the Minister, Baroness Thornton, noted that “we recognise and respect our duty to ensure that the provision of healthcare is fully compliant with human rights principles” but stated that, in deciding whether refused asylum seekers should be entitled to free healthcare:

We must, whilst still paying due regard to human rights principles, also take account of other factors ...

We legitimately need to ask whether we can provide all healthcare free of charge to people who are not legitimate residents in the UK. Also, might such an amendment not encourage applications under the human rights Convention, particularly for chronic conditions? I am dubious about that, and I share the questions of the noble Baroness about that. I am not saying that any of these arguments should justify the denial of human rights in the provision of healthcare. However, decisions on the extent of free NHS provision must consider all these factors, such as public health, clinical costs and cost implications.<sup>152</sup>

3.8 The Minister also referred to the review of access to the NHS for foreign nationals, the recommendations of which would be put to formal consultation and any changes subject to the appropriate parliamentary process.<sup>153</sup>

3.9 Baroness Tonge indicated that she intended to bring back her amendments on Report.<sup>154</sup>

3.10 We have received evidence since we concluded our inquiry into the treatment of asylum seekers which suggests that the charging Regulations remain a problem and that access to healthcare for refused asylum seekers has not improved. During our mini-conference last summer, which followed up on our Report one year on, we again heard that NHS employees were confused about the Guidance, that there was inconsistent practice and that the policy was unduly burdensome on staff.

3.11 Contributing to our scrutiny of this Bill, three witnesses provided submissions to us focusing on the issue of access to healthcare for refused asylum seekers.<sup>155</sup> For example, Still Human Still Here, a coalition of 29 organisations, stated that the policy was discriminatory and burdensome for healthcare professions to administer and enforce. They suggested that the policy was in breach of the UK’s human rights obligations under

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<sup>150</sup> See below, page 127

<sup>151</sup> 17 March 2009, HL, GC 79.

<sup>152</sup> 17 March 2009, HL, GC 86.

<sup>153</sup> 17 March 2009, HL, GC 87.

<sup>154</sup> 17 March 2009, HL, GC 89.

<sup>155</sup> Eleventh Report of Session 2008-09, *Legislative Scrutiny; Health Bill; Marine and Coastal Access Bill*, HL Paper 69, HC 396, Ev 15-20 and 22-24

the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>156</sup> and concluded:

Treatment that prevents or cures illnesses is obviously more efficient and effective than waiting for a condition to deteriorate until it requires emergency care. Restoring refused asylum seekers' access to secondary healthcare will save lives and ensure efficient use of NHS resources. It is consistent with the ethos of the NHS Constitution and the UK's international human rights commitments as well as other policy objectives in relation to health, social exclusion, combating HIV/AIDS and the every child matters agenda.<sup>157</sup>

3.12 In its recent General Comment on the right to social security, the UN Committee on Economic, Social and Cultural Rights stated that “refugees, stateless persons and asylum-seekers and other disadvantaged and marginalised individuals and groups, should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards.”<sup>158</sup>

3.13 On 30 March 2009, the Court of Appeal gave judgment in a case concerning a refused asylum seeker who could not be returned who challenged the legality of the Department of Health's Guidance.<sup>159</sup> The Court held that refused asylum seekers were not entitled to free NHS treatment as they were only in the UK until they could be returned. However, it also considered the discretion of NHS Trusts to treat refused asylum seekers without charge and unanimously held that the Department of Health's Guidance was unclear. Considering the Guidance on “urgent treatment” in particular, the Court of Appeal held:

... the Guidance is not clear and unambiguous and in so far as it purports to be dealing with ... the failed asylum seekers who cannot be returned, it is seriously misleading.<sup>160</sup>

3.14 Following this judgment, the Department of Health wrote to health and social care professionals on 2 April 2009 as follows:

Providers are required to charge [chargeable overseas visitors] directly and subsequently recover funds from them where possible. The CA ruling that failed asylum seekers cannot be either ordinarily resident or lawfully resident means their treatment is not now funded by PCTs, which re-establishes the position prior to the High Court judgment of April 2008.<sup>161</sup>

The Department noted the Court's decision that the Guidance was unclear and unlawful. Pending redrafted Guidance in the autumn, it suggested that Trusts should take into

<sup>156</sup> Specifically Articles 2 (non-discrimination) and 12 (the right of everyone to the enjoyment of the highest attainable standard of physical and mental health).

<sup>157</sup> Eleventh Report of Session 2008-09, Legislative Scrutiny; Health Bill; Marine and Coastal Access Bill, HL Paper 69, HC 396, Ev 24, para. 27.

<sup>158</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security*, E/C.12/GC/19, 4 February 2008, para 38.

<sup>159</sup> *R (YA) v Secretary of State for Health* [2009] EWCA Civ 225.

<sup>160</sup> *Ibid.* para. 75.

<sup>161</sup> David Flory, Director General NHS Finance, Performance and Operation to Chief Executives ([http://www.dh.gov.uk/en/Publicationsandstatistics/Lettersandcirculars/Dearcolleagueletters/DH\\_097384](http://www.dh.gov.uk/en/Publicationsandstatistics/Lettersandcirculars/Dearcolleagueletters/DH_097384))

account the likelihood of and timescale for a person returning to his or her country of origin, when considering whether to provide treatment.

**3.15 We remain as concerned as we were more than two years ago when we concluded our inquiry into the *Treatment of Asylum Seekers* that a highly vulnerable group of people in the UK (refused asylum seekers, including children) continue to be denied access to fundamental healthcare which is available to the general population. This is a particularly acute problem for refused asylum seekers who cannot be returned. It is inconceivable that the majority of refused asylum seekers would be able to pay to receive such treatment themselves and therefore, in the absence of a Trust exercising its discretion in the refused asylum seeker's favour, he or she will be refused treatment. This not only risks exacerbating an asylum seeker's health problems to a point where treatment becomes urgent and critical, but also risks breaching his or her rights under the ECHR and the ICESCR. We repeat our recommendation that free primary and secondary healthcare be provided for all those who have made a claim for asylum or under the ECHR whilst they are in the UK, in order to comply with the laws of common humanity and the UK's international human rights obligations, and to protect the health of the nation. In particular, we note the very difficult position of refused asylum seekers who cannot be returned and recommend that the Government issue guidance to set out clearly their entitlement to free healthcare whilst they remain in the UK.**

Insert the following new Clause—

#### **Guidance on charges for certain asylum seekers**

(1) After section 175 of the National Health Service Act 2006 (c. 41) insert—

##### **175A Guidance on charges for certain asylum seekers**

(1) It shall be the duty of the Secretary of State to lay before both Houses of Parliament guidance on charges for failed asylum seekers who cannot be returned to their home country.

(2) Guidance laid under subsection (1) shall be brought into force by statutory instrument.

(3) The Secretary of State may not make a statutory instrument containing (whether alone or with other provision) guidance laid under this section unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(4) "Failed asylum seeker" has the same meaning as under section 49 of the Nationality, Immigration and Asylum Act 2002 (c. 41)."

**3.16 We are disappointed that the Department of Health does not propose to reissue Guidance in the light of the recent Court of Appeal judgment until the autumn. We are unclear as to why the Government considers such a delay to be necessary or desirable. The Court of Appeal held that the lack of clarity in the Guidance was misleading and unlawful. In our view, revised Guidance, consistent with the judgment, must be issued rapidly, in order to ensure clarity for service providers and recipients alike. Furthermore, we ask the Government to explain what steps it proposes to take, in**

**addition to the Department of Health's letter of 2 April 2009, to ensure that the effects of the Court of Appeal's judgment are correctly disseminated to and implemented by front line workers. In addition, we are alarmed that the Government has still not published the outcome of its review of access to the NHS for foreign nationals, nor its promised public consultation. We recommend that it does so as a matter of urgency.**

# Conclusions and recommendations

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## Welfare Reform Bill

### *Welfare, benefits and human rights*

1. Acute political differences often arise in the context of social welfare. Human rights law may not have a clear answer in respect of many of the questions which arise. However, individuals enjoy a minimum right to social security which supports an adequate standard of living. To be human rights compatible, a scheme of social benefits cannot be administered arbitrarily or on a discriminatory basis. In the light of the Government's view that it is principally for Parliamentarians to secure compliance with the right to social security and the right to an adequate standard of living, we consider that it is important that Parliamentarians subject the Government's analysis of these provisions to close scrutiny for compliance with these minimum standards. (Paragraph 1.13)
2. These proposals provide a good opportunity for Government to assess the quality of the current welfare reform system against its international human rights obligations. Parliamentarians should be provided with a clear explanation and supporting evidence of how these proposals will support the right of everyone to an adequate standard of living and ensure that our welfare system will operate in a way which is compatible with basic human rights standards. (Paragraph 1.16)
3. While the detailed delegated powers memorandum provided by the Government aids scrutiny of the proposals in the Bill, it is difficult to scrutinise proposed safeguards for their impact on individual human rights on this basis. We reiterate our previous recommendation that where safeguards are relevant to the Government's view on human rights compatibility, those safeguards should be provided on the face of the Bill. Where the Government's view on compatibility relies on safeguards to be provided in secondary legislation, we recommend that draft Regulations are published together with the Bill. At the very least, the Government should describe in the explanatory material accompanying the Bill the safeguards it proposes to provide. (Paragraph 1.21)
4. We remain concerned that the implementation of these proposals in a way which respects individual rights will depend largely on their day to day implementation in a manner which is neither arbitrary nor discriminatory and which does not result in any person being incapable of securing an adequate standard of living. We consider that appropriate training and guidance will be essential and welcome the Government's commitment to provide this to both Job Centre Plus staff and others. (Paragraph 1.22)
5. We recommend that the Government should keep the new reformed scheme of welfare benefits under review and should report to Parliament on the operation of the Welfare Reform Act 2007 and any reforms made as a result of this Bill before the introduction of any further welfare reform is considered. This review should include

an assessment of the compatibility of the scheme with the human rights standards set out above, including the effectiveness of any relevant safeguards. (Paragraph 1.23)

### ***Employment support allowance and work related activity***

6. The reforms introduced by the Welfare Reform Act 2007 have been in force for a very short period of time. Although we agree that there has been inadequate time for an assessment of the safeguards in place, we are concerned that witnesses have told us that certain vulnerable groups, and in particular, those with mental health problems or learning disabilities, are disadvantaged by the administration of the scheme. We are concerned that the Minister has not provided us with any information on how the Government intends to monitor the effectiveness of existing safeguards. Complaints should not be the Government's only source of information about the administration of ESA, a benefit which is targeted at individuals with a spectrum of health difficulties. (Paragraph 1.26)
  
7. Despite the Minister's reassurances, we remain concerned that the proposal to allow Personal Advisors to direct ESA claimants to undertake specific work-related activities may result in an increased risk that ESA could be administered in a way which could lead to a breach of Convention rights in individual cases. We are concerned by evidence which suggests that vulnerable groups, and particularly those with mental health problems and learning disabilities, are disadvantaged rather than supported by conditionality. While the Minister correctly identifies that the right to appeal a direction will be a valuable safeguard, this will not help any claimant who does not clearly understand why a direction has been given and what the implications of failure to comply will be. We recommend that any training and guidance should expressly address how to identify and engage with people with mental health problems and learning disabilities. This training and guidance should encourage staff to engage proactively with supporters, family and other professionals where necessary, appropriate and consistent with the claimant's right to respect for private life. Any training and guidance should be prepared in consultation with disabled people and service users groups. (Paragraph 1.29)

### ***"Work for you benefit"***

8. We consider that changes to welfare support designed to meet the right to social security and the right to an adequate standard of living should be supported by evidence. We are concerned by the suggestions that the Government's proposals are not supported by their own comparative research. We welcome the Government's decision to pilot its "Work for your benefit" programme before its proposals are rolled out on a wider scale. We recommend that the pilots should monitor the implications of the proposals for individual rights, including the right to respect for an adequate standard of living, the right to respect for private and family life and the right to enjoyment of those rights without discrimination. (Paragraph 1.36)



### ***Parents and work related activities***

9. We welcome the Minister's reassurance that no parents on JSA will be sanctioned if they fail to participate in "work for your benefit" because they cannot access appropriate childcare and that the absence of childcare will be taken into account when discussing the details of other work related activities for parents. (Paragraph 1.41)
10. We recommend that these proposals are closely evaluated for their impact on lone parents and particularly any disproportionate impact on women and parents who may not be able to access appropriate and affordable childcare. (Paragraph 1.42)

### ***Conditionality and drug and alcohol dependency***

11. We recommend that these proposals are deleted from the Bill, unless clear evidence is provided to support the Government's view that the interference proposed with the right to respect for private life is necessary and will be accompanied by appropriate safeguards. In any event, we consider that the Bill should be amended to remove (a) the potential for drug testing subject to be undertaken subject to sanction; (b) the power to direct individuals to undergo specific treatment subject to sanction and (c) the proposals in the Bill for extensive information sharing regulations, particularly the proposal for Job Centre Plus officials to pass information gathered under these provisions onto third parties. We propose amendments to give effect to these recommendations, **below**. (Paragraph 1.48)

### ***Personalisation, individual budgets and disabled people***

12. We regret the ongoing confusion about the scope of the meaning of public authority for the purposes of the HRA 1998. We welcome the Government's undertaking to ensure that in making "right to control" regulations the Government will ensure that the human rights of individual disabled people will be protected and that they will have a clear right to redress if the service purchased is properly a public function. However, we consider that, for the avoidance of doubt, the Bill should be amended to make clear that any service which would otherwise have been provided by the Secretary of State or another public authority shall be considered a public function for the purposes of HRA 1998. In the absence of a wider public consultation on the meaning of public authority for the purposes of HRA 1998, we consider that this will provide an appropriate opportunity for a debate on the implications of the duty to act compatibly with Convention rights for private providers providing services purchased using direct payments. We propose a simple amendment for the purposes of debate, **below**. (Paragraph 1.54)

### ***Contracting out***

13. We welcome the reassurance of the Government that contractors providing services under the proposals in the Bill would be functional public authorities for the purposes of the HRA 1998. We are concerned however that the Minister has suggested that the Bill includes a saving clause that will ensure that individuals may only bring claims under the HRA 1998 against the Secretary of State. We are not

certain whether it is the Government's view that individuals would be able to bring a claim against both the service provider and the Secretary of State or whether the Secretary of State would step into the shoes of the provider for the purposes of any claim under the HRA 1998. We consider that any provision which proposes to alter the ordinary application of the HRA 1998 should be accompanied by clear explanatory notes and appropriate justification. We recommend that the Government provides a further explanation of its view. We consider that where individual contractors are providing services which amount to a public function for the purposes of the HRA 1998, they should be subject to Section 6 HRA 1998 (and the duty to act in a Convention compatible way) and individuals should be able to exercise each of the remedies in the HRA 1998 against them directly, as Parliament intended. If it is proposed that a savings clause should divert claims to the Secretary of State, the Secretary of State must assume liability as if 'stepping into the shoes' of the provider. We do not consider that it would be appropriate for the Secretary of State to rely on a lack of knowledge of the conduct of the provider or that the conduct of the provider was incompatible with the terms of the service contract in order to deprive an individual service user of an effective remedy for a breach of their Convention rights. We suggest the following amendment. (Paragraph 1.57)

14. We welcome the reassurance of the Secretary of State for Communities and Local Government that faith groups should not be permitted to discriminate in the provision of public services provided under contract or to use public money to proselytise. (Paragraph 1.61)
15. We consider that this is consistent with the acceptance of the Government that providers of services contracted out under the proposals in the Bill will be functional public authorities under a duty to act compatibly with Convention rights protected by the HRA 1998. We recommend that any guidance to service providers provide clear direction on discrimination and particular guidance on religion and belief in the provision of public **services**. (Paragraph 1.61)

### ***Powers of the Child Maintenance and Enforcement Commission***

16. We consider that, should the Government proceed with these provisions, the Bill should be amended to clarify the procedure which should be followed by CMEC when considering an order which could remove a person's driving licence or passport, including the requirement to give the non-resident parent notice of the intention to consider an order and their right to make representations, including in respect of the appropriateness of other sanctions and the effect of any order on their capacity to earn a living. However, for the reasons which we set out below, we consider that in the absence of further explanation by the Government, these proposals should be deleted from the Bill. (Paragraph 1.69)
17. We are concerned that the costs provisions in the Bill create a significant disincentive to non-resident parents who might seek to appeal. We are concerned that this may create an unnecessary barrier to the right to a hearing by an independent and impartial tribunal, inconsistent with the requirements of Article 6 ECHR. We recommend that, if these proposals are not dropped, the Bill should be amended to ensure that the discretion to award costs in favour of either party remains with the

court and that, generally, a non-resident parent will be able to recover their costs in respect of a successful appeal. (Paragraph 1.73)

18. We have previously expressed our concern in respect of the increasing use of previously criminal sanctions and powers in an administrative context. For the avoidance of doubt, in our view, CMEC or its contractors should never assume primary responsibility for enforcement through committal or curfew. (Paragraph 1.78)
19. We recommend that the Government should clarify whether or not it considers that these proposals involve the determination of a civil obligation or a criminal charge for the purposes of Article 6 ECHR. In our view, the appeal proceedings must necessarily involve a higher degree of scrutiny, with the burden of proof on CMEC to justify the propriety of the disqualification order proposed. We consider that in practice, these hearings will vary little from the current proposal for an application by CMEC for an order. The proposal to introduce an administrative stage only reduces the likelihood that non-resident parents will, in practice, have the disqualification or suspension tested by an independent and impartial tribunal. We recommend that these proposals should be removed from the Bill. (Paragraph 1.82)

### ***Joint responsibility for birth registration***

20. We are disappointed that the Government has provided little evidence to show that these new provisions will lead to more fathers acknowledging paternity and subsequently performing an active role in their children's lives. This change of policy represents a significant change of approach to birth registrations and potentially criminalises any woman who refuses to name the father of her baby. In the absence of clear and compelling evidence that this change will yield improvements in the lives of children who would otherwise be registered solely by their mother, we regard this as an unwarranted interference in the personal privacy and private life of the mother. (Paragraph 1.100)
21. We note the decision to provide exemptions for women who are uncertain about the identity of the father of their child or his whereabouts and those who fear violence. Similarly, we note the provisions which will allow both mothers and fathers to challenge assertions of paternity by refusing to acknowledge a proposed registration. We note the recognition that certain cases may only be resolved by a judicial determination, including in respect of parental responsibility. We consider that without these safeguards, there would be a significant risk that these provisions would fail to strike an appropriate balance between the family and private life rights of mothers, fathers and their children in individual cases. (Paragraph 1.101)
22. We welcome the Government's indication that registrars will take a limited role in questioning the answers given by a woman. We are concerned that the Minister has indicated that this role may change in 'suspicious' cases. If the Government proceeds with these proposals, we consider that clear and detailed training and guidance on the operation of these provisions will be necessary in order to ensure that they operate in a way which maintains the delicate balance between the rights of parents and their children. We note the Government's indication that these provisions will

be piloted before they are implemented on a wider scale, but question the practicalities and fairness of piloting, particularly if the pilot proves to be unsuccessful and is not implemented nationwide. We recommend that any regulations under these provisions should not be made without close consultation with registrars, parents, children and their organisations. We recommend that similar consultation takes place as part of the evaluation of any pilot programme and before the implementation of any relevant training and guidance for registrars. (Paragraph 1.102)

## **Apprenticeships, Skills, Children and Learning Bill**

### ***Explanatory notes***

23. We welcome the human rights memorandum sent to us by the Department for Children, Schools and Families before the publication of the Bill and we encourage other departments to follow the same practice in future. (Paragraph 2.6)

### ***(1) Education for detained young offenders***

24. We welcome as positively human rights enhancing measures the provisions in the Bill concerning education for detained young offenders. (Paragraph 2.14)
25. We accept that it is not necessarily practical for all of the duties imposed on LEAs in the Education Acts to apply to the education and training of detained children, because of the constraints imposed by custody and the length of time for which children are usually detained. We welcome the Government's amendments to the Bill concerning the special educational needs of detained children and young people. We agree that they amount to a significant strengthening of the legal framework for the meeting of the special educational needs of this group of children and young people amongst whom such special needs are particularly prevalent. (Paragraph 2.22)

### ***(2) Power to search pupils for alcohol, illegal drugs and stolen property***

26. We therefore welcome the Government's aspiration to provide a clear legal framework for searching pupils in schools, with clearly defined powers and safeguards. This should enhance legal certainty for both staff and pupils and therefore advances human rights. However, interferences with Convention rights must be shown by evidence to be necessary. Giving teachers what are effectively police powers to search children and young people, and to seize their property, without the accompanying training in the exercise of such powers or detailed codes of practice regulating their exercise, is a significant step which ought not to be taken lightly. We accept that making such powers available to school staff is in principle capable of justification if they can be shown to be necessary, and we welcome the inclusion of detailed safeguards on the face of the Bill. However, we recommend that the Government publish a more rigorous analysis of the evidence which demonstrates the scale of the problem of drugs, alcohol and stolen property being

present on school premises, so that Parliament can make an informed decision about the necessity for the extended **powers**. (Paragraph 2.30)

### ***(3) Obligation to record significant incidents involving use of force by staff on pupils***

27. We welcome the new obligation to record the use of force on pupils as a positive, human rights enhancing measure. The availability of reliable data about the incidence of the use of force in schools is an important safeguard against the abuse or disproportionate use of that power, as it enables it to be independently monitored. (Paragraph 2.35)
28. We welcome the Government's decision to revise the 2007 Guidance on the use of force by staff in schools in the light of recent developments and we look forward to being given an opportunity to comment on the human rights compatibility of the draft guidance before it is finalised. (Paragraph 2.41)

### ***(4) UNCRC as strategic framework for Children's Plans***

29. We welcome the Government's commitment that children and young people should be consulted when the Children and Young People's Plan is being drawn up, and the fact that this will be made a requirement in the new regulations governing the adoption of such Plans. (Paragraph 2.45)
30. We are not persuaded by the Government's reasons for not taking the opportunity in this Bill to embed the UNCRC further in policy-making. The Bill's provisions on the drawing up of Children and Young People's Plans provide an opportunity for the Government to respond positively and constructively to the concern of the UN Committee on the Rights of the Child that the Convention is not regularly used as a framework for the development of children's strategies. We recommend that the Bill be amended so as to require Children's Trust Boards to have regard to the need to implement the UNCRC when preparing its Children and Young People's Plan and suggest an amendment below to achieve this. (Paragraph 2.48)

### ***(5) Children's Centres***

31. We welcome the Bill's provisions concerning children's centres as human rights enhancing measures which are likely to contribute towards the progressive realisation of the rights of children under the UNCRC. (Paragraph 2.51)

## **Health Bill**

### ***Healthcare for refused asylum seekers***

32. We remain as concerned as we were more than two years ago when we concluded our inquiry into the Treatment of Asylum Seekers that a highly vulnerable group of people in the UK (refused asylum seekers, including children) continue to be denied access to fundamental healthcare which is available to the general population. This is a particularly acute problem for refused asylum seekers who cannot be returned. It is

inconceivable that the majority of refused asylum seekers would be able to pay to receive such treatment themselves and therefore, in the absence of a Trust exercising its discretion in the refused asylum seeker's favour, he or she will be refused treatment. This not only risks exacerbating an asylum seeker's health problems to a point where treatment becomes urgent and critical, but also risks breaching his or her rights under the ECHR and the ICESCR. We repeat our recommendation that free primary and secondary healthcare be provided for all those who have made a claim for asylum or under the ECHR whilst they are in the UK, in order to comply with the laws of common humanity and the UK's international human rights obligations, and to protect the health of the nation. In particular, we note the very difficult position of refused asylum seekers who cannot be returned and recommend that the Government issue guidance to set out clearly their entitlement to free healthcare whilst they remain in the UK. (Paragraph 3.15)

33. We are disappointed that the Department of Health does not propose to reissue Guidance in the light of the recent Court of Appeal judgment until the autumn. We are unclear as to why the Government considers such a delay to be necessary or desirable. The Court of Appeal held that the lack of clarity in the Guidance was misleading and unlawful. In our view, revised Guidance, consistent with the judgment, must be issued rapidly, in order to ensure clarity for service providers and recipients alike. Furthermore, we ask the Government to explain what steps it proposes to take, in addition to the Department of Health's letter of 2 April 2009, to ensure that the effects of the Court of Appeal's judgment are correctly disseminated to and implemented by front line workers. In addition, we are alarmed that the Government has still not published the outcome of its review of access to the NHS for foreign nationals, nor its promised public consultation. We recommend that it does so as a matter of urgency. (Paragraph 3.16)

# Annex: Proposed Committee Amendments

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## Welfare Reform Bill

### *Conditionality and drug and alcohol dependency*

Page 14, line 17, leave out Clause 9

Page 69, line 21, leave out Schedule 3

Page 79, line 9, leave out paragraph 3

Page 80, line 29, leave out paragraph 5

Page 81, line 11, leave out paragraph 6 and insert:

“Regulations may make provision for or in connection with a rehabilitation plan to address a person’s dependency on, or propensity to misuse, any drug.”

