

# **A Human Rights Committee for Westminster**

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# CONTENTS

<b>EXECUTIVE SUMMARY</b>	<b>3</b>
<b>INTRODUCTION</b>	<b>4</b>
<b>PART I</b>	<b>5</b>
<b>THE BACKGROUND</b>	<b>5</b>
<b>Establishment of the Joint Parliamentary Committee</b>	<b>6</b>
Table 1: Example of issues which have been raised in Strasbourg which may need revision before 2 October 2000	7
<b>PART II</b>	<b>9</b>
<b>STRUCTURE OF THE COMMITTEE</b>	<b>9</b>
<b>Composition</b>	<b>9</b>
Table 2: Examples of the sizes of Committees	11
<b>Procedure</b>	<b>12</b>
Time	12
Support	12
<b>Relationship with other bodies</b>	<b>12</b>
<b>Impact of the Committee's recommendations</b>	<b>13</b>
<b>PART III</b>	<b>14</b>
<b>FUNCTIONS AND TASKS OF THE COMMITTEE</b>	<b>14</b>
<b>Scrutinising legislation</b>	<b>14</b>
Draft legislation	14
Primary Legislation	16
Remedial orders	17
Delegated legislation	18
Table 3: The Australian Model	18
Conclusions	19
<b>Monitoring of policy and practice for Human Rights Act compliance</b>	<b>20</b>
<b>Conduct of enquiries</b>	<b>20</b>
<b>Types of enquiries</b>	<b>20</b>
Table 4: The South African Model	21
Table 5: Strasbourg caselaw still unresolved	22
Table 6: Cases pending before the plenary Court against the UK	22



## Executive Summary

- The leader of the House of Commons, Margaret Beckett, has confirmed that Parliament will be asked to establish a Human Rights Committee. The Committee will be a Joint Committee of both Houses with a wide range of tasks. These will include inquiries into human rights issues and the scrutiny of legislation for compliance with the Human Rights Act.
- Scrutinising legislation will be a key role. While the government will not want the legislative process to be unduly complicated or lengthened, it will be important that the committee has the freedom to subject Bills to a human rights impact assessment as it considers necessary.
- The tasks and demands on the committee will far exceed its capacity. The main constraint is sitting time, likely to be a maximum of 70 to 100 hours a year. The committee will need to plan its priorities and work programme very carefully. It can extend its reach through cooperation with other committees, and imaginative use of staff and outside experts.
- The effective functioning of the Committee will depend on its access to legal advisers and human rights expertise. It should have its own dedicated staff, and not depend on part-time staff loaned by both Houses. The Committee will also need to be able to call on outside experts and appoint special advisers where appropriate.
- Given the nature of the Committee's work it is important that it will operate in a robust and non-partisan fashion. The government should not automatically seek a majority. Membership of the committee should include non-lawyers, and be representative of the territories of the UK. The committee should be one on which parliamentarians will be keen to serve throughout a Parliament.
- There is a difficult balance between using the committee as a central and expert resource, and the need to mainstream human rights concerns and considerations throughout Parliament and its committees. The Human Rights Committee must lead through its expertise and strong example, but seek to ensure that its work guides and influences all other committees.
- A successful and respected committee will demonstrate that Parliament can take the lead in promoting democratic rights, and in holding government accountable to human rights standards. Public education and awareness raising are also important in improving human rights compliance, but are beyond the capacity of a parliamentary committee. The first major test of the new parliamentary committee will be an inquiry into the need for a UK Human Rights Commission.

## Introduction

On 27 May 1999 the Constitution Unit held a private seminar, hosted in the House of Lords, to discuss the practical issues which will need to be addressed when setting up the Parliamentary Human Rights Committee. The seminar based around a discussion paper brought together parliamentary clerks, lawyers, academics, senior civil servants, and NGOs who all generously gave of their time to contribute to fleshing out some of the issues which will arise in the coming months as the Committee begins its existence. The contribution of time, knowledge and fresh ideas from all the participants was highly valuable.<sup>1</sup> This briefing is the result, but should not be taken to represent the views of the participants. The briefing is divided into three sections:

- Part I provides a brief background to the establishment of the Committee,
- Part II examines the possible structure of the Committee,
- Part III examines the likely agenda and responsibilities of the Committee

The establishment of a robust, respected human rights committee at Westminster will be an important step in the development of a human rights culture in the UK. This briefing intends to flag some of the issues which will be central to the success of that committee.

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<sup>1</sup> The participants in the seminar also had the benefit of two leading pieces of work on the role of a human rights committee in Westminster: Professor Blackburn, 'A Human Rights Committee for the UK Parliament', [1998] *EHRLR* Issue 5 p. 534, Ian Bynoe and Sarah Spencer, *Mainstreaming Human Rights in Whitehall and Westminster*, IPPR, 1999. A position paper on the Human Rights Act and Parliamentary Scrutiny, reflecting work in progress by Charter 88, Constitution Unit, IPPR, JUSTICE, King's College Incorporation Project, Liberty and the Public Law Project was also circulated at the meeting.

