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MECHANISMS FOR TREATMENT OF HUMAN RIGHTS ISSUES IN NATIONAL PARLIAMENTS

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Mechanisms for treatment of Human Rights issues in National Parliaments

It is a great privilege for me to initiate this discussion today. As some of you will already know, Sir Michael Davies, formerly President of the ASGP, has just retired and has been succeeded by Paul Hayter as Clerk of the House of Lords. Unfortunately, Paul – whom you may remember from the Santiago meeting – cannot be here this week but he looks forward to greeting you in London next year.

I turn now to the subject matter of today's discussions. Respect for fundamental rights is the prerequisite of effective democracy. It follows therefore that in democracies, Parliaments are inevitably concerned with human rights in general terms whether as representative bodies exercising oversight or as legislatures. But in many instances – either in conformity with human rights principles enshrined in a written constitution or following the statutory incorporation of a code of human rights into domestic law – Parliaments now often have a much more specific role to play in human rights. The United Kingdom Parliament is no exception and I hope that a brief account of our relatively recent experiences may help to stimulate our debate.

Until the passing of the Human Rights Act 1998, the United Kingdom law did not contain any specific human rights provisions. This will perhaps surprise many of you. Although the United Kingdom took a leading role in drafting the European Convention of Human Rights and ratified it as early as 1951, successive Governments both Labour and Conservative did not incorporate it into domestic law. That is not to

say that United Kingdom law was not respectful of human rights; nor that most of the "rights" enshrined in the ECHR or indeed any other code were entirely consistent with UK law. You do not necessarily have to incorporate such rights explicitly into law in order to have regard to them.

Ironically, the arguments which successive Governments both Labour and Conservative used against incorporation of a code of rights had a strong parliamentary and constitutional content. Any scheme at incorporation which might have allowed United Kingdom courts to strike down provisions in Acts of Parliament would have undermined the legislative supremacy of Parliament itself. And because of that legislative supremacy, it would in any event be impossible to "entrench" those rights permanently into United Kingdom law. All rather academic you might think, but arguments like these prevailed.

Although in 1966, the UK Government accepted the right of individuals to petition the European Court of Human Rights, and the jurisdiction of the Court in human rights cases, those rights still could not be tested in UK Courts.

This all changed following the 1997 general election when the new Labour Government carried through a commitment to incorporate the European Convention on Human Rights into UK Law and the Human Rights Act was passed in 1998. During the passage of the Bill, it was both suggested by the Government and widely accepted within Parliament that following the passing of the Act, a Joint Select Committee of both Houses might be set up to consider human rights issues. Such a Committee consisting of 6 members from each House (including several lawyers) was

eventually set up early in 2001. So in the main our Parliament's involvement in human rights issues stems partly from provisions in the Human Rights Act and partly from the work of the Joint Committee. [Human rights issues are sometimes explored by other committees too, such as those on delegated legislation, or investigative committees on draft bills.] Our activities can be summarised briefly as follows:

Statements of Compatibility and Scrutiny of Bills by the Joint Committee

Under the terms of the Human Rights Act 1998, when any Bill is introduced by the Governments into either House of Parliament, the responsible Minister is obliged to state whether or not in his view the Bill is compatible with the rights set out in the European Convention. Indeed the statement is printed on the cover of the Bill. But such a statement is made wherever the *balance of argument* supports that view and every Bill introduced into Parliament since December 1998 has carried it. Indeed, in only one case – that of the Communications Bill of the present session – did the Government say that an affirmative statement could not be made. Another bill, the controversial Anti-terrorism, Crime and Security Bill in late 2001 was certified only because the Government gave notice of a derogation from Article 5 (right to liberty) in respect of its provisions to detain certain categories of terrorist indefinitely.

The Joint Committee has powers to consider the human rights aspects of every Bill and thus to explore in greater detail the validity of the minister's statement. With the assistance of its expert Legal Adviser (shortly to leave us to take up a Professorship at Cambridge University), the Committee reports to the two Houses on those aspects of each Bill which have human rights implications. The Government provides written responses to the points made by the Committee in particular where the Committee has

questioned whether any provision is indeed compatible with Convention rights. These reports and the Government's responses are available to the members of the two Houses and to the public as the Bills go through the various legislative stages. Not all Bills raise major human rights issues. But the task of monitoring is nevertheless enormous. In the long 2001-02 session of Parliament the Committee examined 178 bills, 37 of which were government bills, many of which were of considerable length and complexity and on subjects with a considerable human rights dimension like criminal justice and immigration and asylum.

Remedial Orders

So much for scrutiny of bills. But the Human Rights Act 1998 also established a procedure to enable the law to amended quickly whenever a UK court found that some provision of an Act of Parliament was incompatible with Convention rights. Under this procedure, the responsible Minister can make what is called a remedial order to amend the offending provisions in any Act. The Order is laid in draft before Parliament and the Joint Committee is empowered to consider it and report upon it. A final version of the order is then laid and approved by each House. In urgent cases, the Minister can lay an order within immediate effect and approval is retrospective. By this order making procedure, the legislative supremacy of Parliament is preserved.