Page 81, line 17, leave out ‘to be imposed on a person’

Page 83, line 17, line 5, at end, insert new subsection:

“( ) Regulations under paragraph 6 may not impose a sanction in respect of failure to comply with treatment unless recommended by a person having the necessary qualifications or experience and consented to by the person to be subject to the treatment.”

### *Personalisation, individual budgets and disabled people*

Page 41, line 20, insert the following new clause:

*Relevant services and the application of the Human Rights Act 1998 (c.42)*

“( ) Where any relevant service would otherwise be provided by the appropriate authority or the providing authority, or on their behalf, pursuant to any enactment or through financial assistance provided from public funds, the provision of that service or any provision made to secure that service shall be a public function for the purposes of Section 6 of the Human Rights Act 1998 (c. 42)”

### *Contracting out*

Page 8, Line 25, at end insert the following subsection:

“Anything done or omitted to be done by or in relation to an authorised person (or an employee of that person) in, or in connection with, the exercise or purported exercise of the function concerned is to be treated as the exercise of a public function for the purposes of the Human Rights Act 1998 (c.42).”

## **Apprenticeships, Skills, Children and Learning Bill**

### ***UNCRC as strategic framework for Children's Plans***

Clause 188, page 103, line 44, insert:

(6) A Children's Trust Board must have regard to the need to implement the UN Convention on the Rights of the Child when preparing a children and young people's plan.

## **Health Bill**

### ***Healthcare for refused asylum seekers***

Insert the following new Clause—

#### **Guidance on charges for certain asylum seekers**

(1) After section 175 of the National Health Service Act 2006 (c. 41) insert—.

#### **175A Guidance on charges for certain asylum seekers**

(1) It shall be the duty of the Secretary of State to lay before both Houses of Parliament guidance on charges for failed asylum seekers who cannot be returned to their home country.

(2) Guidance laid under subsection (1) shall be brought into force by statutory instrument.

(3) The Secretary of State may not make a statutory instrument containing (whether alone or with other provision) guidance laid under this section unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(4) "Failed asylum seeker" has the same meaning as under section 49 of the Nationality, Immigration and Asylum Act 2002 (c. 41)."



# Formal Minutes

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**Tuesday 21 April 2009**

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	Mr Virendra Sharma MP
Lord Dubs	Mr Edward Timpson MP
Lord Lester of Herne Hill	
Baroness Prashar	

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Draft Report (Legislative Scrutiny: Welfare Reform Bill; Apprenticeships, Skills, Children and Learning Bill; Health Bill), proposed by the Chairman, brought up and read.

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

Paragraphs 1.1 to 3.16 read and agreed to.

Annex read and agreed to.

Summary read and agreed to.

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

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

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 3 February and 10, 24 and 31 March.

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[Adjourned till Tuesday 28 April at 1.30pm.]

## Written Evidence

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### Welfare Reform Bill

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### Welfare Reform Bill

#### Letter from the Chairman to James Purnell MP, Secretary of State for Work and Pensions, dated 27 February 2009

The Joint Committee on Human Rights is currently scrutinising the Welfare Reform Bill for compatibility with the United Kingdom's human rights obligations. I would be grateful if you could provide me with some further information about the Government's views on compatibility.

*Welfare Reform Act 2007: Follow-up*

In its report on the Bill which became the Welfare Reform Act 2007, the Committee considered that making receipt of Employment and Support Allowance (which replaced Incapacity Benefit) conditional on requirements such as attendance at “work-related health assessments”, “work-related interviews” and work-related activity did not pose a significant risk of incompatibility with either Article 8 ECHR or Article 1, Protocol 1. The Committee noted however that this depended on safeguards proposed by the Government being in place and being operated in a consistent manner.

**1. The Welfare Reform Act 2007 has been in force for a very limited period of time (it has applied to new applicants for ESA since October 2008). I would be grateful if you could provide further information on the operation of each of the safeguards outlined by the Government during the passage of the Welfare Reform Act 2007 in respect of the application of conditionality for ESA claimants, including any supporting evidence that the provisions have been operated in a consistent and non-discriminatory way.**

*ESA and work-related activities (Clause 8)*

The Welfare Reform Act 2007 introduced certain conditionality requirements for people receiving ESA and requiring claimants to complete work-related activities. The Bill proposes to amend that Act in order to create powers to make claimants undertake specified activities. The Bill expressly provides that any direction must be reasonable “having regard to the person’s circumstances”. If work-related requirements place an onerous burden on individuals who are not able to meet them as a result of their mental or physical disabilities, or which may exacerbate their health difficulties, they may lead to an increased risk of a breach of that individual’s right to respect for their private life, and peaceful enjoyment of their possessions, without discrimination (Article 14 in conjunction with Article 8 and Article 1 Protocol 1 ECHR).

**2. Why does the Government consider that these additional powers are necessary, in the light of the fact that the earlier provisions have only been in force for a short period of time?**

**3. Is there an increased risk of a breach of the right to privacy and a risk of unjustified discrimination against those with mental or physical disabilities, when it is open to advisers to require individual claimants to undertake specified activities, subject to sanction?**

**4. How does the Government intend to ensure that an adviser specifying a particular work-related activity will have adequate information and expertise to assess whether an individual will be capable of completing that activity without endangering their health?**

*“Work for your benefit”*: JSA (Clause 1)

The Explanatory Notes accompanying the Bill explain that these proposals may engage the right to be free from forced or compulsory labour (as guaranteed by Article 4(2) ECHR); the right to be free from inhuman or degrading treatment (as guaranteed by Article 3 ECHR); the right to peaceful enjoyment of possessions (Article 1, Protocol 1 ECHR); the right to respect for private and family life (Article 8 ECHR) and the right to a fair hearing by an independent and impartial tribunal (Article 6 ECHR).

Individual states retain a wide “margin of appreciation” in respect of the establishment of domestic welfare systems. Although this margin is wide, it is not unbounded and where welfare systems exist within a state, they must be administered in a way that is not arbitrary and is not based upon unjustified discrimination.

The proposals in the Bill introduce new conditions associated with certain benefits in order to encourage more claimants into work. Launching the Bill, the Secretary of State for Work and Pensions said “We will not leave anyone behind as we face up to the global financial crisis...When times are tough, it is more important than ever that we provide people with the extra help they need”.

**5. I would be grateful if you could explain:**

- **Whether the Government considers that the current economic crisis may affect the ability of job centre staff and other advisers, including contractors, to implement the proposals in a manner which is compatible with Convention rights; and**
- **What steps the Government intends to take, including through statutory safeguards or guidance, to ensure that these provisions are not applied in an arbitrary or discriminatory manner.**

In respect of the right to a fair hearing, the Government has explained that the decision that job seekers allowance is not payable will be subject to the “statutory appeal route”.

**6. I would be grateful if you could clarify the route of appeal which will be open to claimants in respect of decisions taken under the proposals in Clause 1? For example, would an appeal be possible against a decision that a participant has no “good cause” for failing to comply with a condition in respect of work-related activity, and if so, what form would that appeal take?**

In respect of the right to peaceful enjoyment of possessions, the Explanatory Notes explain that the Government “considers that these provisions are in the public interest and that they strike a fair balance between the interests of individuals and the interests of the community”. Although this sets out the correct test, it fails to explain the reasons for the Government’s view that it is satisfied. In any event, the Government stresses that two safeguards exist: (a) that someone’s benefit will only be withdrawn when they are “judged not to have good cause for failing to comply with requirements” and (b) the Secretary of State may make provision for hardship payments to be made.

These are the same safeguards which the Government explains will ensure that an individual claimant will never be treated in a way which breaches their right to respect for private and family life (Article 8 ECHR).

The detail of this new scheme will be elaborated in secondary legislation. This means that much of the detail of the scheme is unavailable for scrutiny. For example, the Bill enables the Secretary of State to set up a hardship fund, but does not require him to do so. It allows the Secretary of State to set the conditions for hardship payments, and to set the relevant amounts, but does not provide any further information. The Bill makes provision for the Secretary of State to allow for the payment of incidental expenses, but does not make clear

whether this would include incidental expenses paid by the claimant to enable them to participate in the work or work-based activity (for example, travel costs).

**7. I would be grateful if you could provide a further explanation of the Government's view that (a) these provisions strike a fair balance between the rights of the individual and the public interest (Article 1, Protocol 1 ECHR) and (b) there are adequate safeguards in place to ensure that the right to respect for private life is respected (Article 8 ECHR).**

**8. I would be grateful if you could explain whether the Government intends to make draft regulations available for scrutiny during the passage of this Bill. If so, please provide us with a copy to assist our analysis of the Bill's proposals. If not, could you explain why draft regulations cannot be made available.**

*Other benefit claimants: Work-related activities (Clause 2)*

**9. I would be grateful if you could explain whether the Government intends to make draft regulations in respect of these provisions available for scrutiny during the passage of this Bill. If so, please provide us with a copy to assist our analysis of the Bill's proposals. If not, could you explain why draft regulations cannot be made available.**

*Contracting out*

**10. Does the Government consider that persons exercising functions contracted out pursuant to the powers in Clause 2 (New Section 2G) would be functions of a public nature for the purposes of the HRA 1998? If not, please provide reasons.**

**11. If the Government does not consider that providers of contracted out functions should be treated as functional public authorities, how (and against whom) does it consider that individuals will be able to seek redress for breaches of their human rights?**

In a recent speech to the Evangelical Alliance, the Secretary of State for Communities and Local Government launched a 'conversation' about a charter for excellence for faith groups providing public services, including the type of services which might be contracted out under the proposals in the Bill. She said "The charter would mean faith groups who are paid public money to provide services promising to provide those services to everyone, regardless of their background. And promising not to use public money to proselytise".

**12. I would be grateful if you could provide further information on how the Government intend to ensure that private providers performing welfare functions contracted out under the provisions in this Bill provide services without unjustified discrimination, including on the basis of thought, belief or religion.**

*Conditionality and drug and alcohol dependency*

The Bill creates the power for regulations to impose additional requirements on ESA and JSA claimants where "they are dependent on, or have a propensity to misuse any drug" and "such dependency or propensity is a factor affecting their prospects of obtaining or remaining in work".

Article 8 ECHR provides particular protection for the individual against compulsory medical treatment and guarantees in respect of the disclosure of medical information. It is of particular concern that the Explanatory Notes provide very little explanation of the Government's view that the steps authorised by the proposed regulations will be justified and proportionate to a legitimate aim. In particular, the Government has:

- provided no evidence to support their assertion that benefit compulsion will lead more claimants suffering from drug dependency into treatment;
- not specified any of the safeguards that they consider will ensure that these provisions compliant with Article 8 ECHR.

**13. I would be grateful if you could provide a fuller explanation of the Government's view that these proposals will comply with the right to respect for private life (Article 8 ECHR). In particular I would be grateful if you could provide further information on the safeguards which the Government consider are relevant and why, in the Government's view, these safeguards will ensure compatibility with right to respect for private life and the right to enjoy that right without unjustified discrimination (Articles 8, 14 ECHR).**

*Personalisation, individual budgets and disabled people*

Part 2 of the Bill makes provision for the introduction of pilots to allow direct payments to be paid to people with disabilities in relation to certain support services, including services (a) for the provision of further education; (b) for facilitating the undertaking of further education or higher education; (c) training; (d) support for the purposes of facilitating employment; (e) to enable independent living at home and (f) to enable individuals to overcome barriers to participation (Clauses 28 – 39).

Section 6 HRA 1998 requires public authorities to act in a way which is compatible with the Convention rights set out in the Schedule to the Act. The term "public authority" includes "any person certain of whose functions are functions of a public nature." What constitutes a "function of a public nature" is not further defined in the Human Rights Act. In the Committee's second report on *The Meaning of Public Authority in the Human Rights Act*, published in March 2007, it recommended that:

... the Government should be prepared to acknowledge that the position in law is currently uncertain. This uncertainty should inform parliamentary debate on whether delegation or contracting out is an appropriate means of dealing with the provision of relevant services, and whether it is desirable to make clear on the face of a Bill that a body is a public authority for the purposes of the HRA.

Services purchased through a direct payment may engage an individual in a position of trust and in activities in a person's home and private life. They may be discharging functions which would otherwise be the responsibility of a government body or agency.

**14. Does the Government consider that private providers of services funded through direct payments are to be treated as public authorities under the Human Rights Act? If it does, why is this not expressly provided on the face of the Bill?**

**15. If the Government does not consider that such providers should be treated as functional public authorities, how (and against whom) does it consider that individuals will be able to seek redress for breaches of their human rights?**

*Powers of the Child Maintenance Enforcement Commission (CMEC)*

Clause 40 of the Bill gives the CMEC the power to make an administrative decision to disqualify a non-resident parent from holding a travel authorisation or driving licence if he or she fails to pay child maintenance due under the Child Support Act 1991. CMEC currently has the power to apply for these orders to a magistrates court. The Government accepts that these provisions may engage the right to a fair hearing, the right to respect for private life and the property rights of non-paying parents (Articles 6, 8 ECHR and Article 1, Protocol 1 ECHR). The Explanatory Notes explain the Government's view that a full right to appeal ensures that the provisions will be compatible with the right to a fair hearing. The Bill provides that before making an order, C-MEC shall consider whether the person needs the relevant document in order to earn a living. It also provides that once an order has been made, it must be served on the relevant individual.

**16. Please provide further information about the procedure which C-MEC will follow when considering whether to make an order pursuant to these provisions. Specifically:**

- Will an individual be given notice that an order is being considered before that order is made?
- Will they be permitted to make representations (a) in writing or (b) in person?
- What information will C-MEC take into account in determining whether to make an order, including in respect of the duty to take into account the impact which an order will have on an individual's capacity to earn a living?
- In what kinds of circumstances does the Government envisage that C-MEC may decide that an order is incompatible with an individual's capability to earn a living?
- Will guidance be issued in order to ensure that the assessment of information in respect of an individual's need to retain their relevant documents is consistent and not applied in an arbitrary manner?

The Bill provides for C-MEC to recover their costs in an appeal when an order is affirmed or varied. This could mean that an individual could partially win at appeal, by having the order varied, but that they may not recover their costs. Under ordinary magistrates' courts costs rules, an individual will generally recover the costs of their appeal if they are successful. In the case of a variation, where both parties' cases succeed "in part", the court generally retains discretion over how the costs burden should be distributed.

17. C-MEC may recover their costs in an appeal against the imposition of an order, even in cases where that appeal succeeds in securing changes to the order. **Does the Government agree that this has the potential to undermine the value of an appeal to a potential appellant? Please explain the impact of these cost provisions on the Government's view that the provision of an appeal to the magistrates court will ensure that the right to a fair hearing is respected in cases where a passport or driving licence will be affected by an administrative order of C-MEC.**

*Joint responsibility for birth registration*

The Bill would establish new provisions to deal with birth registration. It would change current rules on birth registration to deal with registration of children born to parents who are not married to each other, or in a civil partnership. The new provisions would effectively create a presumption for joint registration of any birth, together with the names of both parents, subject to some exceptions. The mother would have a duty to register any birth within 42 days. Generally, she would be required to provide prescribed information to the registrar about the father.

The Bill enables the Secretary of State to make provision for a father to register his name against a birth, subject to later acknowledgement by the mother, either before or after the birth. Similar provision is made for the registrar to approach a father named by an unmarried mother to ask him to acknowledge or refuse to acknowledge parenthood.

Failure to comply with the relevant regulations will be an offence and may result in a fine of up to £200. Such failure could include a failure by a mother to provide information when required to do so, failure by a father to acknowledge or deny parenthood or failure by a mother to respond to a registration by a father with an acknowledgement or denial. If a mother provides false information to the registrar, she might be subject to prosecution for perjury and liable to be sentenced to either a fine or imprisonment up to seven years. In order to be liable to prosecution, a person must wilfully provide a false answer, declaration or statement to the registrar, knowing it to be false. The Bill amends the Perjury Act 1911 to specifically include the duty of the mother to provide information. A number of declarations may be provided by the father of a child, or a person who is believed to be the father of a child. It is likely that these declarations, if false, would also open up the possibility of prosecution under the Perjury Act 1911. Many of the provisions which will relate to the role of the father, or a person named as father, are to be in secondary legislation.

**18. Please provide the reasons for the Government's decision to expressly the Perjury Act 1911 to ensure that unmarried mothers providing information to registrars, subject to the proposed duty in the Bill, would be liable for prosecution for perjury.**

**19. Please confirm whether men who provide information about the parenthood of a child (either by falsely stating that they are the child's father or by refusing to acknowledge that they are the child's father), would also be liable to prosecution for perjury. If not, why not? If so, please explain why the Government considers that there is no need to clarify this on the face of the Bill?**

The Government accepts that these provisions will engage the separate private and family life rights of mothers, fathers and children, and believe that "interference with the mother's Article 8 rights in requiring her to provide information about the father is appropriately balanced against the child's Article 8 right to know about his parentage and the father's right to respect for his family life under Article 8."

The Explanatory Notes explain that additional safeguards exist for vulnerable mothers not to have to provide information about the father. Similarly, the Government explains its view that any interference with the father's right to private life, as a result of the requirement that the mother disclose information about him is justified. The reasons for



justification are very similar to those cited above: principally to protect the right of the child to know both parents and to encourage unmarried fathers to be involved in the lives of their children.

**20. I would be grateful if you could provide a fuller explanation of the Government's view that the proposals in the Bill strike the appropriate balance between the rights of women to respect for their private and family life, the rights of unmarried fathers to be acknowledged on the official record of their child's birth and the right of any child to know the identity of its parents. In particular, please explain:**

- **The Government's view that the new proposals will be capable of meeting the aims identified in the Explanatory Notes, including any evidence to support the conclusion that placing a duty on unmarried mothers to provide information will lead to an increased involvement by unmarried fathers in the lives of their children;**
- **The Government's view that the duty on unmarried mothers to disclose information about the father of their child is necessary and proportionate to meet that aim? (Article 8(2) ECHR)**
- **How the Government intends the scheme to be administered. In particular, does the Government intend that training or guidance will be issued to enable registrars to understand the extent of the duty on unmarried mothers. For example, how will registrars respond to a mother who refuses to name a father on the grounds that she does not know his identity? Will the registrar then test that explanation by reference to the potential for prosecution for perjury?**
- **The kind of circumstances in which the Government envisages a prosecution for perjury would be in the public interest. For example would a mother who refused to name a father on the grounds that she did not know his identity be prosecuted where he subsequently came forward and it was established that she withheld his identify as she had been in fear of violence?**

### **Letter from James Purnell MP to the Chairman, dated 19 March 2009**

Thank you for your letter dated 27 February 2009 requesting 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. As requested the attached paper sets out the Government's response to the Committee's questions.

#### ***Welfare Reform Act 2007: Follow-up***

**(1) The Welfare Reform Act 2007 has been in force for a very limited period of time (it has applied to new applicants for ESA since October 2008). I would be grateful if you could provide further information on the operation of each of the safeguards outlined by the Government during the passage of the Welfare Reform Act 2007 in respect of the application of conditionality for ESA claimants, including any supporting evidence that the provisions have been operated in a consistent and non-discriminatory way.**

The safeguards outlined in the Welfare Reform Act 2007 are as follows:

- advising the customer at the point of claim about the work-focused interview process;
- contacting the customer before each work-focused interview to remind them that it is due;
- considering in the context of each work-focused interview whether the interview should be waived or deferred;
- notifying the customer of the date, time and place for the work-focused interview, informing them that travel fares are reclaimable and asking them to get in touch if they cannot make it;
- offering them a more convenient location or a home visit where appropriate, and encouraging advocacy support if needed;
- identifying any relevant issues from medical evidence where available, that might impact on attendance;
- visiting those customers with whom there has been no verbal contact prior to the work-focused interview;
- visiting every customer, with their representative if appropriate, with a stated mental health condition or learning disability if a sanction is to be imposed; and
- lifting all sanctions and reinstating benefit in full when the customer participates in a work-focused interview.

These safeguards have been in place for Incapacity Benefit claimants since the inception of Work Focused Interviews and Pathways to Work. The initial cohort of ESA customers has only just come to the end of the first 13 weeks of the assessment phase, so it is too early to have conclusive evidence on how these safeguards are being applied to ESA customers. However, to date we have received no cases of complaint in either Jobcentre Plus-led or provider-led Pathways to Work districts concerning the application of these safeguards in practice. We have no evidence to indicate that vulnerable or very ill customers are not being visited at home when appropriate or are being sanctioned inappropriately.