# PART I

## The Background

*“Following the passage of the Human Rights Act 1998, the then Leader of the House of Commons told the House on December 14 1998 that the Government wishes there to be a Standing Joint Committee on Human Rights, whose remit will include the examination of draft legislation where there is doubt about compatibility with the ECHR. On the basis of our experience the two Houses should establish a specialist Human Rights Committee as soon as possible.”<sup>2</sup>*

In the White Paper, *‘Rights Brought Home’*<sup>3</sup>, which set out their plans with respect to incorporation of the European Convention on Human Rights, the government repeated the intent present in its earlier consultation paper, *‘Bringing Rights Home’* that

“Parliament itself should play a leading role in protecting the rights which are at the heart of parliamentary democracy.”<sup>4</sup>

It goes on to say that how this is achieved is a matter for Parliament to decide, but, in the Government’s view, the best course would be to establish a new Parliamentary Committee with functions relating to human rights. In *‘Bringing Rights Home’* Labour indicated that,

“The Committee would have a continuing responsibility to monitor the operation of the new [Human Rights] Act and other aspects of the UK’s human rights obligations. It would have the powers of a select committee to compel witnesses to attend. Where new legislation was identified as having an impact on human right issues it could be subject to scrutiny by the Joint Committee. The committee would be able to call on other bodies in discharging its responsibilities.”

*‘Rights Brought Home’* goes on to say that,

The new Committee might conduct enquiries on a range of human rights issues relating to the Convention, and produce reports so as to assist the Government and Parliament in deciding what action to take. It might also want to range more widely, and examine issues relating to the other international obligations of the United Kingdom such as proposals to accept new rights under other human rights treaties.<sup>5</sup>

On 9 November 1998, the Human Rights Act received its Royal Assent. On 14 December 1998, Margaret Beckett, announced:

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<sup>2</sup> Para. 16 Joint Committee on Financial Services and Markets - First Report, 28 April 1998.

<sup>2</sup> CM 3782.

<sup>3</sup> *Ibid* para. 3.6.

<sup>5</sup> *Ibid* para. 3.7.

... I am pleased to announce today that both Houses will be asked to appoint a Joint Committee on human rights. It is intended to set up that Committee before the Human Rights Act 1998 comes fully into force so that it will have time to prepare its work..... We envisage that the Joint Committee's terms of reference will include the conduct of inquiries into general human rights issues in the United Kingdom, the scrutiny of remedial orders, the examination of draft legislation where there is doubt about compatibility with the ECHR, and the issue of whether there is a need for a human rights commission to monitor the operation of the Human Rights Act....It is not intended that the Joint Committee will have a role in commenting on the handling of human rights overseas. .... It is specifically geared to scrutiny within the United Kingdom.<sup>6</sup>

The Joint Parliamentary Committee on Human Rights (JPCHR) is yet to be established. However on 18 May 1999 in reply to a Parliamentary question, the Home Secretary, Jack Straw, announced that it is planned to bring the Human Rights Act into full force on 2 October 2000. With a date for implementation now set, the need to establish the JPCHR is pressing.

The Human Rights Act introduces a constitutional constraint on the government in a manner unique to British constitutional history, yet in line with the large majority of other modern constitutional democracies. The JPCHR, with a specific remit to monitor policy and legislation for compliance with the Act, will be a new, important and central committee to the functioning of Parliament. The JPCHR will have the leading role in ensuring that this new constitutional arrangement is effectively implemented and that the standards and values which the Human Rights Act imports are an integral part of Parliament's business. The Committee will of necessity be a form of hybrid committee, with a remit akin to a select committee, but also with the legislative scrutiny function of a standing committee. With the doctrine of Parliamentary sovereignty carefully preserved under the structure of the Human Rights Act it is appropriate that Parliament demonstrates that it has the capacity to uphold and promote human rights standards and to hold the executive accountable to those standards. Given the significance of this role it is important to ensure that the Committee is provided from the outset with appropriate powers and support.

### **Establishment of the Joint Parliamentary Committee**

It is now beyond doubt that Westminster will have its Joint Parliamentary Committee, but the government has not yet announced when the Committee will be set up. The push must however be for the Committee to be established as soon as possible, and a target date is the autumn session of 1999. To the Commons, Margaret Beckett stated that it was intended to have the Committee well in place before the Act was brought into force so that it could prepare its work. If the Committee is established in October 1999, it would then have just under a year to prepare before the Human Rights Act is brought fully into force. Such a lead-in time is not only desirable but necessary as the need for the Committee to begin its tasks is already evident.

The clearest example of this is in the field of legislative scrutiny. The obligation to ensure that all new legislation is compliant with the Human Rights Act was

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<sup>6</sup> House of Commons Hansard Debates for 14 December 1998, Column 604.

triggered by bringing s. 19 of the Act into force on 24 November 1998. The section requires every Minister responsible for introducing a Bill into either House to make a statement of compatibility, (i.e a statement that in his view the provisions of the Bill are compatible with the Convention rights), or a statement that although unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill. Reviewing legislation, particularly in draft form, to see if it does in fact meet the standards which a s.19 statement demands, will require in several instances the resources of a specialised body. This was the experience of the Joint Committee on Financial Services and Markets. The *ad hoc* committee established to study the draft Financial Services and Markets Bill found itself addressing questions mainly of European Convention law. In its first report in April 1999 the Committee therefore recommended that on the basis of their experience a specialised human rights committee be established as soon as possible.