In fact, only one such order has so far been made following an adverse judgement in the courts. In 2001 an amendment was made to the Mental Health Act 1983 in respect of the burden of proof for detaining someone under that Act. In that instance the Joint Committee recommended that the order be made so as to have immediate effect. The Government agreed.

It is perhaps interesting to note that so far only one remedial order has been necessary. Some other adverse findings in the United Kingdom courts or at the European Court of Human Rights have been or will be remedied in legislation rather than by order. But there has been no deluge of human rights inspired litigation, and little that has been brought successfully.

Scrutiny of Public Policy

The examination of bills and of draft remedial orders by the Joint Parliamentary Committee on human rights are very specific tasks arising out of the passage of the 1998 Human Rights Act. Although the two Houses of Parliament both in debate and through their Select Committees have long been able to consider public policy issues relating to human rights and still do, since the establishment of the Joint Select Committee, consideration of such policy issues has been given a new focus. In addition to performing its scrutiny role, the Joint Committee is also able to function as an investigative committee on public policy issues. Following programmes of public hearings, the receipt of evidence, and the commissioning of specialist advice, the Joint Committee has produced reports on such topical issues as the establishment of a human rights commission for England and Wales; the appointment of a Children's Commissioner for England; and the work of the Northern Ireland Human Rights Commission. These reports can be debated in either chamber of parliament on a motion in the name of a member of the Select Committee and the Government is expected to respond to the recommendations made.

Are these mechanisms successful?

As we all know from our many years experience of these matters, it is not too difficult to set up Parliamentary mechanisms and procedures, whether in the human rights field or any other. But it really is very difficult to gauge the efficacy and influence of those procedures with absolute accuracy. Such judgments are almost always subjective. In the United Kingdom Parliament, where the influence of the Executive (Government) is so strong, it is particularly difficult to influence legislative and policy outcomes. But so far, the signs are encouraging in a number of different ways.

First, some Government departments are now far more forthcoming in the information provided to Parliament on human rights issues in bills. This includes information provided in Explanatory Notes published on the introduction of a bill into either House; and the information provided in subsequent exchanges with the Joint Committee.

Secondly, it is the clear impression of the Joint Committee's Legal Adviser – Professor Feldman – that human rights are being more fully considered and provided for in legislation at an earlier stage than was the case just over two years ago when the Joint Committee began its work of scrutiny. Thus the very existence of the Joint Committee seems to be having a salutary effect. There have even been occasions when officials have consulted Committee members and staff *before* a bill has been introduced into Parliament.

Thirdly, the Government has sometimes been willing to make changes to legislation during its passage through Parliament following an adverse report from the Joint

Committee – the Anti-terrorism Bill in 2001 and the Employment Bill in 2002 are examples. The fact remains however that the government remains resistant to criticism on human rights grounds of the central aims of its policies while being more flexible on the more incidental aspects of implementation of those policies.

So far as concerns the impact on public policy of the investigative work of the Joint Committee, only time will tell. Even then, assuming for example that a Children's Commissioner is appointed or a Human Rights Commission is established, it will not be possible to say with certainty that these developments in government policy were necessarily inspired by the views of Parliament.

Themes for discussion

I hope that I have not spoken at too great a length about our experiences in the United Kingdom Parliament. But as I said when I began, they may help to stimulate our discussions by illustrating some useful themes. Here are some of them:

- To what extent are human rights issues capable of being tested in the courts (justiciable) in your country? In the United Kingdom before 1998 they were not. Now they are.
- How has that come about? In the United Kingdom the European Convention on Human Rights has been incorporated into UK law, but there are other ways of doing it and it would be nice to hear about them.
- Does your parliament have any special procedures for examining the impact of legislation on human rights? Does your parliament have a special committee

to scrutinize draft legislation and how is it staffed? In the United Kingdom, the Joint Committee on Human Rights does this, with the benefit of specialist advice of the highest quality.

- To what extent do proposers of legislation take notice of the views of your parliament on human rights issues? Be honest! In the United Kingdom, sometimes they do and sometimes they don't.
- Are proposers of legislation – for example your government, or executive branch, or in some of your parliaments even individual members or committees – required to provide information on the likely impact of legislation on human rights? In the United Kingdom, since 1998, the government is under a statutory obligation to do so but private members are not.
- Do your courts of law have power to strike down legislation or, as in the United Kingdom, does your parliament alone retain the power to amend any law which is found incompatible with human rights?
- Do your parliaments have ways of considering how to extend or develop policy on human rights? How are lobby groups regarded and catered for? At Westminster, the investigative activities of the Joint Committee now offer a focus for these activities.

I look forward to listening to your contributions on these interesting and important themes.