#### *ESA and work-related activities (Clause 8)*

**(2) Why does the Government consider that these additional powers are necessary, in the light of the fact that the earlier provisions have only been in force for a short period of time?**

Risking people being trapped on benefits for the rest of their lives is bad for the individual, bad for the economy which loses their talents, and bad for the tax-payer who has to foot the benefits bill. Pathways to Work, including mandatory work-focused interviews, have been shown to increase the chances of a customer being in employment after 18 months by around 25%.

We think we can do more. The Gregg Review<sup>162</sup> recommended that conditionality should be based around encouragement, co-operation and co-ownership, but also recognised that on occasions the conditionality would need to be stepped up where people consistently fail to engage effectively with the personalised support regime.

In line with Professor Gregg's recommendations, we therefore want to give advisers the power to require claimants to undertake specific activities, where they fail to comply with the work-related activity requirement, or where they refuse to address specific and significant barriers to work. This will provide advisers with the tools to ensure that no one is written off. In the current economic climate, it is even more important that individuals make full use of the support available to them to address their barriers to work.

We recognise that requiring work-related activity is new territory. This is why we intend to run Pathfinders to test the effects of the new conditionality regime (extended contact with an adviser, coupled with a more central role for the action plan and mandatory work-related activity).

**(3) Is there an increased risk of a breach of the right to privacy and a risk of unjustified discrimination against those with mental or physical disabilities, when it is open to advisers to require individual claimants to undertake specified activities, subject to sanction?**

We do not believe that there is an increased risk to the right of privacy under article 8, or of unjustified discrimination. This is because we will apply a range of safeguards to ensure that vulnerable claimants are not directed into inappropriate activities, or sanctioned where they have good cause for a failure to comply with any requirements placed on them.

The Department is aware of the Article 8 and 14 issues surrounding the taking of new powers in clause 8 of the Bill to direct ESA claimants to undertake specified work-related activity. The Department will ensure that any regulations made pursuant to the powers in the Bill are compliant with the ECHR.

The case of *M S v Sweden* held that it is a legitimate aim for a Government to ensure that only deserving claimants receive social security entitlements. The Government believes that it is unacceptable for welfare payments to continue to be paid where customers fail to undertake work-related activity which is aimed at making it more likely that a person will obtain or remain in work.

Given the many safeguards in what is proposed for the conditionality regime for ESA customers, the Department believes that this balanced policy is proportionate to its aim and is therefore ECHR-compliant.

The conditionality regime is such that the most severely sick and disabled claimants (those in the Support Group due to limited capability for work) are not required to take part in work-related activity.

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<sup>162</sup> In December 2008 Professor Paul Gregg published his independent review "*Realising Potential: A Vision for Personalised Conditionality and Support*", which made recommendations about how the Government could make further progress in reforming the welfare system to promote employment and reduce child poverty. It is available at [www.dwp.gov.uk/welfarereform/gregg-review-discussion-paper-Jan09.pdf](http://www.dwp.gov.uk/welfarereform/gregg-review-discussion-paper-Jan09.pdf)

Under existing powers, all ESA claimants not in the Support Group will be required to undertake some form of work-related activity. Through the Welfare Reform Bill, we are building on existing powers to enable the adviser to direct that a specific activity is the only activity that should count as work-related activity for that particular claimant. This will help to ensure that work-related activity is appropriately focused on addressing claimants' main barriers to work.

However, a direction would only be given as a last resort following discussion with the claimant. Clearly any direction must be reasonable having regard to a person's circumstances. Regulations will provide that this includes a person's medical circumstances. We will provide Personal Advisers with detailed guidance on what to take into account when directing someone into a specific activity.

If the claimant feels that the requirement on them is unreasonable, they will be able to request that it is reconsidered, under the provisions for reconsideration of an action plan.

If the claimant fails to undertake the activity, they will be asked whether they can show good cause for failing to comply with the direction before a sanction is considered. We will make clear, through regulations, that evidence of good cause can include demonstrating that the conclusions from the work-focused health-related assessment or work-focused-interview, which led to the direction, had not been or were no longer appropriate or relevant to the claimant's circumstances. It might also include that the claimant did not understand the requirement, or was unable to undertake the requirement because the activity would cause harm to health or excessive physical and mental stress.

If the claimant is sanctioned for failing to undertake the activity, he will be able to appeal the decision to sanction.

Provided that these safeguards are applied, we believe it is reasonable and proportionate to expect customers to engage with the benefit system and to address their barriers to work.

**(4) How does the Government intend to ensure that an adviser specifying a particular work-related activity will have adequate information and expertise to assess whether an individual will be capable of completing that activity without endangering their health?**

Personal Advisers will have information about what the claimant is likely to be able to do, and what his condition would prevent him from doing from the work-focused health-related assessment. Jobcentre Plus advisers receive thorough training in delivering a package of support which takes account of peoples' different needs and conditions. Personal Advisers have access to Disability Employment Advisers and Work Psychologists to assist them in supporting customers. We will review existing provision in light of the new reforms. Personal advisers are critical to the success of ESA, and we will take all necessary steps to ensure that they are properly supported to do their jobs effectively.

The Personal Advisor will always discuss the activity with the claimant before directing that he must undertake it, providing the claimant with an opportunity to raise concerns if they feel that they are unable to undertake an activity because of a health condition or if they feel the activity specified will damage their health.

*“Work for your benefit”*: JSA (Clause 1)

**(5) Whether the Government considers that the current economic crisis may affect the ability of job centre staff and other advisers, including contractors, to implement the proposals in a manner which is compatible with Convention rights; and**

**What steps the Government intends to take, including through statutory safeguards or guidance, to ensure that these provisions are not applied in an arbitrary or discriminatory manner.**

The Government does not consider that the current economic situation will affect the ability to implement the ‘Work for Your Benefit’ programme in a manner compatible with Convention rights. It is to be a programme tailored to addressing an individual’s employment barriers. In some cases Jobcentre Plus advisers will need to make a reasoned decision on whether a claimant is likely to benefit from the programme at a particular stage of their claim for jobseeker’s allowance (JSA). We will develop guidance and training for advisers on how to identify appropriate customers and avoid arbitrary decisions. We would not implement a programme which could not be delivered to a high standard, and compatibly with Convention rights.

Regulations establishing the ‘Work for Your Benefit’ programme will be piloted in certain areas of the country under section 29 of the Jobseekers Act 1995. These will be laid before Parliament in draft for approval under the affirmative procedure. The regulations will specify the conditions under which JSA claimants can be selected for participation in the programme. Participation may be required only with a view to improving claimants’ prospects of obtaining employment (see new section 17A(2) of the 1995 Act, inserted by clause 1 of the Bill).

The programme itself will be delivered by contractors who will be required to source work experience that is relevant and suitable to the individual they are working with. Safeguards to prevent discrimination will exist in the contracting arrangements. Contractors will be required to promote equal opportunities, and ensure that provision identifies and meets the specific requirements of customers so that they can participate fully in provision. For example, DWP expects suppliers to be exemplars in meeting their duties under the Disability Discrimination Act 2005, including the Disability Equality Duty. This will be specified in the contracting arrangements and monitored through the Department’s contract management approach.

Finally, we will reflect any necessary changes to the decision-making process in guidance for staff and the Decision Maker’s Guide. We will also provide training on any changes to procedures and guidance to ensure a consistency of approach in the pilot areas.

**(6) I would be grateful if you could clarify the route of appeal which will be open to claimants in respect of decisions taken under the proposals in Clause 1? For example, would an appeal be possible against a decision that a participant has no “good cause” for failing to comply with a condition in respect of work-related activity, and if so, what form would that appeal take?**

The route of appeal will be consistent with that currently open to claimants in respect of other decisions taken under the Jobseekers Act 1995. Subsection (4) of Clause 1 amends

Schedule 3 to the Social Security Act 1998 to provide a right of appeal against decisions that benefit is not payable by reason of regulations under new section 17A of the Jobseekers Act 1995. A decision to require a claimant to participate in 'Work for Your Benefit' will not be appealable, but there would be a right of appeal against a decision which resulted in a loss of benefit because of a failure to participate. Appeals will be to the independent First-tier Tribunal constituted under the Tribunals, Courts and Enforcement Act 2007.

Before an appeal is initiated, customers will also be able to ask Jobcentre Plus to reconsider any decision relating to sanctions or disentanglement. With respect to the example quoted a customer can appeal a decision to impose a loss of benefit sanction to a First-tier Tribunal.

**(7) I would be grateful if you could provide a further explanation of the Government's view that (a) these provisions strike a fair balance between the rights of the individual and the public interest (Article 1, Protocol 1 ECHR) and (b) there are adequate safeguards in place to ensure that the right to respect for private life is respected (Article 8 ECHR).**

Support from the State matched by activity from the individual is a long-recognised principle of the welfare state. We believe that there should be a clear balance between rights and responsibilities, where people are aware of the contribution expected of them in return for help and support. A passive welfare state does little to help people back to work. The Government considers that it is entirely reasonable to require claimants who are capable of, and required to seek, work to take steps to improve their employment prospects, including by undertaking work-experience for up to six months, to help develop their work habits and increase their employability. 'Work for Your Benefit' is a programme that will be tailored to addressing an individual's employment barriers, with work-experience suitable and relevant to the individual. The provisions in Clause 1 are intended to achieve a legitimate objective, to help people in to work. Increasing the proportion of the population in work is beneficial for both the individuals concerned and the tax-payer.

Research has shown that sanctions do influence the behaviour of claimants, and the Government considers that it is a reasonable and proportionate response to withhold or reduce benefit payments if claimants do not, without good cause or reason, comply with the responsibilities imposed on them by legislation. The extended Delegated Powers Memorandum (attached) sets out the safeguards we plan to put in place relating to good cause, loss of benefit sanctions and hardship payments in the 'Work for Your Benefit' programme to ensure the right to respect for private life is respected. We plan that these safeguards will be similar to the safeguards for the current New Deal programmes.

**(8) I would be grateful if you could explain whether the Government intends to make draft regulations available for scrutiny during the passage of this Bill. If so, please provide us with a copy to assist our analysis of the Bill's proposals. If not, could you explain why draft regulations cannot be made available.**

The Government does not intend to make draft regulations available on Clause 1 during the passage of the Bill. We do not plan to start piloting the programme until October 2010. Any regulations drafted now will not necessarily reflect the circumstances approaching the implementation date and therefore may not be representative of the final regulations. We have outlined in the extended Delegated Powers Memorandum what we expect to include

in secondary legislation under Clause 1. Where we plan to mirror existing provisions relating to employment programmes we have referenced the relevant regulations to enable scrutiny of our plans. A further safeguard is offered by the fact we will be piloting the programme. This means that any regulations made will be under section 29 of the Jobseekers Act 1995 and therefore subject to the approval of both Houses.

*Other benefit claimants: Work-related activities (Clause 2)*

**(9) I would be grateful if you could explain whether the Government intends to make draft regulations in respect of these provisions available for scrutiny during the passage of the Bill. If so, please provide us with a hard copy to assist our analysis of the Bill's proposals. If not, could you explain why draft regulations cannot be made available.**

In the White Paper "*Raising expectations and increasing support: reforming welfare for the future*" we made a commitment to consult with our stakeholders on the design of the Gregg pathfinders which include lone parents and partners with children aged under seven. This process has started, and we will not be in a position to finalise our policy and draft regulations until those consultations have finished.

The extended Delegated Powers Memorandum, made available at Commons Committee stage of the Bill, gives an indication as how we anticipate using the regulation-making powers.

**(10) Does the Government consider that persons exercising functions contracted out pursuant to the powers in Clause 2 (new section 2G) would be functions of a public nature for the purposes of HRA 1998? If not, please provide reasons.**

The Government's view is that the functions referred to in new section 2G(1) and (2) of the Jobseekers Act 1995 (to be inserted by clause 2 of the Bill) are clearly ones of a public nature. This applies whether they are exercised by the Secretary of State or by another person authorised under those provisions.

**(11) If the Government does not consider that providers of contracted out functions should be treated as a functional public authorities how (and against whom) does it consider that individuals will be able to seek redress for breaches of their human rights?**

As stated above, the Government considers that authorised persons exercising functions pursuant to new section 2G(1) and (2) would be regarded as functional public authorities. Section 2G(7) provides (subject to the exceptions set out in subsection (8)) for acts done by authorised persons to be treated as done by the Secretary of State. So, for example, where it was alleged that a contractor carrying out a work-focused interview had contravened a benefit claimant's Article 8 rights, that person could bring proceedings against the Secretary of State. These might be brought through the statutory appeals process that will apply to decisions under the Social Security Act 1998, by way of judicial review, or (in some case) by a claim for damages.

**(12) I would be grateful if you could provide further information on how the Government intend to ensure that private providers performing welfare functions**

**contracted out under the provisions of the Bill provide services without unjustified discrimination, including on the basis of thought, belief or religion.**

Contractors will be subject to legislation that prohibits discrimination in relation to the provision of services and in the exercise of public functions. See in particular the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995 and, in relation to discrimination on the grounds of religion and belief, sections 46 and 52 of the Equality Act 2006.

Safeguards to prevent discrimination exist in the contracting arrangements. Contractors are required to promote equal opportunities, and ensure that provision identifies and meets the specific requirements of customers. Proposals from them are evaluated for these features as part of the contract award process.

DWP would intend to carry forward existing best practice. For example, it already expects contractors providing training to benefit claimants pursuant to arrangements made under section 2 of the Employment and Training Act 1973 to be exemplars in meeting their duties under the Disability Discrimination Act 2005, including the disability equality duty. This will be specified in the contracting arrangements and monitored through the Department's contract management approach.

The Secretary of State could terminate the contract and/or bring proceedings against a person who failed to comply with these contractual obligations. (Note the saving to new section 2G(7) provided by new section 2G(8)(a).)

*Conditionality and drug and alcohol dependency*

**(13) I would be grateful if you could provide a fuller explanation of the Government's view that these proposals will comply with the right to respect for private life (Article 8 ECHR). In particular I would be grateful if you could provide further information on the safeguards which the Government consider are relevant and why, in the Government's view, these safeguards will ensure compatibility with right to respect for private life and the right to enjoy that right without unjustified discrimination (Articles 8, 14 ECHR).**

The Department is aware of the Article 8 and 14 issues surrounding the drugs proposals and intends to ensure that any regulations made pursuant to the powers in the Bill are compliant with the ECHR.

The case of *M S v Sweden* held that it is a legitimate aim for a Government to ensure that only deserving claimants receive social security entitlements. The Government believes that it is unacceptable for welfare payments to be spent on illegal drugs.

We provide the following evidence of the extent of the problem of drug use and the connection between drug use and social security:

- We estimate that the social cost of Class A drug use (health and crime) in Britain is around £18 billion a year. An estimated 99% of which is attributed to heroin and crack cocaine use.
- Between a third and a half of acquisitive crime is estimated to be drug-related.



- Our estimates show that approximately 89% of problem drug users in Britain are in receipt of out of work benefits.

Several safeguards are included in the proposals:

- People will only be required to complete a rehabilitation plan if their drug use is a factor affecting their employability and they are susceptible to treatment.
- All participants will be required to agree a rehabilitation plan with the employment programme provider, so there is an element of consent, as long as the plan addresses the drug problem.
- While there is a power in the Bill to include invasive treatment in a rehabilitation plan, it is clearly provided that this can only be included with the consent of the claimant.
- Anyone who fails to meet the conditions in their rehabilitation plan will have the opportunity to make a case for good cause before any benefit sanctions are applied. This is subject to an appeal right.
- The Bill further provides that no information obtained about a person's drug use can be used to incriminate the person (except in the case of perjury).

There is international evidence to support the link between compulsion and increased engagement with drug treatment. However, the approach set out in the drugs strategy provides for a balanced combination of incentive, encouragement and compulsion. Furthermore, we only intend to pilot the programme in a small number of districts and evaluate it before any decision is made to extend the program further. The Bill provides that the Secretary of State must review the operation of the pilot and prepare a report on its success and/or failure and lay that report before Parliament. Before the program can be extended, Parliament must pass an affirmative resolution.

Given the many safeguards contained in the Bill and the additional review mechanisms that require further Parliamentary approval, the Department believes that there is a sound basis for arguing that this balanced policy is proportionate to its aims and is therefore ECHR-compliant.

*Personalisation, individual budgets and disabled people*

**(14) Does the Government consider that private providers of services funded through direct payments are to be treated as public authorities under the Human Rights Act? If it does, why is this not expressly provided on the face of the Bill?**

Part 2 of the Welfare Reform Bill provides a broad framework for developing a “right to control” for disabled people. The central aspects of this framework are (a) the purpose (clause 28) and (b) the regulation-making power (Clause 31(1)).

The purpose of the part is to enable disabled adults to exercise greater choice and control in relation to the provision of relevant services by relevant authorities. “Relevant Authority” is defined in clause 30(1). The relevant authorities are publicly-funded bodies with public

functions and it is clear that they are also public authorities for the purpose of the Human Rights Act.

The purpose of defining relevant authorities in this manner is to ensure that the appropriate authority (the Secretary of State, the Scottish Ministers or Welsh Ministers) can make regulations providing choice and control for disabled people only for those services which are delivered publicly-funded bodies. The definition in the Human Rights Act was too broad for this purpose, so referring to the Act could have confused the issue.

In relation to the providers of services paid for by an individual using direct payments the position is different. Regulations will be required to provide the detail of the right to control. They will prescribe specific services to which the right will attach. This is likely, at least initially, to be a much narrower group of services than those which might fall within the broad scope of “relevant services” delivered by “relevant authorities”.

The relevant services which might be included are deliverable under a variety of statutory provisions with different statutory outcomes. As a result, there is potential for the powers in the Bill to be used to enable disabled people to use direct payments to meet a broad range of needs according to the statutory outcomes. The expectation is that, while some of the purchased services will be public functions others, are likely to be essentially private in nature.

The question of whether a body falls within s.6(3)(b) HRA will depend on the nature of the function that they are performing. Clearly it will not be possible to address this issue until the Government had decided the issue of which services the right to a direct payment will attach. Until the Government has made a decision as to which relevant services are to be included in the right to control and which services might be purchased by disabled persons as “equivalent services”, it is not possible to say with certainty that all private providers will necessarily be public authorities for the purposes of section 6 of the Human Rights Act. It would be inappropriate to do so, on the face of the Bill. We do not wish to be unduly restrictive at this point, given that the aim of the provisions is to be as flexible and helpful as possible. However, the Government remains fully conscious of the need to protect individual’s human rights in any particular circumstances.

**(15) If the Government does not consider that such providers should be treated as functional public authorities, how (and against whom) does it consider that individuals will be able to seek redress from breaches of their human rights?**

Regulations under clauses 31 and 32 will make detailed provisions for the circumstances in which direct payments can be made. Extensive consultation on the right to control, with both service users and providers, is due to commence soon. Following that consultation, a decision will be made as to which services will be included in the right to control pilot schemes. Once that decision has been made, the Government will be better placed to determine whether the services which may be purchased with direct payments are functions of a public nature.

The Government will ensure that, in making right to control regulations, the human rights of individual disabled people will be protected. If appropriate, provision can be made in the regulations to ensure that there is clear redress if the service purchased is properly a public function.

*Powers of the Child Maintenance and Enforcement Commission (C-MEC)*

**(16) Please provide further information about the procedure which C-MEC will follow when considering whether to make an order pursuant to these provisions.**

**(a) Will an individual be given notice that an order is being considered before that order is made?**

Yes. The non-resident parent will be informed in writing that the Commission is considering making such order and will be given the opportunity to make representations as to why it would not be appropriate for an order to be imposed, e.g. the driving licence or travel authorisation is essential to the non-resident parent's ability to earn a living.

It should be noted that the non-resident parent can simply pay what it is owed at any stage. This will mean that there is no need to impose an administrative order; and if one is already in effect it can be cancelled. The Commission will of course encourage the non-resident parent to make that payment where it sends him or her notice that it is considering making an administrative order.

**(b) Will they be permitted to make representations (a) in writing or (b) in person?**

The easiest way for non-resident parents to make representations to the Commission is via the telephone. The Commission will however accept representations in writing, and, where possible, in person (there is only a limited "face to face" service available to non-resident parents and individuals will be encouraged to make representations over the phone or in writing).

**(c) What information will C-MEC take into account in determining whether to make an order, including in respect of the duty to take into account the impact which an order will have on an individual's capacity to earn a living?**

The Commission must consider the history of the case. This must include any previous payment pattern of the non-resident parent. The Commission must also ensure that the various county court enforcement mechanisms, i.e. the use of bailiffs, a third party debt order or interim charging order have either been attempted or ruled not appropriate. This is essential in determining whether the non-resident parent has "wilfully refused or culpably neglected" to pay maintenance.

Section 2 of the Child Support Act 1991 requires the Commission to consider the welfare of any child affected by the decision – this would include any children living with the non-resident parent as part of his or her new family.

When considering the impact on the non-resident parent's ability to earn a living, the Commission will be to a large extent reliant on the representations made by the non-resident parent, e.g. how crucial the document is, and whether the non-resident parent has any alternative sources of income; although the impact will be more obvious in cases where the non-resident parent's occupation is directly linked to either a driving licence or travel authorisation. While legislation does not prevent the Commission from making an order where there is a known impact on the non-resident parent's ability to earn a living, it would most likely be counter productive to impose such an order in most cases. The Commission

will however retain the discretion to do so if the individual circumstances of the case merit it. This is the same discretion currently afforded to the courts.

**(d) In what kinds of circumstances does the Government envisage that C-MEC may decide that an order is incompatible with an individual's capability to earn a living?**

Decisions will be made on a case-by-case basis (taking all the relevant factors into account) so it would not be possible to say with absolute certainty in what circumstances the Commission would decide that an order is incompatible with a non-resident parent's ability to earn a living; and thereby not impose the order. However, as outlined above, the Commission is not prevented from imposing an order in these circumstances, and may decide to impose the order where the individual circumstances of the case merit it, notwithstanding the fact that an impact on the non-resident parent's ability to earn a living has been identified – although in the majority of cases the order would not be imposed.

**(e) Will guidance be issued in order to ensure that the assessment of information in respect of an individual's need to retain their relevant documents is consistent and not applied in an arbitrary manner?**

Yes, appropriate guidance will be developed and communicated to staff prior to these provisions taking effect. The guidance will make clear what factors must be taken into account before an order imposed, i.e. proper observation of the safeguards noted in response to the Committee's third question.

The discretionary nature of this legislation means that a blanket policy will not apply. Such a policy would prevent cases from being treated according to their own merits and may therefore unfairly disadvantage some individuals. This may mean that different conclusions are reached in similar cases, but the non-resident parent does of course have the ability to appeal to the courts after the Commission has made the order. This will result in the order being suspended, and not implemented, until after the court has heard that appeal and reconsidered the Commission's original decision.