It is not just new legislation which would already fall into the remit of the Human Rights Committee, but there are several areas of existing UK law which have been identified as falling foul of the standards of the Human Rights Act. In some cases the failings have been identified by way of judgments of the European Court of Human Rights. In other cases the legislation has been identified by departments within Whitehall themselves as posing a potential violation of the Convention. In both cases the Committee should be expected to play a role in the process which seeks to rectify the problem and to promote compliance. That process may include the conduct of an enquiry in order to provide recommendations on how to address a social policy issue - e.g. regulating the law governing parental chastisement. On the other hand it may simply be a review of legislative proposals. For example legislation is proposed to address the absence of a statutory basis for the right to intercept staff e-mails and telephone calls. This legislation should be subject to scrutiny by the JPCHR. Which issues the Committee deals with may depend on the speed at which the responsible departments determine the action they will take if any to respond to potential conflict with the Act. The Committee could be involved in determining which issues should be prioritised.

*Table 1: Example of issues which have been raised in Strasbourg which may need revision before 2 October 2000*

- Guidelines on civil servants' restrictions on participation in political activities, duty of confidentiality
- Planning process enforcement issues related to gypsy sites
- A range of criminal justice and Prison service issues including
  - Evidence obtained under compulsory investigative powers
  - Mental health review tribunals
  - Trial of juveniles in adult courts
  - Blasphemy
  - Inference to be drawn from silence

The Committee should have a role in scrutinising the action which is to remedy the deficiencies in human rights compliance which these issues have raised.

The Committee needs to be established as soon as possible, so that it can begin to provide a central resource within Westminster on human rights expertise. Expert scrutiny is required of new bills and draft bills; and existing law needs to be reviewed to remedy provisions which are known to be non compliant.

## PART II

### Structure of the Committee

#### Composition

##### *Joint Committees: two models*

The model for the Westminster Parliamentary Committee will be a Joint Committee of both Houses. In theory this provides an option for the committee to sit as a single committee, or for there to be two committees who meet jointly for some purposes but are also free to operate within the sphere of their own House as appropriate.

The establishment of two committees who would meet jointly for some purposes would provide a certain amount of flexibility with respect to division of labour between the committees and perhaps provide an opportunity for the committees to undertake more tasks. However, the model clearly favoured is a single committee composed of members from both Houses. Joint Committees are becoming a more regular feature in Westminster, as the two traditions of the Commons and the Lords learn to work closer together. There has been for some time the Joint Committee on Statutory Instruments, and recently the *ad hoc* Joint Committee on Parliamentary Privilege. In order to scrutinise draft legislation, Joint Committees have been established such as the Joint Committee on the draft Financial Services and Markets Bill, and the Joint Committee on the draft Local Government (Organisation and Standards) Bill.

In the context of the Human Rights Committee, the use of a joint committee is useful in so far as it means that there will be a single, central guiding committee on human rights policy in Westminster. This prevents two committees emerging who provide divergent views on human rights compliance. It also encourages a co-operative framework to develop in which the two traditions of the Lords and of the Commons can best work. The success of the human rights committee will also vitally depend on the provision of excellent legal advice, but most importantly human rights advice. It is clearly more efficient to provide this service to a single committee rather than have to provide two sets of human rights expertise.

##### *Overall Balance*

Select Committees traditionally reflect the composition in their own House. The government has a majority on Commons Select Committees, but not in the Lords. A Joint Committee reflects the balance in each House, and the government will not necessarily have a majority. The Committee of Selection in each House operates independently: no regard is had to the overall balance, in party terms, skills or expertise. For such an important Committee it would be desirable for the two Houses to consult with each other.

Achieving equal representation would mean that account needs to be taken not just of the balance from within the Commons and within the Lords, but of the balance which will result from the combined total of members. The committee needs to have an appropriate mix of skills and experience; and the appointment procedure needs to ensure that the committee will act in a relatively non-partisan fashion and that it will be robustly independent of the executive.

The Joint Committee on Parliamentary Privilege had 12 members, six from the Lords and six from the Commons. From the Lords, there were two Labour members, two Conservative members, one Liberal Democrat and one Cross-Bench member. From the Commons there were four Labour members, one Conservative and one Liberal Democrat. The overall effect of the membership was to give Labour (the government) six members, and six to non-government members.

In Australia, the Senate Committees have three of their six members appointed by the government, and three by the opposition. They operate in a bipartisan fashion. One result of this can be that where a controversial issue threatens to undermine the bipartisan relations, that it is avoided rather than addressed. This is a risk that has to be faced but it is preferable to the committee being dominated by a government majority. This risk could also be minimised by the provision to the committee of the services of effective human rights expertise. Where expert advice from support staff is available then this guidance may help to defuse areas of potential controversy.

#### *Membership criteria*

The role of the Whips in suggesting who might sit on a committee will be an important factor in determining the composition of the committee. Effort should be made to ensure that the committee is not a legally driven committee, but that it represents a range of interests in both Houses. Given the constitutional role of the committee it is also suggested that it would be inappropriate for any serving judge to sit on the committee.<sup>7</sup> As the committee will have a key role in evaluating legislation for human rights compliance a judge may find himself in a position where he is required to rule in court on the compatibility of legislation with the Human Rights Act, having partaken in the deliberations on compliance in the committee.

As with many new institutions, the precedent set by the first Chair will be formative for the committee. As the committee will be dealing with questions of human rights law, one preference may be to seek a chair with legal experience. This runs the risk of establishing a committee which is driven by legal criteria and sees itself primarily as offering advice on technical legal compliance with human rights. The committee's value will lie in its ability to evaluate the merits in human rights terms of government proposals and practice, and such a role goes beyond technical legal advice. A chair with a background in human rights which goes beyond the law could set a more imaginative agenda for the committee.

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<sup>7</sup> In a reformed House of Lords, it may be that sitting-judges are no longer part of the House.

The constitutional role of the committee also renders it desirable to have representation from all the nations of the UK on the committee. Likewise, given the nature of the committee, thought should be given to ensuring where practical a suitable balance of gender, race and religion on the committee.

Traditionally Joint Committees are also comprised of equal members of both Houses.<sup>8</sup> This would seem perfectly acceptable: there is a lot of human rights expertise in the Lords and it is a common function of second chambers overseas.

It is also desirable that the Committee membership should remain as stable as possible. High turnover of Members, and the inability of Members to commit sufficient time to Committees need therefore to be minimised. In the House of Commons Standing Orders of the Joint Committee on Statutory Instruments (S.O. 151 (11)) it is stipulated that unless the House otherwise orders, each Member nominated to the committee shall continue to be a member of it for the remainder of the Parliament. It is suggested that a similar rule apply to those on the JPCHR.

#### *Size*

There is no set precedent for the number of Members on any Select committee.

*Table 2: Examples of the sizes of Committees*

Joint Committee on Parliamentary Privilege: 12 members
Joint Committee on Statutory Instruments: 14 members
Joint Committee on Financial Services And Markets Bill: 16 members
Joint Committee on Consolidation Bills: 24 members
Lords Delegated Powers And Deregulation Committee: 10 members
Commons Deregulation Committee: 18 members
Lords European Communities Committee: 20 members
Commons Committee on European Scrutiny : 16 members

It is likely that to reflect the balance of both houses and to ensure territorial representation, the minimum number on the Committee is likely to be around 16 members. The party composition is likely to be five Labour members from the Commons, two Conservatives and one Liberal Democrat; and from the Lords three Labour peers, three Conservative, one Liberal Democrat and one cross-bencher. With eight Labour members on a Joint Committee of 16 the government will not automatically have a majority. This result arises as a result of the composition of the two Houses in 1999-2000. If the composition of either House changes in future (and in particular the Lords), the composition of the committee could change as a result.

#### *Sub Committees*

With the range of tasks facing the Committee, the issue of whether or not the Committee will want to operate by way establishing sub-committees should also be

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<sup>8</sup> There have been exceptions, such as the Joint Committee on Parliamentary Privilege 1997 - 1998 session

addressed. Power to establish sub-committees would need to be provided for in Standing Orders. Concern has been expressed that in the Commons sub-committees have led to fragmentation, with difficulties in finding a quorum, excessive workload, and difficulties in their reports being agreed by the full committee. They can also require as much support as the main committee. The experience of sub-committees in the Lords has not been as disappointing. For example, the European Communities Committee has six policy sub-committees; but each is *de facto* a separate committee. There is no precedent for a Joint Committee having sub-committees. If the JPCHR is allowed to establish sub-committees, thought would need to be given to their composition and balance; to the need for two or more chairs; and additional support staff.

## **Procedure**

### *Time*

The nature and number of tasks entrusted to the JPCHR will raise serious questions about its capacity to do justice to them all. The main constraint is time. Select Committees generally meet for one half day a week for two to three hours. Attendance falls away if they are expected to meet for longer: although members are willing to put in extra sessions for particular inquiries. Meeting once a week for half a day throughout the parliamentary year of 34-35 weeks means the committee will sit for around 70 to 100 hours a year. Any additional time can be found only by establishing sub-committees, or by squeezing in extra sessions on a temporary basis.

With such time constraints a clearly defined timetable, allocating time for enquiries and time for legislative scrutiny will have to be maintained. The time management of the committee will be of key importance.

### *Support*

The Committee will have to be serviced by expert legal advisers, akin to the legal counsel provided to the Joint Committee on Statutory Instruments and the legal counsel provided to the Australian Committees. The legal counsel provided to the Human Rights Committee will be extremely important and will be the main source of guidance to Members on where to focus their concerns and which questions to put to government.

Currently it is rare for a committee to have a senior legal adviser dedicated to it. However, the demands of the Committee are likely to be such that it is likely to require a full-time legal adviser. Moreover the advice that is required is not only legal advice but human rights policy expertise. This level of support or expertise is unlikely to be provided by a shared legal adviser. A dedicated legal counsel will be able to develop a specialisation in human rights law and standards which will be needed.

## **Relationship with other bodies**

There is a need to consider the relationship between the JPCHR and other select and standing committees. A balance needs to be struck between creating the resource of a specialized human rights committee, with the capacity to subject legislation and practice to expert scrutiny, and the mainstreaming of human rights concerns in

other committees. The overlap with the specialized work of the JPCHR and the 'generalist' functions of other Committees is significant. This overlap is likely to occur in relation to the work of the Departmental Select Committees, the Standing Committees which scrutinise legislation, and in particular the Joint Committee on Statutory Instruments.