**(17) C-MEC may recover their costs in an appeal against the imposition of an order, even in cases where that appeal succeeds in securing changes to the order. Does the Government agree that this has the potential to undermine the value of an appeal to a potential appellant? Please explain the impact of these cost provisions on the Government's view that the provision of an appeal to the magistrates' court will ensure that the right to a fair hearing is respected in cases where a passport or driving licence will be affected by an administrative order of C-MEC.**

The Government does not agree that this undermines the value of the appeal to the non-resident parent, and would argue that the right to a fair hearing is respected.

Legislation makes clear that any costs imposed will be at the discretion of the courts. It is likely that there will be circumstances where the court allows an appeal, but it is still right for the court to ask the non-resident parent to pay towards the Commission's costs. For example, where a non-resident parent fails to pay maintenance to their children, the Commission will rightly seek to use enforcement measures against them. However, there may be reasons which make disqualification from holding or obtaining a driving licence or travel authorisation inappropriate as a compliance measure in any particular case, such as

the removal of either document having an adverse impact on any children living with the non-resident parent in his or her new family. Should the non-resident parent fail to make such reasons clear until their court appearance, despite having every opportunity to tell the Commission previously, then the court should have discretion to impose costs in these cases. The unusual nature of appeals against disqualification orders, whereby a successful appellant may still be culpable, means that it is necessary to include this provision so that the court has regard to the possibility of awarding costs against the non resident parent.

Enabling such costs to be imposed against non-resident parents, where circumstances suggest to the court it is right that it should do so, should help to prevent the appeals process from being manipulated as it will send a clear signal to non-resident parents that they should cooperate with Commission fully before the appeal hearing, or face the financial consequences of not doing so.

However we do not consider that this breaches the appellant's right to a fair hearing because courts will only award costs against the appellant in exceptional circumstances. Therefore if the non-resident parent has cooperated with the Commission, or has good reasons for not having done so, he will not be deterred from appealing against the disqualification order, as it is highly unlikely that costs would be awarded against him.

*Joint responsibility for birth registration*

**(18) Please provide the reasons for the Government's decision to expressly the Perjury Act 1911 to ensure that unmarried mothers providing information to registrars, subject to the proposed duty in the Bill, would be liable for prosecution for perjury.**

The Government decided to amend the Perjury Act 1911 to make it clear that the information which a mother is required to provide about the father under new section 2B(1) is to be taken to be information concerning the birth.

A mother will, under new section 2B, be asked to give information about the man she alleges to be the father which is not information to be included on the register – for example, the man's contact details. It may be that she is asked to provide this information before attending the register office in person - she may for example be asked to provide it over the phone, when making her appointment. This will enable the registrar to contact the man alleged to be the father, who will then be asked to acknowledge whether or not he is the father. The Government wanted to make clear that the provision of additional information which may not end up on the register, for example, because the man alleged to be the father, does not acknowledge that he is the father, or because it is contact details that are not to be included on the register, is subject to the Perjury Act 1911. For purposes of natural justice and legal certainty, the Government considered it important to be clear on what constitutes a criminal offence.

Further, in considering sanctions in respect of the new duties created by the joint birth registration provisions, the Government wanted to make sure that the information provided by virtue of the new provisions was subject to the Perjury Act in the same way as the existing provisions are. It was considered appropriate to make the provision of this information subject to the Perjury Act because, the provision of this information is key to how the new process for joint birth registration will work. The offence will capture those

mothers who wilfully make a false declaration, the Government is of the view that if they genuinely make a mistake, they will not be captured. Furthermore, if they do not know the whereabouts of the father, they will not be subject to the duty to provide information .

In practice registrars make it clear to parents registering births that the information which they are required to give is subject to the Perjury Act. We considered that statements and declarations to be made under the new provisions could fall under section 4 (1)(b) or section 4 (1)(d) of the Perjury Act. When considering the new duties we felt that the information provided under section 2B(1) would most likely fall outside of that set out in section 4(1)(b) and section 4(1)(d) but we wanted section 4(1)(a) to apply to it. Section 4(1)(a) covers making a false answer to a registrar and giving false information concerning any birth or death.

There may be circumstances where a mother maliciously provides information about a man who is not the father, or maliciously provides a bogus address that will result in registrars wasting time and resources attempting to contact the man in question. The Government is of the view that the false provision of this information should be treated in the same way as false information which is provided under the circumstances to which section 4(1)(a) of the 1911 Act currently applies.

**(19) Please confirm whether men who provide information about the parenthood of a child (either by falsely stating that they are the child's father or by refusing to acknowledge that they are the child's father), would also be liable to prosecution for perjury.**

By virtue of regulations made under new section 2C and new section 10C where a mother provides information about the father that enables the registrar to contact him, that man will be required to state whether or not he acknowledges that he is the father. The Government is of the view that this statement would be subject to section 4(1)(b) or section 4(1)(d) of the Perjury Act. It is intended that the notice to be sent out by the registrar by virtue of regulations made under new sections 2C and 10C will require a man to state that either he acknowledges he is the father or that he does not acknowledge that he is the father . If he is unsure as to whether he is the father, then it would be open to him to state that he does not acknowledge that he is the father and such statement would not constitute perjury.

Similarly under regulations made under new sections 2D and 10B a man who believes himself to be the father can make a declaration to that effect to the registrar. The Government is of the view that this declaration would also be subject to section 4(1)(b) and 4(1)(d) of the 1911 Act.

If a man refuses to state whether or not he acknowledges he is the father of the child he would not be liable to prosecution for perjury, however, he will be committing an offence under new section 36(aa) of the Births and Deaths Registration Act 1953. The Government is of the view that this approach accords with the approach currently taken in relation to offences in the 1953 Act and the Perjury Act offences, that is, that the offences in section 36 of the 1953 Act deal with failures to give information, whereas the provision of false information is covered by the Perjury Act.

**(20) I would be grateful if you could provide a fuller explanation of the Government's view that the proposals in the Bill strike the appropriate balance between the rights of women to respect for their private and family life, the rights of unmarried fathers to be acknowledged on the official record of their child's birth and the right of any child to know the identity of its parents. In particular, please explain:**

Each point is covered below, but in general terms the Government has sought to balance the mother's, the father's (and the alleged father's), and child's rights under Article 8. The Government has explained that it accepts that the mother's right to a family and private life under Article 8 is engaged by being placed under a duty to provide information about the father. As explained below, the Government considers that the duty will apply in those circumstances where the parents are not cooperating. It is envisaged that these will be exceptional circumstances and, for the reasons outlined below, it is considered necessary to impose such a duty. There will be safeguards in place in terms of the exemptions from the duty that will protect a woman who fears that her safety (or her child's safety) is at risk if the father is contacted about the child's birth. This duty is balanced against the father's Article 8 rights to be involved in his child's life and the child's right to know his parents' identity. The Government is taking the approach that the father has a right to be involved in his child's life and that the child has a right to know his parents' identity, however, where the act of registration itself (that is, the registrar contacting the father) would give rise to a situation where the mother or child is at risk of harm, the mother will not have to provide this information.

In terms of the father's rights (or alleged father's rights) under Article 8, as the Government explained previously, we are of the view that these would consist of his right to a family life with the child in question. Further, if he has another family, it would include his right to respect for the family life that he has with that other family. In addition, disclosing that he had sexual relations with the mother would also engage his right to a private life under Article 8. The proposals to impose a duty on the mother to provide information about the father would engage such rights. This provision of this information is subject to the Perjury Act 1911. There is therefore, an incentive for the mother not to provide false information. We are of the view that these measures will promote the father's right to respect for a private life with his child. In terms of the situation where the father has another family, given the importance of the child to know who his father is and the importance placed on fathers being involved in their child's life, we consider it is appropriate to place this father under a duty to acknowledge that he is the father if the mother provides information about him. There is no requirement for him to disclose this paternity to his current family, but there will a requirement for him to be honest in acknowledging paternity and if he does so, his name will be entered on to the birth register. We consider that this approach appropriately balances the different rights in question.

The father will also have an independent right to present himself to the register office and declare his paternity. Whilst we acknowledge that this will engage the mother's Article 8 rights, we are of the view that such interference is necessary and proportionate. His declaration will be subject to the Perjury Act 1911 and thus there is an incentive for him not to provide false information. If it is considered that he is unsuitable to have parental responsibility, there are court orders available that can remove or limit his exercise of parental responsibility.

The Government's proposals also promote the right of the child to know his parent, but accepts that there are situations where this is not possible, or desirable. So, as outlined above, the Government would not want the registration process in itself, to cause a risk of harm to the mother or child and in these circumstances the mother will not have to provide information about the father.

**(a) The Government's view that the new proposals will be capable of meeting the aims identified in the Explanatory Notes, including any evidence to support the conclusion that placing a duty on unmarried mothers to provide information will lead to an increased involvement by unmarried fathers in the lives of their children**

We are aiming to bring about a radical cultural change centred on the right of children to have the best possible chances in life from the outset. Following a national consultation, we considered the options and came to the conclusion that effective cultural change in this instance needs to be supported by a balance of both legislation and positive promotion of joint registration.

We are seeking, through this policy, to encourage more men to understand and accept their responsibilities as a father. We want both mothers and fathers to recognise that a child has a right to be formally acknowledged by both parents and indeed this act of acknowledging the child is one of the first steps of responsible parenthood.

At the same time, we recognise that most fathers want to be responsible parents. We are therefore seeking to establish a fairer system by giving fathers an entitlement to jointly register their child's birth, rather than leaving the decision on whether they may or may not register to the mother.

So, in addition to enabling more fathers to take this important first step, our proposals will require reluctant fathers to take some responsibility for their children. We are aiming through this policy to encourage and support the development of a long term involvement on the part of the father in his child's life, and the benefits of paternal involvement. We do of course recognise that joint birth registration is merely a starting point for such a relationship, but we believe it is an important and positive milestone in achieving this. Evidence from US research with fragile families demonstrates that early acknowledgement of paternity has significant benefits for both ongoing father-child contact and financial support for the child.

It is important to note that only in a minority of cases (see below), where the father has not come forward to register, will the mother need to provide the registration service with information about the father.

**(b) The Government's view that the duty on unmarried mothers to disclose information about the father of their child is necessary and proportionate to meet that aim (Article 8(2) ECHR)**

The Government's aim is to increase the number of unmarried fathers who are registered on the birth register entry of their child. Unless a duty to provide information about the father is imposed, it is likely that that mothers who are not cooperating with the father in the registration of their child's birth would not provide this information.



In deciding how to legislate for birth registration, the Government considered different options including

- imposing a duty on all unmarried fathers (regardless of whether they had been identified as the father) and
- having a scheme that enabled mothers to provide information about the father, rather than requiring them to do so.

It was felt that option i) would create a situation where many men were under a duty in respect of a child they were unaware existed and the Government was doubtful that this would lead to an increase of fathers on the birth register. The Government felt that a better approach was to provide for a system whereby if the mother provided the father's details, that father was given the opportunity to acknowledge that he is the father and at this point he would become registered as the father.

The Government considered the option at ii) but had in mind that the new provisions would often cover situations where the parents were not cooperating. The ability for unmarried parents to jointly register is already provided for under section 10 of the Births and Deaths Registration Act 1953. The Government is also allowing for a less formal declaration to be made than the statutory declaration currently used for jointly registering unmarried parents where only one party attends the register office. This will make it easier for more unmarried parents to jointly register the birth under section 10 of the 1953 Act where they are cooperating.

In situations where the parents are not cooperating it is considered likely that the mother would not provide the information about the father unless compelled to do so.

In research carried out on behalf of the Department for Work and Pensions,<sup>163</sup> it was found that out of all sole registrations<sup>164</sup>, almost 50% of the mothers were in a close relationship with or were friends with the father. The remaining figure comprised of mothers who were not in a relationship with the father or who were separated from the father. The Government envisages that the imposition of the new duty under section 2B will target a proportion of the women not in a relationship with, or separated from, the father.<sup>165</sup>

It is considered that the process to be triggered by section 2B (where the mother acts alone) will be an exceptional route and an information campaign will be launched and guidance provided indicating that unmarried parents should jointly register under the routes currently set out in section 10 of the 1953 Act.

The Government also considers the duty to provide the information about the father to be proportionate. The duty will not apply if the mother makes a declaration that one of the exemptions set out in section 2B(4) is satisfied. The Government also has the ability to prescribe additional exemptions if the need arises. It is considered that these exemptions will provide safeguards against women at risk from violence if the father is contacted and

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<sup>163</sup> Department for Work and Pensions, Research Report No 463. "Sole and joint birth registration: Exploring the circumstances, choices and motivations of unmarried parents" – Jenny Graham, Chris Creegan, Matthew Barnard, Alice Mowlam and Stephen McKay. A report of research carried out by the National Centre for Research and the Institute of Applied Social Sciences, University of Birmingham on behalf of the Department for Work and Pensions.

<sup>164</sup> Births registered in the mother's name only.

<sup>165</sup> In 2007, sole registration constituted 7% of all registrations.

safeguards from having to identify a man where she is unsure as to his identity. This will be a safeguard against an unjustified interference in that man's Article 8 rights. Furthermore, the information provided about the father under new section 2B will be subject to the Perjury Act 1911. This will protect a man who is not the father, from being named maliciously as the father which will also act as a safeguard protecting his Article 8 rights.

**(b) How the Government intends the scheme to be administered. In particular, does the Government intend that training or guidance will be issued to enable registrars to understand the extent of the duty on unmarried mothers? For example, how will registrars respond to a mother who refuses to name a father on the grounds that she does not know his identity? Will the registrar then test that explanation by reference to the potential for prosecution for perjury?**

Information given to a registrar by a mother in relation to a birth is already covered by the Perjury Act and those attending the register office are reminded of this. The registrar's role is to record the information which he or she is provided with, not to challenge or question it. However, in cases where there are suspicions about the information being provided, the registrar would seek to resolve these with the person concerned in order to enable the birth to be registered.

We expect our proposed new arrangements for joint birth registration to operate on the same basis. The mother attending the register office will, as now, be required to provide certain information concerning the birth. In cases where she is seeking an exemption from the duty to provide information about the child's father (where she is not registering jointly with him) she will need to make a declaration to this effect. We are working with registrars themselves to develop the precise form which such a declaration will take, however a woman who makes a declaration that an exemption applies will not be probed further on this. As happens now, the information will be duly recorded by the registrar and the birth then registered without the father's details.

The legislative measures which we are taking will be supported by a range of non-legislative measures. These will include a comprehensive information and awareness campaign, with the aim of ensuring that prospective parents and those using the birth registration system are fully aware of the changes we are making and understand their rights and responsibilities under the new system. We will ensure that the exemptions set out in the Bill are fully explained as part of this process and that any necessary information and explanation is made available to parents and prospective parents before they register.

We will also be ensuring that registrars themselves are fully trained in the operation of the new system, and that existing guidance is revised to take full account of the changes we are now proposing.

**(c) The kind of circumstances in which the Government envisages a prosecution for perjury would be in the public interest. For example would a mother who refused to name a father on the grounds that she did not know his identity be prosecuted where he subsequently came forward and it was established that she withheld his identity as she had been in fear of violence?**

As now, we would expect the Registrar General to consider each case on its individual merits in making a decision about whether to refer the case to the police.

We are currently working closely with the General Register Office and with registrars themselves to develop the detailed processes which will underpin the primary legislation, including the best way of managing situations where a mother is claiming an exemption. This may of course be particularly sensitive where the exemption relates to the fear of violence or of harm of another kind. We intend to make use of registrars' existing experience and expertise in dealing with such situations in developing our new processes.

Information provided for the purposes of birth registration is of course already subject to the Perjury Act. Those who attend the register office are reminded of this and this will continue.

We intend that registrants will be given clear information about possible exemptions under the new system and that their duty to provide honest information will continue to be made clear to them when registration takes place.

The fact that the mother is the primary carer would be relevant to sentencing.

The following are examples where a prosecution for perjury could be in the public interest. Where the mother maliciously named a man as the father, where it was clear that they had had no sexual relations, in order to cause him stress and this was one of several efforts designed by the mother to harass the man. Or where the mother falsely named a man as the father hoping that it would confer citizenship on her child that would enable her to remain in the UK, in a case where she would not otherwise be entitled to remain in the UK.

Where it was established that a mother who refused to name a father on the grounds that she did not know his identity, actually withheld his identity as she had been in fear of violence, the Government does not consider that it would be in the public interest to prosecute. The purpose of the legislation would not be served by carrying out such a prosecution as the mother would have been fully entitled not to provide information about the father for reasons associated with risks to her safety.

## **Memorandum submitted by the British Humanist Association**

### **About us**

The British Humanist Association (BHA) is the national charity representing the interests of the large and growing population of ethically concerned non-religious people living in the UK. It exists to support and represent people who seek to live good and responsible lives without religious or superstitious beliefs.

The BHA is deeply committed to human rights, equality, democracy, and an end to irrelevant discrimination, and has a long history of active engagement in work for an open and inclusive society. In such a society people of all beliefs would have equal treatment at law, and the rights of those with all beliefs to hold and live by them would be reasonably accommodated within a legal framework setting minimum common legal standards.

One of our largest campaigning areas is that of public service reform – and specifically the contracting out of public services to religious organisations.

### **Introduction**

We welcome the opportunity to submit evidence to this inquiry.

The Welfare Reform Bill is not yet published. However, the Green Paper, ‘No one written off: reforming welfare to reward responsibility’, currently open for public consultation, sets out the Government’s intentions and proposals for the forthcoming Bill.

In May 2007 and in January 2008 the BHA responded to two Department for Work and Pensions (DWP) consultations: those on welfare reform and the “Freud report” and on the DWP’s interim commissioning strategy. In those responses we set out a number of equality and human rights-based concerns specifically in reference to the Government’s proposals for welfare reform. In November 2007 we published our report on the contracting out of public services (including welfare services) to religious organisations, ‘Quality and Equality: Human Rights, Public Services and Religious Organisations’. That report sets out in detail our concerns about discrimination and infringements on human rights that are specific to contracted religious organisations. We attach all three documents, as evidence, as annexes A, B and C.

In September, we met with DWP officials from the Commercial Directorate and from the Commissioning Strategy Policy Team. While we were assured that the DWP has no intention of allowing discrimination in employment on religious grounds by its contractors and subcontractors in its Flexible New Deal programme, our concerns in terms of employment remain. It was clear from our meeting that the present exemptions from equality legislation for organisations based on religion or belief have not been taken into specific consideration by those responsible for commissioning and perhaps more widely.

The welfare reform Green Paper, in essence, proposes the implementation of Freud’s proposals. Importantly from our standpoint, that includes the continuation and expansion of commissioning welfare services from the private and third sectors. Indeed, the Green Paper suggests even more extensive change than the 2007 proposals and proposes ‘giving private and voluntary providers the right to bid for any back-to-work service’ (p7, emphasis added). This will include contracting out many welfare and employment services to religious organisations – a policy that the Government has been especially and increasingly keen to promote over the past couple of years (see annexes A, B and C for evidence and detail).

In this short memorandum (which should be read with the annexes), we summarise our concerns regarding welfare reform and set out in brief our proposals for mitigating the negative effects of contracting out services to religious organisations. We finish with a number of safeguards to promote equality, tackle discrimination and uphold human rights that we consider vital inclusions in the forthcoming Welfare Reform Bill.

### **Our position**

We set out our fundamental position as follows:

- that all public services, including welfare services, should be open and accessible to all citizens and be provided on a non-discriminatory basis;
- that organisations in receipt of public funding to provide public services should be bound in their provision of those services by the same legal obligations to avoid

discrimination in dealing with their clients as are public providers of the same services;

- that those organisations should be bound in their provision of those services by the same legal obligations to avoid discrimination in their employment practices as apply to public providers of the same services;
- that those organisations should be bound, as public authorities, in their provision of those services by the Human Rights Act 1998;
- that such organisations should be required to respect the privacy and autonomy of their clients.

Therefore, should any religious (or, equally, humanist) organisation be involved in providing public services in partnership with or on behalf of the Government or any public authority, it should not be allowed to discriminate on the grounds of religion or belief either in its employment practices or in its service delivery, and it should not be allowed to suggest either to employees or to clients that any advantage might attach to those with beliefs consonant with its own, far less to proselytise. To avoid misunderstanding, we make clear that it is our view that any religious organisation engaged in public services must be ineligible, so far as the delivery of those services is concerned, for the exemptions from anti-discrimination law provided to religious organisations in their religious activities.

We would like to draw the Committee's attention to the fact that religious organisations have exemptions from equality legislation which allow them to discriminate in their employment practices and in the way they provide services in some circumstances, on grounds of religion or belief or of sexual orientation, even when contracting to provide welfare or other public services. Such organisations are also not covered by the Human Rights Act 1998 (HRA), and we consider there to be especial problems in terms of possible infringements of service users' rights, such as their right to freedom of conscience and belief, if their service provider is a religious organisation.

In the forthcoming Equality Bill, which is set to replace all existing equality and anti-discrimination legislation, the Government will look at legislative and non-legislative measures to encourage (or force) contracted organisations to comply with the general equality duty when they are performing public functions. The duty will be extended to cover seven protected areas: gender, race, disability, religion or belief (which includes non-religious beliefs), sexual orientation, age and gender reassignment. In the absence of such future legislative requirements on contracted organisations, or until such time, we would like to see the DWP make clear in its commissioning strategy that all contracted organisations should act as if they were bound by that duty. This should certainly be reflected in the Welfare Reform Bill.

It should be noted that we see contracts – however tight the stipulations are – as a poor second best to legislation for protecting employees and service users from discrimination, for promoting equality, and for protecting human rights – all of which may be especially necessary should the contractor be a religious organisation.

Further, as the DWP is ‘not party’<sup>166</sup> to subcontracts, we have additional concerns that, through including religious organisations as subcontractors in particular, neither employees nor service users will be adequately protected from discrimination or unequal treatment.

It is the main contractors’ responsibility both to stipulate the details of subcontracts and to monitor whether the subcontractors are fulfilling their contractual obligations and, in most cases, it would be the main contractor who would be held accountable for the way subcontractors operate. However, religious main contractors will be able to ignore infringements by religious sub-contractors and in any case, to the extent that religious suppliers become significant suppliers they will be in a position to disregard contractual provisions since there will be no ready alternative to them as suppliers, and the Government or local authority may be reluctant to penalise them.

### **Proposals for Welfare Reform Bill**

It is vital that there are legislative provisions in the Welfare Reform Bill that make clear that:

- Any exemptions in equality law that allow religious organisations to discriminate in employment on any grounds do not apply when working under contract to provide welfare and employment services.
- Any exemptions in equality law that allow religious organisations to discriminate in service provision on any grounds do not apply when working under contract to provide welfare and employment services.
- All organisations working under contract to provide welfare and employment services must act – and be held accountable – as if they were bound by the Human Rights Act 1998.
- Any organisation contracted to provide welfare and employment services must be bound by the same equality and anti-discrimination regulations and duties as public sector providers.
- All services must be provided in a secular way, that is, in a way that is neutral and not religious. This would include outlawing proselytising, preaching, praying and any other religious activity, whether compulsory, voluntary or even that which is visible in the context of service provision. It would also prohibit the provision of welfare and employment services from places of worship or where there is religious symbolism on display.

*October 2008*

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<sup>166</sup> Letter from Caroline Flint MP to the BHA, 11th October 2007

## Memorandum submitted by Citizens Advice

### The CAB service

The CAB service provides free, independent, confidential and impartial advice to everyone on their rights and responsibilities. It values diversity, promotes equality and challenges discrimination. The service aims both to provide the advice people need for the problems they face, and to improve the policies and practices that affect people's lives.

The CAB network is the largest independent network of free advice centres in Europe, providing advice from over 3,200 outlets throughout Wales, England and Northern Ireland. We provide advice from a range of outlets, including GPs' surgeries, hospitals, community centres, county courts and magistrates' courts, and mobile services both in rural areas and to serve particular dispersed groups.

In 2007/08 bureaux in England and Wales advised around 2 million people with new or ongoing problems and dealt with 5.5 million enquiries in total. Of these 79,000 concerned immigration, asylum & nationality issues; 22,000 concerned discrimination issues; and over 332,000 concerned Incapacity Benefit, Jobseekers Allowance, and Income Support issues.

### Introduction

This submission covers the:

- Citizenship, Immigration and Borders Bill.
- Equality Bill
- Welfare Reform Bill

### Citizenship, Immigration and Borders Bill

In this submission, we confine our comments to an issue that we raised with the Committee in 2006-07, and which the Committee addressed in its March 2007 report: the lack of public funding for legal representation at appeal hearings before the Asylum Support Tribunal (AST). In doing so, we will draw on our previous analysis of the 285 appeals determined by the AST in the four-month period January to April 2007. We would like the Government to use the opportunity provided by the forthcoming Bill to extend public funding to such legal representation before the AST.

Where the UK Border Agency (UKBA) decides to refuse or terminate asylum support (including 'section 4 support' for qualifying failed asylum seekers), there is in most cases a right of appeal to the Asylum Support Tribunal (AST). Since its establishment in 2000, the AST (originally known as the Asylum Support Adjudicators) has in many ways proven itself to be a model tribunal, at least in terms of its administration, the training of its judges (originally 'adjudicators'), and its interaction with appellants and other stakeholders.

However, whilst asylum seekers (and failed asylum seekers) are dispersed throughout the UK, including in Scotland, the AST has only one hearing centre – in Croydon, south west London. So many appellants, faced with having to travel considerable distances to attend an appeal hearing, elect to have their appeal determined by the AST on the papers only.

This means that they have no opportunity to present their case in person or, better still, have it presented on their behalf by a skilled and knowledgeable advocate. Only 24 per cent of the 62 paper-only appeals determined by the AST in the four-month period January to April 2007 were allowed or remitted to the UKBA for a fresh decision.

Furthermore, because there is no legal aid in this area of law, those who elect for an oral hearing before the AST are in any case most unlikely to find a solicitor or barrister to represent them at the hearing. And, whilst unrepresented appellants are most unlikely to have any significant knowledge or understanding of UKBA policy and the increasingly complex case law on asylum support, the UKBA is almost always represented at the appeal hearing by a Presenting Officer specialising in asylum support law.

Of the 223 appeals determined by the AST at an oral hearing in the four-month period January to April 2007, a specialist Presenting Officer attended to present the BIA case in all but four cases, whereas only seven of the 223 appellants were legally represented at the hearing by a solicitor or barrister. In short, the vast majority of oral appellants who attend the hearing alone and unrepresented, or who do not attend at all, are on a vastly unequal footing with the body whose decision they are attempting to overturn.

Yet, as in so many other areas of law, and despite the impressive credentials and apparent empathy of the AST judges, there is convincing evidence that legal representation at an oral hearing before the AST substantially increases the chances of success. Since its launch in June 2005, the Asylum Support Appeals Project (ASAP), a small independent legal charity, has run a limited duty scheme providing free legal representation to otherwise unrepresented AST appellants. Of the 223 oral appeals determined by the AST in the period January to April 2007, the ASAP provided representation in 29 appeals, and (as noted above) a solicitor or barrister provided in a further seven appeals. Of these 36 appeals, 58 per cent were allowed or remitted to UKBA for a fresh decision. In contrast, of the 187 oral appeals in which the appellant was not legally represented at the hearing, only 29 per cent were allowed or remitted to UKBA for a fresh decision, a 'success rate' little better than that for paper-only appeals.

The injustice of this inequality of arms has been acknowledged by the Asylum Support Tribunal itself, which in its annual reports has consistently expressed its concern about "the lack of [legal] representation available to appellants at asylum support appeals". And such injustice matters. For, as the Asylum Support Appeals Project has noted, "the human cost of poor [BIA] decision-making is great. Every time [the UKBA] makes a mistake it risks forcing someone who is actually entitled to support into destitution and exposing them to the associated dangers of living on the streets". A genuinely fair appeals mechanism is therefore essential to avoiding such destitution, the risk to the well-being of the men, women and children concerned, and the associated detriment to social cohesion and public policy more generally. And for the appeals mechanism to be genuinely fair requires that all appellants have timely access to specialist legal advice, including representation at any hearing.

In June 2006, in our report *Shaming destitution*, Citizens Advice called for 'legal aid' to be extended to cover advice and representation in all appeals to the AST. And in March 2007, noting that, where an appeal to the AST fails for want of adequate legal representation, the resulting destitution "may be a violation of Article 3 of the European Convention on



Human Rights”, the Committee similarly called upon the Government to “make legal aid funding available for representation before the AST”. We would like the Government to use the opportunity provided by the forthcoming Bill to do so, and thereby make the AST a genuinely fair as well as effective tribunal.

### **Equality Bill**

We welcome the Equality Bill, and the much needed simplification and strengthening of policies and remedies to tackle unfair discrimination in the workplace, consumer markets and the provision of public services. However, we would like to see the Bill used in order to strengthen the remit of the Equality and Human Rights Commission (EHRC) and its partner organisations across both discrimination and human rights law, and to clarify and enhance the Commission’s role with respect of promoting human rights.

There are significant opportunities in this legislation to join up policy across discrimination and human rights law; for example human rights legislation has profound importance for vulnerable older people, and for the first time older people are to be included within the scope of anti-discrimination law. In our submission to the Discrimination Law Review, and throughout our regular contact with the Government Equalities Office, we have argued that

- The Bill should include a power for regulators and inspectorates to act on equality grounds and duties and for the EHRC to work jointly with regulators; we consider that this power should include taking public authorities’ Human Rights Act duties into consideration.
- The process of simplifying existing anti-discrimination legislation should be complemented by the development of the EHRC’s key function in producing clear guidance and accessible guidance for business and public authorities. The role of the EHRC in developing Codes of Practice on equality legislation could likewise be extended to include human rights law and principles.
- The EHRC should have a role in facilitating collective redress under the new legislative regime, where appropriate through a mechanism for initiating representative actions before county courts or employment tribunals – this mechanism could also apply to judicial review proceedings under the Human Rights Act.
- We are also asking for a wider definition of the coverage of “workers” as we see significant evidence of exploitation of migrant and agency workers. This is an area where there is a clear cross-over between discrimination and human rights.

### **Welfare Reform Bill**

The Welfare Reform Bill will seek to implement a number of policies set out in the DWP’s Green Paper No one written off: reforming welfare to reward responsibility (2008) over which we have expressed some concerns, in particular over

- Increasing conditionality requirements for claiming Employment Support Allowance (ESA)

- Introducing new powers for Jobseeker Allowance (JSA) claimants to be sanctioned at various stages of their claim
- Freezing the rate of incapacity benefit (IB) for claimants who have an age addition payable

We believe that the DWP needs to undertake an impact assessment to look at the possible effect of these measures on people with different levels of vulnerability or impairment. The emphasis on conditionality will involve the increased use of medical assessments in order to support the proposed Work-Focused Health-Related Assessment (WFHRA), and we have expressed concerns from CAB evidence that benefit-related medical assessments can be intrusive and sometimes degrading. So these proposals need to be considered within an overall context of human rights standards.

Citizens Advice is also very concerned about proposals to introduce increased requirements for ESA claimants to undertake work-related activity and on what the impact might be on people with different impairments. The Government is also proposing to develop the new form of Work Capability Assessment and to extend mandatory attendance at 'work focussed interviews'. Unless these are conducted to an appropriate standard people with impairments may be forced into taking inappropriate jobs and may suffer discrimination or unfair treatment as a result.

Finally, CAB evidence raises questions about the effectiveness of enhancing the current sanctions regime. CAB advisers report seeing claimants who face hardship as a result of sanctions, including vulnerable clients sanctioned multiple times due to failing to understand or comply with requirements. They are often vulnerable clients with learning disabilities who have failed to understand what is required of them or who haven't attended courses or applied for jobs because the options have been inappropriate to their disabilities or levels of literacy. Without proper probing of claimants' failure to attend and without sufficient Disability Employment Advisers, there is a serious risk that vulnerable claimants will be unfairly and inappropriately treated.

A CAB in the Midlands reported that their client had pronounced learning disabilities and high blood pressure. She was on JSA and was required to actively seek work. She was regularly given information from Jobcentre Plus with the warning that non-attendance would result in sanction but does not understand. As a result she had been regularly sanctioned and has had sustained periods without any money at all resulting in increased debt problems. The stress of the situation was beginning to affect her health.

A Hertfordshire CAB client lacked basic skills, had very poor literacy and had been sanctioned twice within a couple of months. The first time he was nine weeks into a six-month course but was told to leave for failing to participate fully. He said the course was inappropriate and too advanced – he was made to type letters on the computer but struggled as he had no understanding of what he was writing as he couldn't read or write. The second sanction was for failing to complete maths and English tests. He reported that his personal adviser had not taken his struggles seriously. He was worried about how he was going to be able to pay his utility bills.

## Memorandum submitted by Disability Alliance

### Welfare Reform Act 2007 follow-up

#### Employment and support allowance

Disability Alliance notes the Committee's request for further information related to the implementation of employment and support allowance (ESA). We have heard some local instances whereby ESA claimants are being required to submit written requests for payment of benefit when lodging an appeal and after a successful appeal, which is an administrative barrier that is not actually required by the provisions of the Act.

This has clear implications for more vulnerable claimants and we would ask for Ministerial assurance that such unnecessary barriers to benefit receipt are removed. Other than this, we have not come across any specific issues at this stage beyond the usual administrative mishaps such as difficulties using phone services and so on.

#### Local housing allowance

We also wish to raise another issue, related to the Local Housing Allowance (LHA), which was also introduced by the 2007 Act. It has been brought to our attention that DWP has never carried out a Disability Equality Impact Assessment prior to the national roll-out of LHA.

One consequence of this is that disabled people who require an extra bedroom for a non-resident carer to sleep in during overnight stays are finding that the amount of LHA to which they are entitled does not reflect the need for an extra bedroom. There is no flexibility at all to recognise and pay for an extra bedroom, unlike under the previous housing benefit provisions.

We have raised this in writing with Ministers and were informed in a written response from the DWP that, under the LHA scheme:

"It is realised that disabled customers can be limited in the type of property that they can rent"

With no apparent intention to address the issue in a positive and proactive manner as required under the Disability Equality Duty, we would ask the Committee to address this issue with Ministers. We have heard of a case where a disabled student in the third year of his degree is in danger of being unable to complete his course because the introduction of LHA has seen his benefit entitlement restricted to a one-bedroom property, whereas he has previously been paid housing benefit equivalent to the rent for a two-bedroom property.

### Welfare Reform Bill

#### Work for your benefit (Clause 1)

Disability Alliance is very concerned that these proposals will disproportionately affect disabled people with low level physical and mental health problems. DWP has predicted that the introduction of the Work Capability Assessment for ESA will see at least a 10% increase in disallowances, thus meaning that more people with lower levels of health problems will be required to claim jobseeker's allowance instead.

Further, there is research<sup>167</sup> that demonstrates that work for your benefit schemes are least effective in getting people into jobs in weak labour markets where unemployment is high, as is currently the emerging situation in this country and that such schemes are least effective for individuals with multiple barriers to work. Also, welfare recipients with multiple barriers often find it difficult to meet obligations to take part in unpaid work. This can lead to sanctions and, in the most extreme cases, the complete withdrawal of benefits that leaves some individuals with no work and no income.

### **Abolition of income support (Clause 7)**

Disability Alliance is concerned that the proposal to abolish income support will have a detrimental impact on those people claiming benefits for whom work-related activity is not a feasible or viable option, whether in the short or long term. The most obvious and largest group of claimants will be those with caring responsibilities but this also could include pregnant women, estranged children in education and lone parents with young children.

The Government has said that no changes will be made until the circumstances of these groups have been properly addressed, yet the Bill clearly contains other measures (e.g. Clause 3) which are intended to relax the conditionality rules of jobseeker's allowance in anticipation of moving such groups onto this benefit. Requiring such a disparate group of benefit claimants to make a claim for jobseeker's allowance, with varying levels of conditionality to be applied depending on how Jobcentre Plus staff decide to categorise someone, runs a very clear and serious risk of discriminatory and/or arbitrary manner.

### **Claimant directions (Clause 8)**

Disability Alliance is concerned that reforms are being implemented to the ESA system without any credible evidence being presented of either the way that the newly introduced benefit is operating in practice, nor whether further increases in conditionality are actually required.

Further, the explanatory notes to this Clause state that:

“Failure to undertake the specified activity without showing good cause for this within the allowed time would be sanctionable”.

This is in direct contradiction of previous assurances given by the then Minister for Employment and Welfare Reform, Jim Murphy, in the Committee debates about the relevant Clause 15 of the Welfare Reform Act 2007. Mr Murphy stated:<sup>168</sup>

“The decision to apply a direction will not lead to sanctions.”

We feel this is an example whereby Ministerial commitments given when the original legislation was being debated are being ignored or overridden. Similar assurances were made with regards to disabled students and ESA, whereby Ministerial commitments about bringing forward certain rules were subsequently ignored due to a change of mind. This is an unacceptable way for Parliamentary scrutiny to be undertaken in our opinion.

<sup>167</sup> A comparative review of workfare programmes in the United States, Canada and Australia, Richard Crisp and Del Roy Fletcher, DWP 2008

<sup>168</sup> House of Commons Standing Committee A, 31 October 2006

It is also worth highlighting the large and almost unprecedented use of regulation making powers within this Bill. There are 387 references to regulations which means that the actual process for implementation of many of the powers is deferred to secondary legislation, which as the Committee has noted means that scrutiny of the detail of the scheme is difficult. With so many potentially wide-ranging powers being introduced, with much greater conditionality and potentially more sanctions and loss of benefit provisions, we are concerned that this is a worrying precedent being set.

### **Claimants dependent on drugs (Clause 9)**

Disability Alliance shares the concerns laid out by the Committee in their letter to James Purnell dated 27 February regards these proposals. We feel that an approach that has, at the very least, an implication of compulsory medical treatment with risk of financial sanction for non-compliance, as well as mandatory assessment for a drug problem in the first place, as being against the right to a private life and is also, by its intrinsic nature, discriminatory in approach.

We share concerns raised by other mental health charities that if deemed successful, the Government could utilise similar legislation requiring compulsory treatment for people with mental health problems also.

External provider social loans (Clauses 13-15) and Community Care Grants (Clauses 16-17)

Disability Alliance is concerned that there appears to be no independent statutory review in respect of social loans by external providers, nor in respect of some community care grant decisions. The Independent Review Service (IRS), that currently exists to carry out these functions for the social fund scheme, highlight the fact that although the explanatory notes to the Bill do say that there will be a complaints procedure and likely access to the Financial Services Ombudsman, there is no provision in the Bill in relation to this and so any such redress would not be put on a statutory footing by the Bill.

Further, the Bill gives the Secretary of State to exclude from the right of review decisions to make an award for specified goods or services via arrangements made with a specified supplier. The IRS state that their experience shows that decisions are often overturned on review and that there is potential for incorrect decisions being made under the proposed scheme but without the protection of the right of review.

### **Contracting out functions under Jobseekers Act 1995 (Clause 23)**

Disability Alliance is concerned that the greater powers being transferred to external providers of welfare to work services could undermine the ability of disabled people to properly hold to account such providers in terms of the service standards they receive. This has particular implications, for example, whereby individuals may be parked and not receive the level of support that is required to help move them towards employment, or where they are directed to undertake activity that is inappropriate or unhelpful or potentially harmful.

To this end, we have worked with Child Poverty Action Group, Gingerbread and Citizens Advice in drafting a Claimant's Charter which sets out some key principles that we feel

should underpin delivery, including the creation of an Employment Services Ombudsman to mediate where extra-regulatory disputes arise between claimants and contractors. A copy of the draft Charter is attached as an appendix to this submission.

We hope that you find the contents of this submission useful to the Committee's enquiry and look forward to monitoring the outcomes.

### **Undated letter from Families Need Fathers and Resolution to James Purnell MP, Secretary of State for Work and Pensions**

We are writing jointly to ask you to announce at Second Reading of the Welfare Reform Bill, that you are withdrawing the provisions concerning the possible confiscation of driving licences and travel documents by the Child Maintenance and Enforcement Commission without going to court (clauses 40 and 41 and Schedule 5).

These proposals have a number of serious shortcomings.

Fundamentally, they conflict with the citizen's direct access to the courts when the state could be seen to be acting in a way clearly against the person's interests and their right to a fair trial. If the Commission make these Orders administratively, there are no safeguards to have the matter properly considered. If the Orders are made administratively, they are effectively being made by Civil Servants, who may be quite junior in position and, again, there are no 'checks and balances'. The Bill attempts to deal with this by providing that the seizure will only take place by an administrative decision if the individual decides not to appeal to the court. But that is well short of direct and full access to the court. Many of the individuals concerned may be poorly equipped to take sound advice from the legal profession or elsewhere when confronted with the threat to confiscate any of these documents.

Secondly, the provisions depend crucially on CMEC's ability to communicate effectively with the persons whose licence or documents they are confiscating. We know from long experience of CMEC's predecessor, the Child Support Agency (CSA), that communications with payers of maintenance have often been poor. Until CMEC is fully operational it will be difficult to trust them with such onerous responsibilities. It is quite feasible that there will be a considerable number of cases where CMEC is writing to the wrong address, or a person simply has not received the paperwork etc. What system will be in place to ensure that, to the greatest extent possible, the NRP is aware that the application is going to be made? What if letters simply go missing at the Post Office stage and never actually reach the individual concerned?

We understand an individual will have the opportunity to submit an appeal, but this is effectively reversing the burden of proof to the paying party to demonstrate why the Order should not remain in place. This does not make sense.

There are also concerns about the costs provisions. The Bill states that CMEC can recover their costs in confiscating driving licence/travel documents. However, if we have read clause 40 (5) (3) correctly, there is no provision that, if the Court revoke a disqualification Order, the individual against whom the Order has been made can actually recover their costs.

The bill provides that CMEC would consider “whether the person needs the relevant document in order to earn a living”. That is far from a guarantee that they would not do so if it prevented the person earning a living. We know from our experience of the CSA that on occasion they have proposed taking away driving licences from people whose jobs required a current licence. What safeguards will be put in place to ensure proper consideration of the individual case? Such actions militate against the provisions’ objective of maximising the payments of child support due.

In view of the proposed measures, we also believe that provisions are likely to be in breach of the Human Rights Act 1988 and Article One and Article Six of the First Protocol of the European Human Rights Convention.

These draconian sanctions may simply encourage some parents to go underground, to avoid their responsibilities and be counter-productive, where such parents are likely to pay some monies if treated differently.

Similar provisions were, as you know, rejected by Parliament during the passage of the Child Maintenance and Other Payments Act. We believe that this is highly likely to happen again. We suggest that it would be much better for you to withdraw them on your own initiative.

For the avoidance of doubt, we all support the Government’s aim of ensuring that parents pay their appropriate share of child maintenance after divorce or separation. However, we believe that that is best pursued by making the regime more efficient and effective, rather than attempting to introduce provisions which have already been rejected by Parliament as being inappropriate.

## **Memorandum submitted by Law Centre NI**

### **About Law Centre (NI)**

Law Centre (NI) is a public interest law non-governmental organisation. We work to promote social justice and provide specialist legal services to advice organisations and disadvantaged individuals through our advice line and our casework services from our two regional offices in Northern Ireland. It provides a specialist legal service (advice, representation, training, information and policy comment) in five areas of law: social security, mental health, immigration, community care and employment. Law Centre services are provided to over 450 member agencies in Northern Ireland. In this paper we outline the significant human rights issues likely to be presented by implementation of the draft Bill, drawing attention to the Northern Ireland specific issues.

### **The Northern Ireland Context**

The White Paper acknowledges that while the Government will continue to work closely with the devolved administration in Northern Ireland to seek to maintain a single system of social security across the UK, the Northern Ireland Executive will consider the most appropriate arrangements for Northern Ireland. This is important because Northern Ireland presents particular circumstances with regards to welfare and arrangements to move people into employment. Below we highlight the human rights concerns of this Bill for Northern Ireland.

## Lone Parents

We are very concerned by the proposals within the Bill to require lone parents with children aged under seven years of age to actively seek work as a condition of JSA. While we support a policy of positively encouraging lone parent into paid work at an appropriate time, efforts to move lone parents back to work should be through measures tailored to support and encourage lone parents rather than through sanctions.

The Government's current welfare reform proposals to move lone parents and others into work depend on the availability of childcare to allow parents to take paid work. Recent research on childcare provision found that childcare provision in Northern Ireland remains "*woefully inadequate*."<sup>169</sup> Gingerbread (NI) estimate that 30,000 extra childcare places would have to be provided in Northern Ireland to support delivery of the UK government's target to have 70% of lone parents in employment by 2010.<sup>170</sup> Yet between 2002 and 2007 the overall number of daycare places in Northern Ireland fell by 1 percent.<sup>171</sup>

In England and Wales greater strides have been made towards developing comprehensive wraparound child care than in Northern Ireland. Northern Ireland local government structures are very different from those in the rest of the UK, particularly in terms of service support and delivery. Local authorities are under no obligation to assess and meet local childcare needs as required by the Childcare Act 2006 in England and Wales.