The ability of the JPCHR to exchange information with other committees, to pass its reports and comments on to other committees, and to meet concurrently where appropriate will be important. Departmental committees have the power to conduct their functions in such a co-ordinated way if necessary, and to conduct joint inquiries.<sup>9</sup> Similar powers will be needed to ensure the efficiency of the JPCHR.

In the review of the work of the Joint Committee on the Financial Services and Markets Bill, the Committee invited the Delegated Powers and Deregulation Committee to comment formally on the draft bill in respect of the proposed delegated powers. The Deregulation Committee welcomed the invitation and stated that in principle they were happy to undertake such scrutiny on future occasions. In a similar fashion the JPCHR should be in a position to provide its comments on other bills, permitting parliament to take advantage of its expertise.

### **Impact of the Committee's recommendations**

The Committee's reports should be given teeth. In 1979 the Commons Home Affairs sub-committee on Race Relations and Immigration, having taken advice and evidence, warned that the introduction of the 'husband rule' into the Immigration Rules violated the Convention. Despite the warning from the committee the introduction of the rule went ahead. The European Court of Human Rights six years later declared it to be in violation of the Convention. This situation should not be repeated. Reports of the Human Rights Committee should not be so easily ignored. While it is neither realistic nor desirable, to expect the Committee to be able to block legislation, its reports should be attributed special significance, such as being a matter for debate in both Houses where appropriate. Currently the Deregulation Committee has the power to require that its reports be debated where they consider a special problem has arisen. The Human Rights Committee should have similar powers.

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<sup>9</sup> Erskine May, Parliamentary Practice 22nd edition, p.673

## PART III

### Functions and Tasks of the Committee

There are a number of sources from which the likely terms of reference for the Committee are likely to be drawn: the two Consultation Papers which the Labour Party produced and the statement of Mrs. Beckett on 14 December 1998. An amalgamation of those terms include:

- Examination of draft legislation where there is doubt about compatibility with the ECHR
- Scrutiny of remedial orders
- Monitoring of policy and practice for Human Rights Act compliance
- Conduct of inquiries into general human rights issues in the UK, in particular an inquiry into the need for a Human Rights Commission
- Examination of issues relating to the compliance with other international human rights obligations of the United Kingdom

#### Scrutinising legislation

A primary role for the Committee will be scrutiny of new legislation. The scrutiny function will have two elements to it. One element of the scrutiny could be described as a technical evaluation of compliance by the legislation with the ECHR. A technical examination of the Bill would mean measuring the proposal against clearly defined and settled ECHR principles and standards. However this form of scrutiny is likely to add minimum value to the process of legislative scrutiny. The real scrutiny issues lie in the sphere of merits scrutiny - an examination of how the legislation has succeeded in balancing competing interests, and applying the doctrine of proportionality. In effect this will involve a degree of subjective assessment of policy.

It should be possible for the Committee to apply both 'technical' and 'merits' scrutiny to all types of legislation: draft legislation, primary legislation, secondary legislation, and remedial orders under section 10 of the Human Rights Act.

#### *Draft legislation*

The experience of the Joint Parliamentary Committee on Financial Services and Markets provides an example of the role which the JPCHR will have to play with respect to scrutiny of draft legislation.

#### *Joint Committee on the Financial Services and Market Bill*

For the first time, a Joint Committee of both Houses of Parliament was charged with scrutinising a draft Bill. The Committee published its first report on 28 April 1999. The Committee noted that the draft Bill raised several important issues of compatibility with the European Convention on Human Rights (ECHR). The Committee took oral evidence from a number of legal experts and received two written legal opinions on compliance with the ECHR, which are annexed to the

Committees report (See Annexes C and D to the Report). The Committee recommended that the Government should produce a written response on the ECHR issues raised by the draft Bill as soon as possible. Significantly it also recommended that the two Houses should establish a specialist Human Rights Committee as soon as possible.<sup>10</sup> The Government replied to the Committee by way of a memorandum from HM Treasury to the Committee setting out why it considered that the provisions of the Bill complied with the Convention. In the process, the government took on board the concerns expressed in relation to certain powers created under the Bill. The government indicated that the legislation will be amended before being introduced to Parliament so that, in its opinion, compliance with the Human Rights Act will be achieved.<sup>11</sup>

The process of pre-legislative scrutiny is still in its early days but it is a practice which the government would appear to be keen to use on an increasing basis when developing policy.<sup>12</sup> In the context of Bills which have particular human rights impact, this process should prove particularly valuable and the Committee will be able to play a role in this. As the second report from the Joint Committee on Financial Services and Markets demonstrates, the dialogue which develops through consultation on draft legislation can lead to substantial improvements in a Bill to ensure compliance. The JPCHR should also be in a position to expect as a minimum the co-operation and response from other government departments which HM Treasury gave to the Financial Services and Markets Committee in setting out its position on compliance with the Convention.

The use of draft legislation and the role of the Committee in scrutinising it can also improve the quality of legislation in other ways. For example, the impact of legislation in human rights terms is not always self evident from a first reading of any piece of legislation. Whether a piece of legislation will or will not comply with human rights can on occasions only be assessed when put into practice - in other words it is more difficult to identify application breaches of human rights standards than 'system' breaches. However, draft legislation can mitigate this situation as it allows for greater consultation and input from interested parties who will be in a better position to weigh up whether the impact of a law is likely to have negative human rights implications in practice. Where interested parties can make representations at an earlier stage in the legislative process, the dialogue which ensues is likely to be more flexible and more constructive. This in turn can result in better quality legislation.

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<sup>10</sup> See note 1

<sup>11</sup> In the memorandum dated 14 May 1999, the Treasury stated that "... the Government has decided to ensure that additional Convention protections are put in place in the new Bill". See para. 13 of Memorandum of HM Treasury, appendix to the Report 2.

<sup>12</sup> Other proposed legislation which has or will be introduced by way of a draft Bill include the Freedom of Information Bill, Local Government (Organisation and Standards) Bill, Food Standards Agency Bill, Limited Liability Partnerships Bill, Communicable Diseases Bill, Tobacco Advertising Bill, Party Funding Bill.

### *Primary Legislation*

Pre - legislative scrutiny of draft bills is to be welcomed, but at present it is a procedure which is available for less than 10% of all bills. Where ordinary legislation is concerned, the committee should have a general power to identify the Bills that it wishes to subject to scrutiny. Early experience has shown that s.19 statements do not lessen the need for parliamentary scrutiny of legislation. Two examples of this are the following:

#### *Access to Justice Bill (1st reading 2 December 1998):*

In considering the Access to Justice Bill, the question of compliance with the ECHR was a matter of significant debate before the standing committee. A detailed legal opinion was commissioned by JUSTICE from two leading barristers on the question of ECHR compliance. JUSTICE also prepared a briefing for submission to the Standing Committee on the Bill, concluding that on the face of it the Bill would not appear to be in breach of the standards of the Human Rights Act. However there were concerns over why there was no restatement in the Bill of the principles of Article 6.1 of the ECHR. This was raised during the Committee debates.<sup>13</sup>

#### *Asylum and Immigration Bill (1st reading 9 February 1999):*

The House of Commons established a Special Standing Committee on the Asylum and Immigration Bill. The Committee took evidence regarding the Bill including concerns about compliance of the Bill with the ECHR and the Human Rights Act. In particular evidence was submitted by JUSTICE which indicated that there were serious questions of compliance to be addressed.<sup>14</sup>

But the Committee cannot hope to conduct such a detailed scrutiny of each bill to enquire whether its section 19 statement is justified. Not only would the committee be overwhelmed, but there are two further concerns:

1. The impact which the Committee might have on the length of the legislative process. The concern is that the Committee would duplicate efforts and would slow up the parliamentary process.
2. The potential for the Committee to be perceived as the sole responsible committee for ensuring human rights compliance rather than encouraging human rights awareness and building up the capacity throughout parliament to address human rights issues.

These concerns could be resolved through the adoption of a number of approaches:

- The selective use of the Committee for Bills. Effectively it would be for the government to determine which bills would go to the Committee.

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<sup>13</sup> Tuesday 27 April 1999, Standing Committee E, Mr. Grieve to Mr. Hoon.

<sup>14</sup> JUSTICE is currently undertaking a project funded by the Joseph Rowntree Charitable Trust, which carries out human rights audits of proposed legislation. In January 1999, JUSTICE issued a document: "Legislating for Human Rights: Developing a Human Rights Approach to Parliamentary Scrutiny", setting out a human rights audit process.

- The Committee acts as 'a long stop' whereby issues are referred to it by other committees, where a specific human rights concern has arisen in the course of the bill's parliamentary passage.
- The Committee would exercise a filtering system. The Committee would be equipped with legal counsel advising the chairman, who would look at all Bills and indicate to the Committee whether a full scrutiny should be conducted on any particular Bill. This would require the Committee to enjoy a power, but not a duty, to scrutinise legislation. The effective functioning of this model depends on the quality of the human rights expertise the officer acting as a filter can offer.

It is suggested that the final option is the preferred option, and also follows a precedent set by the House of Lords Delegated Powers and Deregulation Committee. The House of Lords Delegated Powers and Deregulation Committee examines all Bills after their first reading and before committee stage. The JPCHR, being a joint committee, should be able to exercise a similar role after their first reading in either House so that any human rights concerns can be raised at the earliest possible stage. This should alert the Standing Committee in the Commons to any human rights concerns, if the JPCHR decides not to undertake a full scrutiny. And it should alert the business managers that time needs to be found during the bill's parliamentary passage for full scrutiny, if the committee decided that full scrutiny was required.

Effective scrutiny should only be carried out when there is adequate information to evaluate the government's proposals. In effect this means that the committee should have the right to expect co-operation from the sponsoring departments regarding the advice lying behind and section 19 statements. The provision of this advice will help to clarify the need for a full human rights impact assessment. The Deregulation Committee noted that when it provided its advice on the Financial Services and Markets Bill it did not have the benefit of a memorandum from the sponsoring Government Department on the delegated powers in the bill. This placed it at a disadvantage in conducting its normal task. The same would be true for the Human Rights Committee. To the the Committee on Financial Services and Markets, the Treasury did provide a memorandum on why they considered that the Bill met the Human Rights Act. This precedent is to be welcomed and is in keeping with a government that is looking to promote good practice and not ensure minimum compliance.