The childcare infrastructure in Northern Ireland required to underpin these proposal is not in place, nor is there a lead Department responsible for developing this. Moreover, with rising unemployment the current economic climate may make it difficult for lone parents to secure jobs that allow them to combine their work and family life. There are also concerns about the potential impact on child poverty if lone parents are exposed to the risk of benefit sanctions. This raises real concerns that implementing the Bill as it stands in Northern Ireland will lead to a potential negative impact on family life and possible discrimination against women, who as the majority of lone parents will be most affected by a lack of adequate childcare. This may potentially engage Article 14 in conjunction with Article 8 and Article 1 Protocol 1 of the ECHR. The Government should also consider its obligations under Articles 2(d) and (f) and Article 11(e) of the Convention on the Elimination of All Forms of Discrimination against Women.

Any UK wide welfare reform must take into account the differing standards and level of investment in childcare across the UK. To combat this inequality we would urge for improved investment in childcare provision in Northern Ireland as part of the wider welfare reforms.

## Sanctions

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<sup>169</sup> Northern Ireland Assembly Research Paper 16/08, *Childcare Provision in the UK and Republic of Ireland*, March 2008

<sup>170</sup> *Supra* note 2 at page 62

<sup>171</sup> DETI, "Women in Northern Ireland: Labour Market Statistics Bulletin" September 2008. The number of places fell from 47,170 in 2002 to 46,914 in 2007.



Research highlights considerable problems with the use of sanctions.<sup>172</sup> An increased use in sanctions is likely to have substantial adverse implications for claimants and their dependants. We are particularly concerned about work-related requirements placing an onerous burden on people with mental health issues which may exacerbate their health issues. The increased use of benefit sanctions may raise issues in relation to an individual's right to respect for their private life, and peaceful enjoyment of their possessions without discrimination thereby engaging Article 8 in conjunction with Article 14 and Article 1 Protocol 1 of the ECHR.

The government recognises that job offers 'may be more limited' for disabled people and people with health conditions.<sup>173</sup> Given this acknowledgement it seems inherently unfair that disabled people will be subject to the same conditionality principles. We oppose increased sanctions in all instances; however, we particularly oppose sanctions against disabled individuals while there is no parity in terms of job offers for disabled/non disabled claimants.

### **Direct Payments**

The Bill provides many welcome moves to assist more people with disabilities into employment and as such it has the potential to better promote the human rights of people with disabilities. The UN Convention on the Rights of Persons with Disabilities provides that State Parties will recognise the rights of persons with disabilities to work, on an equal basis with others and Article 27 states that State Parties will 'safeguard and promote the realisation of the right to work.'

Despite the success of Access to Work, disabled people still face substantial barriers to employment. Statistics compiled by Disability Action in Northern Ireland show that only 32% of people with disabilities are in employment compared to 79% of those without disabilities.<sup>174</sup> Mencap have expressed concern that the proposed reforms do not go far enough to provide 'appropriate specialist support for people with a learning disability' and without the ongoing funding this requires, people with a learning disability will continue to be the disabled group most excluded from the work force,<sup>175</sup> once again raising issues of compatibility with Article 14 when considered together with Article 1, Protocol 1. The Government should also consider Article 6 of the International Covenant on Economic, Social and Cultural Rights and the steps that should be taken by State Parties to ensure the full realisation of the right to work.

### **Joint Registration**

The legislative approach set out in the Bill as regards to joint registration provides a good balance between rights and protection. While the recognition of parental rights and responsibilities is important, equally important is the awareness that in some

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<sup>172</sup> Social Security Advisory Committee 19th Report Sanctions in the benefit system: Evidence review of JSA, IS and IB sanctions. This report highlights the fact that claimants do not understand the sanctioning rules, the process is not clearly explained, there is a lack of uniformity in the imposition of sanctions and there is a lack of support for those who have been sanctioned.

<sup>173</sup> Chapter 3.34. This acknowledgement is reflected in statistics on employment in Northern Ireland: only 32% of people with disabilities are in employment compared to 79% of those without disabilities. Statistics compiled by Disability Action

<sup>174</sup> At <http://www.disabilityaction.org/publications/Building%20a%20Better%20Future.pdf>

<sup>175</sup> At <http://www.mencap.org.uk/news.asp?id=6792> as of 03.02.09

circumstances it is not appropriate to recognise a child's father in order to protect the child and mother from potential harm. Northern Ireland has the highest percentage of sole registration in the United Kingdom, at around 9 per cent, compared to around 7 per cent in England and Wales and around 6 per cent in Scotland.<sup>176</sup>

We share the JCHR's concerns that many of the provisions relating to joint registration are to be in secondary legislation therefore, our ability to comment on potential compatibility issues is somewhat limited.<sup>177</sup> Secondary legislation will need to ensure that given the delicate nature of many of the exemption criteria, considerable care is taken to ensure that no further distress is caused to the mother or alleged father during the registration process. Careful consideration needs to be given to how exemptions are applied and the appropriate burden of proof to be discharged in order to obtain an exemption from registration.

The potential impact on the courts of an increased involvement in paternity or parental disputes and the costs associated with cases of this nature needs to be considered. The individual's right to a fair hearing will need to be protected and the questions arises of whether legal aid will be available to participants in court cases regarding joint birth registration as this could have possible implication in regards to Convention rights. The potential implications of an inability to defend or challenge a joint registration could also potentially engage Article 8 and Article 1, Protocol 1 rights.

Law Centre (NI) welcomes the opportunity to provide evidence to the Committee. We trust you will find our comments helpful. If there is any further way in which we could contribute to this process we would welcome the opportunity to do so.

## Memorandum submitted by Maternity Action

### Summary

Where a mother has reason to fear for her safety or that of the child if the father were to acquire parental responsibility, the father should be required to apply for parental responsibility through the court system.

### About Maternity Action

Maternity Action is a national voluntary organisation working to end inequality and promote the health and wellbeing of all pregnant women, new mothers and their families from before conception to the child's early years.

### Birth registration

The Welfare Reform Bill ('the Bill') creates new processes for registering fathers on children's birth certificates which are likely to result in increased numbers of unmarried fathers being registered on their children's birth certificates. Registering the father on a child's birth certificate enables the child to know the identity of both parents and facilitates contact with a separated parent, where this is in the child's best interest. This is consistent with Article 7 and Article 9 of the United Nations Convention on the Rights of the Child (UNCRC).

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<sup>176</sup> Office for National Statistics, Birth Statistics 1964-2004

<sup>177</sup> Letter to Rt Hon James Purnell MP from JCHR dated 27/02/09

The Bill does not effectively address the risks to the mother and child of an abusive father. The Bill provides all fathers with parental responsibility on registration as the child's father. This includes fathers who are abusive. A mother is entitled to seek an order to remove or restrict the father's exercise of parental responsibility under Section 8 of the Children's Act 1989. This requires a woman who has newly given birth to pursue legal action. This is an unreasonable burden to place on a woman at this time, and also creates a window in which an abusive father may exercise parental responsibility to the detriment of the mother and child.

Where a child has an abusive father, there are significant risks to mother and child. To minimise these risks, the courts should consider the question of parental responsibility before parental responsibility is granted, rather than afterwards.

Maternity Action recommends that where a mother has reason to fear for her safety or that of the child if the father were to acquire parental responsibility, that the father be required to apply for parental responsibility through the court system.

*March 2009*

## Memorandum submitted by Mind

### Key points

- Mental health has a significant impact on welfare reform and benefits. Around 40 per cent of Incapacity Benefit (IB), to be replaced by Employment and Support Allowance (ESA), claimants have a primary diagnosis of a mental health problem and, if secondary mental health diagnoses are taken into account, the proportion increases beyond 50 per cent of the caseload.<sup>178</sup>
- **Training and competency of employment advisors:** The complexities of mental health need to be understood, and taken into account, by employment advisors and other relevant staff. It is unfair and unrealistic to expect employment advisors to be able to offer real and useful assistance to people with mental health problems if they have not received appropriate training themselves.
- **Compulsion and sanctions:** The welfare to work agenda must not result in advisors and staff being given disproportionate and unchecked power over individuals. While these issues are important to anyone claiming benefits, the potential detriment to people in mental distress is a source of great concern.

### Introduction

Over 200,000 people with mental health problems flow onto incapacity benefits each year - this figure has not changed in the last decade.<sup>179</sup> The Government's welfare reform programme has the potential to be of substantial benefit to people with mental health problems and transform lives. But unless this latest programme is carried out with adequate resources and with a proper understanding of the barriers to employment that

<sup>178</sup> Waddell and Aylward (2005) The Scientific and conceptual basis of incapacity benefits The Stationery Office

<sup>179</sup> Dame Carol Black (2008) Working for a healthier tomorrow. TSO.

people with mental health problems face, its effectiveness may be limited. In some cases it may even have the potential to do harm.

The Welfare Reform Bill and the measures it contains are intended by the Government to realise its aspiration of an 80 per cent employment rate for people of working age. The Government has stated that its intention is a system where everyone has personalised support and conditions to help them get back to work, underpinned by a simpler benefits system and genuine choice and control for disabled people.

Since the Government published their proposals for consultation in July 2008 the economic climate has worsened. In the last recession, many people with mental health problems were written off as unemployable when they lost their jobs. Another recession will undoubtedly put pressure on the Government's initiatives to support people in finding and holding on to jobs.

Mind fully supports the Government's aims for the Welfare Reform Bill to achieve a socially inclusive society with opportunity for all. However, a number of the measures proposed seem to be at odds with this principle. Mind has consistently disagreed with the notion of deducting from, or restricting, welfare benefits in an attempt to promote certain types of behaviour in claimants. Benefits are set at a rate deemed sufficient for a claimant to live on, taking into account their personal circumstances. There can be no justification to reduce income levels below what the Government has already decided is the minimum living income. Claimants have a right to the full applicable amounts of benefits they are eligible for. Mind believes it is wholly inappropriate to erode this right and that, to do so, potentially infringes on a person's right to be free from inhumane or degrading treatment.

The disproportionate nature of the sanctions which are provided for in this legislation cause concern in terms of the Government's human rights compliance. Taking away a person's income, as punishment for minor offences such as failing to attend a meeting, impacts directly on their right to privacy, liberty, a family and, potentially, life. Mind believes that this Bill has insufficient safeguards to protect the human rights of benefits claimants.

Mind welcomes the introduction of personalised support. People with fluctuating mental health problems require tailored and flexible support for their needs, and this is often unavailable. However, linking personalised support to increasing conditionality and sanctions is likely to be ineffective in enabling people to take steps towards employment at the most appropriate time and pace for them. In the worst cases it risks pushing people into unsuitable and potentially harmful situations.

Mind supports the Government's objective of supporting people who are in a position to do so to move into employment, but it is difficult to welcome without reservation a Bill which leaves many of the details of the proposed reforms to be set out in as yet unpublished regulations. Draft regulations for the key proposals outlined in the Welfare Reform Bill 2006 were published in time for the Committee Stage debate and Mind would urge the Government to do the same again. Without seeing the regulations in full Parliamentarians cannot be expected to know what the full human rights implications of the legislation are.

This submission draws on wide consultation with Mind's networks and all quotes included in the briefing are taken from people with direct experience of mental distress.

### **Training and competency of employment advisors**

The Bill will give greater flexibility and greater powers to JobCentre Plus Personal Advisers, to tailor the support they offer to individual's needs and circumstances. Mind is concerned that staff who will be responsible for supporting people into work are insufficiently trained on mental health issues. The Bill has no proposals to increase training to support staff who will have to make important decisions.

This Bill allows advisors to remove benefits for people, without trial or due process. It is imperative that anyone invested with such power is also trained to the highest possible standard. The powers that employment advisors will have, for instance the ability to seek access to claimants' medical records, potentially infringe on the claimants' right to privacy.

"Advisors, employers and work colleagues still lack understanding of mental health issues - stigma is alive and kicking. Just because my disability is not visible it's just assumed I was work shy."

"A lot of people including employers do not understand about mental illness and would not be able to deal with an employee who suffers mental health issues."

### **Compulsion and sanctions**

The Bill will allow Personal Advisers to decide the appropriate activity a claimant should undertake. It is wholly inappropriate for this power to be used to require a claimant to access healthcare provision, take medication and/or access psychological therapies. To do so would blur the boundaries between health provision and social control. It is a general principle of law that people with capacity to make decisions about medical treatment should not be subject to compulsion, and, where this is permitted, these powers are subject to stringent safeguards (notably, within mental health and mental capacity legislation). There are also worrying implications for the Government in terms of compliance with human rights legislation as people's rights to liberty and privacy would be severely infringed by such measures.

The Government's use of draconian sanctions for people who fail to comply with work related directions are clearly disproportionate. People will be punished severely, by having their income blocked for arbitrary periods of time, for minor infractions.

The Government had made a commitment that a clear and comprehensive set of safeguards would be built in to ensure claimants are not required to undertake inappropriate activities. Yet the White Paper describes what can constitute work-related activity and it can include any activities a person undertakes to manage their health for work, for example, condition management programmes, drug and alcohol rehabilitation, 'Progress to Work' for drug misusers, or therapy or physiotherapy for a common health condition.

Claimants are to be sanctioned one week's benefit if they are cautioned about an offence involving violence or harassment towards a DWP employee through Clause 20. There needs to be adequate safeguards to prevent this being misapplied through potentially broad

interpretations. It is extremely worrying that people will have their benefits reduced without due process. This clearly infringes a person's right to a fair trial.

In 2007 the DWP launched a pilot to test the effectiveness of Voice Risk Analysis (VRA) technology in detecting benefit claimants who might be subject to a more thorough assessment of their claim. When a person calls to make a benefit claim VRA monitors a person's voice during the call. A baseline tone is established and any deviation from that as the call progresses is taken to indicate that the caller might in some way be suspect. Mind raised concerns about this as people with mental health problems will often be anxious and even more so when in contact with their local authority or JCP, so their tone may fluctuate in a way that might be assessed as being suspicious. Mind argued that the DWP had a duty to carry out a disability impact assessment of the proposals being piloted but this never happened.

### **Memorandum submitted by RADAR**

RADAR is a pan-disability network led by people experiencing ill-health, injury or disability (IID). Many of our members are directly affected by this Bill.

We have significant concerns over the 'work for your benefit' pilot proposals in Clause 1 of the Bill which engage a range of human rights including the right to be free from forced labour and the right to family life. These proposals will affect growing numbers of disabled people as the gateway to ESA is artificially tightened and given that the Flexible New Deal (which precedes the new 'work for your benefit' stage) has not been designed in such a way as to maximise positive employment outcomes for those furthest from the labour market. Dragooning people into work they have not freely chosen on less than the minimum wage with no guarantee of respect for their particular circumstances is unlikely to contribute anything their future employability and will inevitably risk human rights violations. To guard against this Clause 1 and regulations made under it must ensure disabled people have :-

- a choice of what work they do,
- a guarantee of tailored support
- a guarantee that the number of hours people are 'required' to work will reflect how many they can manage (in relation to their impairment) and how many hours are just and fair (no one should be forced to work for prolonged periods on less than the minimum wage)
- a guarantee that such schemes will provide real progression towards sustainable employment.

We regret that the Bill includes proposals to enable personal advisers to direct Employment and Support Allowance claimants to undertake specific work-related activity if they deem claimants' choices to be ineffective. Whilst we agree with the expectation that disabled people, like other citizens, should undertake work-related activity we want to see the maximum level of control possible in that activity – not least because evidence suggests motivation is one of the key indicators of success in job seeking. Unsurprisingly, if you pursue work-related activity that interests you you are more likely to persevere and succeed

than if you are pushed towards activity against your wishes. We also believe there are unacceptable risks to human rights in this policy which confers too much power, inappropriately on personal advisers. We can quite easily envisage people with conditions such as RSI or Chronic Fatigue Syndrome being forced to do things which would actually exacerbate their condition.

In relation to the right to control and direct payments, the regulatory provisions in Part 2 are a missed opportunity to create a seamless system of public service supported rooted in the protection and promotion of human rights. Rather than an integrated system of individual budgets and self-directed support, Part 2 provides for a circumscribed right to require the authorities to give you a direct payment with no 'right to control' should you opt to continue with direct service provision. Part 2 also fails to mandate alignment of key funding streams including social care and so risks continuing the fragmented approach to meeting disabled people's independent living requirements.

In relation to direct payments, RADAR believes domiciliary care agencies should be explicitly brought under the HRA to minimise the risk of abuse in such situations and ensure that support workers are trained to support disabled people's dignity, equality and autonomy. There are too many examples of people receiving substandard support. Similarly we would advocate other agencies acting in lieu of the state – including welfare to work providers having human rights obligations. We would urge JCHR to press for a Claimants Charter safeguarding claimant's human rights against which welfare providers could be held to account. This has been proposed by the Disability Alliance, Gingerbread and others and we strongly commend it.

A general point we would highlight is that while the rhetoric around the Bill promises more support in exchange for more responsibility (disabled people are quite happy with that if we see the support), the Bill itself is largely one sided: more conditionality (much of it ill thought through) and no new support. The increase in the Access to Work budget is of course helpful but that vital programme is discretionary: there is no right to it. We would have liked an approach that breaks down barriers to work and gives disabled people clear rights to the support they may need to build skills and build a real career.

## **Memorandum submitted by the Royal College of Psychiatrists**

The College welcomes the opportunity to make a submission to the Joint Committee on Human Rights on the Welfare Reform Bill.

### **Introduction**

The changes to the welfare benefits system introduced in the 2007 Act and extended in the current Bill have a direct impact on people with mental health problems and learning disabilities (referred to generally throughout as people with a mental disability) who will be required to attend work focused interviews and undertake work related activities. Some may be considered fit for work and come within 'work for benefit' schemes and learning disabilities.

The College broadly welcomes some aspects of the Bill but has concerns about the aspects of the conditionality regime. The provisions appear to be designed for the 'work shy' but

apply also to those who are not work shy but who have significant difficulties in entering the labour market.

Like other disabled people, people who have had mental illness or who continue to have episodic periods of illness (often called fluctuating conditions) generally are keen to enter the paid workforce. They remain some of those most subject to poverty and social inclusion and stand to gain from the benefits of paid work whether on a full or part time basis. Carefully planned a gradual entry to work can have beneficial effects on a person's recovery and on their general wellbeing. Some who have recovered wish merely to restart their life. However the obstacles to employment are considerable. Employers' prejudice or lack of knowledge about the aetiology of mental ill health and the failure of Access to Work to be used effectively for this group are all widely recognised as key contributors to their lack of employment opportunities. People with learning disabilities face similar challenges as well as generally keen to work but need support to do so.

Existing evidence of people coming off incapacity benefit in the pilot areas (Blyth, 2006) has showed an increased likelihood of being employed for people with physical health problems, but not those with mental health problems (Adam et al 2006; Bewley et al, 2007). A recent report (Dorsett, 2008) gave further indication of the difficulty experienced by people with mental health problems:

‘Customers with mental health problems seemed particularly hard to help and some advisers mentioned feeling out of their depth when dealing with such individuals. Perhaps reflecting this, the impact analysis does not find any evidence of a Pathways effect for those with mental health problems. Given the prevalence of mental illness among the Pathways population, identifying ways of better supporting those with such a health condition would seem an important priority’. (page 18).

Specific issues:

- Whether changes to require ESA claimants to undertake specific work-related activities will be administered, without discrimination, and in a way which is compatible with the right to respect for private and family life and property rights (Article 8, Article 1, Protocol 1 and Article 14 ECHR);

The Welfare Reform Bill intensifies the conditionality regime by providing for ESA claimants, to undertake mandatory specific work related activities, with a possible sanction of loss of some benefit if he or she fails without good cause to comply. The College has particular concerns about the extent of work related activities and the adequacy of safeguards for their use.

In the Bill WRA are defined broadly as ‘activity, which makes it more likely that the person will obtain or remain in work or be able to do so’. However, the Welfare Reform White Paper sets out what it may involve:

‘Any activities a person undertakes to:

- Stabilise their own or their family's situation, for example, assessing childcare options, activities to stabilise health conditions, seeing a debt adviser about



stabilising their financial situation and looking at options for improving their housing situation, or joining a Children's Centre;

- Manage their health for work, for example, condition management programmes, drug and alcohol rehabilitation, 'Progress to Work' for drug misusers, or therapy or physiotherapy for a common health condition'.

These sweeping powers cover a wide range of activities - exceeding those that are directly related to a specific type of employment rather than wider employability. There is no built in requirement that the activities required are proportionate to the objective of finding work although a direction must be 'reasonable, having regard to a person's circumstances' (clause 8(2)(a)). Furthermore there is no national programme of training and no national competency standards to ensure that personal advisers have the requisite skills to be making the judgments over a range of non employment activities that are envisaged.

Health related activities: Mandated activities might extend to therapy programmes, to medication regimes, or to other activities such as exercise or weight management. The Explanatory Memorandum states that specific work related activity for ESA claimants under Clause 8 will not extend to medical treatment but there is no such restriction in the Bill.

Such decisions are matters that should be decided between a person and his or her clinician or other expert advisor. Not only does the personal adviser lack appropriate training to be making healthcare related judgments but also their right to coerce people into therapy and other treatments is inappropriate and non-therapeutic. While the College has no objection to health related matters being included in a voluntary action plan the existence of a direction and a sanction changes the entire complexion of the issue. There is no protection in the Bill against these powers being exercised in a way that could breach Article 8 rights to private and family life by being a disproportionate interference with them.

General comments on the conditionality regime as it applies to people with mental disability. Other problems that are likely to have human rights implications stem from the failure to recognise the actual situation people, particularly those with fluctuating conditions and those with learning disabilities, may face. Failure to take part in a work activity could be health related if an illness has recurred or relate to lack of effective communication. A loss of benefits engages Protocol 1 Article 1 rights. It is a particularly severe penalty for people with the double disadvantage of being in poverty and vulnerable to stress.

There is no provision in the Bill that requires the consent or agreement of the claimant to the action plan, or even that his or her views are to be taken into account, although of course the government intends that the system should operate cooperatively. The White Paper makes the point that the system will not work without the claimant's active cooperation. However this ignores the reality that will occur on the ground with busy advisers, vulnerable claimants and the 'big stick' of a sanction. While under Clause 2E, regulations may make provision for the claimant to request a reconsideration of the action plan there is no indication in the Bill on what basis this will be provided. Nor is there a requirement in the Bill for people to be notified clearly at the time of their claim or of their

interview of the consequences that may follow their failure to comply with any requirement imposed on them.

The good cause defence: While the claimant under different provisions of the Bill has a defence for their non-compliance if they have 'good cause' there are several things wrong with this.