### *Remedial orders*

#### **Section 10 of the Human Rights Act**

(1) This section applies if-

(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right ...

(b) it appears...that, having regard to a finding of the European Court of Human Rights ... a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.

(3) If, in the case of subordinate legislation, a Minister of the Crown considers- (a) that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and (b) that there are compelling reasons for proceeding under this section, he may by order make such amendments to the primary legislation as he considers necessary.

(4) This section also applies where the provision in question is in subordinate legislation and has been quashed, or declared invalid, by reason of incompatibility with a Convention right and the Minister proposes to proceed under paragraph 2(b) of Schedule 2.

The power granted to a Minister under the section is extensive, and by its very nature its exercise will have direct human rights implications. It is therefore essential that the JPCHR has a role in scrutinising the exercise of such powers. Schedule 2 to the Human Rights Act addresses remedial orders, and provides that orders can only be made where a draft order has been approved by both Houses after the end of 60 days. To strengthen this procedure it would also be desirable for the standing orders of the JPCHR to ensure that the JPCHR reports to both Houses before any motion to affirm an order is considered by either House.

Section 10 is to be used only in compelling circumstances, and competence should be given to the Committee to consider whether they view the circumstances as in fact 'compelling', in addition to reviewing the merits of the order in respect of human rights compliance.

#### *Delegated legislation*

Delegated legislation will need to be scrutinised for human rights compliance, bearing in mind that it is subject to being set aside by the courts if it does not comply with the Human Rights Act. Co-ordination with the Joint Committee on Statutory Instruments and the House of Lords Delegated Powers and Deregulation Scrutiny Committee will be essential. The Joint Committee on Statutory Instruments will need to be the main filter. The JPCHR could formulate for the Joint Committee on Statutory Instruments some screening principles, and invite it to refer across any cases for the JPCHR of serious doubt.

#### *Table 3: The Australian Model*

Two committees which exemplify the screening procedure described above for primary and for delegated legislation are the committees of the Australian Senate which are held in very high regard. The Standing Committee on Regulations and Ordinances and the Standing Committee for the Scrutiny of Bills both scrutinise measures for compliance with human rights obligations.

Both Committees have six members with three members nominated by the government and three by the opposition. They operate on a bipartisan basis. The Committees are serviced by legal advisers and report to the Senate on possible infringements on rights caused by the measures. The terms of reference are set down in Senate standing orders.

The Standing Committee for the Scrutiny of Bills checks that the Bill does not:

- trespass unduly on personal rights and liberties
- make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers
- make rights, liberties or obligations unduly dependent upon non-reviewable decisions
- inappropriately delegate legislative powers
- insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The Committee on Regulations and Ordinances ensures each instrument:

- is in accordance with the statute
- does not trespass unduly on personal rights and liberties
- does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal
- does not contain matter more appropriate for parliamentary enactment.

The Committee on Regulations and Ordinances may recommend the disallowance by the Senate of any delegated legislation not in accordance with its human rights criteria. The Committee avoids addressing policy issues. The Senate has never rejected a recommendation by the Committee that an instrument should be disallowed. The Committee for the Scrutiny of Bills alerts the Senate to possible infringements but does not offer recommendations. Decisions are left to the Senate and amendments are often made to Bills on the basis of the Committee's deliberations.

In the UK a co-operative approach between the three scrutiny committees is desirable. This would include the exchange of information and reports where the subject matter is similar, and also the sharing of legal counsel on Convention points. Such co-operative arrangements may develop on a formal or informal basis.

### *Conclusions*

In order to carry out these functions the Committee must

- Be serviced by legal counsel with extensive knowledge of the ECHR and international human rights law
- Be able to conduct hearings with expert witnesses, including accepting written evidence from third parties
- Be able to appoint special advisers dependent on the nature of any piece of legislation
- Have general powers to send for persons, papers and records.

## **Monitoring of policy and practice for Human Rights Act compliance**

The Committee could be involved in scrutinising all types of action which seeks to redress human rights problems which Departments have identified, not just where that action takes the form of legislation. The Committee could be entitled to recommend and/or monitor changes in practice or procedure which aim to improve human rights compliance.

In most cases the monitoring should be left to the departmental Select Committees. For example, the issue of the police or Customs and Excise using close circuit TV and automatic number plate readers may be a matter for the Home Affairs Committee. Only when an issue cuts across other select committees and is being neglected should the JPCHR consider stepping in. Even then it will rarely have the time or the resources to do so. This does assume that departmental select committees will include in their remit review of the human rights policy of their department. A practice which also may be encouraged is that when human rights monitoring is carried out, a member of the JPCHR could attend the meeting of the select committee. In this way the JPCHR member could contribute the views of the JPCHR to the meeting and the results of the meeting of the select committee could be directly linked into the considerations of the JPCHR.

## **Conduct of enquiries**

The Committee will also have the power to conduct enquiries. The most important early inquiry will be into whether there is a need for a Human Rights Commission to monitor the operation of the Human Rights Act.

To conduct these enquiries the JPCHR will need to be able to conduct public hearings and to take evidence in different countries, and possibly outside of the UK. The standing orders of the committee must include the power to allow it to do this.