- First the Bill does not define what constitutes a good cause and we can only trust that Regulations will include health related reasons and a lack of effective communication. A statutory definition of good cause that was not exhaustive but gave instances like those in current Regulations would give greater protection and overcome any human rights deficiencies.
- Secondly even if these matters are covered they need to be stated with enough specificity so that staff will be clear when sanctions should not apply. Also claimants need to know clearly in advance the consequences of their failure to attend so that they can regulate their conduct accordingly. In human rights terms this is encompassed in the requirement of legality.
- Thirdly, and most damaging, the required process for providing a defence is to submit a written defence within 5 days. This is both inadequate in terms of timeframe and inappropriate. A person who, for instance, has a recurrent period of depression or schizophrenia will be most unlikely, without help of family or friends to submit a defence in writing within 5 days, if indeed they are able to compose a written defence at all. Depression is characterised by loss of the ability to concentrate, loss of motivation, increased sense of hopelessness and lack of self worth, a psychotic episode brings about a distorted perception of reality. Yet it appears that a sanction will follow from their failure to provide this written response. No requirement to contact the person and no requirement to attempt a face-to-face meeting is entailed.

Whether the proposals in the Bill which would introduce conditionality for benefits claimants who are, or may be, dependant on controlled drugs or alcohol, are compatible with the right to respect for private and family life, property rights and the right to enjoy those rights without discrimination.

The most extreme operation of conditionality appears in the provisions covering claimants who are or may be dependent on drugs or alcohol. The College faculty of Addictions has expressed considerable disquiet at the conditionality provisions while welcoming the attempt to assist drug users with their addiction. The issues affecting people with addictions and mental disorder are complex and difficult. We fear that sanctions will not improve treatment compliance or the chances that people will obtain and remain in work. On the contrary, they may drive people deeper into poverty and marginalization. Being coercive in nature the provisions have the potential to undermine the therapeutic relationship between clinician and client.

The extensive powers are very broadly framed, unduly invasive and thus constitute a significant interference with a person's private and family life. They empower Job Centre Plus staff to identify claimants who are 'dependent on or have a propensity to misuse any drug'. The Bill is unacceptably broad in this respect. There will be requirements to answer

questions about drug use and treatment, undergo an assessment and a power to require someone to undergo a drug test.

We agree with Drugscope:

“Drug testing should not be introduced into the benefit system. It is an invasive procedure. A drug test can only reveal that a particular substance is present in somebody's body at a particular time. This means, for example, that test results can be identical for someone with a serious crack cocaine dependency and for a first time participant.

As currently drafted a benefit claimant with a relevant drug problem could be required by the Secretary of State to attend and abide by the rules of a residential drug service. It is important that expectations of the treatment system are realistic. Research has established that recovery journeys out of long-term drug dependency can take many years. Often drug users have complex needs, including mental health problems and homelessness.

Drug users must not be compelled into unsuitable or inappropriate services - for example, it is important that someone cannot be required to attend a service that they do not feel is appropriate given their age, gender, ethnicity, culture, religion, sexuality and/or disability status” (Second Reading Briefing, Welfare Reform Bill 2009)

We consider that the powers in relation to drugs are excessive and should be curtailed in order to provide a reasonable balance between the rights of claimants and their responsibilities.

## **Memorandum submitted by Tcell**

We are a group representing the HIV community as it has and continues to experience the Welfare State and benefits in the UK. Initially concerned with current benefits such as Disability Living Allowance. We want to ensure equitable and fair access and consideration with respect to the Employment and Support Allowances.

Points we raise.

- “Whether changes to require ESA claimants to undertake specific work-related activities will be administered, without discrimination, and in a way which is compatible with the right to respect for private and family life and property rights (Article 8, Article 1, Protocol 1 and Article 14 ECHR)
- Whether powers in the Bill to contract out functions of the Secretary of State or others, and provision for direct payments, will provide adequate protection for individuals who might seek redress for breaches of their Convention rights under the HRA 1998”

HIV remains one of the most stigmatised conditions. Fear of diagnosis and the reaction thereafter, from others, being a major issue.

Often HIV can be coupled with other discriminating factors such as colour, race, culture, religious, gender & sexual orientation.

This raises issues relating to confidentiality and fair treatment especially where information could be passed to a third party.

Decision's made by the State, especially with regard to Welfare Benefits, largely go unchallenged. The public nature of HIV disclosure to engage in any appeal equates to many being unable to seek full redress to decisions that a non-HIV person would not face.

We know from our past experience of the DWP and Disability Living Allowance reviews. That decision can be inconsistent. The DWP passes on HIV status to GP's where claimant has expressly withheld consent. Those medical assessments are made by sufficiently inexperienced Medical Practitioners working for the DWP.

Mental Health issues are given little to no consideration.

The stress of dealing with the State can exacerbate illness.

That there is no protection for the fluctuating nature of an illness such as HIV.

Access to remedy by the use of the Disability Discrimination Act or Employment Tribunal is rarely taken, again for fear of exposure & stigma.

- "Whether the proposals in the Bill which would introduce conditionality for benefits claimants who are, or may be, dependant on controlled drugs or alcohol, are compatible with the right to respect for private and family life, property rights and the right to enjoy those rights without discrimination"

Within the Bill is mentions drug dependency. However in many cases with HIV control of side effects of either the illness itself or Antiretroviral therapies can lead to the use of pain relief such as opiate based medications. Not limited to just those with HIV but other disabilities the Bill doesn't consider this. Opiate use is in terms of addiction rather than medically necessary.

### **Introduction.**

ThCell is a voluntary group that started as a result of the Special Rules Review of the Disability Living Allowance and its affects on the HIV community within the UK.

This is achieved largely via the Internet allowing people to share their experiences. Lobbying by the group to Parliament and other bodies. Campaigning for better understanding of HIV and reducing stigma. To ensure that processes consider the needs of the HIV individual in ensuring equitable treatment in all aspects.

The group members campaign on issues that personally affect them.

### **Factual Information.**

The website [www.tcell.org.uk](http://www.tcell.org.uk) and its benefit section contains all the reference materials as well as the personal experience of others.

We get approximately 1500 hits a month.

Consideration also needs to be given to the Criminalisation of HIV as it may impact further on the stigma of having & living with HIV.

### **Recommendations.**

1. Sometimes the open nature of government and the legal process suffices for the majority but such openness can oppress minorities thus denying them the execution of their rights through stigma. In insuring compliance consideration needs to be given to the most vulnerable, typically these minorities. In the case of HIV/AIDS this openness disallows, in many cases, suffers from exploring appeal and legal redress for fear of exposure.

2. Any process of redress or appeal should protect the individuals HIV status, as confidential, especially where such information may become public. To ensure those with HIV & their families can access redress without fear. To comply with Article 5 and Article 8.

3. That any referral of a person with HIV to a 3rd party employed by the State in delivery of its goals and the subsequent transfer of key data including HIV status is undertaken only with the full consent of the individual concerned.

4. The disclosure of HIV, say to a potential employer, is subject to the full consent of the individual affected. That measures are in place to ensure this confidentiality. That the State & any agency it employs fully understands and is trained in this respect. That process for redress of non-consensual disclosure doesn't itself risk public exposure.

5. That process is not unduly complex or protracted given the impact to mental and physical health potentially arising from anxiety and undue stress, potentially a breach of Article 3.

6. Training is regular in HIV & co-morbidities – especially for public facing staff.

7. Article 8 extends to not only the right of the individual but of the individuals family and loved ones. That the stigma of HIV needs to be considered not only as affecting the HIV person but tarnishes those close to them like family. That the action taken by the state or any third party needs to reflect, in the execution of its process, the rights of associated people. This potentially giving rise to breach of Article 5 and the right to liberty and security.

8. Proper monitoring and scrutiny of HIV/AIDS benefit applications to ensure they have been processed correctly and not merely a reliance on an equal opportunity policy as part of a poorly "policed" employment contract.

### **Memorandum submitted by Nigel Wheatley, Senior Welfare Rights Adviser, Wolverhampton City Council**

I would like to submit the following concerns about the human rights implications of the implementation of ESA (Employment Support Allowance) and specifically on the effects of the conditionality and work related activity & condition management provisions in ESA on people with a severe and enduring mental illness who are living outside of hospital.

I am responsible for supervision of the benefits advice and casework in Wolverhampton to adult mental health services. We have 5 CMHTs (Community Mental Health Teams) which are jointly commissioned teams between Social Services and NHS. They provide care management, assessment and treatment at secondary care level after referral from GP (primary care). The criteria for referral are strictly that a person must have a severe and enduring mental illness. Each CMHT includes CPNs (community psychiatric nurses), ASW (Approved Social Workers, licensed under mental health act) – recently now re-titled as AMPs, Consultant Psychiatrists, Occupational Therapists and support workers.

As a result of the introduction of ESA (October 2008), I have held a series of updating briefings with staff at these mental health teams, and the comments from health professionals in these teams forms the basis for this submission.

The main point is that we think that, for people with a severe & enduring mental illness, the conditionality and work related activity provisions in ESA are incompatible with many of the provisions within the Mental Health Act, and within the mandatory Department of Health's CPA (Care Programme Approach), for compliance with treatment plans, the vital role of care co-ordination and supervision.

My discussions with our Consultant Psychiatrists indicate that the mortality rate for people with a severe mental illness is between 10% and 15% - my apologies but at short notice given I can't quote exact sources for the committee. By severe mental illness I include people with repeat acute episodes of Schizophrenia, Bi-Polar Mood Disorders (manic depression), Severe (Unipolar) Depression and Anorexia Nervosa. Anything which conflicts with or prevents full compliance with care & treatment plans or adds stress & risk must therefore be potentially life threatening for this vulnerable group.

By my reading of the ESA regulations many of our service users who have a severe and enduring mental illness will be put in the untenable position of ...”either I do what the Jobcentre adviser tells me and keep my benefit or I do what my consultant psychiatrist tells me and risk losing benefit”.

It is arguable that the ESA regulations conflict with human rights, particularly Article 2 the right to life – and the psychiatric treatment & support necessary to preserve life; Article 8 respect for private life - especially interference the area of appropriate medical & psychiatric treatment & support; Protocol 1 the protection of property, ie benefits entitlement earned via national insurance contributions as an incapacity for work benefit being denied or penalised because of non-compliance with conditions that the claimant cannot comply with due to the symptoms of their illness or disability.

In the previous Incapacity Benefit regulations there existed a series of exempt groups which included that of severe mental illness. Provided the correct information was gathered from the GP (not always the case so that many service users fell through this safety net), there was no further obligations or interference on those with severe mental illness. One of the major changes that ESA will bring is that it will for the first time involve a vulnerable group of severely mentally ill people in compulsion and attendance at Jobcentres with staff who have no access to background knowledge about their condition, history, severity and risks associated – nor to reasons why they might not attend or respond appropriately. Knowledge of factors such as symptoms of severe mental illness, especially those

preventing people from going outdoors, being in strange places, meeting strangers, concentrating and remembering content of conversations when subject to voice hearing or intrusive or paranoid thoughts – and crucially awareness that lack of insight means that many service users will not admit or acknowledge the severity of illness.

In my experience DWP/JobCentrePlus policy makers routinely fail to appreciate both the numbers and the severity of illness of those people with severe & enduring mental illness who are living (mostly) in the community with support from CMHTs (community mental health teams). This support includes short term hospital admissions, or intensive home treatment, in acute crises as well as the usual home care & support from CPNs and social care staff in more stable periods - but always under the overall responsibility of a Consultant Psychiatrist (RMO - responsible medical officer). For instance in Wolverhampton we have approx 2,800 registered service users with our mental health teams but only 75 are in residential care homes plus 44 acute short/medium stay beds in our psychiatric hospital. Within the 2,800 there are approx 130 who are registered with the forensic psychiatric service which takes on people who are referred via court diversion, or under probation orders and those subject to Home Office supervision & restriction orders under the Mental Health Act.

All of those referred to adult mental health services from their GP (primary care) have to meet the criteria of severe enduring mental illness and have a care coordinator & care plan & clinical risk assessment under CPA (Dept of Health's mandatory guidelines).

In developing ESA's work related conditionality, for people with severe mental illness, DWP seems to have little apparent awareness of potential conflict between the crucial role of the Care Co-ordinator in the Dept of Health's CPA (Care Programme Approach) and related Mental Health Act provisions for supervision, treatment and co-ordination of care management for people living in the community with severe & enduring mental illness. As a direct result of, amongst others, the Christopher Clunis enquiry in the 1990s (which followed the fatal stabbing of a member of the public by a mental health service user) it was established that every service user assessed with a severe & enduring mental illness must have a nominated mental health professional as care co-ordinator. Usually this will be the ASW (approved social worker) or CPN, OT or Consultant Psychiatrist in the local area Community Mental Health team. All activities, treatments and all professionals involved must be recorded and co-ordinated through this care co-ordinator and form part of the care plan so that all issues/risks and contact were known to all professionals involved - this includes housing/employment/benefits and other non-health related community support.

The Role of the Care Co-ordinator: The care co-ordinator will be a mental health professional who will be responsible for drawing up a Care Plan and a Risk Assessment at regular reviews with the service user and the consultant psychiatrist and supervising that care provision & management. Care Plan lists the week's activities including attendance at Day Services or Day hospital for therapy or therapeutic activities, specific appointments with CPNs for depot injections for people who are not reliably self compliant with medication, regular home visits from support workers and others. At the same time under ESA, the jobcentre adviser could be promoting other activities to the claimant unaware of the existence of the care plan. Compliance with the care plan is vital to ensure well being

DWP in both Incapacity Benefit and ESA seems incapable of bringing itself up-to-date with arrangements which have been in place now for over 15 yrs for community based mental health services. DWP is still not able to change enquiry forms to ask the simple question of if you are having treatment or support for a mental illness do you have a care co-ordinator and/or consultant psychiatrist –if so what are contact details? It will be very difficult for our service users to keep up with their care plan if they are also being pressured, sometimes with compulsion and threats of benefit reductions, to attend and participate in work-related activity by JobCentre advisers who have no knowledge of the role or existence of care co-ordination and CPA.

We already have had instances where the JobCentre has not been willing to re-schedule appointments for our service users and where our service users have not felt able to disclose or explain full extent of mental illness and involvement with mental health services -which might have changed the Jobcentre's decision.

#### **Conflict with Psychiatric Treatment under Care of Consultant Psychiatrist:**

Condition management programme offering alternative treatments such as CBT from unqualified staff without proper co-ordination with adult mental health services. DWP is potentially now also involving on a mandatory basis people with severe & enduring illness with both employment support and Management of Condition Programmes. In Wolverhampton & the Black Country area we have a private agency SEETEC, on behalf of JobCentrePlus, aiming to provide CBT (Cognitive Behavioural Therapy) to ESA claimants without any apparent consultation or knowledge of that person's background, risks, history and current treatment with adult mental health services. The SEETEC treatment is by 'therapists' (in reality unqualified trainees) who are 'working towards a CBT qualification' under the supervision of an area manager who is an Occupational Psychologist (not a Clinical Psychologist). I feel that it is only a matter of time before a very serious & life threatening incident is triggered by unqualified, unaware intervention.

#### **Conflict & Duplication with Role of Employment Support & Vocational Rehabilitation:**

The new situation under ESA for people who first became ill and unable to work after October 2008 will drastically limit the scope of Permitted Supported Work for those with a severe and enduring mental illness. This will be at a time when many Mental Health Trusts are, for the first time, developing proper employment support services or 'Vocational Rehabilitation' which involve service users in the wider world as opposed to sheltered workshops. IPS (Individual Placement & Support) is the current buzzword. Mental Health employment support workers will find that most of their service users who are ESA claimants, despite having a severe and enduring mental illness, will not be able to make use of the permitted supported work scheme, forcing them to stop any useful activity after 52 weeks because their continuing severe mental illness prevents a move into work of 16 hrs or more and Tax Credits. This raises the legitimate concern that therapeutic activity (i.e. employment or vocational rehabilitation) which is medically and clinically prescribed and forms part of that persons treatment and Care Plan might have to be withdrawn after 52 weeks because of ESA rules whereas it can continue under Incapacity Benefit rules for those who first claimed before October 2008. A justifiable discrimination?

#### **Conflict with Supervised Community Treatment Orders:**



The new 2007 Mental Health Act introduces compulsory treatment orders for the first time to England & Wales (used in Scotland since 2005). In effect these add further legal compulsion to the issue of compliance by the service user with the activities and treatments listed in the Care Plan under Dept of health's CPA (Care Programme Approach). We should not have people in a situation where their compliance with these orders is threatened by Jobcentres requiring attendance and participation on programmes under threat of benefit reductions.

**Conflict with the Role of Forensic Psychiatry & Home Office Supervision Orders under sections 39/41 of Mental Health Act:**

In Wolverhampton the Forensic Psychiatry Service has capacity for approx 130 places to supervise people in the community who are either convicted of an offence or have been subject to a treatment order as an alternative; referrals come from Magistrates Court Diversion Schemes, Probation Orders but also the crucial role of supervising on behalf of the Home Office (Ministry of Justice) former detainees or convicted offenders under the provisions of the Mental Health Act. My colleagues who take on this role tell me that the conditions & restrictions laid down by the Home Office are often very tight and breach of conditions will lead to re-arrest. Again the care co-ordinator's role is crucial and people under these restrictions cannot be expected or compelled to take part in activities or programmes which conflict with their treatment plan or involvement in activities especially those which might bring into contact with general public without prior agreement with Home Office.

In order to minimise risk and preserve human rights of those living with severe and enduring mental illness, I would suggest the following amendments or remedies to ESA regulations

- All ESA claimants with mental illness who have a care coordinator under Dept of Health's CPA (Care Programme) should be exempted for any compulsion under the work related activity provisions of ESA and exempted from any benefit deductions for non-compliance/attendance. Alternatively place this group in the ESA Support Group.
- Place a statutory duty on all Mental Health trusts (and provide ring fenced funding by diverting otherwise duplicated funds from ESA advisers budget) to employ or provide a employment support/vocational rehabilitation service that will help people to retain jobs or find alternative jobs or training but as an integrated part of Care Planning & Treatment. Allowing support to be provided in a coordinated/integrated manner at a non time limited pace and with reference to person's individual condition and assessed risks of relapse.
- Amend ESA rules on Permitted Work (which is limited to 52 weeks only) and Permitted Supported Work to allow all who have a care co-ordinator under Dept of health's Care Programme Approach to access Permitted Supported Work (which is not limited to 52 weeks period)
- Amend the housing benefit regs which currently penalise those receiving ESA (contribution based) from earning upto £92 per week under permitted work

scheme but which disregard totally the part-time earnings income from those on ESA (income based) in the same circumstances.

I welcome your committee's interest in this matter and hope that the above is helpful.

## **Apprenticeships, Skills, Children and Learning Bill**

### **Letter to Ed Balls MP, Secretary of State for Children, Schools and Families, dated 10 March 2009**

The Joint Committee on Human Rights is considering the compatibility of the Apprenticeships, Skills, Children and Learning Bill with the requirements of human rights law.

We were grateful to receive from your Department prior to the Bill's publication a human rights memorandum outlining the consideration given to the human rights issues raised by the main policy proposals in the Bill, including explanations of why the Government believes that any interferences with Convention rights are justified and proportionate. This memorandum has assisted us in our scrutiny of the Bill, as in many cases it provided a more detailed explanation of your department's reasoning than is contained in the Explanatory Notes which accompany the published Bill. We will be encouraging other departments to follow your example as best practice in future.

The Committee welcomes a number of provisions in the Bill as measures which positively enhance the protection of human rights in the UK. Its scrutiny of the Bill has however identified a number of questions to which I would be grateful for your answers.

#### *(1) Education for detained young offenders*

The Committee welcomes the new obligations on Local Education Authorities in respect of the education of detained young offenders. However, it wishes to probe further the extent to which the Bill ensures equal access to special needs provision for children in detention. In its 2003 inquiry into the UNCRC, the Committee's predecessor received evidence of a Youth Justice Board audit indicating that as many as 50% of all young people in custody would qualify as having special educational needs (SEN), but that only 1% had formal SEN statements entitling them to special provision. The Committee found that the position of young offenders with special educational needs was "of particular concern" and therefore recommended that the Government legislate to provide a statutory right, not just to education, but to access special needs provision equal to that enjoyed by all other children.<sup>180</sup>

The Bill provides that when deciding whether education or training is suitable to meet the detained child's reasonable needs, the host LEA must in particular have regard to any special educational needs or learning difficulties the person may have.<sup>181</sup> This falls far short, however, of a statutory duty on the host LEA to ensure that provision is made to meet any recognised special educational needs that a detained child or young person may have, or the delivery of all of the special educational provision set out in the relevant part of

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<sup>180</sup> Tenth Report of Session 2002-03, above, at paras 58-59.

<sup>181</sup> New s. 18A(2)(b) Education Act 1996, as inserted by clause 47.

any SEN statement which the detained child or young person has. We note that at Second Reading you gave your assurance that the Government will take forward this issue “with great seriousness” and indicated that the Government will table amendments in Committee to make it clear that the obligations on local authorities to deal with young people in custody will be strengthened. To date those amendments have not been published.

**Q1. The Committee would be grateful if you could give it sight of these proposed amendments at the earliest opportunity, in draft if possible, to enable it to assess whether they ensure equal access to special educational provision for this group of children and young people amongst whom such special needs are particularly prevalent.**

*(2) Power to search pupils for alcohol, illegal drugs and stolen property*

The Explanatory Notes to the Bill are correct that powers to search for and seize alcohol, drugs and stolen property are in principle capable of being justified interferences with pupils’ human rights, and that there are safeguards contained in the Bill designed to ensure that the power is used proportionately. However, neither the Explanatory Notes nor the Departmental memorandum refer to any evidence demonstrating the necessity for the new powers to search for and seize alcohol, illegal drugs and stolen property. Sir Alan Steer’s 2005 Report of the Practitioners’ Group on School Behaviour and Discipline recommended that “the DfES should monitor, evaluate and publish a report on the use of the new legal power to search pupils without consent for weapons. In the light of that report, they should review whether the right to search should be extended in due course to include drugs and stolen property.” The material we have so far seen does not refer to any such review having been carried out, or any other evidence of the need to extend the existing power.

Interferences with Convention rights must be shown by evidence to be necessary. Giving teachers what are effectively police powers, without the accompanying training in the exercise of such powers or detailed codes of practice regulating their exercise, is a significant step which ought not to be taken lightly.<sup>182</sup>

**Q2. What evidence exists that there is a pressing practical problem concerning alcohol, illegal drugs and stolen property on school premises?**

**Q3. What evidence is there of the scale of that problem and of the underlying trend?**

**Q4. What evidence is there that the current powers to address the problem are inadequate?**

*(3) Obligation to record significant incidents involving use of force by staff on pupils*

The Committee welcomes as a positive, human rights enhancing measure the Bill’s new recording and reporting requirements on the use of force in schools and FE colleges. It notes, however, that the use of force in schools may need reconsidering more generally in light of recent developments concerning restraint in child custody, in particular the Court of Appeal’s recent decision that the use of physical restraint is not permissible for the

<sup>182</sup> The Committee expressed similar concerns about conferring police powers on immigration officers in the context of the UK Borders Bill.

purposes of good order and discipline because it violates the child's right to dignity and physical integrity in Articles 3 and 8 of the ECHR, interpreted in light of the UN Convention on the Rights of the Child,<sup>183</sup> the independent review of the use of restraint in juvenile secure settings, and the Government's response to that review.