The Committee could assume the task of promoting legislation to give further effect to human rights commitments. Committees of this kind exist in other parliaments (e.g. Japan, Switzerland, Czech Republic), and it is one of the roles envisaged in the White Paper on the Human Rights Act .

## **Types of enquiries**

### *Enquiry into the need for a Human Rights Commission:*

The need for a Human Rights Commission, and what format that might take is already the subject of extensive research by the IPPR.<sup>15</sup> The merits of this enquiry need not be discussed here. The scope of the inquiry should however be touched upon, as there are parliamentary committees abroad where the parliamentary committee has a specific relationship with the independent statutory body for the promotion of human rights. In the conduct of this inquiry the Committee will want to bear in mind the future relationship between any Human Rights Commission and

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<sup>15</sup> Ian Bynoe and Sarah Spencer, *A Human Rights Commission: The Options for Britain and Northern Ireland*, IPPR, 1998

itself as a Committee. In addition the Committee should consider its relationship with the Northern Irish Human Rights Commission (NIHRC). The NIHRC has a statutory duty to advise the Secretary of State for Northern Ireland on measures which ought to be taken to protect human rights and on future Westminster legislation for a Northern Ireland Bill of Rights. The Human Rights Committee could also receive this advice for its consideration, or it could be left to the Northern Ireland Select Committee.

A Human Rights Commission would create a more public focus for human rights and would be likely to take the lead in education exercises and awareness raising. Should the Committee reach a conclusion that a Human Rights Commission is essential to the effective implementation of the Human Rights Act, then it may wish to consider its relationship with the Commission. The Commission could share many of the functions of enquiry entrusted to the Committee if it is given proper powers to do so.

*Table 4: The South African Model*

In South Africa there is a Parliamentary Committee known as the Joint Committee on Human Rights Commission which was created by the Constitution and whose powers are governed by the Constitution. The Parliamentary Joint Committee on Human Rights Commission sits only on an ad hoc basis for example to appoint the Commissioners. The Commission instead liaises with and submits its reports to the Justice Committee on a regular basis. The Human Rights Commission itself has a Government And Parliamentary Liaison Committee with the following Terms of Reference:

The Committee will:

- Monitor legislation processes at provincial and national levels;
- Follow debates on bills through portfolio committees, national assembly and senate;
- Co-operate with Non Governmental Organisations involved in 'Legiwatch';
- Develop a legislation monitoring resource database;
- Monitor Constitutional Assembly debates on controversial aspects of the constitution;
- Highlight controversial bills;
- Advise government and recommend law reform;
- Monitor implementation, especially the implementation of socio-economic rights;
- Assess legislation against the Bill of Rights, and International Human Rights instruments.

#### *General enquiries*

There are a number of enquiries which the Committee could carry out stemming initially from the issues identified as problematic by Whitehall Departments. For example: Investigation of deaths in custody, legislative supervision of child discipline, AIDS policy in immigration. The enquiry functions of the Committee are

likely to be used most effectively to identify systemic problems, where it is desirable to have a coherent legislative response rather than have the problem addressed through *ad hoc* court decisions. Where the subject matter for enquiry is the result of a Strasbourg case (see Tables 5 and 6) the Committee should have a consultative role in relation to reporting by the Government to the Council of Ministers of the Council of Europe on what action has been taken to respond to Strasbourg decisions.

*Table 5: Strasbourg caselaw still unresolved include*

- Stubbings: Position of persons injured by intentional torts, in particular victims of child sexual abuse.
- Steel: Binding over orders
- A v UK: Limits on parental chastisement
- Finlay and others: Conduct of court martials

*Table 6: Cases pending before the plenary Court against the UK include*

- Sutherland: Discriminatory Age of Consent (Attempts to legislate for the consequences of Sutherland are being taken by way of the Age of Consent Sexual Offences Amendment Bill.)
- Hashman & Harrup : Binding over orders violating Articles 10 and 11
- Caballero: The automatic refusal of bail in the case of certain serious offences when the accused has a previous conviction for one of those offences
- McGonnell : Composition of Royal Court of Guernsey
- Venebales: Criminal trials for youths, and the power of the Secretary of State to set sentence length.

*Protocols 4 and 7*

Protocol 4 of the ECHR provides for

- Prohibition of imprisonment for debt.
- Freedom of movement
- Prohibition of expulsion of nationals
- Prohibition of collective expulsion of aliens

Protocol 7 of the ECHR provides for

- Procedural safeguards relating to expulsion of aliens
- Right of appeal in criminal matters
- Compensation for wrongful conviction
- Right not to be tried or punished twice
- Equality between spouses

The government may seek to ratify either or both of these Protocols. In such an event the JPCHR must at a minimum be consulted before ratification to consider implications of ratification and changes which would need to be made to UK law and practice to comply with the protocols. Consideration should also be given to charging the committee with the conduct of an enquiry into whether ratification

should take place, and if so when. This type of enquiry should not be limited to consideration of ratification only of ECHR protocols but should extend to consideration of other human rights treaties.

A similar role for the JPCHR should also exist where the government is negotiating the draft of new human rights text in inter-governmental forum. The position of the government in such negotiating forums should be informed by the opinion of the Human Rights Committee having carried out an enquiry into which all interested parties can have an input.