**Q5. Does the Government intend to revise its 2007 Guidance on the use of force by staff in schools in light of the recent developments concerning the use of restraint in juvenile secure settings?**

**Q6. If so, how?**

**Q7. The Committee would be grateful to have early sight of a draft of such guidance in order to scrutinise it for human rights compatibility.**

*(4) UNCRC as strategic framework for Children's Plans*

The Committee notes that in its 2008 Concluding Observations on the UK, the UN Committee on the Rights of the Child, commenting on the UK Government's overall strategy for implementing the UNCRC, welcomed the fact that the UNCRC had been referred to in the Children's Plan for England, but expressed its continuing concern "that the Convention is not regularly used as a framework for the development of strategies throughout the State party and at the lack of an overarching policy to ensure the full realization of the principles, values and goals of the Convention."<sup>184</sup> Our predecessor Committee, in its Report on the Bill which became the Children Act 2004, was similarly critical of the failure of that Act to use the UNCRC as the overarching framework of provision for children in UK law.<sup>185</sup>

**Q8. What, if any, would be the Government's objection to the Bill being amended to require Children's Trust Boards**

**(a) to have regard to the need to implement the UNCRC when preparing its Children and Young People's Plan and**

**(b) to consult with children and young people in the preparation of their plans, as envisaged by Article 12 of the UNCRC?**

### **Letter from Sarah McCarthy-Fry MP, Parliamentary Under-secretary of State for Schools and Learners, dated 25 March 2009**

Thank you for your letter of 10 March 2009 about the compatibility of the Apprenticeships, Skills, Children and Learning Bill with the requirements of human rights law. We have set out below our answers to the additional questions you posed and hope these will assist you with your further considerations.

#### **Education of detained young offenders**

We are pleased the committee supports the new obligations we are placing on local education authorities in respect of the education of young offenders. Amendments were

<sup>183</sup> *R (C) v Secretary of State for Justice* [2008] EWCA Civ 882 (28 July 2008).

<sup>184</sup> UNCRC Concluding Observations, above, at pra. 14.

<sup>185</sup> Nineteenth Report of 2003-04, *Children Bill*, HL Paper 161, HC 537, at paras 14-21.

tabled on 11th March to insert a new Chapter 5A into the Education Act 1996, new section 312A and subsection 328(5)(aa) of that Act. Those amendments are enclosed with this letter and make further provision for persons detained in relevant youth accommodation including those with special educational needs.

We believe that it is essential that education and training in custody meets the reasonable needs of children and young people detained there, as far as is practicable within the custodial environment. However, we are also aware of the need to consider the practicalities of arranging and delivering highly specialised and discrete provision for persons in custody, the majority of whom spend only short periods in custody. Therefore, we believe our amendments provide a robust and practicable solution to ensure that the special educational needs of children and young people in juvenile custody can be appropriately supported.

New section 562C will require Host LEAs (by which we mean the local education authority in whose area the juvenile custodial establishment is located) to use its best endeavours to secure that appropriate special educational provision is made for those detained person who had a statement of special educational needs maintained for them prior to their detention in juvenile custody. Section 562C will also require the authority that was maintaining the statement to keep a copy of the statement whilst the person is detained.

New section 562F will make provision for the transfer of SEN statements and makes provision to ensure the host authority is aware that an authority was maintaining a statement of special education needs for the person prior to their detention.

When the person is released, new requirements will be put on the host LEA to inform the home LEA of the person's release, or if different, the LEA that was responsible for maintaining the statement prior to the person's detention. This will help ensure that the appropriate authorities are aware that the person has been released so that where necessary, special educational provision can be made for the person in the community.

In addition, new section 562G will require the host LEA to notify the person's home LEA on their release if they are of the opinion that a person in juvenile custody may have special educational needs (and they do not have a SEN statement). This will ensure that the home LEA is aware that the person may need an assessment on their release and will help ensure that information flows between the home and host LEA.

Amendment 352 amends section 207 of the Education Act 2002 to enable regulations to be made to allow the host LEA to recoup the cost of making appropriate special educational provision for a person from the authority in whose area the person belongs. This will help ensure that the host local education authority is able to meet the special educational needs of persons in custody and is able to recover these costs which are over and above the core education costs in custody.

We have also tabled amendments (NC19) to ensure that a child's statement of special educational needs, which was maintained before the person's detention, is revived and reviewed on their release from custody. This will put a clear framework in place for ensuring that a person's special educational needs are picked up again on their release from custody and should ensure that young people's needs continue to be addressed when they return to their home community.

### **Power to search pupils for alcohol, illegal drugs and stolen property**

You asked what evidence there is that a practical problem in schools exists.

The items included in this clause – alcohol, controlled drugs and stolen property - were identified by behaviour expert Sir Alan Steer as ones that schools would be most likely to need to search for. This was in Sir Alan’s report to the Secretary of State last July on pupil behaviour issues. It reflected Sir Alan’s own experiences as a serving head teacher and the consultations that he undertook with other practitioners during the course of his review. This included the six main teacher professional associations, local government and governor representatives and other key stakeholders on the Ministerial Stakeholders’ Group on Behaviour and Attendance; the Practitioners’ Group on Behaviour and Attendance; the Secondary Heads’ Reference Group; the Drug and Alcohol Education Advisory Group and the national drugs co-ordinator for the Association of Chief Police Officers. The decision not to include a wider range of items within the clause is also, in large part, due to considerations regarding article 8 of the European Convention on Human Rights.

Sir Alan’s recommendation reflected a concern expressed by the former Practitioners’ Group on School Behaviour and Discipline, which he chaired, in their October 2005 report on Learning Behaviour. The Practitioners’ Group particularly highlighted problems of pupils carrying drugs or stolen property. Since 2005, public and media concerns have been expressed over issues around alcohol abuse by some young people. Sir Alan’s July 2008 report noted that “my view, supported by a number of those I have spoken to during the course of this review, is that alcohol is a particular problem”.

Data from a number of sources suggest that alcohol, drugs and stolen items are present in schools:

- In 2006/07 there were 400 drug and alcohol related permanent exclusions (4.6% of the total number were for this reason) and 210 permanent exclusions for theft (2.4%).
- Of the fixed period exclusions recorded 8,180 (1.9%) were drug and alcohol related and 9,440 (2.2%) were for theft.
- 9% of 10-17 year olds in the 2006 crime survey by the Home Office reported stealing something at school in the preceding 12 months.
- Bullying data from the Longitudinal Survey of Young People in England tell us that 3% of 13-14 year olds had been made to hand over money or possessions to bullies in the previous 12 months, falling to 1% when they reached age 15-16.
- In the MORI Youth Survey 2008 -young people in mainstream education, 33% of pupils said they had stolen something in school (an increase from 30% in 2005 and 29% in 2004).

In a survey of 1,500 teachers for the NUT (published in 2008), 20% of respondents reported witnessing possession of drugs within their school in the year preceding the survey and over 20% reported witnessing possession of an offensive weapon over the previous year (‘offensive weapon’ is not defined).

You also asked to what extent the existing powers are insufficient.

There is no existing power to search pupils without consent for any of these items. The obligation of schools to exercise a duty of care towards pupils and staff implies a need for such a power.

We have anecdotal evidence that schools already search pupils for these items. There are difficulties in determining whether or not a child has consented to being searched. The clause will provide clear and explicit powers, within a framework of safeguards.

Making clear in law that searches for these specific items can be undertaken, including setting out a framework of safeguards for the searching process, will help to safeguard the interests of both school staff and pupils.

In the case of school staff, the new power will provide protection from having their disciplinary authority challenged and overturned. The risk of legal challenge to such authority was highlighted in the 1989 report of Lord Elton's Committee of Inquiry into Discipline in Schools and underlined by the 2005 report of the former Practitioners' Group, which noted how the Gillick competence principle means that the risk of such challenge is now even greater, particularly in relation to older pupils. It is not in the interests of pupils for school staff to have their authority to search for alcohol, controlled drugs or stolen property overturned. Alcohol and drugs are an obvious risk to the health and well-being of children, and a common form of bullying is to take items from a child.

Where force is used to search a pupil, the Bill introduces a requirement for this to be recorded and reported to the parent.

### **Obligation to record significant incidents involving use of force by staff on pupils**

You asked if we will be reissuing the 2007 Guidance on the use of force by staff in schools in the light of the recent developments concerning the use of restraint in juvenile settings.

We do anticipate revising this guidance to take account of the new Bill clause, issues raised during passage of the Bill clause and also as appropriate developments arising from the review of use of restraint in juvenile secure settings. An outline will be provided for the Apprenticeships, Skills Children and Learning Bill Committee later this month and we will send you a copy at the same time.

Issues arising from the review of use of restraint in juvenile secure settings that we intend to reflect in the revised guidance include:

- making clear that certain restraint techniques should not be used because of the particular physical risks they pose to children and young people;
- recording being done within 24 hours;
- reporting arrangements to include an opportunity for the child or young person to give their views – this will strengthen existing advice that differing accounts of the incident be recorded. It will be reflected by a change to the model form; and
- the importance of reporting concerns to external agencies such as other local authority children's services, the local Children's Safeguarding Board, the Health

and Safety Executive, youth offending teams and the police where a child or young person may be at risk of significant harm – this will strengthen existing advice that post incident support could involve such reporting.

The revised guidance will also reiterate and as appropriate strengthen references to:

- consulting with and informing staff, pupils and parents about the use of force policy;
- good school practice in assessing the frequency and severity of incidents that are likely to occur, using historical patterns as a starting point; and
- the importance of schools assessing carefully the training needs of staff, including needs for refresher training.

The current guidance includes a model form for recording incidents of use of force in schools similar to that specified in the review of restraint in juvenile secure settings. The Bill clause will make it a legal requirement for schools to have regard to the section of the guidance on recording and reporting incidents of use of force in schools.

Because of the fundamental differences in context between pupils in schools and young offenders in the secure estate, the Government takes the view that not all of the recommendations arising from the review of restraint in juvenile secure settings are applicable to schools. However the guidance will suggest that, where young people move between a school and a juvenile secure setting, there should be an appropriate exchange of information.

### **UNCRC as strategic framework for Children's Plans**

You asked what objections, if any we would have to the Bill being amended to require Children's Trust Boards to

- a) have regard to the need to implement the UNCRC when preparing its Children and Young People's Plan and
- b) consult with children and young people in the preparation of their plans as envisaged by Article 12 of the UNCRC.

The duty to comply with the obligations under the UNCRC lies with the UK as the relevant State party. We do this through a mixture of legislative, executive and judicial action. Insofar as our legislation is concerned, we are content that it is consistent with the provisions of the Convention, and we therefore consider that it is unnecessary to have any specific provision falling on the Children's Trust Board to have regard to the UNCRC when preparing its plan.

The broader issue of embedding the UNCRC into UK policy and practice will be covered in the forthcoming Green Paper to discuss the introduction of a Bill of Rights and Responsibilities. The Government is keen to hear views on the Green Paper and would want to consider any further legislative steps in the light of that consultation

On the question of consulting children and young people, it remains our commitment that they should be consulted when the Children and Young People's Plan is being drawn up –



and so we will be repeating the requirement for this in the new regulations being drawn up under new section 17 of the Children Act 2004 (inserted by clause 185 of the Bill).

## **Health Bill**

### **Letter from Anne Keen MP, Parliamentary Under-secretary, Department of Health and Liam Byrne MP, Minister of State, Home Office, dated 3 July 2008**

#### **Joint Committee on Human Rights Conference on healthcare for failed asylum seekers.**

As you may be aware, the Department of Health and Home Office are currently jointly reviewing the rules governing access to the NHS by foreign nationals. The review was announced on 7 March 2007 in the Home Office publication, *Enforcing the Rules: A new strategy to ensure and enforce compliance with our immigration law*.

The review is due to be completed shortly and will be followed by a full public consultation. As a result, we are unable to attend your conference regarding healthcare for failed asylum seekers whilst the review is still being completed. We think we could have a much more productive discussion once the review has been completed and is sent out to public consultation.

The review is considering a range of issues regarding immigration and asylum particularly the eligibility of failed asylum seekers and their children. An equality impact assessment will also be carried out as part of this review process, in relation to both primary medical services and secondary care.

We are aware that there has been speculation as to the outcome of the review in respect of failed asylum seekers, but that is all it is – speculation. No decisions have yet been made, and we are committed to a full public consultation on any proposals before final decisions are made.

We offer our sincere apologies for the fact that we are unable to attend your conference and hope that you will take the opportunity to respond to the public consultation which is due to be issued shortly.

### **Letter from the Chairman to Ann Keen MP and Liam Byrne MP, dated 31 July 2008**

#### **Human rights issues in healthcare for asylum seekers and trafficked persons**

My Committee held a meeting on Wednesday 9 July with a number of interested parties to discuss the provision of health care for asylum seekers. As you will recall, you decided not to attend the meeting because the Government has not yet produced its new proposals on this issue.

I am attaching the key conclusions of our meeting, to enable you to feed these into your review of health care for asylum seekers. I understand that these conclusions would be most helpful to you now, rather than during the subsequent public consultation.

The overall message we heard is that there are still significant human rights concerns about the provision of health care for asylum seekers.

My Committee is particularly concerned about the current lack of information about the Charging Regulations since the ruling on the case *R v Secretary of State for Health*. I would be grateful if you could inform us of what plans the Department of Health has for drawing up clear guidelines, and of making these available to all relevant parties, including clinicians, overseas payment officers and asylum seekers themselves.

My Committee noted with concern reports of the way in which asylum seekers were treated by some overseas payment officers. Asylum seekers are often vulnerable individuals, sometimes with complicated mental and physical health conditions: being verbally abused by these officers goes against standards of common humanity and increases stress, perhaps thereby exacerbating existing health conditions.

I also flag up the importance of providing free primary care to asylum seekers. We heard that if asylum seekers were not able to access free primary care then human rights abuses would likely increase. Public health concerns would also increase: we heard that failure to treat infectious diseases poses a risk not only to asylum seekers, but to the UK population at large.

We understand that there are reasons on grounds of common humanity, and on public health grounds, for providing treatment to all asylum seekers with infectious diseases. In particular, we continue to be concerned that treatment of HIV/Aids is not provided free of charge for asylum seekers. We understand that the Government is committed to tackling HIV/Aids on a global scale and yet is not doing so adequately within the United Kingdom. I am concerned about the lack of cohesion across Whitehall on this issue, and so I am copying this letter to Gillian Merron MP, Parliamentary Under-Secretary of State for Department for International Development.

My Committee is concerned that there has been little progress towards ensuring that the human rights of asylum seekers are protected, both in the free and accessible healthcare available to them, and in the way that they are treated within the healthcare system. I trust that the outcome of your ongoing review and public consultation will be to ensure that human rights are central to Government policy towards asylum seekers.

### **Letter from Ann Keen MP, dated 1 September 2008**

Thank you for your letter of 31 July to Liam Byrne and me about the conclusions of the meeting of the Joint Committee on Human Rights on 9 July. We will be happy to consider these conclusions as part of the upcoming consultation exercise on the review of access to the NHS by foreign nationals.

Firstly, I must emphasize that within the *NHS (Changes to Overseas Visitors) Regulations 1989*, as amended, asylum seekers whose claims have not yet been decided have full, free of charge access to NHS treatment, including for HIV. We have no plans to change this arrangement. Those asylum seekers whose applications have been rejected, are not exempt from charges, for hospital treatment except where the treatment itself is exempt from charges, or for other courses of treatment begun whilst their application was under consideration and which need to continue while they remain in the UK.

The recent Judicial Review ruling found that failed asylum seekers can, in certain circumstances, be considered to meet the ordinary residence test which is the determinant of who is automatically entitled to free NHS hospital treatment. This means that each NHS Trust must decide whether each failed asylum seeker they treat meets this test, based on the individual circumstances of that failed asylum seeker. If they do, then they cannot be charged for their treatment. Since this ruling is now law, guidance was issued by the Department of Health to all NHS Trust Chief Executives on 1 May, and a copy issued directly to overseas visitors' managers in Trusts, where possible.

The Department of Health has decided to appeal this ruling because of wider implications across health and Government. However, we are mindful of the issues facing failed asylum seekers, and so we are considering these as part of the review of access.

In relation to primary care, I can confirm that the review of access will consider the key preventative and public health role of NHS primary medical care as well as international law and humanitarian principles.

You also raised the issue of asylum seekers being subject to verbal abuse by NHS staff. Clearly this is unacceptable and I would remind you that hospitals have complaints procedures that all patients have the option to use.

In relation to HIV, I would like to point out that much is already underway to address issues such as HIV prevention and the level of undiagnosed HIV in England, especially for those groups most in need, including people from African communities, many of whom may be asylum seekers. We remain committed to action on HIV and recent work has included action on stigma, strengthening our national health promotion programmes and an increase of 17.6 per cent in the AIDS Support Grant paid to local authorities. Thanks in part to open access confidential services, the early introduction of harm minimisation programmes, sustained health promotion and awareness campaigns, estimated HIV prevalence in the UK remains relatively low and is much lower than countries such as France, Spain, Portugal and Italy.

For African communities we continue to commission innovative work from the African HIV Policy Network and their community partners, to increase awareness and encourage people to test earlier for HIV. We have greatly reduced the mother to child transmission of HIV through our policy of offering and recommending an HIV test to every pregnant woman. Again, many of these women are from African communities living here. We are also taking forward work to address HIV related stigma and discrimination, and will be commissioning additional work to reduce the level of undiagnosed HIV in the population.

Finally, we do work closely with other Government departments, including the Department for International Development (DfID). Action includes contributing to *Achieving Universal Action*, published earlier this year, which sets out how the Department of Health supports more broadly DfID's strategy on HIV and AIDS in the developing world. The Department and DfID also worked together in participating in the 2008 United Nations report and high-level meeting on AIDS.

## List of Reports from the Committee during the current Parliament

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First Report	The UN Convention on the Rights of Persons with Disabilities	HL Paper 9/HC 93
Second Report	The Work of the Committee in 2007-08	HL Paper 10/HC 92
Third Report	A Bill of Rights for the UK? Government Response to the Committee's Twenty-ninth Report of Session 2007-08	HL Paper 15/ HC 145
Fourth Report	Legislative Scrutiny: Political Parties and Elections Bill	HL Paper 23/ HC 204
Fifth Report	Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation 2009	HL Paper 37/HC 282
Sixth Report	UN Convention on the Rights of Persons with Disabilities: Government Response to the Committee's First Report of Session 2008-09	HL Paper 46/HC 315
Seventh Report	Demonstrating respect for rights? A human rights approach to policing protest	HL Paper 47/HC 320
Eighth Report	Legislative Scrutiny: Coroners and Justice Bill	HL Paper 57/HC 362
Ninth Report	Legislative Scrutiny: Borders, Citizenship and Immigration	HL Paper 62/HC 375
Tenth Report	Legislative Scrutiny: Policing and Crime Bill	HL Paper 68/HC 395
Eleventh Report	Legislative Scrutiny: 1) Health Bill and 2) Marine and Coastal Access Bill	HL Paper 69/HC 396
Twelfth Report	Disability Rights Convention	HL Paper 70/HC 397
Thirteenth Report	Prisoner Transfer Treaty with Libya	HL Paper 71/HC 398
Fourteenth Report	Legislative Scrutiny: Welfare Reform Bill; Apprenticeships, Skills, Children and Learning Bill; Health Bill	HL Paper 78/HC 414

### Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty-First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270

Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132
Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501
Eighteenth Report	Government Response to the Committee's Sixth Report of Session 2007-08: The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 103/HC 526
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554
Twenty-First Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies	HL Paper 116/HC 635
Twenty-Second Report	Government Response to the Committee's Fourteenth Report of Session 2007-08: Data Protection and Human Rights	HL Paper 125/HC 754
Twenty-Third Report	Legislative Scrutiny: Government Replies	HL Paper 126/HC 755
Twenty-Fourth Report	Counter-Terrorism Policy and Human Rights: Government Responses to the Committee's Twentieth and Twenty-first Reports of Session 2007-08 and other correspondence	HL Paper 127/HC 756
Twenty-fifth Report	Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008	HL Paper 132/HC 825
Twenty-sixth Report	Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill	HL Paper 153/HC 950
Twenty-seventh Report	The Use of Restraint in Secure Training Centres: Government Response to the Committee's Eleventh Report	HL Paper 154/HC 979

Twenty-eighth Report	UN Convention against Torture: Discrepancies in Evidence given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq	HL Paper 157/HC 527
Twenty-ninth Report	A Bill of Rights for the UK?: Volume I Report and Formal Minutes	HL Paper 165-I/HC 150-I
Twenty-ninth Report	A Bill of Rights for the UK?: Volume II Oral and Written Evidence	HL Paper 165-II/HC 150-II
Thirtieth Report	Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill	HL Paper 172/HC 1077
Thirty-first Report	Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008	HL Paper 173/HC 1078
Thirty-second Report	Scrutiny of Mental Health Legislation: Government Response to the Committee's Sixteenth Report of Session 2007-08	HL Paper/ HC 1079

### Session 2006–07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350
Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human Rights Act	HL Paper 77/HC 410
Tenth Report	The Treatment of Asylum Seekers: Volume I Report and Formal Minutes	HL Paper 81-I/HC 60-I
Tenth Report	The Treatment of Asylum Seekers: Volume II Oral and Written Evidence	HL Paper 81-II/HC 60-II
Eleventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 83/HC 424
Twelfth Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 91/HC 490
Thirteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 105/HC 538
Fourteenth Report	Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)	HL Paper 106/HC 539
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 112/HC 555
Sixteenth Report	Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights	HL Paper 128/HC 728
Seventeenth Report	Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers	HL Paper 134/HC 790
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume I- Report and Formal Minutes	HL Paper 156-I/HC 378-I

Eighteenth Report	The Human Rights of Older People in Healthcare: Volume II- Oral and Written Evidence	HL Paper 156-II/HC 378-II
Nineteenth Report	Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning	HL Paper 157/HC 394
Twentieth Report	Highly Skilled Migrants: Changes to the Immigration Rules	HL Paper 173/HC 993
Twenty-first Report	Human Trafficking: Update	HL Paper 179/HC 1056